

DATE: June 4, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-15074

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

From October 1999 to May 2000, Applicant accessed pornography on the Internet using his personal computer, on a daily basis for most of that time. His obsession with pornography led to improper sexual advances (molestation and exposure) toward his then 13-year-old daughter on at least three occasions. Convicted of illegal sexual contact with a victim under 16 in 2000, he was sentenced to three years in jail, suspended, and placed on intensive probation for 10 years. Applicant has made some progress in therapy, but it is too soon to conclude there will be no recurrence of the criminal conduct and sexual behavior. Moreover, the Department of Defense is precluded from reinstating his security clearance pursuant to 10 U.S.C. §986. Clearance is denied.

STATEMENT OF THE CASE

On October 15, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4 and the implementation of Title 10, Section 986 of the United States Code), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue his security clearance. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR alleged criminal conduct (guideline J) because of his conviction of illegal sexual conduct with a victim under age 16 in 2000 and sexual behavior (guideline D) because of his sexual criminal offense and viewing of pornographic material on his personal computer from October 1999, including when his children were present. Applicant's conviction of the 2000 illegal sexual contact with a minor, for which he was sentenced to three years in prison, suspended, and 10 years probation, allegedly disqualified him from having a security clearance granted or renewed pursuant to Title 10, Section 986 of the United States Code.

On November 6, 2002, Applicant responded to the SOR, admitting all the allegations and requesting a hearing before a

DOHA Administrative Judge. The case was assigned to me on February 12, 2003, and pursuant to formal notice dated March 4, 2003, a hearing was scheduled for March 26, 2003. At the hearing held as scheduled, the Government submitted seven exhibits, entered without objection. Applicant's case consisted of nine exhibits, all admitted, as well as his testimony. DOHA received the transcript on April 4, 2003.

FINDINGS OF FACT

The SOR alleges criminal conduct and sexual behavior. In his Answer, Applicant admitted all the factual allegations. He requests consideration of his case for a waiver of 10 U.S.C. §986. I accept his admissions, and after a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 42-year-old field technical service specialist, who has been employed by a defense contractor since June 1999. He held a secret security clearance from November 1999 until May 2001 when his clearance was withdrawn by the Defense Security Service (DSS).

In July 1998, Applicant retired with an honorable discharge from a successful military career as a sonar technician (submarines), after 20 years of dedicated service to his country.

In October 1999, Applicant purchased a personal computer for his home. Feeling depressed about a lack of intimacy in his relationship with his spouse of then 16 years and having difficulties adjusting to civilian life, Applicant turned to Internet pornography as an escape from all his problems. He began to view pornography once every couple of days, usually when his 15-year-old son and 13-year-old daughter were not at home or after they had gone to bed. Within a month, he was accessing pornographic sites daily. For about six months, he viewed pornographic images--on occasion including pornographic pictures of young girls--on the Internet at his home almost continuously, from the time he arrived home from work until he went to sleep. After awhile he made no effort to conceal his habit, and he sometimes viewed the pornography when his teenagers were in the room or in an adjacent open area.

His obsession with the pornography led him to develop inappropriate feelings of attraction to his teenage daughter, which he acted on at least three times between late fall 1999 and May 2000. Circa late 1999/early 2000, while watching television at home, Applicant's daughter sat on Applicant's lap at his request. Applicant put his hands on her breasts, which made her uncomfortable.⁽¹⁾ She said nothing to Applicant about it, but complained to her mother. Applicant was informed by his spouse later that evening that such contact was no longer appropriate, given their daughter's age and maturation. Applicant told his wife he had feelings for their daughter, but he would never act on them. He apologized to his daughter, warning her that he was going through a "mid-life crisis" and would be "coming on to her."

One evening in March 2000, Applicant entered his daughter's bedroom when she was sleeping and placed his hand down the front of her pajama bottoms. As he withdrew his hand from her vagina, she awoke with a start. No words were exchanged between them, and Applicant left the room.⁽²⁾ He felt guilty about the incident and apologized to his daughter for what he had done.

Circa early May 2000, Applicant came upon his daughter sleeping on the sofa. Sexually aroused by the sight of his daughter's open mouth, Applicant took out his sexual organ with the intent of placing it in her mouth. As he leaned over her with his penis exposed, she awoke. Applicant backed away and left the room after apologizing.

Worried that her father would someday go too far, Applicant's daughter complained to a friend about Applicant's inappropriate advances. This friend's mother contacted the state agency concerned with child welfare, and anonymously reported Applicant's daughter had been the victim of sexual misconduct by Applicant (*i.e.*, Applicant had masturbated while sitting on his daughter's bed earlier that week).⁽³⁾ The following day, an investigator from the state's department of children and family interviewed Applicant's daughter at school, and Applicant at his home. Applicant's daughter reported her father had touched her on the breast in fall 1999, often hugs her and rubs against her, and she awoke on one occasion to find him standing near her with his penis exposed. She indicated Applicant had admitted he was sexually attracted to her, but she denied he had ever raped or molested her. During his interview, Applicant acknowledged he had put his hands on his daughter's breasts while she was sitting in his lap on the sofa in about February 2000, and that he

had touched her vagina underneath her pajamas one night while she was sleeping. Applicant indicated his penis could have been exposed on that occasion, but he denied any penetration as well as any knowing masturbation or exposure in her presence. At the request of the department of children and family, Applicant removed himself from the family home. Applicant's viewing of Internet pornography ceased at that time, as he was without access to his home computer, although he continued to experience daily the urge to view pornography.

Advised by the department of children and family to have no contact with his children and to pursue psychological counseling, Applicant began in late June 2000 specialized sex offender treatment. The next day, he was interviewed by local police on report from the department of children and family. Applicant admitted to the two incidents where he placed his hands on his daughter's breasts and put his hand down his daughter's pajamas while he slept. When confronted about his daughter's report of him exposing himself to her, Applicant indicated he lacked recollection of the incident, but he did not deny it could have happened.

In mid-July 2000, Applicant was arrested pursuant to warrant on charges of sexual assault, 4th degree, and risk of injury to a minor child. Applicant pleaded guilty to a substitute charge of illegal sexual contact with a victim under 16, and he was sentenced to three years in jail, placed on 10 years intensive probation, ordered to continue in sex offender counseling, and to register as a sex offender.

In compliance with his sentence, Applicant registered with the state as a sexual offender in December 2000. He has also continued to pursue on a once weekly basis group therapy for men who have had sexual contact with minors and separate marital and family counseling. In the opinion of his therapists, Applicant's response to treatment has been noteworthy, with his involvement in treatment characterized largely by honesty and openness, although he has withheld some information. Due to his progress in therapy, he has been allowed some supervised visitation with his teenage children. For a year following his conviction, he was permitted to see his children four hours per week. In late February/early March 2003, visitation was increased to 24 hours a week, although he is still not allowed overnights. His therapists do not consider Applicant a security risk, as his arrest is public and he is registered with the state as a sexual offender, and he is careful not to be alone with children. There is no anticipated end date to his sexual offender counseling. Applicant intends to continue with the group sessions for the foreseeable future as he still has "issues" to work through.

Since his arrest in July 2000, Applicant has accessed pornography at least once, when a coworker, unaware of Applicant's conviction, asked him in to look at pornographic pictures in a magazine in June 2002. Applicant reported his violation of his probation to his probation officer. Until at least January 2003, Applicant continued to experience urges to view pornography, although the frequency of the impulses has declined gradually over time from daily over the summer and fall of 2000 to once or twice monthly in 2002. Applicant has managed not to act on these urges by talking with friends and taking up the hobby of model building.

Applicant was candid about his sexual misconduct during his security clearance investigation, disclosing his conviction on his security clearance application in October 2001 and detailing the specific acts of molestation of his daughter when he was interviewed by a Defense Security Service special agent in December 2001.

Applicant's supervisor at work is aware of Applicant's conviction and probationary status. He has complete confidence in Applicant's ability to complete assignments in a precise and accurate manner without supervision, based on his observations of Applicant's work since May 1999. A close friend, who has known Applicant since they served together on active duty seven years ago, does not consider Applicant a threat to national security, as Applicant has "faced his problem squarely, and truthfully, seeking all available help and has been open with both those close to him and employers alike."

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each

adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. 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 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 judgment, irresponsibility or emotionally unstable behavior. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Criminal Conduct

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

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

- a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged
- b. A single serious crime or multiple lesser offenses
- c. Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year
- g. Potentially disqualifying conditions c. and d., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver. ⁽⁴⁾

Conditions that could mitigate security concerns include:

None

Sexual Behavior

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 lack of judgment or discretion. Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance (E2.A4.1.1.)

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

Sexual behavior of a criminal nature, whether or not the individual has been prosecuted (E2.A4.1.2.1.)

Compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high-risk behavior or that which is symptomatic of a personality disorder (E2.A4.1.2.2.)

Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress (E2.A4.1.2.3.)

Sexual behavior . . . which reflects lack of discretion or judgment (E2.A4.1.2.4.)

Conditions that could mitigate security concerns include:

None.

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which 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. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern 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 criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

Having considered the evidence of record as a whole, in light of the appropriate legal precepts and factors and after consideration of the factors enumerated in Section 6.3. and those referred to in Section E2.2. dealing with the Adjudicative Process, I conclude the Government has established its case with regard to guidelines J and D.

Applicant pleaded guilty to one count of improper sexual contact with a victim under age 16 for acts of molestation and exposure committed on his then 13-year-old daughter from late 1999 to May 2000. For his admitted criminal sexual misconduct, he was sentenced to three years in prison, suspended, and placed on 10 years intensive probation, with counseling and mandatory registration as a sex offender for life. The violation of such a close fiduciary relationship such as that of parent to child raises serious doubts about an individual's judgment, reliability and trustworthiness. Under guideline J, criminal conduct, disqualifying conditions a. (allegations or admissions of criminal conduct), b. (a single serious crime or multiple lesser offenses) and c. (conviction in a federal or state court of a crime and sentenced to a term of imprisonment of more than one year) are clearly pertinent to an evaluation of Applicant's security worthiness.

Applicant presents in mitigation evidence of his voluntary admission for specialized sex offender therapy before being court-ordered to do so, and his continued participation in counseling on a weekly basis since late June 2000 with sufficient progress to where unification of the family is seen by his therapists as a viable option in the not-too-distant future. While he has been unusually direct in his approach to treatment, it is too soon to safely conclude that his criminal sexual conduct is safely behind him, however. Applicant admits he still has "issues" to work through, and there is no planned end date for his treatment. He remains on intensive probation until 2010. Although completion of this term is not a prerequisite for reinstatement of Applicant's security clearance, the state clearly does not yet consider him to be successfully rehabilitated.

In addition to the sexual behavior of a criminal nature, Applicant compulsively viewed Internet pornography (including pornography involving young girls) from October 1999 to June 2000. Applicant has attributed his molestation of his daughter, in part, to his addiction to pornographic images. By late 1999, he was accessing pornography from the time he arrived home after work until he went to bed. His desire to view the pornography grew to where he no longer cared if his children were present when he accessed the pornography. Under the sexual behavior guideline D, all of the

disqualifying conditions and none of the mitigating conditions apply.

Both his sexual molestation and obsession with pornography are considered recent. While there is no evidence Applicant has had any improper sexual contact with his daughter since May 2000, he has had only supervised contact and no overnights with his children since he left the family home. An accurate measure of his reform is not possible in these circumstances. As recently as June 2002, he looked at pornographic pictures in a magazine. His self-report of the probation violation is further evidence of his candor. However, the fact that he viewed the images, after he had been in therapy for about two years, confirms the magnitude of his problem and the need for further therapy before he can be considered successfully rehabilitated. Since Applicant's supervisor and friends are aware of his criminal conviction, and he has registered as a sexual offender with the state, his illegal sexual contact with his daughter no longer serves as a basis for coercion, exploitation, or duress (*see* mitigating condition E2.A4.1.3.4.). The evidence does not establish that Applicant's problems with pornography are public knowledge. When asked by a coworker to look at a pornographic magazine, Applicant chose to violate his probation rather than disclose information which could clearly serve as a basis for coercion, exploitation or duress.

Furthermore, pursuant to 10 U.S.C. §986 of the United States Code, the Department of Defense is precluded from granting or renewing a security clearance to those applicants for access who have been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year. Since Applicant was sentenced to a three year prison term (albeit suspended) for his illegal sexual contact with his daughter, he is ineligible for a clearance absent a waiver. Applicant's unmitigated criminal conduct and sexual behavior provide sufficient basis for denial of his clearance, independent of the statutory disqualification. Given the doubts which exist for Applicant's reform, it would be premature to make any recommendation as to whether or not further consideration for a waiver is warranted.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Paragraph 2. Guideline D: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: 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.

Elizabeth M. Matchinski

Administrative Judge

1. When discussing the incident with an investigator from state's department of children and family in May 2000, Applicant's daughter indicated Applicant often rubbed against her. (Ex. 3). Applicant does not dispute that there may have been other incidents of improper sexual contact with his daughter, but he does not recall any specific incident.
2. Interviewed by the state's investigator in May 2000, Applicant acknowledged he was wearing boxer shorts at the time, and his penis could have been exposed, but he was not certain of this. (Ex. 3). There is no evidence of any sexual

penetration.

3. Applicant has consistently denied ever masturbating in the presence of his daughter. During her interview with the investigator from the department of children and family, Applicant's daughter discussed the incident where she awoke to find him standing near her with his penis exposed. The written report does not include any complaint by the daughter of Applicant ever masturbating in her presence, and the record does not otherwise establish that such misconduct occurred.

4. Section §986 of Title 10 limits the grant of security clearances:

(a) Prohibition.--After the date of the enactment of this section, the Department of Defense may not grant or renew a security clearance for a person to whom this section applies who is described in subsection (c).

(b) Covered Persons.--This section applies to the following persons:

(1) An officer or employee of the Department of Defense

(2) A member of the Army, Navy, Air Force, or Marine Corps who is on active duty or is in an active status.

(3) An officer or employee of a contractor of the Department of Defense.

(c) Persons Disqualified From Being Granted Security Clearances.--A person is described in this subsection if any of the following applies to that person;

(1) The person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year. . .

(d) Waiver Authority--In a meritorious case, the Secretary of Defense or the Secretary of the military department concerned may authorize an exception to the prohibition in subsection (a) for a person described in paragraph (1) or (4) of subsection (c). The authority under the preceding sentence may not be delegated.