

DATE: August 14, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-25153

ECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 57 years old and works for a federal contractor. From 1978 until 1985, he sexually abused his stepdaughter, but was never criminally prosecuted. He subsequently failed to disclose the misconduct to his employer, and did not disclose the revocation of a previous security clearance on his security clearance application. He failed to mitigate the security concerns raised by his sexual behavior, but did mitigate those raised by personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On September 14, 2005, the Defense Office of Hearings and Appeals (DOHA) under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guidelines E (Personal Conduct) and D (Sexual Behavior) why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On October 13, 2005, Applicant filed his Answer to the SOR, and elected to have the case decided on the written record in lieu of a hearing. On May 15, 2006, Department Counsel prepared a File of Relevant Material (FORM) containing five Items. The FORM was mailed to Applicant on May 17, 2006, and received on May 25, 2006. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation by June 24, 2006. Applicant did not provide additional information. The case was assigned to me on July 25, 2006.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his response to the SOR, I make the following findings of fact:

Applicant is 57 years old and married. He has worked as a technical support specialist for a federal contractor since August 2003. In September 2003, he filed a security clearance application (SCA), and resubmitted it in June 2004. Prior to filing the application, he previously had been granted a top-secret security clearance in 1995 that was subsequently revoked. The date of the revocation is not contained in the record.

Applicant admitted he watched his stepdaughter undress without her knowledge and sexually abused her from about 1978 to 1985. She was between the ages of nine and sixteen at the time. (Item 3) He was never arrested or criminally prosecuted for his misconduct. Later he saw a counselor two or three times. (Item 3 at 2). He and his family have resolved the problems and ramifications that resulted from his behavior. He regrets his actions and accepts blame for the wrongdoing. He believes he has changed over the last 20 years and "is no longer that person." (Item 3 at 2)

When Applicant signed his SCA in September 2003 and June 2004, he certified his answers were "true, complete, and correct" to the best of his knowledge and belief. In response to Question 32. Your Investigative Record - Clearance Actions (*To your knowledge have you ever had a clearance or access authorization denied, suspended or revoked, or have you ever been debarred from government employment?*), he answered "No." He did not list the revocation of his security clearance.

In December 2004, Applicant met with a government investigator and signed a statement regarding information in the SCA. At the time he submitted the security clearance applications, he did not know his security clearance had been revoked. He learned that later, along with the reason, viz., his prior sexual misconduct. (Item 5 at 3) He denied he intentionally falsified the SCA. (*Id.* at 4) During the meeting he acknowledged he was terminated by a former employer in August 2002, but denied the underlying allegation of timecard fraud. He admitted his present employer does not know about the sexual misconduct, and believes he will lose his job if the incident is disclosed. (Item 5 at 3)

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth criteria which must be evaluated when determining security clearance eligibility. Within those adjudicative guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence in order to reach a fair, impartial and common sense decision.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Section E2.2. of Enclosure 2 of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct an administrative judge should consider: (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; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not only the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual a security clearance is not necessarily a judgment about an applicant's loyalty. Executive Order 10865, § 7. Instead, it is a determination that an applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). The Directive presumes a rational connection between past

proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence in refutation, extenuation, or mitigation sufficient to overcome the position of the government. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive, Enclosure 3, ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his clearance." *Id.*

Based upon the allegations contained in the SOR, the following adjudicative guidelines are pertinent to an evaluation of the facts of this case:

Guideline E - Personal Conduct - E2.A5.1.1: A security concern may exist when conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Guideline D - Sexual Behavior - E2.A4.1.1: A security concern may exist if sexual behavior involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress or reflects a lack of judgment or discretion.

The disqualifying and mitigating conditions, either raising security concerns or mitigating security concerns applicable to this case, are discussed in the Conclusions section below.

CONCLUSIONS

I considered all of the evidence, the applicable legal standards, including the "whole person" concept, and concluded as follows:

Guideline E: Personal Conduct

Based on the evidence, the Government established a potentially disqualifying condition under Guideline E. Applicant's prior sexual misconduct and failure to inform his current employer of it, demonstrate questionable judgment and the lack of candor underpinning the primary concern of this guideline, as noted in E2.A5.1.1. The 2002 employment termination, reported by his former employer, also raises a disqualification under Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.1 (*Reliable, unfavorable information provided by associates, employers, coworkers, neighbors and other acquaintances*).

The Government having established its case, the burden shifted to Applicant to mitigate or rebut the allegations. After reviewing all of the mitigating conditions, I concluded none apply, including Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). Although Applicant's family is aware of the previous transgressions, his employer is not. He has not disclosed it because he does not want to lose his job. That fear makes him vulnerable to coercion or duress. Without proof of full disclosure to his employer, Applicant is unable to demonstrate that he has taken positive steps to reduce or eliminate a vulnerability to coercion, as required under this condition.

The Government also alleged in SOR ¶ 1.e that Applicant falsified his SCA by failing to disclose the revocation of his security clearance, constituting a potential case under Personal Conduct Disqualifying Condition (PC DC) 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 determines security clearance eligibility or trustworthiness, or award fiduciary responsibilities*). Applicant denied the allegation.

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial

evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Although Applicant asserted he learned of the revocation, along with the reason, after completing the SCA, the Government failed to provide any substantive evidence to document the revocation date or to contradict his denial. Hence, SOR ¶ 1.e is found in his favor, as well as ¶ 1.b alleging the security clearance revocation occurred in May 1999.

After weighing the disqualifying and mitigating factors, and evaluating the evidence in the context of the whole person, including Applicant's remorse, I concluded Applicant has not mitigated the security concerns based on personal conduct. Accordingly the allegations contained in SOR ¶¶ 1.a, 1.c, and 1.d are concluded against him, and Guideline E is decided against Applicant.

Guideline D: Sexual Behavior

The Government established a potential disqualification under two conditions: (1) 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*), and (2) SB DC E2.A4.1.2.3 (*Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*). Applicant admitted he engaged in sexual misconduct with his young stepdaughter for a period of seven years. Such behavior is criminal in nature and makes him vulnerable to coercion, exploitation or duress in the future.

The Government having established its case, the burden shifted to Applicant to mitigate or rebut the allegations. After reviewing all of the mitigating conditions, in particular, Sexual Behavior Mitigating Condition (SB MC) E2.A2.1.3.2 (*The behavior was not recent and there is no evidence of subsequent conduct of a similar nature*), I concluded it applies. However, the mere passage of time and absence of similar conduct does not sufficiently mitigate the disqualifying conditions due to the seriousness and duration of the misconduct, unless accompanied with substantive evidence from a credible health care professional addressing his current mental health and potential for recurrence. SB MC E2.A.4.1.3.4 (*The behavior no longer serves as a basis for coercion, exploitation, or duress*) does not apply because Applicant admitted he would not tell his current employer about his sexual misconduct for fear of reprisal, which fear creates a potential vulnerability to coercion.

After weighing all of the factors and evaluating the evidence in the context of the whole person, I concluded Applicant failed to mitigate the security concerns raised by his sexual behavior. Accordingly, the allegations contained in SOR ¶ 2.a are decided against him.

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 as follows:

Paragraph 1: Guideline E (Personal Conduct) AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: For Applicant

Paragraph 2: Guideline D (Sexual Conduct) AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

DECISION

In light of the evidence in the record, it is not clearly consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

Shari Dam

Administrative Judge