

DATE: August 31, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-26028

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has worked for a defense contractor for over 25 years as a roofer, floor installer, estimator, and scheduler for maintenance of a family housing area on a military installation. Applicant was charged with felony sexual abuse of his stepdaughter, which occurred on numerous occasions in 2002. He acknowledged his conduct, expressed remorse, pled guilty, and completed all the evaluations, counseling, and probation requirements to date. He is working on, but has not completed, the three-year probation period and the court-ordered sex offender's treatment program. Absent clear evidence of successful rehabilitation, Applicant has not mitigated the security concerns arising from his criminal conduct and sexual behavior. Clearance is denied.

STATEMENT OF THE CASE

On July 31, 2003, a defense contractor notified the Defense Security Service that Applicant, who then held a security clearance, was convicted of a criminal offense. The Defense Office of Hearings and Appeals (DOHA) declined to 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 January 25, 2005, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleged security concerns raised under the Directive, specifically Guideline J, Criminal Conduct.

Applicant answered the SOR in writing on February 17, 2005. He elected to have a hearing before an administrative judge.

The case was assigned to me on March 21, 2005. With the concurrence of Applicant and Department Counsel, I convened the hearing on May 24, 2005. The government introduced Exhibits 1 through 7. At the conclusion of the government's evidence, government counsel moved to amend the SOR to include an allegation under Guideline D, Sexual Behavior, based upon the same criminal conduct. Ex. I. Applicant did not object, and I granted the motion. Applicant introduced Exhibits A and B, and testified on his own behalf. DOHA received the final transcript of the

hearing (Tr.) on June 7, 2005.

FINDINGS OF FACT

Applicant admitted the factual allegations in ¶ 1.a of the SOR. Applicant's Answer to SOR, dated February 17, 2005. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant is 46 years old. Ex. 1 at 1. He has served as a family housing maintenance worker for a defense contractor on a military installation for over 25 years. Tr. at 25. He seeks to maintain his security clearance.

Applicant was graduated from high school in 1977. Ex. B at 3. He was skilled in construction trades and worked as a roofer for about three years before joining his present company. Applicant has worked for his present employer for over 25 years, although the company has changed names in that time. *Id.*; Tr. at 25. The defense contractor maintains the family housing units on a military installation. Applicant worked as a roofer, floor installer, planner/estimator, and scheduler. Tr. at 24; *Id.* at 4. He is also a licensed massage therapist. Ex. 1 at 1.

Applicant was married when he was 20 years old. Ex. 1 at 3; Ex. B at 5. Three children were born of the marriage. Ex. B at 5. Applicant and his wife separated after almost 20 years of marriage. *Id.*

Applicant remarried in September 2000. His second wife had two children from a prior marriage. The family developed good relationships. Applicant often gave back and foot massages to his second wife and her daughter. Ex. 2 at 1, Ex. B at 5.

In 2002, Applicant's second wife began suffering from severe depression. Ex. 3 at 2; Ex. 5 at 14. She became short-tempered and emotional, and experienced abrupt mood swings. Ex. B at 5. She felt her prescribed medication only made matters worse. Ex. 5 at 14. She often argued with her daughter, who was then about 14 years old. As a result, Applicant's stepdaughter pulled away from her mother and became closer to Applicant. Ex. 2 at 1.

The first incident of improper touching occurred in about the summer of 2002. Tr. at 29. Applicant massaged his stepdaughter's shoulder to treat a softball injury. *Id.* at 28. On this occasion, she pulled up her shirt to uncover her shoulder and also exposed her breast. Applicant cupped her breast with his hand. *Id.* On about 10 to 12 subsequent occasions while massaging her back, Applicant fondled the victim's breasts, both through and under her clothing, for his sexual gratification. Ex. 2 at 1-2. During the same period, while giving his stepdaughter a foot massage on the sofa, Applicant placed his foot between her legs and touched her genital area for sexual gratification.. Ex. 2 at 1-2; Tr. at 30. This occurred on about six occasions. Tr. at 31. He told his stepdaughter not to tell anyone, but did not threaten her. *Id.* at 34. In October 2002, the child moved out of the family home to live with her adopted father. *Id.* at 31.

In about February 2003, the child told her mother about the incidents. Ex. 2 at 2; Tr. at 35. Applicant admitted what he had done. Ex. 2 at 2. The family discussed it and resolved the matter amongst themselves. Tr. at 38. The victim's mother did not report the abuse to authorities.

In April 2003, during a program at school, the child reported the abuse to school counselors, who in turn reported it to the local Child Protective Services (CPS) agency. Ex. 2 at 2. The CPS agents talked with Applicant's wife. When Applicant learned the matter had been reported to authorities, he voluntarily went to the local sheriff's office and confessed what he had done. Tr. at 21, 40; Ex. 2 at 2. The police arrested him for child molestation in the third degree (a felony). Ex. 2 at 1.

Applicant pled guilty and was found guilty in accordance with his plea. The court sentenced him to 12 months confinement, but suspended all but 60 days. Of the 60 days confinement, Applicant served 30 days through a work-release program (20 days in work-release and 10 days credit for good time). Tr. at 53. The other 30 days confinement was converted to 240 hours of community service, which Applicant was waiting to schedule at the time of the hearing. *Id.*; Ex. 2 at 3. He was placed on supervised probation for three years. Tr. at 23; Ex. 2 at 3. Additionally, Applicant paid fines totaling about \$1,500.00 (Tr. at 54), was required to complete a sex offender's treatment program, and was required to register as a sexual offender. Ex. 2 at 3.

Applicant's employer removed him from his duties in housing maintenance and moved him to a position working as an estimator/planner for about 18 months. Tr. at 22. He has since returned to housing maintenance as an estimator/scheduler. *Id.*

Applicant obtained a psychosexual evaluation by a clinical social worker who is a certified sex offender treatment provider. Ex. B at 10. He opined Applicant is a low-risk to re-offend. *Id.*

Applicant began a three-year sex offender's treatment program. Tr. at 22. At the time of the hearing, he had completed about two-thirds of the program. *Id.*; Tr. at 47. He attends counseling sessions once a week, two hours a night, in a group setting. Tr. at 23. His counselor perceives Applicant to be a low risk for committing a sexual offense in the future. Ex. A at 2. As part of his treatment, Applicant informed his family, friends, and business associates about his circumstances. Tr. at 23, 24; Ex. 2 at 4. He is allowed around his grandson without supervision. Tr. at 22. He is allowed around other children with an approved chaperone. Applicant's stepdaughter resides with her adoptive father, but visits on occasion. Tr. at 51.

Applicant asserts his family connections to the military services are strong, creating a powerful incentive not to threaten national security. Tr. at 24. Applicant's eldest son is on active duty in the U.S. Army, and was deployed to the Middle East at the time of the hearing. *Id.* His son's wife is on active duty in the U.S. Air Force. *Id.* One of his daughters is in the Junior Reserve Officer Training Corps at school, and her fiancé is on active duty in the Air Force.

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 guidelines at issue in this case are:

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

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. Directive, ¶ E2.A4.1.1.

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

"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.

Guideline J, Criminal Conduct

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." Applicant admitted sexually abusing his stepdaughter and was convicted of a felony. I conclude these disqualifying conditions apply.

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." Applicant's offenses occurred between about August and October 2002. I find this conduct is recent, therefore this potentially mitigating condition does not apply.

The Directive, ¶ E2.A10.1.3.2, also provides that it may be mitigating where "the crime was an isolated incident." Applicant sexually abused his stepdaughter on multiple occasions; therefore, this potentially 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." Applicant has been completely open and forthright about his offenses, expressed his remorse, and completed all the corrective and counseling measures required to date. At the time of the hearing, his psychological counselor and evaluator opined Applicant was a low risk of re-offending. Ex. A; Ex. B. Unfortunately, he has not completed the probation period or the three-year sex offender treatment program. I find that, until he completes these programs, it is too soon to determine whether he has been successfully rehabilitated. I conclude this mitigating condition is not established at this time. However, if Applicant continues on his present course and successfully completes these programs, this mitigating condition may apply.

I carefully considered the disqualifying and mitigating conditions in this case, in light of the "whole person" concept. Applicant's offenses were serious, and call into question his judgment, reliability and trustworthiness. Commendably, he has done everything required of him so far, and appears to be on course towards resolving this extremely unfortunate matter. However, until he completes his term of probation and the sexual offender's treatment program, it is too soon to determine whether he has been successfully rehabilitated. Balancing the disqualifying and mitigating factors in light of the "whole person" concept, I conclude Applicant has not yet mitigated the security concerns arising from his history of criminal conduct.

Guideline D, Sexual Behavior

Under ¶ E2.A4.1.2.1 of the Directive, "[s]exual behavior of a criminal nature" may be disqualifying. Applicant's sexual abuse of his stepdaughter constituted a criminal offense, therefore this disqualifying condition applies.

The Directive, ¶ E2.A4.1.2.1, also provides that "[s]exual behavior that causes an individual to be vulnerable to

coercion, exploitation, or duress" may be disqualifying. In this case, the conviction is a matter of public record. Applicant is a registered sex offender. He informed most, although not all, of his family members and co-workers of his conduct. I find that Applicant's vulnerability to coercion, exploitation, or duress is so minimal that it is not a significant factor in this case.

The Directive also presents potentially mitigating conditions. Paragraph E2.A4.1.3.2 applies where "[t]he behavior was not recent and there is no evidence of subsequent conduct of a similar nature." There is no evidence Applicant committed any conduct of a similar nature after the offense in 2002. However, I find the behavior was recent. This potentially mitigating condition does not apply.

I balanced the potentially disqualifying and mitigating conditions in light of the "whole person" concept, and all the circumstances in this case. Although Applicant has made great strides, and is well on the way toward successful rehabilitation, I am not persuaded that he has mitigated the security concerns arising from his sexual misconduct.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Paragraph 2, Guideline D: AGAINST APPLICANT

Subparagraph 2.a: 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