

DATE: September 10, 2004

In Re:

Applicant for Security Clearance

ISCR Case No. 03-04791

ECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 56-year-old analyst sexually touched a 12/13 year old girl in 1995, for which he was convicted of a lesser included charge, and a nine-year-old girl in 1994. He lied about the second touching on his security clearance application in 2000 and to a Defense Security Service agent in 2002. Mitigation has not been adequately established. Clearance is denied.

STATEMENT OF THE CASE

On January 21, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On March 9, 2004, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing by a DOHA Administrative Judge. The matter was assigned to me for resolution on April 15, 2004. A Notice of Hearing was issued on May 17, 2004, and the hearing was conducted on May 24, 2004. At the hearing, the Government submitted six documents, which were marked for identification as Government's Exhibits (GX) 1- 6. Applicant testified and offered one exhibit, which was marked as Applicant's Exhibit (AX) A. The transcript was received at DOHA on June 15, 2004.

FINDINGS OF FACT

Applicant is a 56-year-old analyst for a defense contractor who is seeking a security clearance for Applicant in connection with his employment. The SOR contains four allegations under Guideline E (Personal Conduct). In his response to the SOR, Applicant *admits* allegations 1.a. and 1.b., with explanations, and denies allegations 1.c. and 1.d. The admissions are accepted and incorporated herein as Findings of Fact.

After considering the totality of the evidence in the case file, I make the following additional FINDINGS OF FACT as to the status, past and present, of each SOR allegation:

Guideline E (Personal Conduct)

1.a. - Applicant did intentionally falsify or omitted material facts on a June 19, 2000 Security Clearance Application (SF 86), in which he replied to Question 26, "Have you ever been arrested for, or charged with, or convicted of any offense not listed in modules [questions] 21, 22, 23, 24, or 25." He answered "Yes" and cited a 1995 "Assault/Misdemeanor," but did not mention that he had actually been arrested on that date for "Annoying Children," as a result of which he had been required to register as a sex offender after his conviction. He did note at Question 43 that he wished to discuss the arrest more fully "with investigator," which he subsequently did, but he still failed to mention the second sexual touching, in 1994.

1.b. - Applicant deliberately omitted and/or falsified information given to a Defense Security Service (DSS) agent on April 2, 2002, when he stated: "This incident was the only time in my life that I have ever had inappropriate contact with a minor," referring to the child who was the victim of the 1995 criminal conviction, when he knew and sought to conceal that he had inappropriate sexual contact with another child.

1.c. - On his June 19, 2000 SF 86, Applicant answered "No" to Question 19 Your Medical Record - "In the past seven years have you consulted a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health related condition?" The counselor to whom he spoke and whose report was accepted by the court did not come within any of the described positions. Consequently, Applicant was not required report the counseling.

1.d. - As a 45 or 46-year-old, Applicant did have inappropriate sexual contact with two minors, a 12 or 13-year-old girl in 1995 and a nine-year-old girl in 1994.

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable financial judgment and conduct.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses, here based solely on the written record.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private life or connected to work, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the

Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended,

at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Applicant is a man of 46, born in 1958. He first received a DoD Secret-level security clearance in 1995, at age 37 (GX 1 at page 9).

Guideline E (Personal Conduct) - The concerns expressed in the Directive's guidelines for personal conduct are essentially that personal misconduct may raise questions about the judgement, reliability, and trustworthiness of someone seeking access to the nation's secrets.

1.a. - While it is clear that Applicant did not mention the words "Annoying Children" on his answer to Question 26, he did add at Question 43 General Remarks that the "offense will only be

discussed with investigator" (GX 1). His first sworn statement to the DSS agent (April 2002) (GX 3) does contain Applicant's statement about the 1995 offense, but not the one in 1994. Based on this record, I conclude that Applicant signed the SF86 intending to reveal only the 1995 touching to the investigator, which he did two years later, in 2002. He did not disclose the 1994 touching until confronted by the DSS agent, in GX 4. This strongly suggests that Applicant completed and signed the SF86 in 2000 with the intent to omit and conceal the 1994 touching. Whatever was actually on Applicant's mind, his conduct and statements have raised a doubt about his intent and, under the security clearance program, such doubts must be construed against the Applicant. Therefore, I am compelled to conclude that Applicant was seeking to deceive the Government when he answered the way he did to Question 26 on the SF 86.

1.b. - In his first submission of information to the DSS agent on April 2, 2002, Applicant stated "This incident [in 1995] was the only time in my life that I have ever had inappropriate contact with a minor [referring to the minor female who was the victim of his touching in 1995]. On that occasion, the then 37-year-old Applicant was in a car with a "13-year-old neighbor girl" when he "inappropriately but intentionally touched her breast" (GX 3). As he subsequently admitted to the DSS agent (GX 4), that offense was not his only incident of inappropriate conduct. I conclude that he had lied to the DSS agent in his first conversation.

He changed his story when the agent informed him that court records revealed a complaint by another girl. He now admitted that he had felt the breasts of a nine-year-old girl while they were play-wrestling on a chair in his home. That incident occurred in 1994. He did not mention this incident previously because it was "embarrassing and painful to me to discuss these incidents in [his] life" (GX 4). He added that he did not believe the new information to be "available in court records and I did not feel it necessary to bring them up on April 2" (*Id.*).

1.c. - The resolution of this allegation depends on whether the type of counseling Applicant received was such as to be covered by the language of Question 19. From court records, it is clear that Applicant was ordered to obtain counseling relating to his offense. It is also clear that counseling was obtained at a religious based Counseling Services Center from a pastor with a "D.D." degree, which I take in context to mean Doctor of Divinity. The counseling report of December

20, 1995 was accepted by the court as fulfilling its requirements (GX 5 at page 10). Considering the language of the Directive, it is not clear that a pastor with a D.D. at a church-based counseling center qualifies as a "mental health professional" or "health care provider" as those terms are used in Question 19 of the SF 86. Applicant did not think he had to answer in the affirmative and the Government has not established to the contrary about this disputed issue. On this basis, I find for Applicant as to this allegation.

1.d. - Applicant's explanations for the second sexual touching are contradictory and unpersuasive. In his response to the SOR, he claims the touching was not done "in a sexually purposeful manner." In support of his claim, he offers a letter, dated February 29, 2004, from the young lady he touched. She says that in the 13 years she has known him, he "has never made any advances in a sexual way toward me . . ." While I have no reason to doubt her sincerity, she was nine at the time and Applicant has admitted touching her in a manner he considered to be sexual, even if she did not at the time or recently (GX 4). In addition, the girl's name appears in court documents as a victim, so someone complained on her behalf (GX 5). In the same documents Applicant is directed by the court to avoid contacts with "the victims" (i.e. plural). Based on the totality of the record, I conclude it more likely than not that Applicant did touch each girl with sexual intent, and it is that intent that is central to the issues before me, rather than 10-year-old memories of someone who was a child at the time.

I have carefully considered the testimony of Applicant and his two witnesses. The first is his current church pastor, who has known Applicant for about six years. He discussed what Applicant had told him about the two girls and the court proceedings (Tr at 63 - 72). I did not find this to be particularly helpful to Applicant's position since it contains mixed signals as to how the two touchings occurred and what was in Applicant's mind. In addition, I am concerned that Applicant suggested conspiracy and improper motive between the 9 and 12 or 13-year-old girls and behind the complaint naming the two girls as victims. I also find no reason to believe that the DSS agent misstated what Applicant had told him. Overall, I conclude that it is more likely than not that Applicant did touch each girl intentionally and with sexual feelings in *his* mind. I further conclude that while Applicant does now feel genuine remorse for what he did, he is still, to a significant degree, in a state of denial, and it is this troubled state of mind that caused him to lie on his SF 86 in June 2000 and in his sworn statement to the DSS agent in April 2002.

Personal Conduct - The following Disqualifying Conditions (DC) are applicable: DC 1 - reliable unfavorable information provided by associates, . . . neighbors, and other acquaintances; DC 2 - the deliberate omission, concealment, or falsification of relevant and material information from any personnel security questionnaire. . . .; and DC 3 - deliberately providing false or misleading information concerning relevant and material information to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

The record does establish that any of the parallel Mitigating Conditions (MC) are applicable, particularly since the falsifications are still "recent" (MC 2), and the correct information was provided only after being confronted by the DSS agent (MC 3).

I have considered Applicant's statements and all of the positive statements by other individuals. However, viewing the totality of the evidence as a whole, I cannot conclude that Applicant has demonstrated the integrity, good judgment, reliability, and trustworthiness required of anyone seeking access to the nation's secrets.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline E (Personal Conduct) Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. 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.

Barry M. Sax

Administrative Judge