

KEYWORD: Personal Conduct; Sexual Behavior; Criminal Conduct

DIGEST: In 1998, Applicant signed a sworn statement admitting to indecently touching his 14-year-old daughter several times over a period of about two years, and improperly touching another 14-year-old girl on one occasion. In February 2004, he deliberately misrepresented material facts on a security clearance application by concealing his record of mental health counseling and the prior revocation of his security clearance. In a subsequent interview with a security investigator, Applicant falsely denied his criminal acts involving the girls. Applicant failed to mitigate the security concerns arising from his sexual behavior, false statements, and criminal conduct. Clearance is denied.

CASENO: 05-09569.h1

DATE: 05/31/2006

DATE: May 31, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-09568

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL J. BRESLIN**

**APPEARANCES**

**FOR GOVERNMENT**

Richard Stevens, Esq., Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

In 1998, Applicant signed a sworn statement admitting to indecently touching his 14-year-old daughter several times over a period of about two years, and improperly touching another 14-year-old girl on one occasion. In February 2004, he deliberately misrepresented material facts on a security clearance application by concealing his record of mental health counseling and the prior revocation of his security clearance. In a subsequent interview with a security investigator, Applicant falsely denied his criminal acts involving the girls. Applicant failed to mitigate the security concerns arising from his sexual behavior, false statements, and criminal conduct. Clearance is denied.

### **STATEMENT OF THE CASE**

On February 6, 2004, Applicant submitted a security clearance application. The Defense Office of Hearings and Appeals (DOHA) declined to grant a security clearance for Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (the "Directive"). On November 18, 2005, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under the Directive, specifically, Guideline E, Personal Conduct, Guideline D, Sexual Behavior, and Guideline J, Criminal Conduct.

Applicant answered the SOR by letter dated December 12, 2005. He requested a hearing before an administrative judge.

The case was assigned to me on March 2, 2006. With the concurrence of Applicant and Department Counsel, I convened the hearing on April 18, 2006. DOHA received the final transcript of the hearing (Tr.) on April 26, 2006.

## EVIDENTIARY ISSUES

The government introduced Exhibits 1 through 9, without objection. Applicant presented Exhibit A, which was admitted, and testified on his own behalf.

Department Counsel called one witness in rebuttal. (Tr. at 91.) Applicant objected on the grounds of a lack of notice of the potential witness. (Tr. at 92.) In light of Applicant's desire to resolve the matter, he indicated his willingness to proceed despite any lack of notice. (Tr. at 93.) I heard the testimony of the witness to determine whether it constituted proper rebuttal, and reserved ruling on the admissibility of that testimony. (Tr. at 97.) I concluded only a portion of the witness' testimony, summarized below, was properly admissible as rebuttal. I did not consider as substantive evidence testimony that was not rebuttal-i.e. that which would have been admissible in the government's case-in-chief. Applicant also indicated that if he had known about this potential witness, he would have called his supervisor as a witness in the case. (Tr. at 95.) I gave Applicant additional time to present a statement from his supervisor. (Tr. at 121-24.) On ay 3, 2006, Applicant submitted a statement from his former supervisor which I admitted, without objection, as Exhibit B.

## FINDINGS OF FACT

Applicant denied all the allegations in the SOR. (Applicant's Answer to SOR, dated December 12, 2005; Tr. at 8.) After a complete and thorough review of the evidence in the record, I make the following findings of fact.

Applicant was born in February 1965. (Ex. 1 at 1.) In June 1983, immediately after graduating from high school, he enlisted in the U.S. Army. (*Id.* at 4; Tr. at 46.) Initially, he served in an armored unit and held a security clearance. (Tr. at 70.) He then served about 14 years as a recruiter. (Tr. at 17.) Applicant estimated that, as a recruiter, he assisted about 1,000 applicants in preparing and submitting security clearance applications. (Tr. at 30.)

In June 1983, Applicant was married. (Ex. 1 at 3.) A daughter was born to the marriage in August 1983. (Ex. 9 at 2.)

In January 1998, Applicant's daughter, then 14 years old, informed military police investigators that for about two years Applicant had been fondling her breasts (under her clothing) and vagina (through her clothing) while she slept, and that when she awoke he would make excuses for being in her room. (Ex. 2 at 2.) Applicant's daughter executed a 5-page sworn statement detailing the incidents. (Ex. 2 at 8.) Her girlfriend, also 14 years old, reported that Applicant touched her breast one night in about December 1997 while she was staying overnight with Applicant's daughter, and that he

fondled her thigh and buttocks while driving her home the next day. (Ex. 2 at 2.) She also signed a sworn statement. (Ex. 2 at 13.)

On the same day, military investigators arranged to interview Applicant. (*Id.* at 3.) He contacted Applicant at a bar where he had stopped that evening with his co-workers. (Tr. at 38.) Applicant's supervisor drove him to the police station. (Tr. at 40-41.) The investigator questioned Applicant for several hours. In the early hours of the next day, Applicant executed a sworn statement admitting that he fondled his daughter's breasts about ten times over the preceding two years. (Ex. 2 at 19.) He denied ever touching her vaginal area. (*Id.*) He also admitted touching the thigh of his daughter's friend while driving her home one day. (*Id.*) At the conclusion of the statement he expressed remorse and indicated his desire to receive counseling for this problem. (*Id.*) He signed the three-page, typed statement, and initialed it numerous places. (*Id.*)

Investigators contacted Applicant's wife, who denied any knowledge of inappropriate conduct toward their daughter. Later, she refused to allow investigators to interview herself or her daughter for additional information. (Ex. 2 at 5.)

Applicant's commander ordered him to live in military quarters for about one or two weeks. (Tr. at 60.) He then returned to the family home. Applicant's brigade commander gave him a written letter of reprimand on April 10, 1998. (Ex. 3.) The letter directed Applicant to continue family counseling. (*Id.*) The letter afforded Applicant an opportunity to appeal, but he did not do so. (Tr. at 51.)

Applicant saw a civilian psychiatrist about four or five times over a one-month period. (Tr. at 61, 63.) He also went to a mental health counselor on base to arrange counseling for his daughter—they referred her to a social worker in the civilian community. (Tr. at 54, 59.) According to Applicant, his daughter retracted her allegations the first time she talked to her civilian counselor. (Tr. at 63.) Applicant's commander rescinded the SOR.

In January 1999, the U.S. Army Central Personnel Security Clearance Facility (CCF) informed Applicant of its intent to revoke his security clearance because of the allegations of improper sexual behavior with his daughter. (Ex. 5.) On March 3, 1999, Applicant appealed the denial of his clearance. (Ex. 6.) He indicated his daughter fabricated the allegations because she was angry that he would not allow her to date her 18-year-old boyfriend, and that she later recanted. Applicant forwarded a letter from his commander indicating the commander concluded Applicant "was completely exonerated of the offenses for which he was investigated." (Ex. 7.) The U.S. Army CCF revoked Applicant's security clearance. (Ex. 5.)

Applicant continued to serve as a recruiter. (Ex. 1 at 2.) He received a Meritorious Service Medal for his duty performance between May 1993 and November 1998. (Ex. 8; Ex. A.) He retired from the Army in June 2003 as a sergeant first class (E-7). (Ex. 1 at 4.)

Applicant separated from his wife in May 2001. (Ex. 9 at 2.) In January 2004, Applicant was divorced. (Ex. 1 at 3.) He remarried in January 2005, and now lives with his second wife and her three children. (Ex. 9 at 2.)

Applicant began working for his current employer in February 2004. (Ex. 1 at 2.) He is a tradesman, performing manual labor. (Tr. at 18, 72-73.)

On March 26, 2004, Applicant filled out an SF 86, Security Clearance Application, by entering the data into a computer. (Tr. at 36; Ex. 1 at 1.) In response to Question 19, Applicant denied that he had consulted with a mental health professional (psychiatrist, psychologist, counselor, etc.) or another health care provider about a mental health related condition. (*Id.* at 5.) Question 32 inquired whether Applicant had ever had a security clearance or access authorization denied, suspended, or revoked. Applicant answered "No." (*Id.* at 6.)

In April 2005, security investigators interviewed Applicant. (Ex. 9 at 8.) He denied any improper sexual contact with his daughter. (Ex. 9 at 3.) In a signed, sworn statement, Applicant asserted his daughter fabricated the allegations to get back at him for forbidding her to see her boyfriend. (*Id.*) He also stated that on the night he was questioned, he had stopped after work with friends and consumed four or five beers over a two or three hour period, and was under the influence of alcohol. (*Id.*) Applicant stated he repeatedly denied all the allegations to the investigator. According to Applicant, the investigator typed out a statement and required him to sign it without reading it. (*Id.*) Later, the investigator provided Applicant a copy of the statement-when he read it, he realized the investigator misrepresented what he said. (*Id.* at 5.)

In the statement to security investigators, Applicant admitted that he received a letter of reprimand from his commander and was required to attend family counseling about once a week for one month. (*Id.*) Later, Applicant received notice of intent to revoke his security clearance. He responded by indicating that his daughter recanted the allegations, the letter of reprimand was revoked, and he had been exonerated. Applicant asserts he was never informed about the result of the action. (*Id.*) At the end of the statement, Applicant wrote, "I did not list this investigation, the related mental health counseling and the fact that my security clearance had been revoked on my case papers because I did not want my current employer [ ] to learn of the situation." (Ex. 9 at 6.)

At the hearing, Applicant discussed in detail the circumstances surrounding the statement he signed in 1998 relating to the allegations by his daughter. (Tr. at 20-24.) He stated that after obtaining the signed statement from him, the investigator commented, "Wow, it took a while but I broke him," or words to that effect. (Tr. at 33.)

Applicant testified he did not provide correct responses to questions on the SF 86 because he assumed his employer would have access to the information. (Tr. at 30-32.) He also claimed he forgot about the mental health counseling. (Tr.

at 33, 83.)

At the hearing, the investigator who took Applicant's statement in January 1998 testified in rebuttal. The admissible rebuttal evidence included his assertion that he would not have interviewed Applicant if he appeared to be intoxicated, and that he never gave a copy of the signed statement to Applicant. (Tr. at 110; 112.) Also, the witness indicated he never told Applicant's supervisor that "he was a tough one but I cracked him," or words to that effect. (Tr. at 116.)

In surrebuttal Applicant presented a statement from his supervisor about bringing Applicant to the police station from the bar, and the length of time the investigator questioned Applicant. (Ex. B.) The supervisor recalled the investigator commenting that "he had finally broken him (or words to that effect)." (*Id.*) Applicant's supervisor noted Applicant seemed disoriented and confused after the questioning about the documents he had signed. He also attested to Applicant's high moral character, honesty, and trustworthiness. (Ex. B.)

## 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 E, Personal Conduct: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. (Directive, ¶ E2.A5.1.1.)

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.)

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.)

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.

The most significant concern in this case is the 1998 allegation that Applicant indecently touched two 14-year-old girls, including his daughter. The government presented a report of investigation which contained sworn statements of witnesses and Applicant's own signed, sworn, statement indicating he engaged in indecent sexual conduct with the girls. As noted above, when the government presents evidence raising a security concern, it is an applicant's burden to present evidence demonstrating he is suitable for a clearance. Applicant provided testimony that his daughter later recanted her accusations, and evidence that his commander was persuaded that Applicant should be exonerated of the crimes. Applicant attempted to explain his signed confession by indicating the investigator misrepresented his statements, he was under the influence of alcohol, and was not allowed to read the statement before he signed it.

I note the daughter's recantation occurred months after the initial report. Where a child makes such a report but the alleged offender is quickly returned to the family home and no significant corrective or punitive action is taken, the child may well feel pressured into retracting the allegations. Although it appears Applicant consumed some alcohol before the interview, the evidence does not persuade me that he was unable to understand what was going on during the three hour interview, or that he was so impaired that he could not intelligently act on his own behalf. There was no evidence of why the investigator would misrepresent Applicant's responses, other than professional zeal. Moreover, there is no apparent reason why the investigator would falsify Applicant's responses to some, but not all, the questions on the statement in issue. Perhaps most significantly, it is not credible that Applicant, an experienced noncommissioned officer facing a serious criminal investigation, would initial and sign a statement without reading it. If this were a criminal case, I would not be persuaded beyond a reasonable doubt of Applicant's guilt. However, Applicant has the burden of showing that it is clearly consistent with the national interest to grant him a security clearance. Applicant has not met his burden of persuasion.

### **Guideline E, Personal Conduct**

The Directive sets out various factors relevant to an applicant's personal conduct that may be potentially disqualifying. Paragraph E2.A5.1.2.1 provides that "[r]eliable, unfavorable information provided by associates, employers, coworkers, neighbors and acquaintances" indicating questionable judgment, untrustworthiness, unreliability, lack of candor, or dishonesty may be disqualifying. The sworn statements of witnesses and Applicant's own signed, sworn, statement indicating he engaged in indecent sexual conduct with two 14-year-old girls is sufficient to raise a security concern under this potentially disqualifying condition.

Under ¶ E2.A5.1.2.2 of the Directive, "[t]he deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire" may be disqualifying. Paragraph 1.b of the SOR alleges that on February 6, 2004, in response to Question 19 on his SF 86, Applicant deliberately failed to report that he had consulted a mental health professional in early 1998. Applicant first indicated he did not report the matter because he was concerned that his employer would find out about the allegations of child sexual abuse in 1998. (Ex. 9 at 6.) Later, he indicated he forgot the counseling. Applicant's later statement is not persuasive. Clearly, being the subject of a criminal investigation into allegations that he sexually abused his child would be a matter of great importance to Applicant. He was required to move out of his house and attend mental health counseling. Moreover, it would have resulted in extensive turmoil within his family. Therefore, it is not believable that he would have forgotten the incident. Applicant's first statement-that he deliberately did not report it-is more credible. I conclude the evidence is sufficient to raise this



potentially disqualifying condition.

Paragraph 1.c of the SOR alleges Applicant falsified material facts in response to Question 32 on his SF 86 when he denied ever having a security clearance denied, suspended, or revoked. The available evidence shows Applicant was notified of the government's intent to revoke his security clearance by letter dated January 21, 1999, and he responded on March 3, 1999. (Ex. 5.) The government submitted documents indicating the Army eventually revoked Applicant's security clearance. There is no documentation demonstrating Applicant was advised of this decision. However, in his statement to the security investigator, he admitted he did not report the fact of the revocation because he did not want his employer to learn of it. This indicates Applicant was aware of the revocation, and that his failure to report it was intentional. I find the evidence sufficient to raise this possible security concern.

The Directive, ¶ E2.A5.1.2.3, provides that it is potentially disqualifying if an applicant deliberately provides false or misleading information concerning relevant and material matters to an investigator in connection with a personnel security determination. Paragraph 1.d of the SOR alleges Applicant lied to a security investigator when he executed a sworn statement denying any improper touching of his daughter. Here, Applicant executed two sworn statements. The first one admitted to committing indecent acts upon his daughter, and the second one denied the allegations. I note that a statement against one's penal interests tends to be more credible, considering that people are not likely to make statements adverse to their interests unless they are true. As noted above, Applicant's explanation for his signed confession is not persuasive. I conclude the evidence is sufficient to raise this potentially disqualifying condition.

Under the Directive, an applicant may mitigate the security concerns arising from questionable personal conduct. (Directive, ¶ E2.A5.1.3.) Under ¶ E2.A5.1.3.1, it may be mitigating where "[t]he information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability." The incidents of indecent acts and his deliberate falsification of the security clearance application are relevant to his character and stability, and are pertinent to a determination of his judgment and reliability. I find this mitigating factor does not apply.

The potentially mitigating condition in ¶ E2.A5.1.3.2 of the Directive arises where "the falsification was an isolated incident, was not recent, and the individual subsequently provided correct information voluntarily." Applicant's falsification of the security clearance application was not an isolated incident. Moreover, the false statements were recent, and Applicant did not provide correct information until confronted by investigators. I conclude this potentially mitigating condition does not apply. I also considered carefully the other potentially mitigating conditions and conclude they do not apply.

#### **Guideline D, Sexual Behavior**

Paragraph E2.A4.1.2.1 of the Directive states it is potentially disqualifying where there is evidence of "[s]exual behavior of a criminal nature, whether or not the individual has been prosecuted." Similarly, under ¶ E2.A4.1.2.3, sexual behavior

that causes an individual to be "vulnerable to coercion, exploitation, or duress" may raise a security concern. Also, under ¶ E2.A4.1.2.4, sexual behavior that "reflects lack of discretion or judgment" may be disqualifying. In this case, Applicant confessed to multiple incidents of indecent assault, which are criminal offenses. Also, the fact that the victims were his own 14-year-old daughter and another child is a matter which would embarrass or humiliate Applicant if known, and thus causes him to be vulnerable to exploitation or duress. Finally, the nature of the conduct itself suggests an extreme lack of judgment. I find the evidence raises these potentially disqualifying conditions.

The Directive suggests several factors that should be considered in mitigation of sexual behavior. I considered each very carefully, and conclude none are raised in this case.

### **Guideline J, Criminal Conduct**

Paragraph E2.A10.1.2.1 of the Directive provides an "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 or multiple lesser offenses." As discussed above, Applicant made a false statement in response to Question 19 of his Security Clearance Application, and lied to a security investigator about his criminal history. Applicant's conduct violated 18 U.S.C. § 1001, and constitutes a serious crime. I conclude these potentially disqualifying conditions apply

Under the Directive, the security concerns arising from a history of criminal conduct may be mitigated in certain circumstances. I examined each of the potentially mitigating conditions, and conclude none apply.

### **The "Whole Person" Concept**

I considered each of the potentially disqualifying and mitigating circumstances in light of the "whole person" concept. Applicant served the United States Army in positions of trust and successfully held a security clearance for many years. His supervisor praises his integrity and dedication. At the same time, he demonstrated poor judgment by his repeated sexual offenses, his false statement on his security clearance application, and his misrepresentation, under oath, to the security investigator. Weighing all the factors, I conclude Applicant has not mitigated the security concerns in this case. Clearance is denied.

## **FORMAL FINDINGS**

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.c: Against Applicant

Paragraph 2, Guideline D: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Paragraph 3, Guideline J: AGAINST APPLICANT

Subparagraph 3.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