

KEYWORD: Criminal Conduct

DIGEST: Applicant is 54 years old and has been employed as a project manager/senior technical writer for a defense contractor since March 2002. He was arrested for shoplifting in February 1996. He was arrested again in February 2003, and indicted by a grand jury under state law for Lewd Act on a Minor. He pled guilty to lesser offenses in both matters. Applicant failed to mitigate the security concerns raised by his criminal conduct. Clearance is denied.

CASENO: 04-05712.h1

DATE: 02/08/2006

DATE: February 8, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-05712

**DECISION OF ADMINISTRATIVE JUDGE**

**DAVID S. BRUCE**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is 54 years old and has been employed as a project manager/senior technical writer for a defense contractor since March 2002. He was arrested for shoplifting in February 1996. He was arrested again in February 2003, and indicted by a grand jury under state law for Lewd Act on a Minor. He pled guilty to lesser offenses in both matters. Applicant failed to mitigate the security concerns raised by his criminal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

On April 21, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Review Program*, dated January 2, 1992, as amended and modified (Directive), issued a Statement of Reasons (SOR) to Applicant alleging facts that raise security concerns addressed in the Directive under Guideline J - Criminal Conduct. The SOR detailed why DOHA could not preliminarily determine under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's request for a security clearance. By his answer dated May 12, 2005, supported by extensive documentation he submitted along with his answer, Applicant admitted, with specific explanations, the literal allegations of subparagraphs 1.a. and 1.b. of the SOR, but denied the underlying facts supporting the allegations of subparagraph 1.b., and requested a hearing before an administrative judge.

The case was assigned to me on August 24, 2005, and I conducted the hearing on November 10, 2005. The government submitted exhibits (GE) 1 through 6, which were admitted without objection. One witness testified for the Government. A second witness called by the Government, a juvenile, was not allowed to testify given the sensitive nature of the case.

Applicant testified at the hearing along with one other witness, and proffered the testimony of four other witnesses on his behalf. The substance of the proffered testimony was accepted without objection by Department Counsel. Applicant further offered exhibits (AE) A through D in support of his case. Exhibits A and D were not admitted. Exhibits B and C were admitted without objection. DOHA received the hearing transcript (Tr.) on December 2, 2005.

### **FINDINGS OF FACT**

Applicant's admissions to the allegations of the SOR are incorporated herein by reference. In addition, after a thorough review of the pleadings, transcript, and exhibits, I make the following findings of fact:

Applicant was born in Italy and is a naturalized U.S. citizen. He is 54 years old and came to the United States with his parents when he was about nine years old. He obtained a bachelor's degree in business administration in 1978, and he has taken some graduate level courses in marketing.<sup>(1)</sup>

He has been married two times. He has three adult children by his first marriage which ended in divorce in May 1998.<sup>(2)</sup> He married the second time in June 1998, and separated from his second wife on July 26, 2002. They have no children as a result of their marriage. A contested divorce action was pending between the parties at the time of the hearing. One of the issues in the case involves allegations by Applicant's wife that he sexually abused her daughters at times while they were living together, and his counter allegation she fabricated all the events in conjunction with her daughters.<sup>(3)</sup>

Applicant served in the U.S. Navy from October 1971 until October 1977. He was honorably discharged at paygrade E-6.<sup>(4)</sup> He held prior clearances while serving on active duty and, intermittently, following his discharge from the military when working for federal contractors until about 1988. Thereafter, he successfully worked in the private sector until his last job terminated in June 2001, when his company went out of business. He was well regarded by his business associates at his last position and was considered a valuable asset to the company.<sup>(5)</sup> He remained essentially unemployed for the next nine months until arch 2002, when he was hired by his present employer as a project manager/senior technical writer.<sup>(6)</sup>

In February 1996, Applicant was charged with shoplifting when he attempted to steal a cordless telephone that was intended to be a gift for his daughter. He pled guilty to a reduced charge of trespassing. He served five days community service and paid a fine for the offense, and also completed a three year probation period without incident.<sup>(7)</sup>

Applicant's second wife has two daughters and two sons from prior marriages. The girls were 17 and 9 years old and her sons were 15 and 11 years old when the parties married in 1998. The girls were in the care and custody of their mother at the time, but the actual custodial status of the boys was not made clear at the hearing.<sup>(8)</sup>

Applicant was arrested on a criminal warrant on February 14, 2003, and later formally charged with Lewd Act on a Minor, a felony.<sup>(9)</sup> Based upon statements of her youngest daughter who was about 14 at the time, Applicant's wife was the named complainant in an indictment issued against Applicant alleging he committed the crime on her daughter over a five year period from January 1997 through January 2002.<sup>(10)</sup> Applicant vehemently denied the charge.<sup>(11)</sup> The charge was later reduced to simple assault and battery, and Applicant pled guilty to the amended charge in January 2004, and paid a fine for the offense.<sup>(12)</sup>

As to the 2003 case, concerns about Applicant's personal behavior were first expressed by Applicant's younger step-daughter who described being inappropriately touched by him to a school counselor in March 2002. The allegations were conveyed by the counselor to Applicant's wife who later confronted him.<sup>(13)</sup> Among other matters, she demanded he never again close the door to his computer room when in the room alone with her daughter.<sup>(14)</sup> Applicant said little in response, but later said he was sorry, blaming his behavior on depression from having been unemployed for about nine months at that point, and noting further he had started drinking secretly in the garage that caused him to not care what he was doing when around his step-daughter.<sup>(15)</sup> A short time later while attending church, Applicant also asked his wife as a Christian to forgive him for his behavior.<sup>(16)</sup> After consulting with several social agencies in her area in subsequent months, however, Applicant's wife concluded from speaking further with both her daughters that Applicant's conduct had not been a one-time event, but had happened frequently.<sup>(17)</sup> She then reported the matter to the police.<sup>(18)</sup>

The facts presented by the younger step-daughter, particularly, compelled an independent investigation to be undertaken for presentation to a grand jury and resulted in a felony indictment issued against Applicant. Sworn statements were taken from both step-daughters. Each depicted subtle, sexually oriented, inappropriate and perverted touching of them by Applicant over a period of years.<sup>(19)</sup> Their descriptions were similar, yet specific enough as to differing details to lend credibility to each, considering the respective ages of the children at the time.<sup>(20)</sup> The statements were taken about two months after Applicant moved out of the family home in July 2002.

One of Applicant's sons, age 20, testified he never observed his father doing anything around the step-daughters that was at all inappropriate. He recalled pleasant memories of times they all spent together as a family.<sup>(21)</sup> Proffers of testimony from four other witnesses on behalf of Applicant were also accepted - from his daughter, his other son, his sister and his former wife - that he had always been an excellent father and family man, and certainly appeared to have an altogether proper relationship with his two step-daughters whenever they were all together at family gatherings and other times.<sup>(22)</sup> A proffer from Applicant was also accepted that he had numerous video recordings to present showing the wholesome relationship he says he had with his step-daughters over a period of years, and particularly with the younger step-daughter. I find, however, the critical aspect of the matter ostensibly involves Applicant's conduct when he<sup>(23)</sup>

was alone with his younger step-daughter.

## POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines For Determining Eligibility For Access To Classified Information*, sets forth the criteria which must be evaluated when determining security clearance eligibility. The adjudicative guidelines specifically distinguish between those factors that are considered in denying or revoking an employee's request for access to classified information (Disqualifying Conditions), together with those factors that are considered in granting an employee's request for access to classified information (Mitigating Conditions). By acknowledging that individual circumstances of each case are always different, the guidelines provide substantive standards to assist an administrative judge in reaching fair and impartial common sense decisions.

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 well-informed decisions. 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 conduct of the applicant and the circumstances in any case, the factors an administrative judge should consider pursuant to the concept are: (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 the 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.

Protecting national security is the paramount concern in reaching a decision in any case, and is dependent upon the primary standard that issuance of a clearance must be clearly consistent with the interests of national security. Granting an applicant's clearance for access to classified information is predicated on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of disclosure of such information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information in any aspect of his or her life. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. <sup>(24)</sup> The decision to deny a security clearance request to an individual is not necessarily a determination of the loyalty of the applicant. <sup>(25)</sup> It is merely an indication the applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

In accordance with the Directive, the government bears the burden of proof in the adjudicative process to first establish conditions by substantial evidence which indicate it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. <sup>(26)</sup> The legal standard for the burden of proof is something less than a preponderance of the evidence. <sup>(27)</sup> When the government meets this burden, the corresponding heavy burden of

rebuttal then falls on the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the position of the government, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance. (28)

Upon consideration of all the evidence submitted in this matter, the following adjudicative guideline is appropriate for evaluation with regard to the facts of this case:

**Guideline J - Criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.**

### CONCLUSIONS

I have thoroughly considered all the facts in evidence in this case and the legal standards required by the Directive. The government has established its case for disqualification under Guideline J - Criminal Conduct.

Based on all the evidence, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*) applies in this case. Applicant has been involved in two criminal matters since 1996. The first incident in 1996 involved a misdemeanor. The original charge filed in the 2003 matter was a serious felony. While both charges were reduced through prosecutorial discretion to lesser crimes to which Applicant pled guilty, the nature of the factual circumstances surrounding both matters raise concern about Applicant's judgment, trustworthiness, honesty and character. Applicant's conduct in being involved in the 2003 matter qualifies as a single serious crime, and together both incidents qualify as multiple offenses within the meaning of Guideline J.

I have considered all the mitigating conditions and specifically Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.2.1. (*The conduct was not recent*), CC MC E2.A10.1.3.2. (*The crime was an isolated incident*), and CC MC E2.A10.1.2.6. (*There is clear evidence of successful rehabilitation*), and conclude they do not fully apply.

Applicant's misdemeanor shoplifting offense occurred in 1996. The case was totally resolved shortly after the incident and he successfully completed all aspects of his three year probation that followed. He has not been involved in any shoplifting or other misdemeanor offenses since that time. The incident occurred nearly ten years ago. Accordingly, I find Applicant's 1996 misdemeanor conviction is not recent, and in the context of the nature of the charge, was an isolated incident.

Applicant says he always denied any inappropriate touching of either of his step-daughters. The essence of his case presented at the hearing clearly emphasized his emphatic denial of any wrong-doing. Notwithstanding Applicant's attempts to re-try the criminal case at the hearing, he pled guilty to an assault and battery charge upon a female minor child, founded on facts raising serious concerns about Applicant's character.

The 2003 charges filed against Applicant are difficult to reconcile. His defense misses the mark. He passively apologized to his wife for his behavior when confronted with the initial allegations. He offered another tacit admission of his conduct by the comments he later made in church. (29) While Applicant may be correct the events described by the indictment are overstated, we have no way of knowing precisely. His specific motivation for pleading guilty to the lesser charge is incidental, as are the reasons the prosecutor exercised his discretion to reduce the charge. (30) What is clear is Applicant placed himself in a position precariously on the edge of sexually abusive criminal conduct time and time again with a vulnerable minor female with whom he enjoyed a relationship of trust. He then resorted to aggressively claiming all the allegations to be a complete fabrication by his wife to gain a tactical advantage in their contentious divorce. Having carefully considered all aspects of Applicant's and his wife's testimony, Applicant's assertion of her motives is disingenuous and is not credible. Simply put, the initial allegations concerning Applicant's behavior were first disclosed by his step-daughter to her school counselor. It is not likely her mother conspired with her daughters to fabricate such a well thought out self serving series of events.

Applicant failed to conscientiously pursue professional counseling as a means to achieve a full appreciation of the underlying basis and gravity of his behavior. Whether it is posturing for this case or not, simply accusing his wife of fabricating the events and continuing in complete denial that it was his conduct alone that created the difficulties, does not meet his heavy burden of persuasion to effectively mitigate the government's concerns. Applicant has not demonstrated by his actions a serious commitment to address the reasons for his self-destructive behavior. The presence or absence of rehabilitative and other positive behavioral changes are significant factors in the overall adjudicative process. I am not confident Applicant understands the psychological aspects of his conduct, nor has he demonstrated any personal accountability for his serious behavioral indiscretions. He has simply failed to show mature personal insight of his prior actions, typically illustrated by meaningful rehabilitation. Considering all the circumstances, Applicant's candor and credibility are questionable given the seriousness of the events. The nature and extent of Applicant's conduct creates serious doubt about his judgment, reliability, and trustworthiness. He has failed to show clear evidence of rehabilitation, and has, accordingly, failed to successfully mitigate the security concerns raised by his criminal conduct.

I have further reviewed all the record evidence under the "whole person" concept required by the Directive in evaluating Applicant's vulnerability in protecting our national security. An Applicant with a good or even exemplary work history may engage in conduct that has negative security implications. Although Applicant's loyalty to the United States is not in question, I am persuaded by the totality of the evidence that it is not clearly consistent with the national interest to grant Applicant a security clearance. For the reasons stated, Applicant has not met the strict guidelines for issuance of a clearance. Accordingly, Guideline J is decided against Applicant.

## **FORMAL FINDINGS**

In accordance with Section E3.1.25 of Enclosure 3 of the Directive, the following are the formal findings as to each allegation in the SOR:

Paragraph 1. Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.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 Applicant. Clearance is denied.

David S. Bruce

Administrative Judge

1. GE 1 (Applicant's Security Clearance Application dated April 26, 2002), at 1 and 2, and Tr. at 67.
2. *Id.* at 4 and 5.

3. GE 2 (Applicant's sworn statement to Defense Security Service Special Agent dated November 11, 2003), at 4-5. See also Tr. at 77, 78, 102 and 104.
4. GE 1, *supra* note 1, at 6. See also Tr. at 68-69.
5. AE C (Applicant's employer documents consisting of six pages).
6. GE 1, *supra* note 1, at 2-3. See also Tr. at 69-71.
7. GE 2 *supra* note 3, at 1-2.
8. *Id.* at 4, and GE 1, *supra* note 1, at 5. Note: Applicant did not list his youngest step-daughter and one of his step-sons on his SF 86 dated April 26, 2002. He also did not list one of his own sons who was 16 at the time who did not reside with him. All three were later disclosed to a Defense Security Service Special Agent on November 14, 2003, during an interview.
9. GE 5 (Grand Jurors Criminal Indictment dated April 14, 2003), at 1-3.
10. *Id.* at 4.
11. GE 2, *supra* note 3, at 5.
12. GE 6 (Court disposition documents consisting of eight pages), at 8. See also GE 2, *supra* note 6, at 5-6.
13. Tr. at 39-42, and 52.
14. *Id.* at 42, 48-49, and 97.
15. *Id.* at 42.
16. *Id.* at 56 and 57.
17. *Id.* at 44-45.
18. *Id.* at 52-57.
19. GE 3 and GE 4 (Sworn statements dated September 18, 2002).
20. On September 18, 2002, the younger step-daughter was 13, and the older step-daughter was one day short of her 22<sup>nd</sup> birthday.
21. Tr. at 127-136.
22. *Id.* at 113-124.
23. *Id.* at 107 And 108.
24. Directive, Enclosure 2, Para. E2.2.2.
25. Executive Order 10865 § 7.
26. ISCR Case No. 96-0277 (July 11, 1007) at p. 2.
27. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

28. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Para. E3.1.15.

29. Applicant maintained at the hearing he only generally apologized for anything he *may* have done (emphasis added), but denied the 'apology' was intended to address anything specific about his youngest step-daughter. See Tr. at 145. Nonetheless, I do not find his explanation credible considering his comments were made extemporaneously with the event, and were not ambiguous.

30. Tr. at 61-62.