

DATE: October 20, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-03613

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Ray Blank, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 54 years old and drives a truck for the federal government contractor. He and his wife had a foster home and took in high risk youths. After a child had an altercation with his wife and was threatening her, he pulled the child away from his wife. The child then accused him of sexually assaulting her. He has consistently and vehemently denied the charges, but after two years in the court system and spending his life's saving to defend himself, he pled guilty to a misdemeanor assault charge. His probation officer did not believe he committed the offense. Applicant was never in trouble before or since. He has successfully mitigated the criminal conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On June 18, 2005, under the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline J, (criminal) of the Directive. Applicant answered the SOR in writing on August 16, 2005, and elected to have a hearing before an administrative judge. In his answer, Applicant denied the allegations under Guideline J. The case was assigned to another judge on July 19, 2006 and reassigned to me on August 28, 2006. A notice of hearing was issued on August 29, 2006, scheduling the hearing for September 12, 2006. Applicant waived the 15 day notice and I conducted the hearing as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance. The Government offered four exhibits for admission in the record marked as Government Exhibits (GE) 1-4. The exhibits were admitted into evidence without objection. Applicant testified on his own behalf, called one witness, and offered 39 exhibits for admission into the record. They were marked as Applicant's Exhibits A-MM and were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on October 3, 2006.

FINDINGS OF FACT

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

Applicant is 54 years old and has worked as a truck driver for a federal contractor for the past seven years. In the years prior to, he worked on his family owned farm and as a private truck driver. Applicant has been married for 16 years and has three children from a prior marriage. His wife has two children. They collectively have five grandchildren and treat all of their offspring as their biological family.

Applicant grew up in a difficult family situation. His mother was an alcoholic and drug addict, and at the age of nine he went to live in a boys' home. He stayed in contact with his biological father, but the boys' home was where he lived until he was in the 11th grade. While there he was guided by a mentor who had a significant impact on his life. When Applicant's wife inherited her family's farm from her mother in 1996, they decided to give back to help children who were unwanted by their families and society. They worked through an organization and the social service system and took care of mostly boys who would be given a stable home environment and work on the farm. They had about 4-6 children who lived with them permanently at different times. Applicant's wife was a full time mother to the children, taking them to doctor's appointments, school visits, and being at home to care for them.

Applicant and his wife took in a girl (Child A) as a respite, that is they would only have her on weekends or holidays to allow her foster parents a break. She was about 13 years old when they first had her in their house. She was on medication for either bipolar disorder or a manic disorder. When she took her medication she acted in a socially acceptable manner. However, she was very manipulative and did not accept being told "no." Applicant and his wife were very careful to ensure Applicant dealt with the boys and was never alone with any of the female children, so there would never be issues.

In April 1999, during the Easter school break, Applicant's wife received a phone call from Child A asking if she could come to stay with them. Applicant's wife had been in a car accident and was not able to drive. She told Child A she could not pick her up. Child A showed up at their home without the case worker's permission. Applicant's wife contacted the case worker and cleared it with her. Child A was told not to wear a string bikini while riding a "4 wheeler" with one of the 15 year old boys who lived there. She did not obey this rule. Child A wanted to live with Applicant and his wife as a permanent resident. Both Applicant and his wife had previously decided they would not take in a teenage girl. Most of their "children" were boys and they did not want a teenage girl. Child A was not happy about their decision. She did not bring her medication for the week. She was told she could stay on the weekends and holidays, but they would not take her in as a permanent resident.

Child A was disruptive during the Easter break while she was at Applicant's home. She refused to help his wife around the house and said she would only do so if they bought her designer jeans. She became upset with Applicant's wife and started yelling at her and acting in a threatening manner. One of the boys became concerned and went outside to get Applicant. He came in and told Child A to calm down. She refused to do so and was acted in a threatening manner towards Applicant's wife. Applicant grabbed her arm and steered her away from his wife. She told Applicant "I'll get you, you'll pay for it." She then stormed to her room. Later in the evening, she apologized to both Applicant and his wife. However, on the bus going to school she told the other children "if I can't live there nobody else will, Mom and Pops will pay." Child A then accused Applicant of some type of sexual assault. She was removed from the home as were the other children the same day. Child A attempted to contact Applicant's wife by telephone 17 times that night. Applicant's wife refused to accept the collect calls because she had been advised by child protective service to have no contact with the children. Applicant was charged with felony sexual assault of taking indecent liberties with a child. It is unclear what exactly Applicant was accused of doing. When questioned, Applicant believes he was accused of making Child A feel uncomfortable and he was looking at her in an inappropriate manner. No specifics facts pertaining to the allegation were provided. Applicant claimed Child A also falsely accused another foster parent of sexual assault.

Applicant has consistently denied he sexually assaulted Child A. ⁽³⁾ He admits he grabbed her arm to protect his wife. Applicant's wife credibly testified as to the confrontation she had with Child A and that she felt threatened by Child A.

Applicant spent two years fighting the charge. ⁽⁴⁾ He hired an attorney and spent his life's savings. He firmly believed he was not guilty, but was convinced by his attorney that because he grabbed Child A that he had assaulted her. ⁽⁵⁾

Applicant finally agreed to put the charges behind him and plead guilty to a misdemeanor assault on a female. ⁽⁶⁾ The court sentenced him to 60 days in jail, to pay a fine of \$500 and \$120 in court costs. He was placed on 18 months of

supervised probation, and ordered not to serve as an employee of a group home or a foster parent or to be in the presence of children without a responsible adult. He complied with the sentence and was released from probation early.

(7) Applicant did not serve any jail time

Applicant went back to being a truck driver. He provided 36 character letters from people who have known him throughout periods of his life. He provided letters from his children and stepchildren. All uniformly, consistently and vehemently support his innocence and his character as a man who is a devout Christian and a family man, and one who would help anyone in need. He is a kind man and has gone out of his way to help others, expecting nothing in return. Many stated they would trust him with their money, their family, and their children. He is believed to be honest, loyal and caring. He started a benevolence fund for truckers who ran into emergencies and needed funds. (8) During his tenure as a foster parent to the most troubled youth, he took into his home approximately 97 children over four years and cared for them. Three of those children adopted Applicant and his wife as their parents.

Applicant provided a letter from his probation officer from the Department of Corrections. She served as Applicant's probation officer from April 30, 2001 to March 28, 2002. She observed Applicant's behavior and demeanor. When she discussed Applicant's case with him she stated: "Immediately I had the sense that this man had not committed the crime he was accused of. I cannot say that about everyone I have supervised in my six years employment ...as a Probation Officer." (9) She believes Applicant is not a "threat to society." (10) Applicant continues to try and help the troubled youth of society, but now only does it through his financial donations.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. (11) The government has the burden of proving controverted facts. (12) The burden of proof is something less than a preponderance of evidence. (13) 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. (14) Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. (15)

No one has a right to a security clearance (16) and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." (17) Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. (18) The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. (19) It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in 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.

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

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline J.

Based on all the evidence, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*) both apply.

Applicant was charged and found guilty of assault on a female. He pled guilty to the misdemeanor offense and was sentenced.

I have considered all the mitigating conditions and especially considered Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1 (*The criminal behavior was not recent*), CC MC E2.A10.1.3.2 (*The crime was an isolated incident*), CC MC E2.A10.1.3.3 (*The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*), CC MC E2.A10.1.3.4 (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*). It has been over seven years since Applicant was accused of the offense and five years since he was convicted of a misdemeanor offense. Applicant repeatedly and consistently denied committing the offense, however he does have a conviction. I find that even if the act was committed it is not recent and was isolated. Therefore, CC MC E2.A10.1.3.1 and E2.A10.1.3.2 apply. Although there is no indication that there was pressure exerted on Applicant regarding the offense as described in CC MC 3, the fact is that the circumstances no longer exist that would put Applicant in a vulnerable position. That is, he no longer is a foster parent and no longer has contact with Child A. I find CC MC E2.A10.1.3.3 partially applies. It is questionable whether Applicant committed the act, but the fact is he pled guilty to an offense. He has lead an exemplary life as reflected by the many people he has helped and attest to his character. He and his wife drive trucks together and no longer take in foster children. It is unlikely Applicant will be accused in the future of any criminal offenses. He has no other criminal record, before or since this incident. Those who know him best attest that he is a good man. It is clear that he will not be in any future trouble and is successfully rehabilitated. Of particular note is that even his Probation Officer believes he was wrongly accused and attests that he does not pose a threat to society.

The Whole Person

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have also considered the following specific factors: the nature and seriousness of the conduct and surrounding circumstances, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence of the conduct.

I considered Applicant's background and his attempt to pay back society and help children. I considered his demeanor and credibility and found him to be humble and honest. I found his answers to be forthright. He has spent his life helping others. He spent his life's savings trying to fight the charges and finally decided to move on. He has put the offense behind him and does not appear to be bitter. He continues to see good in people and this shows he has been

rehabilitated. It is unlikely Applicant will get in any trouble in the future. Having considered all of the facts in the case and the whole person, I am convinced Applicant has mitigated the security concerns under Guideline J, criminal conduct. Therefore, I am persuaded by the totality of the evidence in this case, that it is clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guideline J is decided for Applicant.

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:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Carol G. Ricciardello

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960) as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. GE 2.
4. GE 2 and testimony.
5. Tr. 28.
6. *Id.*
7. Tr. 28-29.
8. AE L.
9. AE JJ.
10. *Id.*
11. ISCR Case No. 96-0277 at 2 (App. Bd. Jul 11, 1997).
12. ISCR Case No. 97-0016 at 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
13. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
14. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
15. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
16. *Egan*, 484 U.S. at 531.

17. *Id.*

18. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

19. Executive Order 10865 § 7.