

KEYWORD: Criminal Conduct

DIGEST: Applicant is a 48-year-old employee of a defense contractor. He drove a vehicle while intoxicated in March 1983, was convicted of the offense and sentenced to three days' confinement. Between about January and March 1982, Applicant used physical force to make a 6-year-old girl under his care perform oral sodomy on him on five to seven occasions. He pled guilty to felony sexual abuse, was sentenced to five year's confinement, and served three years in jail. Since then, Applicant obtained treatment, abstained from alcohol, avoided criminal conduct, and built a successful career. Applicant mitigated the security concerns arising from his criminal conduct. But, absent a waiver, 10 U.S.C. § 986 precludes the Department of Defense from granting Applicant a security clearance where he served more than one year in confinement. Clearance is denied.

CASENO: 03-13139.h1

DATE: 08/17/2005

DATE: August 17, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-13139

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Kathleen E. Voelker, Esq.

SYNOPSIS

Applicant is a 48-year-old employee of a defense contractor. He drove a vehicle while intoxicated in March 1983, was convicted of the offense and sentenced to three days' confinement. Between about January and March 1982, Applicant used physical force to make a 6-year-old girl under his care perform oral sodomy on him on five to seven occasions. He pled guilty to felony sexual abuse, was sentenced to five year's confinement, and served three years in jail. Since then, Applicant obtained treatment, abstained from alcohol, avoided criminal conduct, and built a successful career. Applicant mitigated the security concerns arising from his criminal conduct. But, absent a waiver, 10 U.S.C. § 986 precludes the Department of Defense from granting Applicant a security clearance where he served more than one year in confinement. Clearance is denied.

STATEMENT OF THE CASE

On July 23, 2001, Applicant submitted an application for a security clearance. The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant, under Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (the "Directive"). On May 20, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under the Directive, specifically Guideline J, Criminal Conduct.

Applicant answered the SOR in writing on June 13, 2004. He elected to have a hearing before an administrative judge.

The case was assigned to me on July 29, 2004. At the request of Applicant's counsel, I originally scheduled the hearing for September 29, 2004. Subsequently, I approved Applicant's request for a delay until October 4, 2004, when the hearing was convened. The case was continued until October 26, 2004. The government introduced Exhibits 1, 2 and 3. Applicant presented Exhibit A and several witnesses, and testified on his own behalf. DOHA received the final transcript of the hearing (Tr.) on November 3, 2004. A moratorium was imposed on December 14, 2004, on all cases involving 10 U.S.C. § 986, and was lifted on August 15, 2005.

FINDINGS OF FACT

Applicant admitted the allegations in ¶¶ 1.a, 1.b, and 1.e of the SOR. Applicant's Answer to SOR, dated June 13, 2004. Those admissions are incorporated herein as findings of fact. He denied the allegations in ¶¶ 1.c and 1.d of the SOR. *Id.* After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant is 48 years old. Ex. 1 at 1. He entered active duty in the U.S. Army in 1980. Ex. 1 at 6. He worked as a psychiatric technician for the base hospital (Tr. at 144), specializing in drug and alcohol abuse treatment. Tr. at 191.

In late 1980, Applicant met a woman who was a patient in the psychiatric unit where he worked. Tr. at 146. He continued to see her after she was discharged (Tr. at 146), in violation of the applicable ethics regulations. Tr. at 147. They became romantically involved (Tr. at 169), and Applicant began living with her and her three children: a daughter and two sons. Tr. at 171. Applicant wanted more authority to discipline the children, but his fiancée would not support him. Tr. at 146. Applicant was unhappy and wanted to terminate the relationship, but claims she threatened to expose him for his violation of the ethics regulations. Tr. at 147. Applicant also reports that during this time he drank about one six-pack of beer each night and smoked about one-half of a marijuana cigarette daily. Tr. at 145.

For several months in early 1982, Applicant physically and sexually abused his fiancée's six-year old daughter. Tr. at 147. On five to seven occasions (Tr. at 155; 173), he struck her in the face or stomach, locked her in the bathroom, and forced her to orally sodomize him. Tr. at 193. In about March 1982, the victim told her babysitter's child what occurred, and the child reported the offenses. Tr. at 175, 186. Investigators from the state's child protective services office questioned Applicant, and he admitted the offenses. Tr. at 147. Later, Applicant told security investigators he did it to get back at the victim's mother. Tr. at 173.

While the criminal investigation was pending, Applicant continued to drink alcohol to excess and use marijuana. Tr. at 149. In March 1983, state authorities arrested him for driving under the influence of alcohol. Tr. at 163, 189. He pled guilty the next day (Tr. at 190), and was sentenced to 3 days in jail. Tr. at 163. He did not notify the U.S. Army of his conviction or seek alcohol or drug treatment at that time. Tr. at 190-91.

Applicant was formally arrested for the child sexual abuse offenses in December 1983. Tr. at 149. He was honorably discharged from the U.S. Army in January 1984. Tr. at 144. Through his legal counsel, Applicant arranged a plea bargain. Tr. at 149-50. In April 1984, Applicant pled guilty to child sexual abuse. Tr. at 151. The state court sentenced him to five years' confinement. *Id.*

While in prison, Applicant attended Alcoholics Anonymous meetings. Tr. at 152. He also got counseling for his sex offenses (Tr. at 152-53), and his personal mental health issues. Ex. A.

Applicant served three years in jail (Tr. at 151), and was released on parole in April 1987. Tr. at 156. While on parole he was subject to drug-screening and never tested positive for a controlled substance. Tr. at 156. He also continued counseling for two years. Tr. at 160. Applicant was discharged from parole in April 1989. Tr. at 156.

Applicant got married in May 1992. Ex. 1 at 5. He is currently separated from his spouse, although they are on good terms. Ex. 1 at 5; Tr. at 96.

Applicant completed college in August 1993. Tr. at 139. He obtained a bachelor of arts degree in psychology from a local university. *Id.* He has also gone on to complete additional course work in information technology. Ex. 1 at 1.

Since his release from confinement, Applicant has held a variety of positions, specializing in information technology. Ex. 1 at 2-3. He has worked for a defense contractor for over three years. Ex. 1 at 2. Applicant's supervisors praise his duty performance, describing him as dedicated, dependable, skillful, and trustworthy. Tr. at 84-85, 122-24. He applied for a security clearance in July 2001, by submitting a completed SF 86, Security Clearance Application. Ex. 1. He reported his convictions for driving under the influence of alcohol and sexual abuse. Ex. 1 at 7, 8. Applicant also commented that the sex abuse was "a one-time incident in my life and has not been repeated and did not occur before the offense." Ex. 1 at 10.

Applicant testified he has not consumed alcohol since entering prison in 1984. Tr. at 157. Friends and associates testified they have not seen Applicant drink alcohol. Tr. at 78, 97, 129.

Applicant asserts he is not sexually attracted to children, therefore he does not pose a threat. Tr. at 158. Witnesses testified they have seen Applicant in the company of children and have never seen him act inappropriately. Tr. at 79, 97, 129-30.

POLICIES

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." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guideline at issue in this case is:

Guideline J: A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive, ¶ E2.A10.1.1.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to this adjudicative guideline, are set forth and discussed in the conclusions below.

Additionally, Title 10, United States Code, § 986, prohibits the Department of Defense from granting or renewing a security clearance to any employee of a DoD contractor who has been convicted of a crime in any court of the United States, was sentenced to imprisonment for a term exceeding one year, and was incarcerated for more than one year. The statute also provides that, in meritorious cases, the Secretary of Defense or his designee may authorize a waiver of the prohibition.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive, ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider the following factors: (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 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. *Id.*

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. Directive, ¶ E3.1.14. Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. Directive, ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "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.

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. Exec. Ord. 10865, § 7. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Under the Directive, ¶ E2.A10.1.2.1, "admission of criminal conduct" may be disqualifying. Similarly, under ¶ E2.A10.1.2.2 of the Directive, it may be disqualifying where an applicant committed "a single serious crime or multiple lesser offenses." Applicant drove a motor vehicle while drunk, and was convicted of driving under the influence of alcohol in about March 1983. He also sexually abused a child on five to seven occasions from about January to arch 1982, resulting in a felony conviction and a sentence to five years confinement. *See also* Ex. 2, 3. Applicant's admissions and the government's documentation is substantial evidence of a single serious crime or multiple lesser offenses. I conclude these disqualifying conditions apply.

Paragraphs 1.c and 1.d of the SOR allege Applicant was convicted of contempt of court on two occasions. Applicant denies any knowledge of these convictions. The government provided no information showing the basis for these allegations. I find there is no substantial evidence indicating Applicant was convicted of contempt of court as alleged.

Under the Directive, the security concerns arising from a history of criminal conduct may be mitigated in certain circumstances. Under ¶ E2.A10.1.3.1 of the Directive, it may be mitigating when "the criminal behavior was not recent." As the evidence shows, the offenses occurred over 20 years ago, therefore this mitigating condition applies.

The Directive, ¶ E2.A10.1.3.2, also provides that it may be mitigating where "the crime was an isolated incident." The evidence demonstrates that Applicant physically and sexually abused a child on five to seven occasions. Although these incidents were combined in a single criminal charge, the crime was not an "isolated incident." Additionally, Applicant was also convicted of a second offense in about the same time frame. I conclude this mitigating condition does not apply.

Under, ¶ E2.A10.1.3.6 of the Directive, it may be mitigating where "there is clear evidence of successful rehabilitation." As Applicant's counsel forcefully argued, Applicant has completed counseling for drugs, alcohol, and sexual offenses, served his sentence to confinement and fulfilled the terms of his parole, obtained a college degree, held positions of increasing responsibility, and remained alcohol and drug-free since his release from confinement. I conclude this mitigating factor applies.

I carefully considered the disqualifying and mitigating conditions in this case, in light of the "whole person" concept. On one hand, the offenses were especially serious, including multiple heinous offenses against a small child under Applicant's care. At the time of the offenses Applicant was a responsible adult working in a health care facility with an abundance of opportunities for assistance or support. Applicant's deliberate, repeated, and egregious offenses injured a small child, and violated the special trust reposed in him by his fiancée, his community, and his service. On the other hand, since that time Applicant has taken significant steps to atone for his wrongs, avoid criminal conduct, and lead a better life. Balancing the disqualifying and mitigating factors, I conclude Applicant has mitigated the security concerns arising from his history of criminal conduct.

Paragraph 1.e of the SOR alleges Applicant is disqualified from having a security clearance under 10 U.S.C. § 986, because he was convicted of a crime and sentenced to five years in jail. As noted above, Applicant admitted that he was convicted of child sexual abuse, a felony, was sentenced to five years confinement, and actually served three years in jail as a result of the sentence. I conclude 10 U.S.C. § 986 applies in this case and precludes the Department of Defense from granting Applicant a security clearance, absent a waiver. I do not recommend further consideration of this case for a waiver under 10 U.S.C. § 986.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline J: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: 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 continue a security clearance for Applicant. Clearance is denied.

Michael J. Breslin

Administrative Judge