

KEYWORD: Sexual Behavior; Criminal Conduct; Personal Conduct

DIGEST: During a two-week period in August 1991, Applicant sexually molested his eight-year-old daughter at least twice. In October 1991, he was charged with a felony sexual offense, but pled guilty in March 1992 to a lesser included misdemeanor sexual offense. Applicant deliberately omitted the felony charge from his 2001 security clearance, and deliberately falsified the details of his criminal sexual conduct in a May 2003 signed, sworn statement to an agent of the Defense Security Service (DSS). Clearance is denied.

CASENO: 03-16297.h1

DATE: 11/29/2005

DATE: November 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-16297

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

During a two-week period in August 1991, Applicant sexually molested his eight-year-old daughter at least twice. In October 1991, he was charged with a felony sexual offense, but pled guilty in March 1992 to a lesser included misdemeanor sexual offense. Applicant deliberately omitted the felony charge from his 2001 security clearance, and deliberately falsified the details of his criminal sexual conduct in a May 2003 signed, sworn statement to an agent of the Defense Security Service (DSS). Clearance is denied.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to give Applicant a security clearance. On November 2, 2004, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline D (sexual behavior), Guideline E (personal conduct), and Guideline J (criminal conduct). Applicant timely responded to the SOR, ⁽²⁾ admitted with explanation all of the allegations, except for SOR 3.a.,⁽³⁾ and requested a hearing.

The case was assigned to me on July 21, 2005, and I convened a hearing on August 16, 2005. The parties appeared as scheduled and the government presented two exhibits (GE 1 and GE 2), which were admitted without objection. Applicant testified in his own behalf and presented a single exhibit (AE A), consisting of five letters of reference, which was admitted without objection. DOHA received the transcript (Tr) on August 25, 2005.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is 46 years old and employed as a computer systems analyst by a defense contractor on a contract with the Navy. He requires a security clearance as part of his job. His work performance has been outstanding since he joined his current employer in October 2000. He has received several commendations, formal and informal, for his work in support of a new Department of the Navy information system.

Applicant has been married twice. His first marriage began in May 1983, but ended in divorce in January 1991. He has three children by that marriage, including a daughter who is now 21 years old. Applicant met his second wife in 1992, and they were married in 1994. Both are active in their church, and they appear to have a close, mutually supportive relationship.

When Applicant and his first wife separated before their divorce, the children stayed with their mother. Applicant was allowed periodic visitation with the children. During a two-week period in August 1991, when the children were staying with Applicant, he sexually molested his eight-year-old daughter. In a May 2003 subject interview with a DSS agent, Applicant claimed all he did was touch his daughter's vagina to apply anti-itch ointment in response to the child's complaint of discomfort one night. He may have done this, but on at least two occasions, he also made his daughter rub his penis to masturbate him, details he deliberately did not disclose to the DSS agent. Applicant testified he was too embarrassed to discuss these details with the DSS agent because the agent was female. Applicant also characterized his conduct as innocent and isolated, and claimed he only agreed to plead guilty to the reduced charge to avoid putting his daughter through a prosecution.

Applicant was arrested on October 7, 1991, and charged with felony sexual abuse of a minor child under 13 years of age. On March 26, 1992, pursuant to an apparent plea bargain, Applicant pled guilty to a misdemeanor charge of sexual battery. He was sentenced to 12 months in jail, with all but 20 days suspended, assessed court costs, ordered to undergo therapy for sex offenders, and ordered to have no contact with the victim unless and until his therapist approved.

Applicant's children are now grown, having been raised by their mother since 1991. He has had no contact with any of them since 1991. Around 1996, Applicant sent his children Christmas cards, which earned him a verbal reminder from the court that he was not to contact his daughter in any way.

Applicant served on active duty in the U.S. Navy from 1984 until 1993. After his arrest, he participated in counseling through the Navy Family Advocacy Program. Applicant conscientiously attended twice weekly sessions until his end of active obligated service. The Navy did not allow him to re-enlist, gave him an honorable discharge, and assigned him an R-4 re-enlistment code, which precluded any further military service. Applicant's service in the Navy was otherwise characterized by solid performance and steady advancement. At the time of his discharge, he was still in paygrade E-5 (Petty Officer Second Class), but was pending advancement to paygrade E-6 and had been "frocked;" that is, he was authorized to wear the uniform and assume responsibilities of a Petty Officer First Class but was not yet getting paid for his rank.

Applicant submitted a security clearance application (SF 86) on November 28, 2001. In response to question 21, which asked if Applicant had "ever been charged with or convicted of any felony offenses." Applicant answered "no." He does not contest he was aware when he completed the form that he initially was charged with a felony sex offense, but has claimed he either thought the scope of the question extended only seven years prior, or that he simply misunderstood the question. Applicant did not otherwise disclose his arrest anywhere in the SF 86.

POLICIES AND BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁴⁾ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for the Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽⁵⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁽⁶⁾

To that end, the Directive sets forth adjudicative guidelines⁽⁷⁾ for consideration when evaluating an Applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline D (sexual behavior), Guideline J (criminal conduct), and Guideline E (personal conduct).

CONCLUSIONS

The government alleged under Guideline D the Applicant was charged in October 1991 with a felony sex offense, but pled guilty five months later to a lesser included misdemeanor sex offense (SOR ¶ 1.a), and that the conduct behind his arrest is also disqualifying under Guideline J (SOR ¶ 2.a). The government further alleged, under Guideline E, he deliberately falsified his November 2001 SF 86 (SOR ¶ 3.a), and he deliberately falsified a May 2003 sworn statement to DSS about the details of his conduct towards his daughter (SOR ¶ 3.b).

The government has produced sufficient information, through Applicant's response to the SOR and his hearing testimony, to support the allegations under Guideline D. Under this guideline, sexual behavior becomes 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. ⁽⁸⁾ Applicant sexually molested his daughter, who was then of tender years and completely dependent on him for care and protection. Available information also shows his conduct was criminal in nature and may still make Applicant vulnerable to pressure, coercion, or blackmail insofar as it still embarrasses Applicant, as discussed under Guideline E, below. Based on the foregoing, Guideline D disqualifying condition (DC) 1, ⁽⁹⁾ DC 3, ⁽¹⁰⁾ and DC 4 ⁽¹¹⁾ apply.

I have reviewed the Guideline D mitigating conditions (MC) and conclude only MC 2 ⁽¹²⁾ applies. However, for reasons discussed under Guideline E, below, I still question Applicant's judgment as it relates to his willingness to be candid about his conduct and accept full responsibility for his actions. I am also concerned Applicant's sexual misconduct may still be used to pressure or coerce Applicant to act against the national interests. Based on the totality of available information, I conclude Guideline D against the Applicant.

Under Guideline J, a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. A person who is willing to ignore the law, thereby risking criminal sanctions including fines and incarceration, may also be willing to disregard rules, regulations, and procedures intended to protect classified information. Available information shows Applicant engaged in serious criminal conduct when he molested his daughter. Further, although not alleged as a criminal matter, I am compelled to consider that, as discussed below, Applicant deliberately made false statements to a government agency concerning matters within its jurisdiction. This conduct is a violation of federal criminal law under 18 U.S.C. §1001.

On the facts presented here, Guideline J DC 1 ⁽¹³⁾ and DC 2 ⁽¹⁴⁾ apply. By contrast, a review of the listed mitigators shows none apply. Had his conduct in this case been limited to the 1991 arrest, it is possible MC 1 ⁽¹⁵⁾ and MC 2 ⁽¹⁶⁾ would apply. However, Applicant's deliberate falsifications of his SF 86 responses and his statement to DSS, discussed below, bring current the government's concerns about his judgment and willingness to protect the government's information. I conclude Guideline J against the Applicant.

The security concern stated under Guideline E is that 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.⁽¹⁷⁾ In response to claims he deliberately falsified his response to question 21 of his 2001 SF 86, Applicant has provided inconsistent responses but has failed to explain why he did not disclose his felony charge anywhere on the form. Available information, in the form of his response to SOR ¶ 3.b and his hearing testimony, shows Applicant deliberately falsified his statement to DSS in May 2003 regarding details of his sexual molestation of his daughter. Applicant has since admitted the underlying facts, but was embarrassed about discussing the facts with a female DSS agent. His embarrassment does not excuse him from being candid and forthcoming at all times in responding to government inquiries in the context of his background investigation. More to the point, his reaction in the May 2003 interview underscores the government's concern he may be vulnerable to coercion or blackmail over his sexual misconduct. Based on the foregoing, Guideline E DC 2⁽¹⁸⁾ and DC 3⁽¹⁹⁾ apply. Further, because of the effect his 1991 conduct had on his Navy career, DC 4⁽²⁰⁾ also applies.

By contrast, I conclude none of the listed mitigators under Guideline E apply. Applicant's falsifications must be considered recent as they occurred during his current background investigation. Applicant made no attempt to correct his November 2001 SF 86 information during the 18 months that elapsed before his May 2003 DSS interview. When he finally had an opportunity to fully disclose the facts about his sexual behavior, Applicant deliberately withheld the most salient facts at issue in a sworn statement to DSS. He wilfully attempted to mis-characterize what happened and minimize the severity of his conduct. For these reasons, his falsifications cannot be considered isolated. Regarding possible duress or coercion stemming from this information, Applicant has acknowledged he was too embarrassed to discuss details with anyone other than his current wife, but has presented no information about any steps he may have taken to reduce his vulnerability in this regard. On balance, I conclude Guideline E against the Applicant.

I have carefully weighed all of the available evidence, and I have applied the appropriate disqualifying and mitigating conditions. Further, I have tried to make a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. No single fact or adjudicative factor is dispositive of my decision in this case; rather, I have considered Applicant's suitability in light of the record evidence in its entirety. Reasonable doubts persist, based on information about Applicant's criminal sexual conduct and his lack of candor about that conduct, about his ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to mitigate these doubts, which Applicant has failed to provide, I cannot conclude he has overcome the government's case.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline D (Sexual Behavior): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Paragraph 2, Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Paragraph 3, Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 3.a: Against the Applicant

Subparagraph 3.b: 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 the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Applicant's responsive pleading included several attached documents, identified in the transcript at pp. 10 - 16, which are normally offered as part of one's case-in-chief and subject to objection by the opposing party. Rather than sever these documents, however, they have been included in the record with Applicant's answer without objection by Department Counsel.

3. Although facially Applicant admits this allegation, he denies any intent to falsify. Insofar as intent is the gravamen of this allegation, I entered his response as a denial. (Tr., p. 7)
4. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
5. *See Egan*, 484 U.S. at 528, 531.
6. *See Egan*; Directive E2.2.2.
7. Directive, Enclosure 2.
8. Directive, E2.A4.1.1.
9. Directive, E2.A4.1.2.1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
10. Directive, E2.A4.1.2.3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;
11. Directive, E2.A4.1.2.4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.
12. Directive, E2.A4.1.3.2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;
13. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
14. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
15. Directive, E2.A10.1.3.1. The criminal behavior was not recent;
16. Directive, E2.A10.1.3.2. The crime was an isolated incident;
17. Directive, E2.A5.1.1.
18. Directive, E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
19. Directive, E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination;
20. 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;