

DATE: December 22, 2004

In Re:

SSN:

Applicant for Security Clearance

ISCR Case No. 03-19955

ECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's criminal, sexual behavior committed against his daughter for a period of eight years ending when he was caught in 1993, that is aggravated by his repeated attempts to conceal his crimes during the course of a security investigation in 2002 and 2003, disqualifies him from access to classified information. Clearance is denied.

STATEMENT OF CASE

On June 10, 2004, 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, amended April 4, 1999, issued a Statement of Reasons (SOR) to Applicant. The SOR 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 a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant furnished his answer to the SOR on June 29, 2004. Applicant elected to have his case decided on a written record. The Government provided Applicant a copy of the File of Relevant Material (FORM) on August 23, 2004. Applicant received the FORM on September 2, 2004. His response to the FORM was due by October 3, 2004. No response was received. The case was assigned to me on October 12, 2004.

FINDINGS OF FACT

The SOR alleges criminal conduct (Guideline J), sexual behavior (Guideline D) and personal conduct (Guideline E). Applicant admitted all the factual allegations. He is 47 years old and employed as a technician for a defense contractor. He was employed as a technician for other employers since 1984; during the period he also worked as a part-time musician for his church.

Criminal Conduct/Sexual Behavior. On July 27, 1993, Applicant was arrested and charged with (1) oral copulation with a person under age 14/force/fear, (2) oral copulation with a person under the age of 16, (3) oral copulation with a person under the age of 18, and (4) continual sex abuse w/Minor under age 14. On September 30, 1993, he pled guilty to

the first count, oral copulation with a person under age 14/force/fear, and was sentenced to 365 days in jail, three years probation, pay a fine of \$200.00, not to be present with a minor unless they are with an adult, and to register as a Sex Offender. Applicant successfully completed all terms of his sentence.

Personal Conduct. On June 14, 2002, Applicant furnished a sworn statement to a special agent of the Defense Security Service (DSS). In that statement, he denied the sexual misconduct ever occurred. Instead, he blamed his wife for fabricating the entire story because she wanted to take their children and her mother to a state in the central part of the United States (U.S.). Applicant claimed he pled guilty to the sexual crimes on the advice of his attorney and because he wanted to continue to see his children. In addition to satisfying all terms of his sentence, he has kept his sexual offender registration in a current status.

In a sworn statement dated May 20, 2003, Applicant initially told the same story he had on June 14, 2002; he added an additional claim the detectives (who arrested him in 1993) had threatened to take his children away unless he confessed to the charges. Even after seeing the probation report and being reminded of his taped confession, Applicant clung to his story. Finally, he disclosed the entire account of events leading up to the sexual misconduct, the type and duration of the sexual acts, and when the acts ended. Applicant engaged in inappropriate sexual contact with his stepchild from age nine (1985) to age seventeen (1993). Applicant was attracted to his stepdaughter because his wife was not appealing anymore. The sexual acts usually occurred late at night when his stepdaughter was watching television or in her bedroom, wearing only her panties and pajamas. Though Applicant described only seven acts in his sworn statement (May 2003), his detailed description of the acts leads me to believe more sexual conduct with his stepdaughter occurred. The sexual behavior stopped only after his wife turned him into the law enforcement after Applicant tried unsuccessfully to engage in sexual intercourse with the victim. While Applicant was certain he never threatened the victim, the probation report reflects Applicant made threats to hurt his wife (who previously caught Applicant twice before with the stepdaughter/ victim) if the victim ever told her mother (Applicant's wife) about the sexual activity. In describing his mental state during these sexual acts, Applicant used the words "going out of my mind," "temporary insanity," and "stupidity." Applicant stated he enjoyed the sexual acts with his stepdaughter (victim) as she was much better than his wife. Applicant also stated, "It was very, very, hard for me to reveal and vocalize any of the above acts that happened between myself and [stepdaughter]." In the May 2003 sworn statement, Applicant articulated his remorse after every sexual act with the victim.

Character Evidence. Applicant completed vocational training in April 1983, and has no other criminal record. He had a security clearance in 1984. Prior to his sentencing in 1993 for the sexual crimes, several of Applicant's friends in the church indicated Applicant was a good Christian who was faithful to the church mission. Applicant's immediate family members, including his other two children and the victim, implored the 1993 sentencing judge through character statements to grant Applicant leniency and/or release from confinement.

POLICIES

Enclosure 2 of the Directive sets forth policy conditions which must be given binding consideration in making security clearance determinations. These conditions must be considered in every case according to the pertinent guideline; however, the conditions are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the conditions exhaust the entire realm of human experience or that the conditions apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Conditions most pertinent to evaluation of the facts in this case are:

Criminal Conduct (Guideline J)

Disqualifying Conditions (DC):

2. A single serious crime or multiple lesser offenses.

Mitigating Conditions (MC):

1. The criminal behavior was not recent;

2. The crime was an isolated incident;
6. There is clear evidence of successful rehabilitation.

Sexual Conduct (Guideline D)

Disqualifying Conditions (DC):

1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
2. Compulsive or addictive 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.

Mitigating Conditions (MC):

2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature.
3. There is no other evidence of questionable judgment, irresponsibility, or emotional instability.

Personal Conduct (Guideline E)

Disqualifying Conditions (DC):

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

Mitigating Conditions (MC):

1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;
2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information;
3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 16 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 behavioral changes; (7) the motivation for the conduct; and, (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must establish a *prima facie* case under the foreign influence guideline that establishes doubt about a person's judgment, reliability and trustworthiness. Then, the burden shifts to applicant to refute, explain, mitigate, or extenuate the facts. An applicant has the ultimate burden of persuasion to demonstrate he qualifies for a security clearance.

CONCLUSIONS

Criminal Conduct. Applicant's conviction in September 1993 of oral copulation on person under 14 years old, with force and fear, constitutes a serious crime as defined by DC 2 of the guideline. Two aggravating factors compound the seriousness of this crime. First, the crime was perpetrated against Applicant's child on repeated occasions under circumstances of fear and force and even though his wife had caught him on two previous occasions. Second, the crime occurred over eight years and would likely have continued indefinitely had his wife not finally reported the sexual misconduct to the authorities.

Even though the sexual crimes occurred over 11 years ago (MC 1), Applicant must present more than the simple passage of time claim to demonstrate he is rehabilitated and warrants security clearance access. MC 1 is insufficient overcome the serious evidence under DC 2. While the egregious conduct that lasted for eight years ended in 1993, Applicant has not produced any evidence to explain what directions his life has taken to reduce the chances of this behavior from occurring again. In view of the pattern of illegal conduct, Applicant cannot be given much consideration under MC 2. Clear evidence of successful rehabilitation (MC 6) is not present here as Applicant has provided no evidence to demonstrate his understanding of the crimes and remorse he supposedly carries for the victim. Successful rehabilitation begins with an extensive comprehension of the gravity of the crime and sorrow for the victim. In his first sworn statement in 2002, less than a year before Applicant finally acknowledged most of the conduct, he had no appreciation for either the crime or the victim. Applicant has not met his burden of persuasion under the mitigating conditions of the criminal conduct guideline.

Sexual Behavior. A person's sexual behavior becomes a security concern when it involves a criminal offense, indicates a personality disorder, or may subject the person to duress, or reflects a lack of discretion or judgment. Applicant's conduct falls within DC 1 because he was prosecuted under the state's penal laws relating to sexual misconduct of a child. Since Applicant could not control his actions even after he had been caught twice by his wife, DC 2 is applicable. DC 3 is also applicable based on Applicant's intentional concealment of the sexual misconduct: (1) in his June 2002 sworn statement; (2) in the initial portion of his ay 2003 sworn statement; and, (3) in his admission at the end of his May 2003 sworn statement that discussing the sexual misconduct was difficult for him to talk about. Though MC 2 may weigh in Applicant's favor, MC 3 will not as there is other evidence of questionable judgment arising from Applicant's deliberate omission of material information regarding his sexual misconduct. ⁽¹⁾

Personal Conduct. Conduct that involves dishonesty or poor judgment may also indicate the individual cannot safeguard classified information. Applicant's deliberate omission of material information in June 2002 about his eight-year sexual misconduct with his stepdaughter falls within the scope of DC 3. Not alleged in the SOR but present in the May 2003 sworn statement is the fact Applicant tried two more times to conceal the sexual abuse information. Only after the special agent reminded Applicant of his taped confession, did Applicant finally come forward with most of the sexual misconduct. Though three mitigating conditions are available to mitigate, none are applicable. MC 1 is irrelevant because the omitted information is substantiated and pertinent to judgment and trustworthiness. MC 2 and MC 3 are not applicable because Applicant's falsification occurred less than three years ago and Applicant had to be confronted with the truth several times before he abandoned his earlier false positions. My findings against Applicant under the three guidelines has also included an examination of this case under the whole person concept.

FORMAL FINDINGS

Paragraph 1 (Criminal Conduct, Guideline J): AGAINST THE APPLICANT.

a. Against Applicant.

Paragraph 2 (Sexual Behavior, Guideline D): AGAINST THE APPLICANT.

a. Against Applicant.

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

a. Against 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.

Paul J. Mason

Administrative Judge

1. In reaching my adverse findings under sexual behavior, I have reviewed the criminal conduct guideline (J) and the emotional/mental disorders guideline (I) in determining how to resolve the security concerns raised by sexual behavior. While both the state and Applicant's psychologist believe treatment is necessary, their differing positions (eleven years old) regarding Applicant's condition and treatment, coupled with the lack of current evidence, e.g., records, qualified medical opinion(s), makes any meaningful conclusions under the emotional /mental disorder guideline speculative. (Guideline I)