

DATE: May 11, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-06762

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Michael M. Maguire, Esq.

SYNOPSIS

Applicant is an employee of a defense contractor who was charged with aggravated sexual battery and sodomy of his daughter over a period of six to eight years. During the entire period the daughter was a minor aged six or seven until age thirteen. The charge was reduced to sexual battery, a misdemeanor, and he was sentenced to 12 months in jail with six months suspended for two years expiring in May, 2004. He served three months with suspension conditioned on good behavior and participation in a community corrections program. Although he is showing progress in treatment it has not concluded and no diagnosis of the cause of his conduct has been made. It is premature to grant a clearance at this time. Clearance is denied.

STATEMENT OF CASE

On October 15, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On November 5, 2003, Applicant, in a sworn written statement, responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to me on January 22, 2004. A notice of hearing was issued on February 12, 2004. A hearing was held on March 10, 2004. The Government introduced five exhibits and Applicant introduced four. All exhibits were admitted into evidence. The Applicant testified as did one other on his behalf. The transcript was received March 17, 2004.

FINDINGS OF FACT

After a complete review of the evidence in the record and upon due consideration of the record, the following findings of fact are made:

Applicant is an employee of a defense contractor who was charged with aggravated sexual battery and sodomy with his daughter approximately 23 times over a period of six to eight years. During the entire period the daughter was a minor aged six or seven until age thirteen. The charges were reduced to one count of sexual battery, a misdemeanor, and he was sentenced to 12 months in jail with six months suspended for two years expiring May, 2004. He served three months with suspension conditioned on good behavior and participation in a community corrections program.

Applicant voluntarily ceased his misconduct when his daughter confronted him with the statement that she wanted a "normal father." Two years later the daughter told a school friend about the past conduct and it was reported to family protective services, which investigated the matter and charges were filed. Applicant did not voluntarily seek therapy during the two year period from cessation of the misconduct until his arrest since to do so would have resulted in a report to authorities and immediate arrest.

Applicant has been under the care of a certified clinical social worker who specializes in sex offender treatment for the past two years since his conviction. He will continue the treatment for another 18 months. Applicant has lived separately from his family since his arrest and is barred by

the court from contact with his daughter until June 2004 when she reaches the age of 18. His daughter has been in treatment but, at her request, is no longer receiving it. Applicant has two sons whom he is allowed to see. His wife was unaware of the conduct until his arrest. While there have been considerable strains on the marriage, his wife has continued to be supportive to keep the family together.

Applicant's treatment provider testified on his behalf and submitted a lengthy analysis of his treatment and prognosis concluding that he accepted full responsibility for his conduct and had complied with all treatment requirements. He could not yet reach any conclusion as to the cause for the conduct. (Exh. B) He found no indication of pedophilia and there has been no subsequent sexual misconduct. He has no alcohol problems and has normal sexual interests. He found little likelihood of a repeat of the prior sexual misconduct. Applicant has been a model patient and has no difficulties with complying with all treatment requirements.

Applicant has a responsible position as a supervisor and is highly regarded by his employer. He has held a security clearance since 1976 both during his active duty Navy service and the past 20 years of his private industry employment. His family, friends, and employer are aware of his actions and the ensuing legal difficulties although it has cost him a number of friends.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position that will give that person access to such information." *Id.* at 527.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (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. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information *See Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b)

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to all allegations set forth in the SOR.

Disqualifying Condition Criminal Conduct (DC) 2 is applicable under Guideline J to Applicant in that he was convicted of a serious crime and sentenced to a year of confinement. Sexual Misconduct (DC) 1 is also applicable under Guideline D because of the misconduct engaged in with a minor daughter. Also applicable is DC 3 involving sexual behavior that causes an individual to be vulnerable to undue influence or coercion.

Based on the evidence of record, including Applicant's admissions, the Government has established reasons to deny him a security clearance because of criminal conduct. Having established such reasons, the Applicant has the burden to establish security suitability through evidence which refutes, mitigates, or extenuates the disqualification and demonstrates that it is clearly consistent with the national interest to grant a security clearance. ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

As the policy prescribes, the burden shifted to the Applicant to show that Mitigating Conditions (MC) are applicable to him. Possible mitigating conditions might be that there is clear evidence of successful rehabilitation (MC) 5 under Guideline J and the behavior no longer serves as a basis for undue influence or coercion (MC) 4 under Guideline D. None are applicable to the facts of this case.

The gravity of the offense and the duration of the time of the offenses are factors that must be taken into consideration in evaluating the case. The clinical social worker gave excellent supporting testimony regarding Applicant's present state of health, prognosis, and lack of tendency to pedophilia. However, he is still in treatment and will be for at least 18 more months without yet a diagnosis as to what precipitated the criminal conduct. It is difficult to conclude that there has been successful rehabilitation when it has yet not been determined the cause of his conduct.

Although his family, friends, and employer are aware of the conduct, others do not know of it and in view of the gravity and nature of the acts it is impossible to conclude that it could not be a basis for undue influence or coercion. Thus, notwithstanding the fact that he has held a clearance for 28 years, in view of the circumstances of this case, I find it premature to continue a security clearance at this time.

The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. The "whole person" concept recognizes that we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude that he is not eligible for access to classified information. Thus, I find against the Applicant.

FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Paragraph 2. Guideline D: AGAINST APPLICANT

Subparagraph 2.a.: Against 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 renew a security clearance for Applicant. Clearance is denied.

Charles D. Ablard

Administrative Judge