

KEYWORD: Criminal Conduct; Sexual Behavior; Personal Conduct

DIGEST: Applicant was convicted of sexually abusing his three stepdaughters in 1994, and served three years in prison. He has failed to mitigate the security concerns his sexual behavior, criminal conduct, and personal conduct have created. Clearance is denied.

CASENO: 05-02014.h1

DATE: 03/27/2006

DATE: March 27, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-02014

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant was convicted of sexually abusing his three stepdaughters in 1994, and served three years in prison. He has failed to mitigate the security concerns his sexual behavior, criminal conduct, and personal conduct have created. Clearance is denied.

STATEMENT OF THE CASE

On September 27, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J (criminal conduct), Guideline D (sexual behavior), and Guideline E (personal conduct). The SOR also alleges that 10 U.S.C. § 986 disqualifies Applicant from having a security clearance granted or renewed. Applicant submitted a sworn answer to the SOR that was received by DOHA on October 20, 2005, admitted all SOR allegations, and requested a hearing.

This case was assigned to me on December 21, 2005. A notice of hearing was issued on January 4, 2006, scheduling the hearing for January 19, 2006. ⁽²⁾ The hearing was conducted as scheduled. The government submitted six documentary exhibits that were marked as Government Exhibits (GE) 1-6. GE 1-5 were admitted into the record and administrative notice was taken of the information contained in GE 6, all without objection. Applicant testified, called three witnesses to testify on his behalf, and submitted seven documentary exhibits that were marked as Applicant's Exhibits 1-7, and admitted into the record without objection. The transcript was received on January 27, 2006.

FINDINGS OF FACT

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

Applicant is 59 years old and has been employed by a defense contractor to provide integrated logistics support since October 2002. He was employed by a different government contractor as a senior administrative specialist from November 2000 until October 2002, and before that as an administrative assistant by two separate employers from February 1999 until June 2000. He was unemployed from December 1997 until February 1999. Applicant served in the U. S. Navy from January 1967 until April 1989, and retired as a chief petty officer (paygrade E-7).

Applicant was married in April 1967 and divorced in March 1972. His only child, an adult son, was born from this marriage. He remarried in November 1979 and that marriage ended in divorce in March 1983. He married again in January 1993 and that marriage ended in divorce in June 1997. He has now been remarried since August 2001.

Applicant was charged with Lewd and Lascivious Act with a Child in April 1986. He provided a statement in February 2005 to a Special Agent (SA) from the Defense Security Service (DSS) in which he indicated two neighborhood girls, ages five and seven, unexpectedly entered his bedroom while he was changing and saw him naked. His hearing testimony makes clear he intended to expose himself to the girls (Tr. p. 37). The girl's version of the incident indicated there was substantially more to the incident including his rubbing oil on their bodies and being naked in bed with them (Tr. p. 37). Applicant was released from custody after 72 hours and was not prosecuted for the offense, apparently because of a technical mistake involving the questioning of the girls (Tr. p. 38). Applicant did participate for about six months in therapy following this incident.

Although it is not alleged in the SOR, Applicant testified he fondled a girl who was approximately 11 years old in 1989. In the statement he provided to the DSS, Applicant stated he was not arrested in 1990, however, his arrest record (GE 4) discloses he was charged with child molesting on September 26, 1990. The arrest record does not provide a disposition for the charge, and the evidence is unclear if this is the same illicit sexual conduct with a child he testified he committed in 1989.

Applicant sexually abused each of his three stepdaughters from his third marriage. The girls were eight, ten, and twelve years old at the time of the abuse, which occurred on a dozen or more occasions over the course of nearly a year in 1993/94. In the DSS statement, Applicant attempted to place much of the blame for his perverse behavior on the girl's mother. He claimed in the statement that for the most part his conduct consisted of sexually fondling the girls, although he did admit as to the eight-year-old: "touching her all over with a finger and mouth and in one case rubbed against her vagina with my penis" (GE 3, pp. 2-3).

Applicant was aware the two older girls had been previously sexually abused which made them more vulnerable to his illicit actions (GE 5, p. 2). The youngest girl eventually disclosed that Applicant had engaged in sexual intercourse with her (GE 5, p. 2). Applicant initially testified he did not engage in sexual intercourse with the youngest girl, although he admitted on one occasion they were naked and his penis contacted her vagina (Tr. p. 31). He later explained his denial as follows:

ADMINISTRATIVE JUDGE: You deny that there was sexual intercourse?

(Name omitted): Well, it goes back to Clinton and what he said. She sat on my lap with my penis exposed and no panties on and slid up and down on me. I ejaculated. That was the one and only time. She -

ADMINISTRATIVE JUDGE: And how old was she at the time?

(Name omitted): Nine. She put my penis in her mouth once, but I didn't ejaculate. It was just momentarily.

Applicant was convicted of three counts (one count for each of his stepdaughters) of Lewd or Lascivious Acts with a Child Under 14 in September 1994. He was sentenced to serve six years in prison on each count, the sentences to run concurrently. Applicant actually served about three years in prison, and was then required to serve two years in a rehabilitation center, which was then followed by three years supervised probation/parole (GE 2). He participated in sexual offender treatment from the time of his release from prison until about 2000, but has not continued in treatment since then. He is required to register as a sexual offender.

Applicant's witnesses and character reference letters speak very highly of him personally and as an employee. At least some of those people, including his present wife, are aware of his criminal history and do not believe he is a risk to re-offend. However, his co-workers are unaware of his sexual misconduct, and at least one of his witnesses who was aware that Applicant had been in prison for child molestation testified: "Basically, that with his woman he was with, there was lewd and inappropriate conduct with minors" (Tr. p. 44). The witness was unaware of any of the details of the criminal conduct that sent Applicant to prison.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, Guideline D, pertaining to sexual behavior, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁽⁵⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹²⁾

CONCLUSIONS

Under 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. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Although he was not prosecuted, the evidence establishes that Applicant committed the criminal offenses he was accused of in 1986. In 1994, he was convicted of sexually abusing each of his three stepdaughters. He served approximately three years in prison, followed by two years in a rehabilitation center, and then three more years on probation/parole. Disqualifying Conditions (DC) 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply.

The SOR alleges offenses that occurred in 1986 and 1994. Additionally, although not alleged and therefore not a separate disqualifying incident, Applicant sexually abused at least one additional child in 1989/90. Although the last offense occurred in 1994, Applicant did not complete his prison sentence, residence in a rehabilitation center, and supervised probation/parole until approximately 2002. He has not participated in any sexual offender aftercare treatment since 2000.

Considering the number of children Applicant has victimized, the number of years his criminal conduct spanned, the relatively short time he has been off supervision, the lack of continuing treatment, and his obvious continuing efforts to minimize his deviant criminal conduct, I find Mitigating Conditions (MC) 1: *The criminal behavior was not recent*; MC 4: *. . . the factors leading to the violation are not likely to recur* and MC 6: *There is clear evidence of successful rehabilitation* do not apply. Applicant has failed to meet his burden to present evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him. Guideline J is decided against Applicant. Further, the three-year prison sentence Applicant served disqualifies him from having a security clearance granted or renewed under the statutory disqualification imposed by 10 U.S.C. § 986.

Under Guideline D, 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.

Applicant sexually abused two very young girls in 1987, and his three young stepdaughters in 1993/94. His admitted deviant criminal activity with his eight-year-old stepdaughter is particularly repulsive, and, although he minimizes much of the sexual abuse he committed on all his victims, it is clear from their accounts and his testimony that he was a child sexual predator for many years. Further, while some people know of his criminal activity, he appears to have minimized it to at least some of them, and his co-workers are unaware of it at all.

DC 1: *Sexual behavior of a criminal nature, whether or not the individual has been prosecuted*; DC 3: *Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*; and DC 4: *Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment* apply in this case. For the same reasons discussed under Guideline J above, I find MC 2: *The behavior was not recent and there is no evidence of subsequent conduct of a similar nature* does not apply. Applicant's continued minimization of his deviant criminal conduct is sufficient reason to find that MC 3: *There is no other evidence of questionable judgment, irresponsibility, or emotional instability* inapplicable. Guideline D is decided against Applicant.

Under Guideline E, personal conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Applicant's criminal sexual abuse of young girls makes DC 1: *Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*; and DC 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* applicable to this case.

Applicant's co-workers and most likely other associates are unaware of his criminal history. Accordingly, MC 5: *The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress* does not apply. The remaining mitigating conditions have no application to this case. Guideline E is decided against Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, Applicant has failed to mitigate the security concern caused by his sexual behavior, criminal conduct, and personal conduct. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

SOR ¶ 2-Guideline D: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

SOR ¶ 3-Guideline E: Against Applicant

Subparagraph a: Against 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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Applicant was contacted by Department Counsel sometime before issuance of the formal notice of hearing and agreed to this hearing date. At the hearing, Applicant stated he was prepared to proceed (Tr. p. 9).

3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id* at 531.
12. *Egan*, Executive Order 10865, and the Directive.