

DATE: December 9, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-03248

**DECISION OF ADMINISTRATIVE JUDGE**

**PHILIP S. HOWE**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez, Jr., Esq., Department Counsel

**FOR APPLICANT**

Jeffrey Hammerlund, Esq.

**SYNOPSIS**

Applicant is a 60-year-old computer systems administrator working for a defense contractor. Applicant was convicted in 2001 of aggravated criminal sexual abuse for fondling the breast of his eight-year-old daughter. Applicant denies the events with his daughter happened, and continued the denials during an interview with a government investigator and a polygraph examiner. Applicant has not mitigated the criminal conduct, personal conduct, and sexual behavior security concerns. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On February 27, 2004, DOHA issued a Statement of Reasons <sup>(1)</sup> (SOR) detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline D (Sexual Behavior) of the Directive. Applicant answered the SOR in writing on March 31, 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on May 20, 2004. On June 28, 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government submitted 21 exhibits that were admitted into evidence. Applicant submitted no exhibits. DOHA received the hearing transcript (Tr.) on July 9, 2004.

**FINDINGS OF FACT**

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 60 years old, married and divorced three times, and has three children from his first marriage, and one child from his third marriage that ended on ay 15, 2001. Applicant retired from the U.S. Army in the rank of captain, his highest rank attained, but the majority of his time served was as a non-commissioned officer. He served on active duty

from 1961 to 1988. During his military career Applicant worked in the base legal office as a paralegal and was a court reporter in military proceedings . Applicant worked as a state correctional facility officer from 1989 to 1997 after he retired from the Army. (Tr. 17, 18, 30, 31, 33, 36, 45, 47; Exhibit 1)

Applicant was arrested May 9, 2001, on allegations of aggravated criminal sexual abuse and predatory sexual assault of a child on December 22, 2000; that child being his eight-year-old daughter. Applicant posted bond and was released from jail. He was indicted by a grand jury on four counts, count 1 being predatory criminal sexual assault of a child, count 2 being attempted predatory criminal sexual assault of a child, count 3 aggravated criminal sexual abuse, and count 4 aggravated criminal sexual abuse. Applicant was convicted on count 3 (fondling his daughter's breast) at a bench trial on October 2, 2001, on stipulated testimony. Applicant was sentenced to intensive probation for 48 months until January 2006, 12 months periodic imprisonment that was suspended, substance abuse treatment, sex offender treatment, mental health treatment, domestic violence treatment, and anger management. On January 18, 2002, Applicant was certified by the court as a sex offender and required to register under state law as a sex offender, which registration he has done. (Tr. 18, 20, 3547, 49, 50, 57; Exhibits 2 to 6, 10, 12, 16)

Applicant denies he did anything wrong, and claims he only agreed to the stipulated evidence procedure to spare his daughter the discomfort of testifying in court about the incident. Applicant contends his former wife put their daughter up to making these false accusations so she would get more money and property in the divorce. The divorce was finalized four days before Applicant's arrest. Applicant filed a motion on November 8, 2001, to vacate the finding of guilty and the court orders resulting from that conviction on the grounds he did not fully understand the implications of pleading guilty to a Class 2 felony under state law and he was incapacitated when he entered into the stipulated bench trial. There is no direct evidence of any judge's order vacating the conviction, but the subsequent legal documents submitted show the motion must have been denied because Applicant continued to be subject to the order of the court directing various treatments. Applicant denied he perpetrated these acts during his denial intervention process pursuant to court order. Applicant failed a June 18, 2002, polygraph test on the questions pertaining to the actions, the opinion of the polygraph operator being that Applicant was untruthful in those answers pertaining to the sexual acts with his daughter. In a June 24, 2003, statement to the government investigator Applicant again denied he committed any sexual acts with his daughter. Applicant again denied the sexual acts in a statement to a government investigator on August 20, 2003. Applicant also failed a September 18, 2003, government polygraph examination on questions pertaining to the sexual acts with his daughter. Applicant's September 18, 2003, statement to a government investigator admits the sexual acts with his daughter except the oral sex allegation. At the hearing, Applicant recanted his admissions, and claimed the polygraph operation intimidated him into making the statement and that he did not read the statement before signing it, even though his initials and signature appear on the statement form. Applicant tested positive for marijuana when he reported for his court-ordered substance abuse evaluation and treatment on October 22, 2001. (Tr. 20, 21, 25, 26, 32 to 35, 39, 41 to 44, 50; Exhibits 7, 8, 11, 13, 14, 15, 17 to 21)

Because of his denial of committing any sexual acts with his daughter, Applicant failed to successfully complete the denial intervention program and was discharged from it July 23, 2002. Applicant spent 18 sessions in that program from January 23, 2002, until July 2002. The licensed clinical social worker who prepared the July 26, 2002, report on Applicant's participation and evaluation concluded Applicant was not ready to enter formalized sexual offender treatment at that time primarily because Applicant did not admit the actions occurred for which he was indicted or convicted, either to himself or the counselor. (Tr. 50; Exhibits 13 and 15)

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in

the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at \*\*6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

### **Guideline J: Criminal Conduct**

(A) The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

(B) Conditions that could raise a security concern and may be disqualifying include:

- (1) Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
- (2) A single serious crime or multiple lesser offenses.

(C) Conditions that could mitigate security concerns include:

None

**Guideline E - Personal Conduct:**

(A) The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

Refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personal security or trustworthiness determination.

(B) Conditions that could raise a security concern and may be disqualifying also include:

(1) Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, or other acquaintances.

(3) Deliberately providing false or misleading information concerning relevant and material matters to an investigator in connection with a personnel security or trustworthiness determination.

(4) Personal conduct or concealment of information that increases an individual's

vulnerability to coercion, exploitation or duress, such as engaging in activities which,

if know, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail.

(5) A pattern of dishonesty or rule violations.

(C) Conditions that could mitigate security concerns include:

None

**Guideline D - Sexual Behavior**

(A) The Concern: Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress or reflects a lack of judgment or discretion.

(B) Conditions that could raise a security concern and may be disqualifying include:

(1) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(3) Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

(4) Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

(C) Conditions that could mitigate security concerns include:

None

**CONCLUSIONS**

In the SOR, DOHA alleged, under Guideline J, Applicant committed several sexual acts on his daughter and was

convicted in state court of one count in the indictment. Disqualifying Conditions (DC) 1 and DC 2 are applicable.

Contrary to Applicant's continued protestations of innocence, the evidence of these acts is supported by the state court conviction. No Mitigating Conditions apply. I did not find Applicant's claims of innocence in view of his conviction to be credible or persuasive. His recantation of his September 2003 signed statement at the hearing is absolutely not believable. He knew what he signed, and cannot now expect to be believed as he tries to deny his admissions. I conclude this guideline against Applicant.

The Government established by substantial evidence each of the allegations under Guideline E. Applicant gave a false statement to the government investigator in June 2003. His personal conduct of engaging in aggravated criminal sexual abuse with his eight-year-old daughter increases his vulnerability to blackmail. His continued denials of culpability in the face of the evidence is dishonest. DC 1, DC3, DC 4, and DC 5 apply.

I conclude none of the MC apply to these facts. Therefore, I conclude this guideline against Applicant.

Regarding Guideline D, the Government established by substantial evidence that Applicant was convicted of aggravated criminal sexual abuse in a state court, and is required to register as a sex offender. DC 1, DC 3, and DC 4 apply to this series of facts. This crime and conviction manifest Applicant's lack of discretion and judgment.

There are no MC applicable to this conviction and these facts. Therefore, I conclude this guideline against Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Paragraph 3. Guideline D: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).