

DATE: October 25, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-09850

ECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esquire, Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esquire, Attorney at Law

SYNOPSIS

Applicant was convicted of three counts of child molesting in 2001/2002, involving two young females. He admits exposing himself and masturbating in front of the girls, one of whom was his girlfriend's daughter. His only excuse was that he was in a period of family stress. He remains on probation until 2005, is receiving counseling, and is required to stay away from the victims. No mitigation has been established. Clearance is denied.

STATEMENT OF THE CASE

On March 8, 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 25, 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 May 10, 2004. A Notice of Hearing was issued on June 25, 2004 setting the hearing for July 12, 2004. At the hearing, the Government did not call any witnesses but submitted six documents, which were marked for identification as Government's Exhibits (GX) 1 - 6. Applicant testified, called three other witnesses, and offered seven exhibits, which were marked as Applicant's Exhibit (AX) A - G. The transcript was received at DOHA on August 5, 2004.

FINDINGS OF FACT

Applicant is a 51-year-old technician for a defense contractor who is seeking a security clearance for Applicant in connection with his employment. The SOR contains one allegation under Guideline J (Criminal Conduct) and one

related allegation under Guideline E (Personal Conduct).

In his response to the SOR, Applicant admits the single Guideline J allegation "as to the no contest pleading" but denies the allegation as to his "reliability and trustworthiness." He denies the Guideline E allegation "as to lack of candor, dishonesty, and failure to comply with rules and regulations," but admits "to a severe lack of judgment in all instances, but den[ies] that it will ever happen again." Both admissions are 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:

1. Guideline J (Criminal Conduct)

1.a. In February 2002, this 49-year-old Applicant was arrested on three counts of Child Molesting. In August 2002, he pleaded no contest to three counts of Child Molesting (Tr at 47).⁽¹⁾ He was placed on three years of probation, ordered to attend counseling, register as a sex offender, and serve 90 days in jail. Applicant satisfied all requirements of the court disposition with the exception of the three years of probation, which is expected to be completed in 2005.

2. Guideline E (Personal Conduct)

2.a. - The information in subparagraph 1.a., above.

Applicant has received a favorable letter from a License Clinical Social Worker (AX 5), and favorable testimony, letters, and evaluations from friends, co-workers, and his company (Tr at 23 - 47, AX A, B, C, D, E, and F).

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.

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

1. Guideline J (Criminal Conduct) and 2. Guideline E (Personal Conduct)

The criminal conduct in question is child molesting that occurred in about early 2002. Applicant lived for nine years with a woman who had a young daughter, who was about 8 and 12 when the incidents occurred. According to a sheriff's report, the girl told her mother and the sheriff that the suspect entered her bedroom and "exposed himself in a lewd manner" (GX 4). On the first occasion, when she was about eight, ⁽²⁾

Applicant walked into her bedroom completely naked. His penis was erect and he was touching himself. When she was 11, he began entering her bedroom again, naked and touching himself again. She warned him to stop doing so or she would tell her mother. Applicant did not desist but repeated the conduct at least 15 more times, usually when her mother was out of the house or sleeping in another room. On some occasions, Applicant was wearing a robe that was hanging open. Around her 12th birthday, he entered her room, masturbated in front of her, and ejaculated onto her bed comforter. She scooped up some of the ejaculate in a plastic egg and showed it to her mother.

When questioned by the sheriff, Applicant did not deny the allegation but did not admit it either. Eventually, when asked again about exposing himself and then masturbating in front of the victim, he nodded his head up and down, signifying "Yes" to the sheriff deputy (GX 4 at pages 8, 9). Applicant's final words on the matter came at the hearing. As his counsel stated: Applicant "admitted to the offenses. He cooperated with the investigation. He underwent a rigorous therapeutic and counseling regimen" and "the matter is now under control" (Tr at 20).

All three of Applicant's witnesses speak highly of him. However, I note that one witness testified that Applicant told him the conduct was "accidental" rather than "intentional" and that "it" occurred while he was walking from a bathroom to his room, which suggests a one-time occurrence and a lack on intent, all of which is contrary to the rest of the evidence of record (Tr at 34, 35). Applicant explained his lack of complete candor with his three witnesses as the result of embarrassment (Tr at 48, at line 8, 57, 58).

Applicant acknowledges that he is a registered sex offender, that he is still on probation, and that he is receiving counseling (Tr at 48). He did expose himself to eight-year-old girls and he did masturbate in front of them (Tr at 49, 54 - 56). He lied to the victim's mother when he told her the ejaculate described by the victim was actually soap (Tr at 57). Applicant views himself as currently eligible for a security clearance because "it was a remote incident" that he regrets. (Tr at 50). To prevent any recurrence, he is determined not to be socially involved with any woman who has children and he "just simply avoid[s] minors at all costs" (*Id.*).

Applicant is single and lives with his mother (Tr at 51). He is on probation until 2005 and he understands that a violation would likely land him jail (Tr at 59). The praise of his supporters and his counseling are certainly positive factors to be considered, but considering the nature of the misconduct, it is at least as possible that the absence of recent

recurrence is due to the pressures imposed by the sentence and probation rather than a result of lasting psychological rehabilitation. It is just too soon to be able to conclude that Applicant has, and will continue to have, the judgment, reliability, and trustworthiness required of someone seeking access to the nation's secrets.

Guideline J - Disqualifying Conditions 1 (any criminal conduct, regardless of whether the person was formally charged) and 2 (a single serious crime or multiple lesser offenses) are clearly applicable. I find that none of the possible Mitigating Conditions has been demonstrated by Applicant; e.g., the criminal behavior in 2002 is deemed, in context, to be still recent, (MC 1); not an isolated incident (MC 2); and no clear evidence of successful rehabilitation (MC 5).

Guideline E (Personal Conduct) Viewing the same evidence discussed above in the context of Guideline E, Disqualifying Conditions 1 (reliable, unfavorable information) is applicable but, as yet, none of the possible Mitigating Conditions have been established.

I have considered the testimony of Applicant's statements and all other evidence. While I accept the statements of his witnesses as to their opinions of Applicant, at least one witness agreed that his opinion might have been different if he knew the full facts and circumstances behind the misconduct. Few criminal violations offend the basic fabric of our society's standards for taking care of our children as child molesting. The misdemeanor child molesting accusations, to which he pleaded no contest, rightfully raise question about Applicant's ability to comply with the rules that bind all of us. The sexual feelings and drives that led to his period of misconduct appear to be of a nature that is difficult to overcome without successful, long, and containing care, as diagnosed by mental health professionals. While Applicant's family, friends, and co-workers are free to accept him as he is, DoD does not have that luxury. Holding a security clearance is a privilege and anyone seeking access to the nation's secrets must conform to DoD requirements. In this context, the record compels the conclusion that too much serious criminal and personal misconduct has occurred over too long a period of time, and too recently, to allow a finding of current eligibility. Viewing the totality of the evidence, I cannot conclude 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:

1. Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 1.a. Against the Applicant

2. Guideline E (Personal Conduct) Against the Applicant

Subparagraph 2.a. 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

1. According to the victim, the misconduct occurred once in 1998 and numerous other times in 2001/2002. The Counts in the Complaint do not cite number of times the misconduct occurred and Count 2 refers to Jane Doe 2, the victim's friend, who was present on one occasion.

2. I note Applicant's claim that the misconduct occurred over a two year period, when the victim was 10 -12, rather than the four year a period, when she was 8-12, described by the victim. Although the difference is not outcome

determinative, I accept the victim's statement over that of Applicant.