

KEYWORD: Criminal Conduct; Sexual Behavior; Personal Conduct; Financial

DIGEST: This 36-year-old mechanic, while in the Air Force, sexually molested his minor daughter over a period of years, and was charged under the Uniform Code of Military Justice (UCMJ). He was allowed to resign from the Air Force with an Under Other than Honorable Conditions discharge. After first admitting the sexual misconduct, he now denies it occurred, suggesting a continuing state of denial. He also has significant delinquent debts, and has done almost nothing to resolve them despite being aware of the Government's concerns over the past few years. No mitigation has been established. Clearance is denied.

CASENO: 02-12705.h1

DATE: 03/21/2005

DATE: March 21, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12705

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esquire

Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 36-year-old mechanic, while in the Air Force, sexually molested his minor daughter over a period of years, and was charged under the Uniform Code of Military Justice (UCMJ). He was allowed to resign from the Air Force with an Under Other than Honorable Conditions discharge. After first admitting the sexual misconduct, he now denies it occurred, suggesting a continuing state of denial. He also has significant delinquent debts, and has done almost nothing to resolve them despite being aware of the Government's concerns over the past few years. No mitigation has been established. Clearance is denied.

STATEMENT OF THE CASE

On October 16, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

On January 19, 2004, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge on the written record, i.e., without a hearing. Department Counsel issued a File of Relevant Material (FORM) on August 12, 2004. The Form instructed Applicant that any response to the FORM had to be submitted within 30 days of its receipt by Applicant. Any response was due by October 9, 2004, but no submission to the FORM was received as of that date. The matter was assigned to me for resolution on November 1, 2004.

FINDINGS OF FACT

Applicant is a 37-year-old mechanic for defense contractor (Item 4 in FORM). The October 16, 2003 SOR contains one allegation under ¶1-Guideline J (Criminal Conduct); one allegation under ¶ 2- Guideline E (Personal Conduct); one allegation under ¶ 3 - Guideline D (Sexual Behavior); and six allegations under ¶ 4 Guideline F (Financial Considerations). Applicant admits the facts alleged in the single allegations under both Guideline E and F, but denies the conclusions alleged; He denies both Guideline D allegations. He admits the factual basis for allegations 4.a.-4.d. and 4.f., but denies 4.e. Applicant adds explanations and arguments to his answers. The admitted allegations are accepted and incorporated herein as Findings of Fact.

After considering the totality of the evidence derived from the FORM and its attachments, including Applicant's responses to the SOR and FORM, I make the following additional FINDINGS OF FACT as to the status, past and present, of each SOR allegation:

As alleged in the SOR,

Guideline J (Criminal Conduct)

1.a. - On May 26, 1998, while serving in the U.S. Air Force at a base in a foreign country, court-martial charges were brought against Applicant for violating the UCMJ. The charges contained three specifications of indecent sexual acts with his stepdaughter, who was less than 16 at the time. On July 2, 1998, the charges were referred to a general court-martial. The charges were dismissed on October 14, 1998, upon the convening authority accepting Applicant's request for a discharge in lieu of a court-martial. On November 5, 1998, Applicant was discharged from the U.S. Air Force with a discharge characterized as Under Other than Honorable Conditions.

Guideline E (Personal Conduct)

2.a. - Applicant received an Under Other than Honorable Conditions discharge from the U.S. Air Force, as alleged in SOR 1.a., above;

Guideline D (Sexual Behavior)

3.a. - The sexual conduct alleged under SOR 1.a.;

Guideline F (Financial Considerations)

Applicant has the following delinquent, past-due, charged off, or referred for collection debts owed to the named creditor in the approximate amount cited:

4.a. Telephone Company A - \$1,552.00;

4.b. Company B - \$227.00;

4.c. Collection Agency C - \$9,900.00;

4.d. Credit Company D - \$2,513.00;

4.e. Company E - \$1,078.00;

4.f. Collection Agency F - \$1,651.00

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed

that the factors cited above exhaust the realm of human experience or that the factors apply equally

in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable financial judgment and conduct. Because Applicant chose to have this matter decided without a hearing and without submitting any additional information in response to the FORM, all credibility determinations and findings of fact are necessarily based entirely on the contents of the FORM and applicant's response.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make

critical judgments as to the credibility of witnesses, here based solely on the written record.

In the defense industry, the security of classified information is entrusted to civilian workers

who must be counted on to safeguard classified information and material twenty-four hours a day.

The Government is therefore appropriately concerned where available information indicates that an

applicant for a security clearance, in his or her private life or connected to work, may be involved

in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately

or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government

of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either

by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence

of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the

Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended,

at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Since this matter is being decided without a hearing, my evaluation is necessarily limited to the contents of the various documents that are found in the case file, the latest of which is Applicant's response to the SOR.

Applicant is a man of 36, born in 1968. The Government's concerns about Applicant fall into four areas: (1) criminal conduct), (2) sexual behavior, (3) personal misconduct, and (4) financial problems.

I have considered the entire record. The concerns expressed in the SOR's first three paragraphs all revolve around a single scenario, the alleged sexual misconduct over a period of years with his minor stepdaughter and the legal and other consequences that followed. Starting with Applicant's latest statement, contained in his response to the SOR, he claims, in essence, that the sexual misconduct never occurred and that the charges were fabricated by his stepdaughter as a means to get the family to move back to the United States (Item 3). He also claimed he accepted the discharge in lieu of a court martial in order to prevent future turmoil within the family (Id.).

To begin with, I have no authority, and no reason to question the findings and/or sentence of the Air Force court-martial which, I conclude, supports the allegations in the SOR under Guidelines J, D, and E. I have evaluated the underlying facts and circumstances to determine whether Applicant has established adequate mitigation.

After studying Applicant's most recent explanations, I have reviewed his previous statements that were closer to the court martial. The accuser, Applicant's older stepdaughter, was born in 1985 and described sexual contact by Applicant over a period from October 1994 to December 1997 (when she was 9-12 years old). She told the story to school friends who told school officials who, in turn, reported it to Air Force authorities. The victim was interviewed by an Air Force Office of Special Investigations (AFOSI) agent and a member of Family Advocacy. The interview was videotaped. When Applicant was interviewed on the same day, "he provided oral and written statements in which he admitted rubbing the victim's breasts on [a number of] occasions and inserting his finger into her vagina on a single occasion (Item 7 at page 31, *see, also* Item 3).

At trial on September 14, 1998, the victim recanted, saying she had lied when she said the accused molested her and was upset because he was no longer living with her and the family (Item 7). At the same time, the victim's mother intended to put the girl "in therapy" once the trial was over so that what she told the therapist could not be used against Applicant (*Id.*, at page 32). Applicant himself underwent counseling/treatment for five months at a mental health clinic at the air base when he was stationed overseas from May 1998 to October 1998 (Item 4 at Question 19)

Applicant requested that he be discharged in lieu of continuing the court-martial because "it is in the best interests of himself and the Air Force" (*Ibid.*). He has not explained why he admitted the sexual touching when first interviewed by DSS, if it had not actually occurred. Considering all of the evidence, including the statements by Applicant *and* the victim, I conclude it is more likely than not that Applicant did what he was accused of doing and that the victim changed her story to avoid further family turmoil. In any case, in security clearance cases, where there is a doubt, the doubt must be construed against the granting of a security clearance and here, Applicant's various and contradictory stories create a doubt.

Guideline J (Criminal Conduct) - Disqualifying Conditions (DC) 1- any criminal conduct, regardless of whether the person was formally charged; and (2) a single serious crime (that I find this violation to be) or multiple lesser offenses. I conclude that none of the possible mitigating conditions (MC) are demonstrated by the facts of this case.

Guideline D (Sexual Behavior) - DC 1 - sexual behavior of a criminal nature; (3) sexual behavior that causes an individual to be vulnerable to undue influence or coercion; and (4) sexual behavior of a public nature and/or that which reflects a lack of discretion or judgment are all applicable. I conclude that none of the mitigating conditions have been established.

Guideline E (Personal Conduct), DC 1 - reliable, unfavorable information provided by associates, employers, coworker, neighbors, and other acquaintances is applicable as is DC 5 - a pattern of dishonesty or rule violation. I conclude that none of the possible mitigating conditions (MC) are demonstrated by the facts of this case. At the same time, Applicant has not overcome the negative impact of the evidence by any sufficient evidence of mitigation.

Guideline F (Financial Considerations)

Applicant admits most of the alleged debts and states they were incurred during the period after his return from overseas, when he had to support his family on the \$10.00 per hour he was able to make. He says he is currently "making good money" and is making some "progress in clearing up the debts" (Item 3). He denies only the debt alleged in SOR 4.e. because he does not "know who this is" (Id.), but the debt is listed on his February 13, 2003 Credit Bureau report, so he has had an opportunity to discover the actual holder of the debt (Item 9).

I have carefully considered Applicant's explanations for his delinquent debts. He faces an overriding problem under this guideline in that while there is no question that the delinquent debts exist as alleged, and in fact have actually increased, he has as yet done nothing more than promise that they will be resolved.

Under this guideline, DC 1 - a history of not meeting financial obligations and DC 3 - inability or unwillingness to satisfy debts are both clearly applicable but none of the parallel mitigating conditions have been demonstrated.

Overall, the applicability of all allegations under all four Guidelines has been established, but none have been adequately mitigated. Under these circumstances, Applicant had not carried his ultimate burden of proof and I am unable to conclude that Applicant is currently eligible for access to the nation's secrets.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 1.a. Against the Applicant

Guideline E (Personal Conduct) Against the Applicant

Subparagraph 2.a. Against the Applicant

Guideline D (Sexual Behavior) Against the Applicant

Subparagraph 3.a. Against the Applicant

Guideline F (Financial Considerations) Against the Applicant

Subparagraph 4.a. Against the Applicant

Subparagraph 4.b. Against the Applicant

Subparagraph 4.c. Against the Applicant

Subparagraph 4.d. Against the Applicant

Subparagraph 4.e. Against the Applicant

Subparagraph 4.f. Against the Applicant

DECISION

In light of all 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.

Barry M. Sax

Administrative Judge

