

DATE: November 18, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-05989

ECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was charged in 1990 with first degree sexual abuse for his conduct with his four-year-old niece. For several years he has viewed pornographic internet web sites that have, at times, included nude pictures of children. He continues to view pornography on the web, to include nude photographs of children. Applicant deliberately falsified his security clearance application in May 2002 by omitting his 1990 arrest. He has failed to mitigate resulting security concerns about his sexual behavior, personal conduct, and criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

Based on information available to the government concerning Applicant's background, DOHA adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant's security clearance. ⁽¹⁾ On April 1, 2004, in accordance with DoD Directive 5220.6, as amended (Directive), the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline D (Sexual Behavior), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct).

On April 20, 2004, Applicant answered the SOR (Answer), wherein he admitted all of the SOR allegations except for those at SOR subparagraphs 2.b and 2.c. He also requested a determination without a hearing. DOHA Department Counsel submitted a file of relevant material (FORM) in support of the government's preliminary decision, a copy of which Applicant received on August 17, 2004. Applicant submitted nothing further within the time allotted and the case was assigned to me on October 8, 2004.

FINDINGS OF FACT

Applicant's admissions are incorporated herein as facts. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact:

Applicant is 45 years old and has been employed by the same defense contractor since 1981. He and his wife have been married for 19 years and have children, ages 23 and 17. Applicant has held a clearance, apparently since 1981. (2)

On September 14, 1990, Applicant's four-year-old niece was spending the night at Applicant's house. During the night, Applicant twice went into her room, unzipped the sleeping bag she was in and touched her in the rectal and vaginal areas. Applicant thought the girl was asleep, but she was not and the next day she told her parents what happened. They confronted Applicant who initially denied having done what he was accused of, but later admitted to them that the girl was telling the truth. (3)

Subsequently, Applicant self-referred for counseling through a service at work and went through 14 therapy sessions. However, due to the age of the victim, the counselors were also obligated by state law to report the matter to the police. Applicant was arrested on September 19, 1990 and charged with first degree sexual abuse, a felony. However, the victim's parents declined to put their daughter through further questioning in support the prosecution and expressed satisfaction that Applicant (to whom they are related by marriage) was undergoing counseling on his own. (4)

When Applicant was being fingerprinted incident to his 1990 arrest, he indicated his prints were already on file with DoD because he held a security clearance. The police told him their information system would not have access to the DoD files; therefore, the police still required his fingerprints. Applicant submitted a security clearance questionnaire on May 31, 2002. In response to questions about his arrest record, Applicant deliberately omitted the fact of his 1990 arrest on felony sexual abuse charges by answering "no" to questions 21 and 26. He did so because he "was embarrassed about the incident and after being told [the police and DoD did not share fingerprint information] was hopping (sic) that the Department of Defense would not find out about it for a secret level investigation. Thus I chose not to list this incident on my EPSQ." (5)

Applicant frequents strip clubs to see nude women and has used the internet for several years for the same purpose. While visiting pornographic web sites on the internet, Applicant has also viewed photos of nude children. While he claims the photos of children appear without his actively seeking them out, he continues to visit the same web sites knowing that such photos will occasionally appear. Applicant claims his wife and employer know he uses the internet to view nude photos of adults. However, Applicant does not want them to know sometimes he also views photos of nude children. (6)

POLICIES

The Directive sets forth adjudicative guidelines (7) to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account both disqualifying conditions (DC) and mitigating conditions (MC) under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the SOR allegations and having reviewed the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are those conditions listed in the Directive under Guideline E (Personal Conduct), Guideline F (Financial Considerations), and Guideline J (Criminal Conduct).

BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest (8) for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden, it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion. (9)

A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. The Government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the Government. ⁽¹⁰⁾

CONCLUSIONS

The security concern under Guideline E (personal conduct) is that behavior 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. ⁽¹¹⁾ Department Counsel has presented sufficient evidence to establish a *prima facie* case for disqualification under this guideline.

The government's concern is two-fold; first, that Applicant may have deliberately lied on his SF 86 when he failed to disclose his 1990 arrest for first degree sexual assault. Applicant admits he deliberately withheld this information from his SF 86 because he was hoping investigators would not discover the arrest record. Based on his SOR Answer and his statement to a Defense Security Service (DSS) agent in October 2002, he may have been thinking at the time he was arrested about whether he would have to tell the government about this incident. Guideline E DC 2 ⁽¹²⁾

applies here.

Further, the government is appropriately concerned about Applicant's continued use of the internet to view pictures of nude women, knowing that pictures of nude children will occasionally appear, and his concern that his wife and employer not know about his behavior in this regard. Such conduct is wholly inappropriate and potentially illegal. ⁽¹³⁾ It also demonstrates a degree of poor judgment and immaturity completely inconsistent with the government's interest in ensuring those who have classified access will act in a way that will not compromise the national interest. Lastly, Applicant's conduct leaves him vulnerable to coercion or blackmail because of his lack of disclosure to those closest to him, and it arguably could adversely affect his employment if he revealed his activities. Guideline E DC 4 ⁽¹⁴⁾ applies.

Against the disqualifying conditions, there is no basis in the facts here for application of any of the listed mitigating conditions. Consistent with the analyses under Guidelines D and J, below, Applicant has not shown that his judgment and reliability are now or will in the future be acceptable. I conclude Guideline E against the Applicant.

Under Guideline D, an applicant's sexual behavior may be a security concern if it involves a criminal offense, may subject the individual to coercion, exploitation, or duress, or reflects lack of judgment or discretion. ⁽¹⁵⁾ Department Counsel has presented sufficient evidence to establish a *prima facie* case for disqualification under this guideline, and it is clear Applicant's sexual behavior falls squarely within this security concern. As noted above, not only was he arrested for inappropriate sexual conduct with a child of tender years, his continued access of photos of nude children is potentially a violation of federal law. Further, it is reasonable to conclude from this record that Applicant is vulnerable to coercion or pressure because he does not want his activities known even by those closest to him. Guideline D DC 1 ⁽¹⁶⁾ and DC 3 ⁽¹⁷⁾ apply here. Despite the fact he voluntarily sought counseling around the time of his 1990 arrest, his ongoing use of the internet to view pornography undermines any claim he might have that such conduct is no longer of concern. Accordingly, there is no basis in the record for application of any of the mitigating conditions under this guideline. I conclude Guideline D against the Applicant.

The security concern under Guideline J (Criminal Conduct) is that someone who is willing to disregard the law, even through minor violations, may also be willing to disregard rules, regulations and procedures in place to safeguard classified information. That person's judgment, reliability and trustworthiness may be sufficiently undermined as to disqualify him from holding a security clearance. ⁽¹⁸⁾ Department Counsel has established a *prima facie* case for disqualification under this guideline, as DC 1 ⁽¹⁹⁾ and DC 2 ⁽²⁰⁾ apply here; however, none of the available mitigating conditions is supported by these facts.

As for potential mitigation, Applicant's 1990 arrest, standing alone, might be mitigated as isolated [\(21\)](#) and not recent. [\(22\)](#) However, his continued use of the internet in a manner that is potentially a violation of federal law, and his deliberate falsification of his 2002 SF 86, a violation of 18 U.S.C. §1001, taken as a whole, demonstrate repeated and recent criminal conduct. Further, there is no support in these facts for application of any other mitigating conditions. I conclude Guideline J against Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under each applicable adjudicative guideline. A fair and commonsense assessment [\(23\)](#) of the record before me raises significant doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to resolve those doubts, which Applicant failed to provide, I cannot conclude it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Personal Conduct (Guideline E) 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

Subparagraph 2.c: Against the Applicant

Paragraph 3, Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 3.a: Against the Applicant

Subparagraph 3.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 the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. FORM, Item 4.
3. FORM, Items 6 and 7.
4. Id.
5. FORM, Items 4 and 6.

6. Id.
7. Directive, Enclosure 2.
8. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
9. *See Egan*, 484 U.S. at 528, 531.
10. *See Egan*; Directive E2.2.2.
11. Directive, E2.A5.1.1.
12. Directive, E2.A5.1.2.2. 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, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
13. FORM, Item 8.
14. Directive, E2.A5.1.2.4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;
15. Directive, E2.A4.1.1.
16. Directive, E2.A4.1.2.1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
17. Directive, E2.A4.1.2.3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;
18. Directive, E2.A10.1.1.
19. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
20. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
21. Directive, E2.A10.1.3.2. The crime was an isolated incident;
22. Directive, E2.A10.1.3.1. The criminal behavior was not recent;
23. Directive, E2.2.3.