

KEYWORD: Sexual Behavior; Personal Conduct

DIGEST: Applicant is 46 years old and works for a federal contractor. In 2002, he was arrested and charged with Aggravated Sexual Assault Child Younger than 14 years of age, for an incident involving his stepdaughter. In 2003, the case was dismissed because his stepdaughter would not testify. In May 2003 and January 2004, he refused to provide releases or execute a sworn statement about the criminal charges as requested by the government. He failed to mitigate the security concerns raised by his sexual behavior and personal conduct. Clearance is denied.

CASE NO: 03-14186.h1

DATE: 04/28/2006

DATE: April 28, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-14186

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 46 years old and works for a federal contractor. In 2002, he was arrested and charged with Aggravated Sexual Assault Child Younger than 14 years of age, for an incident involving his stepdaughter. In 2003, the case was dismissed because his stepdaughter would not testify. In May 2003 and January 2004, he refused to provide releases or execute a sworn statement about the criminal charges as requested by the government. He failed to mitigate the security concerns raised by his sexual behavior and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On June 20, 2005, the Defense Office of Hearings and Appeals (DOHA) under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guidelines D (Sexual Behavior) and E (Personal Conduct) why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On July 13, 2005, Applicant filed his Answer to the SOR, and elected to have the case decided on the written record in lieu of a hearing. However, the Government asserted its option to hold a hearing and the case was assigned to me on January 12, 2006. A Notice of Hearing was issued on January 31, 2006, scheduling the case for hearing on February 28, 2006. At the hearing the Government called one witness and introduced exhibits (GX) 1-7 into evidence. Applicant testified in his case-in-chief. DOHA received the Transcript (Tr.) on March 9, 2006. I kept the record open until March 21, 2006, to give Applicant an opportunity to submit documents related to his criminal case; however, he did not do so.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his Answer to the SOR and at the hearing, I make the following findings of fact:

Applicant is 43 years old and has worked as a quality engineer for a federal contractor for the last 19 years.⁽¹⁾ He has held a secret security clearance since 1997. In March 2000, he filed a security clearance application (SCA) to update his clearance.⁽²⁾

Applicant married his first wife in 1983, and was divorced in 1997. They had two children. In January 1999, he married his second wife. She had three children, two of whom lived with them. They divorced in April 2003.⁽³⁾

In November 2002, Applicant was arrested and charged with Aggravated Sexual Assault of a Child Younger than 14 years of age. The charges were based on an investigation of an incident that occurred in December 1999, involving inappropriate sexual contact with his then 13-year-old stepdaughter. According to the Affidavit supporting a finding of probable cause, underlying the state's Complaint, Applicant admitted to a hospital representative and a child protective service worker that he engaged in sexual misconduct with her.⁽⁴⁾ The Affidavit stated the conduct began in December 1999 and continued for three years.

In May 2003, Applicant met with a government investigator regarding the criminal case. He said the district attorney's office offered to settle the matter with a guilty plea to a second degree felony, a fine, and 10 years deferred adjudication. Applicant made a counteroffer of a guilty plea "to a 2nd degree felony conviction, \$1000 fine, and 8 years of deferred adjudication."⁽⁵⁾ He then changed his mind and offered a "state jail conviction, which is between a misdemeanor and felony, 5 years of deferred adjudication and a \$1000 fine."⁽⁶⁾ That offer was rejected by the district attorney's office and the case was scheduled to go to trial in July 2003. During the interview, he denied the charges, and refused to give a sworn statement regarding the charges or sign a medical release because the criminal case was pending. He acknowledged that his refusal to answer could jeopardize his security clearance.⁽⁷⁾ In June 2003, the case was dismissed pursuant to his stepdaughter's request after she learned that witnesses would testify about her sexual history.⁽⁸⁾

A government investigator testified that in January 2004, he also interviewed Applicant. Applicant stated that on two occasions in 1999, his 13-year-old stepdaughter made inappropriate sexual contact with him, once in March while his wife was present, and once while he was alone with her in December, which he did not mention to his wife. He indicated that he and his wife had numerous problems related to their children. After an argument with his stepdaughter

in June 2002 about her friends, job and sexual activity, he and his wife, along with his stepdaughter, sought help at the local hospital counseling center. During the meeting with the hospital staff, his stepdaughter made allegations about his sexual abuse. Subsequently, he moved out of the house. In November 2002, he was charged with criminal misconduct for the December 1999 incident. He denied all allegations of wrongdoing. After the interview, the investigator asked Applicant to provide a sworn statement about the charges and execute releases for information from his former spouse and the hospital records. Applicant said he would not sign the releases until he spoke to his attorney.⁽⁹⁾ He agreed to contact the investigator by the end of January, but did not do so.⁽¹⁰⁾

In September 2004, Applicant executed a release for information from his former spouse and the treatment records of the hospital.⁽¹¹⁾ He did not submit a sworn statement about the sexual assault charges as requested by the government in May 2003 and in January 2004.

At the hearing, Applicant denied that he engaged in sexual misconduct with his stepdaughter or ever admitted wrongdoing to anyone.⁽¹²⁾ He believes that the charges were brought by her in retaliation for confronting her about her behavior. He said he negotiated a plea with the state because he did not have the money to contest the case. While testifying he was confused about the chronology of the plea agreements during the negotiation process, and as recorded in his May 2003 statement. He contested the order of the settlement offers as drafted in the SOR, but not the substance. I do not find his testimony about the allegations or plea agreements credible.

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth criteria which must be evaluated when determining security clearance eligibility. Within those adjudicative guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence in order to reach a fair, impartial and common sense decision.

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 a balanced decision. 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 disqualifying and mitigating conduct an administrative judge should consider: (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.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not only the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual a security clearance is not necessarily a judgment about an applicant's loyalty. Executive Order 10865, § 7. Instead, it is a determination that an applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). The Directive presumes a rational connection between past proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence in refutation, extenuation, or mitigation sufficient to overcome the position of the government. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive, Enclosure 3, ¶ 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 clearance." *Id.*

Based upon the allegations contained in the SOR and a consideration of the evidence as a whole, the following adjudicative guidelines are pertinent to an evaluation of the facts of this case:

Guideline D - Sexual Behavior: A security concern may exist if sexual behavior involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress or reflects a lack of judgment or discretion.

Guideline E - Personal Conduct: A security concern may exist when conduct 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.

The disqualifying and mitigating conditions, either raising security concerns or mitigating security concerns applicable

to this case, are discussed in the Conclusions section below.

CONCLUSIONS

I considered all of the facts in evidence, legal standards, including the "whole person" concept, and Applicant's credibility, and conclude as follows:

Guideline D: Sexual Behavior

The Government established a *prima facie* case for disqualification under Guideline D. Based on the evidence, two disqualifying conditions under this guideline apply: (1) Sexual Behavior Disqualifying Condition (SB DC) E2.A4.1.2.1 (*Sexual behavior of a criminal nature, whether or not the individual has been prosecuted*), and (2) SB DC E2.A4.1.2.3 (*Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*). In 2002, Applicant was arrested and charged with sexual assault of a child younger than 14 years of age, which is the type of crime that causes him to be vulnerable to coercion. Applicant made admissions that he later denied and also offered to plead guilty through a plea agreement. I find his denials and testimony that he was willing to plead guilty because he could not afford to try the case, not credible.

The Government having established its case, the burden shifted to Applicant to mitigate or rebut the allegations. After reviewing all of the mitigating conditions, in particular, Sexual Behavior Mitigating Condition (SB MC) E2.A2.1.3.2 (*The behavior was not recent and there is no evidence of subsequent conduct of a similar nature*), I conclude that the mere passage of time does not sufficiently mitigate the disqualifying conditions due to the seriousness of the charges and the lack of any evidence to support his denials, which are not credible. Nor does SB MC E2.A.4.1.3.4 (*The behavior no longer serves as a basis for coercion, exploitation, or duress*) apply, as Applicant did not present any evidence indicating that he disclosed the charges to friends, family or his employer sufficient to dispel a potential vulnerability to coercion. Other than his denial, Applicant offered no corroborating testimony or evidence to support his position. I considered his testimony, demeanor, credibility and all facts surrounding the criminal charges, and find his denial alone is not enough to mitigate his heavy burden. Hence, the allegation contained in SOR ¶ 1.a is decided against him, as he failed to rebut the security concerns raised by his sexual behavior. Accordingly, Guideline D is decided against Applicant.

Guideline E - Personal Conduct

The Government established a *prima facie* case for disqualification under this Guideline. Based on the evidence, I find that Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.1.2 (*Refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personnel security or trustworthiness determination*) applies. In May 2003 and January 2004, Applicant refused to provide the government with releases for his hospital records and access to his former spouse, in addition to a sworn statement about the criminal charges. In May 2003, he based his refusal on the pending criminal case, fully acknowledging that his failure to provide the information could jeopardize his security clearance. By the second interview in January 2004, the criminal case had been dismissed, and yet he continued to refuse although he said he would respond to the government within a month. In September 2004, more than 16 months after the first request, he provided a release for the hospital records and permission to contact his ex-wife. He never provided a signed sworn statement. Sixteen months is not a reasonable length of time to refuse to comply with an investigator's request, given the fact that the criminal case was dismissed in June 2003.

I reviewed all of the mitigating conditions under the Guideline and conclude none apply. Accordingly, SOR ¶¶ 2.a and 2.b are concluded against him, and Guideline E is decided against Applicant.

I further considered the totality of the evidence in this case, including Applicant's nineteen year work history, years of holding a clearance without incident, his consistent denials and the lack of evidence to support them, as well as the absence of any evidence to reassure this agency that the circumstances or factors leading to the charges are unlikely to recur, despite being given additional time to substantiate his position and mitigate the disqualifying conditions.

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 Section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1: Guideline D (Sexual Behavior) AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Paragraph 2: Guideline E (Personal Considerations) AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

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

Shari Dam

Administrative Judge

1. Tr. 52.
2. GX 4 at 1 and 7.
3. Tr. 54-55.
4. GX 2 at 2-3.
5. GX 5 at 2.
6. *Id.*
7. *Id.* at 3.
8. Tr. 44.

9. Tr. 65.

10. GX 7 at 2.

11. GX 8.

12. Tr. 57.