KEYWORD: Sexual Behavior; Personal Conduct; Criminal Conduct

DIGEST: Applicant failed to mitigate the security concerns about his sexual conduct, personal conduct, and criminal conduct arising from his molestation of his daughter and a nephew, and his conviction for assault after originally being charged with sexual battery and forcible sodomy. He was also unable to overcome the security significance of his deliberate falsification of statements he made to the government about his conduct. Clearance is denied.

CASENO: 03-19282.h1

DATE: 05/31/2006

DATE: May 31, 2006

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-19282

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esquire, Department Counsel

FOR APPLICANT

David P. Price, Esquire

SYNOPSIS

Applicant failed to mitigate the security concerns about his sexual conduct, personal conduct, and criminal conduct arising from his molestation of his daughter and a nephew, and his conviction for assault after originally being charged with sexual battery and forcible sodomy. He was also unable to overcome the security significance of his deliberate falsification of statements he made to the government about his conduct. Clearance is denied.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding[(1)] it is clearly consistent with the national interest to give Applicant a security clearance. On July 28, 2004, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline D (sexual behavior), Guideline E (personal conduct), and Guideline J (criminal conduct). Applicant timely submitted a responsive pleading and requested a hearing.

The case was assigned to me on October 3, 2005, and I convened a hearing on November 15, 2005. The parties appeared as scheduled and the government presented 22 exhibits (GE 1 through 22), of which GE 14 through 20 have been excluded from the record, and the testimony of one witness. Applicant presented 16 exhibits (AE A through P), of which two and a portion of a third were excluded in response to Department Counsel's objections. Applicant also presented the testimony of two witnesses. DOHA received the transcript (Tr) on December 1, 2005. On December 20, 2005, Applicant's counsel submitted a list of proposed corrections to the transcript, a revised copy of which was received by DOHA on December 28, 2005. After reviewing the corrections and being advised that Department Counsel had no objections to the revisions, I included the revised transcript in the record and it has served as the sole source for what was said and done at hearing. Accordingly, the record in this case actually closed on January 3, 2006.

PROCEDURAL ISSUES

1. SOR 2.b alleged Applicant was precluded from holding a security clearance through application of 10 U.S.C. § 986. At the time the SOR was issued, this statute barred award or renewal of a clearance for anyone who had been convicted of a crime and sentenced to more than one year in jail. As alleged in SOR ¶ 1.a(2), available information indicated Applicant had been sentenced to five years in jail on conviction of a misdemeanor sex offense in 1988, but that the sentence was suspended conditioned on Applicant's adherence to the terms of his probation. The statute has since been amended[(2)] and is now applicable only in cases where the applicant has actually served more than one year in jail. Based on the recent change in this statute, Department Counsel moved to withdraw the SOR 2.b allegation. Without objection, I granted the motion.

2. Department Counsel initially proffered 21 exhibits in support of its case in chief.[(3)] After hearing Applicant's counsel's objections as to GE 14 through 20, I admitted all of the exhibits proffered.[(4)] After a brief recess, Department Counsel asked leave to withdraw GE 14 through 20 out of concern their use in this matter would constitute an unfair advantage for the government. After a brief discussion of this request, and without objection by Applicant's counsel, I allowed Department Counsel to withdraw the GE 14 through 20.[(5)] I have not reviewed or considered them in arriving at my decision. The exhibits are retained in the case file in a separate folder along with exhibits proffered by Applicant that were excluded in response to Department Counsel's objections.[(6)]

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is 46 years old and employed by a defense contractor as a senior electronics engineer. He has been with his current employer since June 1995. Before that, he worked for another defense contractor from 1991 through 1995. Applicant was married from March 1978 until March 1983, when he and his wife divorced. They had one child, a daughter who is now 27 years old and a single mother of one child. Applicant sees his daughter and grandchild frequently as he helps with babysitting in the evenings when his daughter works.

Applicant enlisted in the United States Air Force in June 1981, where he served until he was honorably discharged in June 1985. Applicant first received a security clearance in 1982 while in the military. In September 1989, the Defense Office of Hearings and Appeals issued an SOR to Applicant alleging separate instances of improper and criminal sexual acts with his minor daughter and minor nephew.[(7)] The SOR also alleged Applicant lied to an Air Force investigator about his conduct with his nephew.[(8)]

Based on a review of the written record,[(9)] a DOHA administrative judge found Applicant had, in fact, molested his nephew in 1981 and his daughter in 1988.[(10)] As a result of the latter conduct, Applicant was convicted of engaging in a lewd act on a minor and sentenced to five years in jail. The jail time was suspended, and Applicant was placed on supervised probation for three years and ordered to continue the mental health and sex offender counseling he had started before sentencing. The administrative judge also found Applicant intentionally lied about his conduct to an Air Force investigator when interviewed in February 1983 during a criminal investigation into Applicant's conduct with his nephew.[(11)]

Applicant's therapy lasted from June 1988 until June 1989. His therapist has commented positively on his participation in the therapy and gave Applicant a good prognosis given he was not allowed contact with his daughter.[(12)]

Applicant's request for continued access was denied by the administrative judge on January 30, 1990. However, Applicant subsequently re-applied for a security clearance in August 1991,[(13)]and was apparently granted a clearance he has held ever since.[(14)]

For the most recent periodic review of his suitability for continued access to classified information, Applicant submitted a security application (SF 86) on January 9, 2003. In response to question 21 (Your Police Record - Felony Offenses), Applicant disclosed he had been charged in 1988 with Criminal Sexual Contact with a Minor, but that he was convicted of a reduced charge of misdemeanor Lewd Act on a Minor. He also disclosed he was charged in September 1994 with Aggravated Sexual Battery and Forcible Sodomy, and indicated those charges were dismissed. In response to question 22 (Your Police Record - Firearms Charges), Applicant disclosed he was charged in July 1998 with making a false statement on a weapons consent form, which was also later dismissed. Lastly, in response to question 26 (Your Police Record - Other Offenses), which solicited information about arrests, charges, or convictions within the preceding seven years not addressed by other questions, Applicant answered "no," thereby omitting the fact that, on January 3, 1996, after the aforementioned charges of aggravated sexual battery and forcible sodomy were dismissed, he entered an Alford plea to a lesser included misdemeanor charge of assault, and was sentenced to 12 months in jail, suspended, and assessed court costs. The original 1994 charges stemmed from an alleged sexual assault by Applicant on a neighbor's minor daughter who Applicant was babysitting in September 1993.

At hearing, Applicant's oldest sister, a 32-year veteran of a local police department, testified that Applicant's other sister, the family's second oldest between the witness and Applicant, had conspired with the aforementioned neighbor to have the 1994 charges brought. The witness also testified their sister, at an unspecified earlier time, had also charged Applicant with inappropriate sexual contact with the sister's daughter, Applicant's and the witness' niece. But aside from the oldest sister's testimony, there is no information available showing any formal charges or prosecution of this incident. The witness also testified that this sister was somehow involved with the 1988 charges of sexual assault involving Applicant's daughter. This sister was characterized as dishonest, manipulative, and one who holds a grudge. The sister's reported motivation for bringing false charges is to somehow affect the potential shares in their parents' estate.

In 1998, Applicant was charged with making a false statement when he applied for a license to carry a firearm. It was alleged that his 1988 and 1994 convictions were for felony charges, a circumstance that would bar him from owning a firearm in his state. However, he was able to show he was convicted of misdemeanors, so the false statement charge was dismissed.

In the background investigation underlying the 1989 SOR, Applicant admitted and other evidence supported the allegations he inappropriately touched his nephew at least 10 times in 1981, and that he had inappropriately touched his daughter in 1988.[(15)] At hearing, when asked about these incidents, Applicant either denied doing anything illegal with his nephew and his daughter, or would allow only that he had "surrendered to the notion" he may have done these acts.[(16)]

Applicant leads a quiet, productive life in a community where he has lived for more about 14 years. He owns his own home, is financially stable, and enjoys an excellent reputation for trustworthiness, reliability, and expertise at work. He also studied in his spare time for an associates' degree in accounting, graduating summa cum laude with a 3.836 grade point average.

POLICIES AND BURDEN OF PROOF

The Directive sets forth adjudicative guidelines[(17)] to be considered in evaluating an applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive.[(18)] The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline D (sexual behavior), Guideline E (personal conduct), and Guideline J (criminal conduct).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest[(19)] for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the applicant to refute, extenuate or mitigate the government's case.

Because no one has a "right" to a security clearance, the applicant bears a heavy burden of persuasion to show that, despite the information supporting the government's decision, it is still clearly consistent with the national interest that the applicant have access to classified information.[(20)] A person with such access enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite integrity, judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.[(21)]

CONCLUSIONS

The government alleged under Guideline D that, as was also alleged in a previous SOR and as concluded by a DOHA administrative judge, that Applicant sexually molested his six-year-old nephew in November 1981 (SOR ¶ 1.a(1)), and that he was convicted of performing a lewd act upon a minor in September 1988, for which he was sentenced to five years in jail, suspended (SOR ¶ 1.a(2)). The SOR further alleged the conduct underlying his 1988 conviction; to wit, that he sexually molested his nine-year-old daughter in February 1988 (SOR ¶ 1.b); that he participated in a sexual offenders therapy group from June 1988 until June 1989 (SOR ¶ 1.c); that, in September 1994, he was charged with aggravated sexual battery and forcible sodomy, and that both charges were dismissed in January 1996 (SOR ¶ 1.d); and that Applicant pleaded guilty in January 1996 to a simple assault charge, for which he was sentenced to 12 months in jail, suspended.

Regarding the allegations stemming from the May 1989 SOR, the administrative judge's conclusions in that case are incorporated herein by reference and I find against the Applicant as to SOR ¶¶ 1.a(1) and 1.a(2). Additionally, the government has produced sufficient information to support the remaining allegations under Guideline D. Sexual behavior becomes 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.[(22)] Available information shows that Applicant has three times engaged in inappropriate sexual acts with minor children in his care. The information supports the allegation that he molested his daughter (SOR 1.b), and that he underwent sex offender therapy for one year (SOR 1.c).

As to the allegations in SOR ¶¶ 1.d and 1.e, they address a single prosecution for Applicant's alleged conduct with his neighbor's daughter. Applicant was charged with two felony sex offenses as alleged in SOR ¶ 1.d. These charges were dismissed as part of plea bargain whereby Applicant entered an Alford plea to a misdemeanor assault charge. The legal effect of the Alford plea was to acknowledge that the state had sufficient evidence to obtain a conviction but did not admit guilt. I find against Applicant as to both SOR ¶¶ 1.d and 1.e.

As alleged in SOR ¶ 1.c, Applicant underwent group sex offender therapy for about a year. He initially self-referred for this treatment after he was charged in connection with his molestation of his daughter. The court ordered him to

continue this treatment as part of his sentence in September 1988.

On the information presented by the government in support of SOR paragraph 1, I conclude Guideline D disqualifying condition (DC) 1[(23)] and DC 4[(24)] apply. Applicant has been twice charged with crimes as a result of his sexual conduct with minors, and investigated, but not charged, one other time. Further, he exhibited a gross lack of judgment by violating the trust of two small children who relied on him for protection. After reviewing the Guideline D mitigating conditions (MC), MC 2[(25)] applies, because more than ten years have passed since Applicant's last known instance of this type of sexual behavior. I have also considered MC 4,[(26)] in that his past conduct appears to be known to some of his family.

However, application of available adjudicative factors should not be done so rigidly as to hinder the exercise of common sense. The benefit Applicant derives from MC 2 and MC 4 is undermined by the fact that Applicant still does not accept full responsibility for his actions. He has attempted through the present case to re-litigate the 1988 offenses related to his daughter and to explain why he did not do the acts alleged, despite having previously admitted in no uncertain terms that he did molest his nephew and his daughter. In his January 1990 decision denying Applicant's request for clearance, the administrative judge concluded "[t]here is no credible evidence in the record that would lead [the administrative judge] to believe Applicant would not lie to the Government in the future if he felt it necessary."[(27)] Taken together with Applicant's begrudging testimony in the current case that he has "surrendered to the notion" that he the possibility exists he may have molested his nephew and daughter, despite the fact he earlier admitted doing so, the totality of the available information shows Applicant continues to be evasive about his sexual conduct. This, in turn, greatly undermines my confidence he is no longer at risk of repeating this type of conduct. In short, I still question Applicant's judgment as it relates to his willingness to be candid about his conduct and accept full responsibility for his actions. Based on the totality of available information, I conclude Guideline D against the Applicant.

The government also alleged Applicant's sexual behavior is a concern as criminal conduct under Guideline J. Specifically, SOR ¶ 2.a cross-references the allegations in SOR ¶¶ 1.a(1), 1.a(2), 1.b, 1.d, and 1.e. As noted, above, the allegations in SOR ¶¶ 1.a(1) and 1.a(2) were previously adjudicated and have been incorporated into this decision. As to SOR ¶¶ 1.d and 1.e, Applicant's Alford plea is sufficient to support a conclusion he did, in fact, commit a criminal act as alleged. As to the allegation in SOR ¶ 1.b, Applicant pleaded guilty to a lesser included offense and, when interviewed by a government investigator in 1988, he admitted performing the acts as alleged.

The security concern under Guideline J is that someone who is willing to disregard the law and risk serious repercussions, including incarceration and other deprivations of personal liberties, may also disregard regulations and procedures intended for the protection of classified information. Such conduct also may indicate a defect in one's character, judgment, and reliability. Based on the foregoing, I conclude Guideline J DC 1[(28)] and DC 2[(29)] apply. By contrast, a review of the Guideline J mitigating conditions requires consideration of MC 1[(30)] and MC 6.[(31)] As to the former, Applicant's last adverse involvement with the law was in 1994, with the case being disposed of in 1996. However, mere passage of time may not be enough to find there is no likelihood of future criminal conduct. Application of MC 6 turns, in part, on whether an applicant has taken responsibility for and acknowledges the gravity of his prior criminal acts. As discussed above, Applicant still vacillates regarding whether he sexually molested his nephew and niece. Just as mitigation available under Guideline D is attenuated by his failure to accept responsibility, so, too, is the

weight of the evidence of rehabilitation lessened under Guideline J. I conclude this guideline against the Applicant.

Lastly, the government alleged under Guideline E that, as was also alleged in a previous SOR and as concluded by a DOHA administrative judge, that Applicant deliberately falsified a February 1983 statement to Air Force investigators who interviewed him about his sexual misconduct with his nephew (SOR ¶ 2.a(1)). That finding is incorporated herein by reference and I find against Applicant as to that allegation. Also alleged was that Applicant deliberately omitted from his most recent security clearance application (SF 86) his January 1996 assault conviction as required by the plain language of SF 86 question 26 (SOR ¶ 2.b). In response to SF 86 question 21 (Police Record - Felony Offenses), Applicant disclosed the original 1994 charges of aggravated sexual battery and forcible sodomy, which were dismissed in January 1996 as part of a plea bargain whereby he subsequently entered an Alford plea to a misdemeanor assault charge.

As a general matter, Applicant might reasonably rely on the fact he disclosed, in response to question 21, the original felony charge and dismissal to show he did not intend to deceive or mislead the government by answering "no" to question 26. I am also mindful of the fact the omitted assault conviction occurred about six years and 49 weeks before he submitted the SF 86 in question. However, the net effect of his answers was to present an absence of actual criminal activity, whereas, in truth, he acknowledged through his Alford plea there was enough evidence of his assault to convict him. In light of Applicant's evasive testimony about his past sexual conduct and unwillingness to accept responsibility for his actions, as discussed above, I am unwilling to conclude he satisfied his obligation to be forthright and candid about all aspects of his background when he submitted his SF 86. Applicant made false statements to Air Force investigators, he deliberately withheld information about his criminal record from his SF 86, and he offered testimony at hearing that directly contradicted his 1988 statement to a government investigator. At a minimum, the government does not have a clear picture, which Applicant is in the best position to present, of what occurred.

Based on the foregoing, Guideline E DC 2[(32)] and DC 3[(33)] apply here. By contrast, I have reviewed the listed mitigating conditions under Guideline E, and conclude none apply. He has persisted in this falsification, which further underscores the government's concerns about his judgment. In light of the foregoing, I conclude Guideline E against the Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guideline. No single fact or adjudicative factor is dispositive of my decision in this case; rather, I have considered Applicant's suitability in light of the record evidence in its entirety. A fair and commonsense assessment[(34)] of this record shows reasonable doubts about Applicant's suitability for access to classified information persist based on Applicant's criminal sexual conduct, and his lack of candor regarding that conduct. His ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests is sufficiently undermined by the totality of adverse information available herein. Absent substantial information to mitigate these doubts, which Applicant has failed to provide, I cannot conclude he has overcome the government's case.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline D (Sexual Behavior): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Paragraph 2, Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: Withdrawn

Paragraph 3, Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 3.a: Against the Applicant

Subparagraph 3.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 the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

2. It appears the delay between August 2004 and its assignment to me in October 2005 was due to a moratorium on cases involving potential application of this statute. The moratorium was lifted in September 2005.

3. GE 22 was proffered and admitted without objection in concert with the testimony of the government's witness. See Tr., 69 - 85.

4. Tr., 31 - 38.

5. Tr., 39 - 42.

6. Tr.,

7. Applicant and his wife were, at the time of this conduct, in the process of adopting her nephew.

8. GE 3.

9. Applicant elected to forego appearing at an administrative hearing.

10. The administrative judge determined an allegation Applicant had also molested his daughter in 1981 was not supported by the record before him.

11. GE 3.

12. GE 10; GE 11.

13. GE 2.

14. GE 1, Question 31; Tr., 198 - 199.

15. GE 6; GE 22.

16. Tr., 158, 159, 165, 177.

17. Directive, Enclosure 2.

18. Commonly referred to as the "whole person" concept, these factor are as follows:

1. Nature and seriousness of the conduct and surrounding circumstances.
2. Frequency and recency of the conduct.
3. Age of the applicant.
4. Motivation of the applicant, and the extent to which the conduct was negligent,

willful, voluntary, or undertaken with knowledge of the consequences involved.
5. Absence or presence of rehabilitation.
6. Probability that the circumstances or conduct will continue or recur in the future;

19. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).

20. *See Egan,* 484 U.S. at 528, 531.

21. *See Egan;* Directive E2.2.2.

22. Directive, E2.A4.1.1.

23. Directive, E2.A4.1.2.1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

24. Directive, E2.A4.1.2.4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

25. Directive, E2.A4.1.3.2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;

26. Directive, E2.A4.1.3.4. The behavior no longer serves as a basis for coercion, exploitation, or duress.

27. GE 3, at 7.

28. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.

29. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

30. Directive, E2.A10.1.3.1. The criminal behavior was not recent.

31. Directive, E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

32. Directive, E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

33. Directive, E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

34. Directive, E2.2.3.