

DATE: April 4, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24475

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq.

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 53 years old and retired from the Navy. He has worked for a defense contractor as an electrical engineering technician since 1995. In 1996, Applicant inappropriately touched his 17 year old daughter on two occasions. He was charged, pled guilty, and was convicted of a reduced charge of sexual battery. In 2003, Applicant was charged and convicted of intentionally making an obscene display of private parts in a public place or while others were present, in this case children. Applicant failed to mitigate the security concerns regarding his criminal conduct and sexual behavior concerns. Clearance is denied.

STATEMENT OF THE CASE

On June 2, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J, for criminal conduct and Guideline D, for sexual behavior.

In a sworn statement, dated June 28, 2004, Applicant responded to the SOR allegations, and elected to have his case decided on the written record, in lieu of a hearing. In his SOR response, Applicant admitted some allegations and denied other allegations contained in the SOR. Department Counsel submitted the government's case on December 21, 2004. A complete copy of the file of relevant material (FORM) was received by Applicant on December 29, 2004. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the FORM, and provided additional material. Department Counsel did not object. The case was originally assigned to another judge, but due to case load it was reassigned to me on February 17, 2005.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the

pleadings, exhibits, and statements, I make the following findings of fact:

Applicant is 53 years old and retired from the Navy. He works as an electrical engineering technician for a defense contractor. He has been employed with the same contractor since 1995. Applicant held a security clearance while he was on active duty in the Navy. Applicant is divorced twice and currently married. Applicant has a grown daughter.

In 1996, Applicant's then 17-year-old daughter was having difficulties living with her mother. Applicant and his daughter's mother were divorced. Applicant's daughter came to live with him for a period of time. Applicant inappropriately touched his daughter on two separate occasions when she was living with him. Applicant was arrested and charged with two counts of Indecent Liberties with a Child by Custodian (both felonies). Applicant pled guilty of Sexual Battery (misdemeanor), and sentenced to jail for 12 months, suspended, required to complete counseling and to not have any unsupervised contact with the victim. The other charge was nolle prosequi.

Applicant admitted he touched his daughter's breast on one occasion. On the other occasion, he admitted he touched her genitalia, but said he did not penetrate her.⁽²⁾ Applicant claims he did it "to get her out of my house."⁽³⁾ Applicant blames his actions on drinking and marital difficulties with his (then) wife.

In April 2003, Applicant was arrested for (1) Knowingly and Intentionally (with Lascivious Intent) Expose Sexual/Genital Parts to a Child Under the Age of Fourteen, a felony violation and (2) Intentionally Make an Obscene Display of Private Parts in a Public Place or Where Others are Present. Applicant was found guilty of Charge (2) and sentenced to 12 months in jail, suspended, ordered to perform 50 hours of community service, to undergo recommended counseling, and to serve probation for one year. In June 2004, Applicant remained on probation. Applicant exposed himself at a campground/park area, after he had taken children for a ride on his golf cart.

Applicant is sorry for the events that occurred with his daughter.⁽⁴⁾ Applicant admits he used poor judgment in his actions and associations with minor children.⁽⁵⁾ He regrets and takes full responsibility for his actions,⁽⁶⁾ although he denies the allegations in the SOR subparagraph 1.b. Applicant admits he is aware of the "flags" that exist alerting him to avoid similar situations and takes great measures to avoid similar situations.⁽⁷⁾ Appellant blames his actions on an improper thinking pattern which he can no longer accept or display.⁽⁸⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline J, pertaining to criminal

conduct, and Guideline D, pertaining to sexual behavior, with their respective DC and MC, apply in this case.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁹⁾ The government has the burden of proving controverted facts.⁽¹⁰⁾ The burden of proof is something less than a preponderance of evidence.⁽¹¹⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽¹²⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹³⁾

No one has a right to a security clearance⁽¹⁴⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁵⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽¹⁶⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽¹⁷⁾ 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.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes we should view a person by the totality of their acts, omissions, motivations and various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

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

Guideline J - Criminal Conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

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.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guidelines are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all of the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline J and Guideline D.

The same facts alleged and established by the government apply to both Guideline J and D and will be discussed together. Based on all the evidence, Criminal Conduct Disqualifying Condition E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses.*) applies in this case. Sexual Behavior Disqualifying Condition (SB DC) E2.A4.1.2.1 (*Sexual behavior of a criminal nature, whether or not the individual has been prosecuted*), SB DC E2.A4.1.2.3 (*Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*), SB DC E2.A4.1.2.4. (*Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment*), all apply in this case.

Appellant's inappropriate touching of his daughter occurred on two separate occasions. His excuse for his criminal conduct with his daughter is that he just wanted her out of the house. Although he is sorry now for his actions, his justification for his actions are unpersuasive. Seven years later, Applicant had another criminal sexual incident with children. This offense occurred less than two years ago, involved him exposing himself, and occurred in a public area.

Applicant was arrested twice for crimes involving children. Applicant was found guilty on two separate occasions, of two charges involving minor children, seven years apart. The very nature of the conduct and society's response to criminal conduct on children make Applicant's behavior the type that could be exploited. Appellant's criminal conduct toward children is serious. I have considered all the mitigating conditions and specifically considered Criminal Conduct itigating Condition (CC MC) E2.A10.1.3.1 (*The criminal behavior was not recent*), CC MC E2.A10.1.3.2. (*The crime was an isolated incident*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*) and conclude none apply.

I have also considered all the mitigating conditions and specifically considered Sexual Behavior Mitigating Condition (SB MC) E2.A4.1.3.2. (*The behavior was not recent and there is no evidence of subsequent conduct of a similar nature*), SB MC E2.A4.1.3.3 (*There is no other evidence of questionable judgment, irresponsibility, or emotional instability*), and SB MC E2.A4.1.2.4 (*The behavior no longer serves as a basis for coercion, exploitation, or duress*), and conclude none apply.

The intervening years between the incidents causes great concern that Applicant's conduct towards children is not isolated. The relatively short period of success in his probation program is not enough to mitigate the serious concerns regarding Applicant's conduct. Applicant's behavior is too recent, raises serious questions regarding his judgment and motives when he committed battery on his daughter. There is no evidence that Applicant is successfully rehabilitated.

I have considered all the evidence in this case. I have also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I am persuaded by the totality of the evidence in this case that it is not clearly consistent with the national interest to grant Applicant a security clearance. Applicant has failed to mitigate the security concerns caused by his criminal conduct and sexual behavior. Accordingly, Guideline J, pertaining to Criminal Conduct and Guideline D, pertaining to Sexual Behavior are decided against Applicant.

FORMAL FINDINGS

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

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

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Paragraph 2. Sexual Behavior (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. Clearance is denied.

Carol G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. Item 10.

3. Id.

4. Statement of January 18, 2005.

5. Id.

6. Id.

7. Id.
8. Id.
9. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
10. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
11. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
12. ISCR Case No. 94-1075 (August 10, 1995) at pp.3-4; Directive, Enclosure 3, ¶ E3.1.15.
13. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15
14. *Egan*, 484 U.S. at 531.
15. Id.
16. Id.; Directive, Enclosure 2, ¶ E2.2.2.
17. Executive Order 10865 § 7.