

KEYWORD: Criminal Conduct; Sexual Behavior; Personal Conduct; Security Violations

DIGEST: Applicant is a 53-year-old employee of a defense contractor. He seeks a security clearance. In 1987, Applicant pled guilty to and was convicted of aggravated sexual battery of a child, and indecent liberties with children, between 1985 and 1986. He was sentenced to 13 years confinement, but was paroled after about 4 years in jail. Applicant also admitted to sexual crimes against a child in 1981. Applicant has not mitigated the security concerns arising from his sexual offenses. Also, under 10 U.S.C. § 986, the Department of Defense may not grant or continue a security clearance for any applicant who has been sentenced by a U.S. court to confinement for more than one year, absent a waiver from the Secretary of Defense. Clearance is denied.

CASENO: 03-02155.h1

DATE: 08/23/2004

DATE: August 23, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-02155

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL J. BRESLIN**

**APPEARANCES**

**FOR GOVERNMENT**

Juan J. Rivera, Esq., Department Counsel

## FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant is a 53-year-old employee of a defense contractor. He seeks a security clearance. In 1987, Applicant pled guilty to and was convicted of aggravated sexual battery of a child, and indecent liberties with children, between 1985 and 1986. He was sentenced to 13 years confinement, but was paroled after about 4 years in jail. Applicant also admitted to sexual crimes against a child in 1981. Applicant has not mitigated the security concerns arising from his sexual offenses. Also, under 10 U.S.C. § 986, the Department of Defense may not grant or continue a security clearance for any applicant who has been sentenced by a U.S. court to confinement for more than one year, absent a waiver from the Secretary of Defense. Clearance is denied.

### STATEMENT OF THE CASE

Under Executive Order 10865, *Safeguarding Classified Information Within Industry*, (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, (Jan. 2, 1992), as amended and modified (the "Directive"), the Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On October 24, 2003, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under Guideline J, Criminal Conduct, Guideline D, Sexual Behavior, Guideline E, Personal Conduct, and Guideline K, Security Violations, of the Directive.

Applicant answered the SOR in writing on December 15, 2003. He elected to have the matter decided on the written record in lieu of a hearing.

Department Counsel submitted the Government's written case on June 21, 2004. Department Counsel provided a complete copy of the file of relevant material (FORM) to Applicant, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on June 24, 2004, but did not provide additional materials for consideration within the required time. The case was assigned to me on August 10, 2002. Subsequently, Applicant submitted an undated personal statement which was

received August 12, 2004, without objection, and included in the record.

### **FINDINGS OF FACT**

Applicant admitted all the factual allegations under Guideline J concerning criminal conduct. Item 2, Applicant's Answer to SOR, dated December 15, 2003, at 1-2. He also admitted the factual matters alleged under Guideline K concerning security violations, but included matters in explanation and extenuation. *Id.* Those admissions are incorporated herein as findings of fact. Applicant denied the allegations under Guideline D, Sexual Behavior, and Guideline E, Personal Conduct. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

Applicant is 53 years old, and works for a defense contractor. Item 3, Security Clearance Application, dated October 1, 2002, at 1. He seeks a security clearance.

Applicant joined the U.S. Navy in 1973. *Id.* at 3. He was married in November 1977, and had a child of the marriage in 1979. *Id.* at 2, 3. Applicant's marriage was marked by marital disputes. Item 5, Statement of Applicant, dated July 21, 1997, at 3-4.

In 1981, Applicant sexually molested his daughter on several occasions. *Id.* at 4. The molestation continued over several years and several homes. *Id.*

In 1985, during an argument with his wife, Applicant grabbed his wife's arm, twisted it behind her back, and held her against the wall. Item 5, *supra*, at 2. Applicant's wife reported an assault to naval and civilian police authorities. Item 8, Incident/Complaint Report, dated October 22, 1985. Applicant was confined temporarily by civilian authorities, but the charges were dropped and he returned to the barracks. Item 5, *supra*, at 2.

Applicant molested his daughter in 1985 and 1986. Item 4, Court Order, dated July 21, 1987, at 1. This included having his daughter and a neighbor's children watch as Applicant performed explicit sexual acts. Item 5, *supra*, at 4. The neighbor's children reported the incident. *Id.* In about July 1986, Applicant was arrested by state authorities. Item 6, Naval Investigative Service Report, dated September 18, 1986, at 1.

After Applicant's arrest by civilian authorities, he was ordered to reside in military barracks. Item 9, Naval Investigative Service report, dated February 19, 1987, at 1. He was held in arrest on the military installation. Item 5, *supra*, at 5. Military members were detailed to move his personal items from his home to his barracks. *Id.* The service members discovered a notebook containing classified materials lying on a living room coffee table. *Id.* Applicant admitted possessing the notebook, and indicated that it was accidentally included among his personal items when he moved from a ship to a series of residences ashore. Investigators also learned that, while assigned on board a ship, Applicant was detailed as a Special Task Person with daily access to classified information. Item 5, *supra*, at 5. He occasionally had Top Secret messages in his bunk during sleep period. *Id.* Applicant asserted the ship was open for storage of classified materials (Top Secret and below) in personal quarters. *Id.* at 5.

The U.S. Navy administratively discharged Applicant and released him to the state for trial. *Id.* State authorities charged Applicant with Indecent Liberty with a Child, Aggravated Sexual Battery, and Forcible Sodomy. Item 2, *supra*, at 1. In March, 1987, Applicant pled guilty to aggravated sexual battery and indecent liberties. *Id.*; Item 4, *supra*, at 1; Item 5, *supra*, at 7. The state court sentenced Applicant to ten years confinement for the aggravated battery, and three years confinement for the indecent liberties, to run consecutively, however, the court suspended the execution of five years of the sentence conditioned upon Applicant's good behavior upon release from confinement. Item 4, *supra*, at 2.

Applicant served about four years in state confinement, and was released on parole in May 1991. Item 5, *supra*, at 7, 8. Since that time, he has met the requirements of his parole. He lives with his mother and sister in the United States. He enrolled in college, attends church regularly, and makes his child support payments on time. Item 5, *supra*, at 8. Applicant is registered in the state as a child molester. *Id.* Applicant has worked for federal contractors since at least 1995. Item 3, *supra*, at 1.

## POLICIES

In Executive Order 12968, *Access to Classified Information*, § 3.1(b) (August 4, 1995), the President provided that eligibility for access to classified information shall be granted only to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. Exec. Ord. 10865, § 7. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline J, Criminal Conduct: A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive, ¶ E2.A10.1.1.

Guideline D, Sexual Behavior: 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. Directive, ¶ E2.A4.1.1.

Guideline E, Personal Conduct: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive, ¶ E2.A5.1.1.

Guideline K, Security Violations: Noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to safeguard classified information. Directive, ¶ E2.A11.1.1.

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

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive, ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 pertinent 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. *Id.*

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. Directive, ¶ E3.1.14. Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. Directive, ¶ 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 security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2.

Title 10, United States Code, § 986, prohibits the Department of Defense from granting or renewing a security clearance to any DoD officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

- (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;
- (2) The person is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. § 802));
- (3) The person is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or
- (4) The person has been discharged or dismissed from the Armed Forces under dishonorable conditions.

The statute also provides that the Secretary of Defense and the Secretary of the military departments concerned may authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed forces in meritorious cases.

On June 7, 2001, the Deputy Secretary of Defense issued a memorandum implementing these restrictions on the grant or renewal of security clearances. The memorandum provides that provision regarding criminal convictions "disqualifies persons with convictions in both State and Federal courts, including UCMJ offenses, with sentences imposed of more than one year, regardless of the amount of time actually served."

### **CONCLUSIONS**

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

#### **Guideline J, Criminal Conduct.**

The Government's documentary matters and Applicant's admissions constitute substantial evidence of several

disqualifying conditions under Guideline J of the Directive. Paragraph E2.A10.1.2.2 of the Directive provides that it may be a disqualifying condition if an applicant commits a "single serious crime." Paragraph E2.A10.1.2.1 also indicates that "admission of criminal conduct, regardless of whether the person was formally charged" may be disqualifying. Applicant admitted committing serious sexual offenses against his daughter in 1981. He also admitted to the sexual offenses against his daughter and the neighbor's children in 1985 and 1986 that resulted in his state convictions and sentence. The evidence shows a history and pattern of criminal activity that creates doubts about Applicant's judgment, reliability, and trustworthiness. Directive, ¶ E2.A10.1.1.

Paragraph 1.c of the SOR asserts Applicant was arrested by civilian police authorities in 1985 and charged with assault, but the charges were later dismissed. Applicant admitted this allegation. Item 2, *supra*, at 2. However, he asserted he acted to prevent his wife from assaulting him and to calm her down. Item 5, *supra*, at 2. The file does not include a statement from Applicant's former spouse. The only other evidence in the record concerning this incident is the complaint report summarizing the statement Applicant's former spouse gave the police. Item 8, *supra*, at 2. She said that she got into a heated argument with Applicant and he twisted her arm behind her back. *Id.* Considering that the former spouse's version of events is consistent with Applicant's explanation and that the charges were dismissed, I conclude the substantial evidence is insufficient to show Applicant engaged in criminal conduct as alleged in ¶ 1.c of the SOR.

The security concerns arising from Applicant's convictions can be mitigated where it is determined that the criminal behavior was not recent. Directive, ¶ E2.A10.1.3.1. The offenses in this case were not recent; Applicant's last offense occurred in 1986. However, considering the especially egregious nature of the crimes, and the length of time they continued, the passage of years mitigates the offenses only slightly.

If the crime was an isolated event, that may be a mitigating factor. Directive, ¶ E2.A10.1.3.2. Applicant's offenses against his daughter were not isolated incidents; rather they were a course of continuing conduct spanning many years. This mitigating condition does not apply here.

It may also be mitigating where there is "clear evidence of successful rehabilitation." Directive, ¶ E2.A10.1.3.6. Applicant indicated he served his sentence to confinement, became active in the church, enrolled in college, satisfied the conditions of his parole, and remains a law-abiding citizen. Notably lacking, however, is any indication Applicant sought, received, or completed medical assessment or treatment for the conditions that caused him to commit sexual offenses against his daughter and the neighbor's children.

I considered all the circumstances, including the mitigating conditions, in light of the "whole person" concept. I conclude Applicant has not mitigated the security concerns arising from his criminal conduct involving sexual offenses against children.

Under 10 U.S.C. § 986, the Department of Defense may not grant or continue a security clearance for any applicant who has been sentenced by a U.S. court to confinement for more than one year, absent a waiver from the Secretary of Defense. Applicant is subject to 10 U.S.C. § 986 by virtue of being sentenced to thirteen years in confinement as a result of the convictions for sexually abusing minor children. Under the circumstances, I am required to find against Applicant

on ¶ 1.d of the SOR. As my adverse security decision against Applicant is not based solely on the applicability of 10 U.S.C. § 986, it is inappropriate for me to make a recommendation as to whether Applicant's case should be considered for waiver. ISCR Case No. 02-00500 at 6 (App. Bd. Jan. 16, 2004) (citing DOHA Operating Instruction 64 ¶ 3.e.).

#### **Guideline D, Sexual Behavior.**

Sexual behavior may raise security concerns where it involves a criminal offense, it makes the individual vulnerable to coercion, exploitation, or duress, or it reflects a lack of discretion or judgment. Directive, ¶ E2.A4.1.1. The Government's documentary matters are substantial evidence of two disqualifying conditions under the Directive: ¶ E2.A4.1.2.1, "[s]exual behavior of a criminal nature, whether or not the individual has been prosecuted," and ¶ E2.A4.1.2.4, "[s]exual behavior . . . which reflects a lack of discretion or judgment." Applicant's repeated, aggravated, sexual offenses against several children clearly constitutes criminal behavior. These acts include those for which he was convicted and punished and those to which he confessed and was not prosecuted. The behavior also demonstrates a serious lack of judgment and discretion.

The security concerns arising from this misconduct may be mitigated under certain conditions. It may be mitigating if the conduct "was not recent and there is no evidence of subsequent conduct of a similar nature." Directive, ¶ E2.A4.1.3.2. Applicant's offenses were not recent, and there is no evidence he committed similar offenses since his confinement. However, considering the egregious nature of the offenses, and the fact that they continued for a substantial number of years, this mitigates the offenses only slightly.

It may also be mitigating where there is no other evidence of questionable judgment, irresponsibility, or emotional instability. Directive, ¶ E2.A4.1.3.3. This mitigating factor does not apply here. In addition to Applicant's sexual offenses, he admitted several occasions where domestic disputes turned into physical altercations, and at least one period where he considered suicide and made a suicidal gesture. Item 5, *supra*, at 3.

Finally, it may be mitigating where the sexual behavior at issue "no longer serves as a basis for coercion, exploitation, or duress." Directive, ¶ E2.A4.1.3.4. Applicant submitted that he could not be "blackmailed" about his sexual offenses because it is a matter of public record and he is registered in the state as a "child molester." Item 5, *supra*, at 8. Undoubtedly, the public nature of his conviction and his registration as a sexual offender substantially diminishes Applicant's vulnerability to coercion. Nonetheless, there is no indication it is a matter widely known within Applicant's business or personal community, and Applicant's history is still a matter that would evoke public opprobrium. For these reasons, I do not find this to be a significant mitigating factor.

#### **Guideline E, Personal Conduct.**



The Government's documentary matters relating to Applicant's sexual offenses also constitute disqualifying conditions under Guideline E of the Directive, concerning personal conduct involving questionable judgment, untrustworthiness, or unreliability. Directive, ¶ E2. A5. 1.1. The Government's documentary proof of the sexual offenses constitutes "reliable, unfavorable information" that raises a security concern under ¶ E2.A5.1.2.1. They also increase Applicant's "vulnerability to coercion, exploitation or duress" because if they became widely known, they "may affect [Applicant's] personal, professional, or community standing . . ." Directive, ¶ E2.A4.1.2.4. As discussed above, the fact that some of Applicant's crimes are included in the public record diminishes somewhat his susceptibility to coercion or duress for those matters. Nonetheless, they are still likely to adversely affect his personal, professional, or community standing.

It may be mitigating if the person involved "has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation or duress." Directive, ¶ E2.A5.1.3.5. As noted above, Applicant's guilty plea, the successful completion of his sentence and terms of probation, and the public record of his offenses diminish, but do not eliminate, Applicant's vulnerability to coercion, exploitation, or duress arising from his previous sexual offenses against children.

#### **Guideline K, Security Violations.**

The Government's documentary matters and Applicant's admissions demonstrate a disqualifying condition under ¶ E2.A11.1.2.2 of the Directive: negligent violation of a security regulation. Service members moving Applicant's personal property found classified material among Applicant's personal papers in his residence. Applicant indicated he possessed the classified material while assigned to a ship, and it was accidentally included within his personal belongings when he left the ship. He indicated it stayed with his personal belongings through several successive moves. The classified material was found among personal papers on his coffee table. Applicant indicated "this is the only times [sic] I had any secret or classified materials at home or anywhere not designed for access of these materials." Item 5, *supra*, at 6. This indicates Applicant negligently violated regulations concerning the proper storage of classified information, and raises questions about Applicant's trustworthiness, and his willingness and ability to properly safeguard classified information. Directive, ¶ E2.A11.1.1.

It is mitigating where the violation was inadvertent (¶ E2.A11.1.3.1) or where it was an isolated event (¶ E2.A11.1.3.2). Both mitigating factors are present in this case. Applicant has mitigated the security concerns arising from his negligent mishandling of this classified information.

Paragraph 4.b of the SOR alleges Applicant failed to comply with security regulations by having Top Secret messages in his bunk aboard ship during sleep periods. Applicant indicated his duties required him to have daily access to classified, and that it was permissible to possess Top Secret material anywhere on the ship while deployed. In the absence of any information countering this representation, I find the substantial evidence is insufficient to indicate Applicant violated applicable security regulations by having classified material in his sleeping area on board ship.

## **FORMAL FINDINGS**

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline B: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Paragraph 3, Guideline E: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Paragraph 4, Guideline K: FOR APPLICANT

Subparagraph 4.a: For Applicant

**DECISION**

In light of all of 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.

**Michael J. Breslin**

**Administrative Judge**