

DATE: August 26, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-07979

DECISION OF ADMINISTRATIVE JUDGE

NOREEN A. LYNCH

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 44-year-old employee of a defense contractor. Applicant sexually and physically abused his five-year-old autistic daughter in the Fall of 2000. Applicant and his wife received marriage/family counseling after the incident, and Applicant obtained therapeutic treatment in 2002 for the inappropriate acts with his daughter. He has not mitigated the security concerns arising from his sexual behavior and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On October 15, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, 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. The SOR 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 because of security concerns arising under Guidelines D (Sexual Behavior) and E (Personal Conduct).

In his sworn answer dated November 1, 2004, Applicant responded to each of the factual allegations set forth in the SOR, and elected to have the case decided on the written record in lieu of a hearing. Department counsel submitted the government's case in writing on April 8, 2005. Department counsel provided a complete copy of the file of relevant material (FORM)⁽¹⁾ to Applicant, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the allegations. He provided a written response to the FORM dated May 31, 2005.⁽²⁾ The case was assigned to me on June 15, 2005.

FINDINGS OF FACT

Applicant admitted one of the factual allegations pertaining to sexual behavior under Guideline D (subparagraph 1.b)

and a corresponding portion of an allegation pertaining to personal conduct under Guideline E (portion of subparagraph 2.a.).⁽³⁾ Applicant's admissions are incorporated as findings of fact. He denied the remaining allegations or portions thereof. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant, a 44-year-old chief systems engineer, has been employed in the defense industry since 1991. Applicant is married and lives with his wife and two children. His daughter has Pervasive Developmental Delay (autism),⁽⁴⁾ and was difficult to care for. She lacked the ability to interact in the manner that her peers do, and acted out and required constant instruction and attention.⁽⁵⁾

Applicant's daughter was not able to bathe herself, due to her disability,⁽⁶⁾ and Applicant and his wife took turns bathing her.⁽⁷⁾ In the Fall of 2000, when his daughter was five years old, Applicant bathed his daughter by taking her into the shower with him and holding her in his arms while washing her.⁽⁸⁾ Applicant's son usually joined him, although on several occasions Applicant was alone with his daughter in the shower. On one occasion, after washing his daughter's face and hair, Applicant became sexually aroused.⁽⁹⁾ He put his daughter down by intentionally sliding her down and over his erect penis. Applicant left the bathroom immediately.⁽¹⁰⁾

After this incident, Applicant continued to shower with his daughter and son.⁽¹¹⁾ On another occasion, Applicant became sexually aroused while showering with his daughter.⁽¹²⁾ He contends he left the shower immediately thereafter.⁽¹³⁾

On about ten occasions, Applicant touched his daughter's inner thighs and genital area.⁽¹⁴⁾ The incidents occurred in the living room, while lying on a bed in Applicant's room, or in his daughter's bedroom.⁽¹⁵⁾ He rubbed his daughter's leg above the knee, her inner thigh, and her pelvic area just above the vagina,⁽¹⁶⁾ and became sexually aroused on about four of those occasions.⁽¹⁷⁾

At times, Applicant's daughter acted out in a manner that required physical restraint.⁽¹⁸⁾ She would run away and into the street, scream, kick and flail her arms in a public place, struggle to resist getting dressed in the morning, and fight to avoid taking medication.⁽¹⁹⁾ Applicant developed techniques for restraining and carrying the child.⁽²⁰⁾ He carried her horizontally to the ground, with her head on his left shoulder, his left arm across her chest and stomach, and his left hand between her legs. To dress her, he straddled her, facing her feet, in order to pull on her pants socks and shoes. He used the bulk of his body to restrain her in order to administer medication. Applicant's efforts left red marks or bruises on his daughter's body.⁽²¹⁾ They were not performed for his sexual gratification.⁽²²⁾

A National Security Agency (NSA) investigator interviewed Applicant in November 2001,⁽²³⁾ in connection with his application to renew his security clearance. During a November 2, 2001, polygraph he admitted to sexual abuse and physical abuse of his daughter. He acknowledged that he bruised his daughter approximately 10 to 50 times by jerking her arm or grabbing her, leaving bruises or marks on her arm.⁽²⁴⁾ He admitted that 50% of the time his conduct was malicious.⁽²⁵⁾ Applicant stated he attempted to keep his daughter from moving by sitting on her or holding her down with his hand or foot, as his way of dealing with his frustrations.⁽²⁶⁾

Applicant also admitted to showering with his daughter, sliding her naked body down his body and over his penis and that on one instance his penis was erect.⁽²⁷⁾ He also played with his daughter on the bed in an inappropriate manner rubbing her inner thighs and her legs and placing his hands on her vagina.⁽²⁸⁾ It was his wish to get a "sense of joy out of this child" meaning sexual joy.⁽²⁹⁾

Security investigators informed the local county police department. The police conducted a criminal investigation and completed a report but did not file charges.⁽³⁰⁾ In December 2001, the local

department of social services received a referral for abuse and investigated Applicant for sexual and physical abuse of his five-year-old daughter. (31) The local county social services department made a finding of child abuse against the Applicant in late 2001 or early 2002. (32)

The local county department of social services required Applicant to sign a service agreement in February 2002. (33) That agreement required Applicant to move from the family home; live apart from his family for a period of time; have no contact with his children until approved by the social services department; have unsupervised visits and outings with his son, but supervised visits with his daughter; and undergo sexual offender treatment therapy and marriage counseling. (34)

On August 15, 2002, a Defense Security Service (DSS) agent interviewed Applicant. (35) Applicant admitted to the DSS agent in that interview that he became frustrated and angry with her, but denied ever acting on these thoughts. In that same interview Applicant stated that he wanted to feel a sense of sexual joy from his daughter, because he felt close to her. Applicant admitted playing with his daughter on the bed in the same manner that he would play with her mother. (36)

Applicant received counseling for sexual offenders, individual therapy for depression, and marital counseling in 2002 as a requirement of the social services agreement. (37) He receives ongoing treatment, and is on medication for depression. (38) Applicant's psychiatrist diagnosed him with affective disorder, (39) and characterized him as stable. (40)

In May 2005, Applicant stated that in his initial interview he presented himself in an "extreme manner" based on guilt felt over his actions with his daughter. (41) He contended that he squelched the sexually related acts before the end of 2000. (42) He admits that his actions with his daughter in the shower were inappropriate and show a flaw in his character. (43) He admitted losing control of himself at that time. (44) Applicant claims he removed himself from the shower and the fondling situation, but acknowledges that he is still uncomfortable with these actions. He points to the fact that the local police did not charge him. (45) Applicant continues to take steps to recover from his disorder. (46)

Applicant admits to the bruises from restraining her in various situations but maintained that he did not physically abuse his daughter because the physical restraint was necessary to protect her (47). Applicant admitted he was stressed in coping with his autistic daughter. He asserted, "It has only been in the last two years that I have started to realize that the amount of force I used was necessary and not abusive." (48)

Applicant notified his employer at the time of the initial security clearance application about the incidents and the local department investigation. He also acknowledged that some people, including his wife, parents, and some neighbors, already know about the investigation of abuse with his daughter. Applicant is ashamed of his behavior with his daughter. Applicant claims that the sexual child abuse issue is a large component of the security concerns in this case. (49)

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines For Determining Eligibility For Access To Classified Information*, sets forth the criteria which must be evaluated when determining security clearance eligibility. The adjudicative guidelines specifically distinguish between those factors that are considered in denying or revoking an employee's request for access to classified information (Disqualifying Conditions), and those factors that are considered in granting an employee's request for access to classified information (Mitigating Conditions). By acknowledging that individual circumstances of each case are always different, the guidelines provide substantive standards to assist an administrative judge in reaching fair and impartial common sense decisions.

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 meritorious decisions. 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 conduct of the applicant and the circumstances in any case, the factors an administrative judge should

consider pursuant to the concept are: (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 the 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.

Granting an applicant's clearance for access to classified information is predicated on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of disclosure of such information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information in any aspect of his or her life. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. The decision to deny a security clearance request to an individual is not necessarily a determination of the loyalty of the applicant. ⁽⁵⁰⁾ It is merely an indication the applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

In accordance with the Directive, the government bears the burden of proof in the adjudicative process to first establish conditions which indicate it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. ⁽⁵¹⁾ When the government meets this burden, the corresponding heavy burden of rebuttal then falls on the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the position of the government, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance. ⁽⁵²⁾

Upon consideration of all the evidence submitted in this matter, the following adjudicative guidelines are appropriate for evaluation with regard to the facts of this case:

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. ⁽⁵³⁾

Guideline E - Personal Conduct: Conduct involving questionable judgment trustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. ⁽⁵⁴⁾

Disqualifying and mitigating conditions, either raising security concerns or mitigating concerns, pertaining to these adjudicative guidelines, are set forth and discussed in the Conclusions section below.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and guidelines, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

Sexual Behavior

The government has established its case under Guideline D. Applicant admitted he engaged in inappropriate sexual conduct with his autistic daughter on numerous occasions in 2000. Considering all the evidence, I conclude this constituted sexual behavior of a criminal nature. Applicant sexually abused his daughter by rubbing her inner thigh and vaginal area on multiple occasions. While he admitted the acts, he denied that it constituted abusive behavior because he did it to either relax or stimulate his daughter. Applicant's argument is unpersuasive. He became sexually aroused on multiple occasions while fondling his daughter, and he admitted wanting to feel a sense of sexual joy from his daughter. Further, there is no indication that this fondling was part of a prescribed or medically accepted course of care for his daughter.

Applicant attempted to explain away his earlier admissions to investigators by claiming he used "extreme" terms to

describe his behavior out of guilt for his daughter's condition. His explanation is implausible and unreasonable. I am not persuaded that any guilt Applicant may have felt because of his daughter's affliction would motivate him to falsely admit to sexual or physical conduct he did not commit.

Applicant argued that the fact that the local police did not file charges exonerates him. The prosecutor's recommendation that the case be handled through the local department of social services is not tantamount to a finding that no criminal conduct occurred. Thus, Applicant's conduct pertaining to sexual behavior falls within Sexual Behavior Disqualifying Condition (SB DC) E2.A4.2.1. (*sexual behavior of a criminal nature whether or not the individual has been prosecuted*), and SB DC E2.A.4.1.2.4. (*Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment*).

Applicant claims to be embarrassed and ashamed by his conduct. Although he contends that his family, friends, some neighbors, and his current employer know of this past sexual behavior, no information was provided as to who is actually aware of what. In the absence of specifics, there may be people could use this information against Applicant for coercion, exploitation, or duress. At the time he submitted his security clearance application in 2001, Applicant notified his employer about the local department investigation for sexual child abuse. However, future employers or a broader group of people, such as neighbors or future coworkers might subject Applicant to blackmail. Thus, SB DC E2.A4.1.2.3. (*sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*), also applies in this case.

There have been no other instances of this behavior reported or charges of any kind. Therefore, Sexual Behavior Mitigating Condition (SB MC) E2.A4.1.3.2. (*the behavior was not recent and there is no evidence of subsequent conduct of a similar nature*) applies.

I considered the remaining SB MC and conclude they do not apply. SB MC E2.A4.1.3.3. (*there is no other evidence of questionable judgment, irresponsibility, or emotional instability*) does not apply. Applicant's May 31, 2005, statement says he has learned not to volunteer any information in the future. Applicant's rationalization raises serious questions regarding his judgment, responsibility, and truthfulness.

Applicant has failed to mitigate or overcome the government's case, for the evidence leaves me with questions and doubts as to his security eligibility and suitability. Accordingly, allegations 1.a. and 1.b. of the SOR are concluded against Applicant.

Personal Conduct

The government has established its case under Guideline E. Applicant's admissions to the NSA investigator in November 2001 and the DSS agent in August 2002, concerning child sexual abuse, raises serious questionable judgment or unreliability. Applicant physically abused his daughter, and admitted becoming angry and frustrated with her and that 50% of her bruises resulted from his malicious conduct. Applicant's position changed markedly when he admitted feeling angry but denied ever acting on those impulses. More recently, Applicant did not deny using physical force to restrain and control his daughter, but argued it was not abuse because it was for a proper purpose. I find Applicant's inculpatory first statement is credible and his later exculpatory statements are not believable. I conclude there is reliable evidence showing Applicant physically abused his daughter, therefore Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2. (*reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*) applies.

Applicant was worried about possible prosecution. Although certain people know about the incidents, that does not mean that he would want a broader group of people to have that information about his physical and sexual abuse of his daughter. Applicant's neighbors, future employers and/or coworkers do not know about the child abuse incidents. Applicant's 2005 admission of his "extreme" misinterpretation of his handling of his daughter, and exoneration by the local police (no criminal charges filed) is not enough to mitigate the security concerns engendered by his sexual misconduct with his own five-year-old child. This is exactly the type of information that makes one susceptible to exploitation in various situations. Thus, Applicant's personal conduct also falls within PC DC 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).

Applicant did not volunteer this information concerning his physical or sexual behavior with his disabled daughter until confronted during a security interview in 2001. His admissions changed over time and he minimized the incidents, especially in his 2005 response to the FORM. His statement that he would not volunteer information in the future does not alleviate a concern for lack of candor, untrustworthiness or unreliability, and thus, I find that his personal conduct could increase his vulnerability to coercion or render him susceptible to blackmail. Thus Personal Conduct Mitigating Condition (PC MC) E2.A.5.1.3.5 (*the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*) does not apply. None of the other PC C's apply in this case except the one discussed above. Consequently, I conclude that Applicant has failed to mitigate or overcome the government's case. Accordingly, allegation 2.a. of the SOR is concluded against Applicant.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by E3.1.25. of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline D: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

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

Noreen A. Lynch

Administrative Judge

1. The government submitted six items in support of its contentions.
2. Applicant indicated Attachment 2.4 would be forwarded separately. However, no attachment with that number is included in the file.
3. Item 3 (Applicant's Answer to SOR, dated November 1, 2004) at 1-2.
4. Applicant's Response to FORM, dated May 31, 2005, at 2.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. Item 5 (Clearance Decision from DSS, undated) at 1.

10. *Id.*

11. Item 6 (Certified Results of Interview, undated) at 1. It should be noted that the document characterized as "certified" is neither sworn to, certified, nor dated. It is nothing other than unsworn hearsay submitted to supply "evidence" which is otherwise missing from the government's case. There is no proffer by the government to indicate compliance with sections E.3.1.20.or E3.1.22.2, Enclosure 3, of the Directive. However, inasmuch as Applicant has failed to object to this document it will be given the appropriate weight it deserves.

12. *Id.*

13. *Id.* at 3.

14. *Id.* at 2.

15. *Id.*

16. *Id.*

17. *Id.*

18. Applicant's Response to FORM, *supra* note 4, at 2.

19. *Id.*

20. *Id.*

21. Item 5, Clearance Decision, *supra* note 9, at 1.

22. *Id.*

23. Item 5 (NSA Interview, dated November 2, 2001).

24. *Id.* at 3

25. *Id.*

26. *Id.* at 1.

27. *Id.* at 4.

28. *Id.* at 3.

29. *Id.* at 4.

30. Item 6, *supra* note 11, at 3.

31. The local department's report on the alleged abuse is not a part of the FORM.

32. Applicant's Response to FORM, *supra* note 4, at Attachment 2.2.

33. Item 3, *supra* note 3, at 1.

34. *Id.*

35. Item 6, *supra* note 11, at 1.

36. *Id.*
37. Attachment 2.5 at 1.
38. *Id.*
39. Affective disorder does not have a separate classification under the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition-Text Revision (DSM-IV-TR)*. Affective disorder is defined as inappropriate emotional tone or outward emotional reactions out of harmony with the idea, object, or thought accompanying it. *Dorland's Illustrated Medical Dictionary* (28th ed., W.B. Saunders 1994).
40. Applicant's Response to FORM *supra* note 4, at Attachment 2.6.
41. *Id.* at Attachment 2.5.
42. *Id.*
43. *Id.*
44. *Id.*
45. Applicant's Response to FORM *supra* note 4, at 2.
46. *Id.* at Attachment 2.6.
47. *Id.*
48. *Id.* at 2.
49. *Id.* at 1.
50. Executive Order No. 10865, Section 7.
51. Directive, Enclosure 2, ¶ E2.2.2.
52. ISCR Case No. 94-1075 (App. Bd., Aug. 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
53. Directive, Enclosure 2, ¶ E2.A4.1.1.
54. Directive, Enclosure 2, ¶ E2.A5.1.1.