

DATE: January 31, 2007

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-12622

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's sexual behavior raised security concerns after he pleaded guilty plea in November 2000 to child molestation (2nd Degree) and Assault (3rd degree) in State #1 for an incident with his 12-year-old stepdaughter in September 1999. Subsequently, the court suspended imposition of sentence pending successful completion of two years of probation with special conditions, two days incarceration, counseling as directed, including sex offender therapy. The court required him to register as a sex offender under state law. While he completed the required therapy and probation in November 2002, it is still too recent to conclude he has mitigated security concerns. Further, he has only disclosed this matter to family, not his employer; so the potential for blackmail remains despite his long employment history. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on March 31, 2006. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.⁽¹⁾ The SOR alleges specific concerns over sexual behavior (Guideline D). Applicant retained counsel and responded to these SOR allegations in an Answer notarized on April 23, 2006, where he admitted all allegations and requested a hearing.

Department Counsel signed a Ready to Proceed notice on July 28, 2006; and the matter was assigned to me on August 1, 2006. A August 1, 2006, Notice of Hearing set the matter for August 16, 2006. Applicant received the Notice on August 9, 2006, but agreed to waive⁽²⁾ the Directive's 15 day notice provision.

Procedural Issues

At the hearing Applicant asked that the hearing be closed. At the close of the hearing Department Counsel moved to amend the SOR under Directive paragraph E.3.1.17 to add the following allegations under Guideline E, Personal

Conduct that first, he falsified his SF 86 by failing to disclose his treatment in response to Question 19 when he had been under treatment and he failed to disclose his participation in two sex offender therapy groups and second, that he had failed to inform the facility security office of his guilty plea. Applicant denied both of these allegations in response to earlier cross-examination by the Government. Thus, as Applicant did not admit to these allegations, I denied the motion to add these allegations at the hearing as there was insufficient new evidence. (TR 93-97; 97-99)

Department Counsel offered four documents that were admitted into evidence (Exhibits 1-4) and one document for Administrative Notice, a state statute (AN I). (TR 13-20) Applicant offered one exhibit⁽³⁾ (Exhibit A) which was admitted into evidence over Government's objection. (TR 20-23) The transcript (TR) was received on August 28, 2006.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 59 years old, has worked for Employer #1 in State #1 as an engineer/scientist from 1966 to present for a total of over forty years. As part of a periodic review, he completed a security clearance application (SF-86) in June 2004 (which was reprinted in part in March 2006). He was granted a Defense Department Secret clearance in February 1967. (Exhibit 1; TR 28-30; TR 75-77)

Applicant attended college in State #2 and was granted an associate degree in 1966. (Exhibit 1; TR 28) He was married to Wife #1 in 1964 and divorced in 1978; he married Wife #2 in 1979 and divorced in 1994; he married Wife #3 in September 1994. When he lived with Wife #3, she had custody of her daughter born in 1987, his stepchild. From his earlier marriages he has a daughter born in 1982, and three sons born in 1980, 1969 and in 1964. He has eleven grandchildren. (Exhibit 1; TR 32-34; 39-40) He and Wife #3 were divorced in September 2004. (TR 31)

Sexual Behavior

In September 1999 Applicant was living with Wife #3 and her daughter. (TR 35) On his June 2004 Security Clearance Application (SF 86) Applicant disclosed in answer to Question 26, his police record: he had been arrested for child molestation - 2nd Degree and Assault - 3rd degree in State #2 in September 1999. This was the first time he had reported his arrests officially as he was not aware that his company had any requirement to report adverse information. Applicant conceded that though his family knew about this incident that he had "not told anyone at work." He believed the information was personal and felt no need to report that he was a registered sex offender on his SF 86. Neither did he disclose in answer to Question 19 that he had consulted a mental health professional as he considered "mental health as being schizophrenia or other type of mental disease." Based on his interpretation, Applicant considered his answer to Question 19 correct. (Exhibit 1, 2; TR 6, 77-83)

Even though he had not reported his arrest and guilty plea to his security office, he stated he would not be subject to blackmail as he would report to security any attempt to blackmail him over this incident. (TR 79-80)

On his SF 86 Applicant did not provide the disposition of the arrests, but subsequently provided an Affidavit in January 2005 that explained the origin of the incident that led to his guilty plea:

- After Applicant had gone into his stepdaughter's room in September 1999 to turn off the television at 1:30 AM, he then sat on her bed and rubbed her back with lotion underneath her clothes. The child later told her therapist and told police that he had touched⁽⁴⁾ her breasts. He maintained that nothing else happened, but he knew that his conduct was inappropriate as she was twelve years old. He testified that he had been having "control" issues with her and wanted to show his control over her and persuade her to accept him. (SOR 1.a.)
- Later the child discussed this incident with her therapist who called the child abuse hotline which triggered an investigation. The police came to his house and said he could have no contact with the child, so the wife and child moved into her parents home initially. In January 2000 Applicant was interviewed by police. (SOR 1.a., 1.b.)

- Later he took a polygraph test and was told he failed with respect to questions concerning his having touched his stepdaughter's breasts. The police reported that the child had reported this action by him in her police interview. (SOR 1.c.)
- In August 2000 he learned of the charges the prosecutor planned to bring. Applicant consulted with a lawyer and his wife; the lawyer recommended he plead guilty. In November 2000 he decided to plead guilty rather than face a trial and negative publicity. Subsequently, he admitted he pleaded guilty to the two charges. (SOR 1.d.)
- The court suspended imposition of sentence pending successful completion of two years of probation with special conditions, two days incarceration, counseling as directed, including Sex Offender Therapy⁽⁵⁾ which he attended for ten months. He then entered another group in December 2001 and continued to November 2002 when his probation ended. Also, the court required him to register as a sex offender every 90 days. He complied with all of the terms of the court order and reported to his probation officer initially on a weekly basis, then every two weeks and then monthly. He completed all the terms of probation in November 2002; however, he never got written confirmation. (SOR 1.d.)

(Answer; Exhibits 1, 2, 3; Exhibit A; TR 25-27; 35-39; 40-61; 64-65; 68-69; 70-75; 88; 88-91)

In addition to what was required by the court, Applicant voluntarily entered therapy with Ms. R, a licensed clinical social worker (LCSW), in December 1999 for sexual abuse of his stepdaughter; she also provided therapy to his wife and stepdaughter. Applicant also successfully completed a required program through the court system for sex offenders. Subsequently, he continued individual therapy with Ms. R over the issues of "control" and how his views on control contributed to "relationship problems in his home." She provided no diagnosis or prognosis to support her view that "he would not present a threat to security in regard to his job, as there would be no power to coerce." (Exhibit A; TR 61-67; 91-92) Applicant stopped seeing Ms. R for therapy in 2005. (TR 67)

Applicant testified that he takes the protection of information "very, very seriously" in his position at work. (TR 27)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I weighed relevant Adjudication Guidelines as set forth below:

Guideline D - Sexual Behavior

E2.A4.1.1. The Concern: 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. ⁽⁶⁾ **Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance.**

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. The Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance.

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Guideline D - Sexual Behavior

The Government established security concerns over Applicant's guilty plea in November 2000 to child molestation (2nd Degree) and Assault (3rd degree) in State #1 for an incident with his 12-year-old stepdaughter in September 1999. Subsequently, the court suspended imposition of sentence pending successful completion of two years of probation with special conditions, two days incarceration, counseling as directed, including Sex Offender Therapy, and the court required him to register as a sex offender every 90 days. Even though he completed all the terms of probation in November 2002 security concerns⁽⁷⁾ persist over Sexual Behavior, notably Disqualifying Condition (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 . . . which reflects lack of discretion or judgment.

Having admitted these two criminal charges, Applicant failed to establish that his actions have been mitigated. Although he claimed, "control," not sexual activity was his intent, nevertheless he pleaded guilty to serious criminal charges. Consequently, under state law he will be listed as a sexual offender for his lifetime. Although to his credit, he immediately sought counseling in 1999 and provided a letter from that therapist, she provided no diagnosis or prognosis after his therapy. He failed to mitigate⁽⁸⁾ these security concerns even though the behavior that led to his arrests is not recent as it occurred in 1999. However, he was on probation until November 2002 and will remain on the state register of sex offenders for his lifetime. Thus, it is still too soon to mitigate. While there is no evidence of subsequent conduct of a similar nature under MC 2, he provided no favorable prognosis from an expert. While there is no other evidence of questionable judgment, irresponsibility, or emotional instability under MC 3, concerns remain as he provided no expert opinion or no prognosis that this incident would no longer persist as a factor in his conduct. Also, concerns remain over the potential for blackmail, so he failed to establish MC 4 as he did not timely inform his security office of his criminal convictions under the mistaken view that this conduct was personal. That view is not persuasive given the fact that he knows that under the guilty plea he has a lifetime duty under state statute to file as a sex offender.

Even on his security form he was not fully forthcoming. While he disclosed the arrests for the 1999 conduct in his 2004 SF 86, he did not provide the disposition, nor list his court-ordered therapy, nor indicate he had to register as a sex offender by state statute. While he has 40 years of service to his company, he provided no favorable evaluations on his work nor letters of reference from his employer or from individuals in the community on his good character. Thus, even evaluating him as a whole person, security concerns persist.

After considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant under subparagraph 1.a. through 1.d. incorporated under SOR Paragraph 1.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline D: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: 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 the Applicant. Clearance is denied.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
2. Department Counsel confirmed this understanding in an e-mail of August 1, 2006, and at the hearing. (TR 9)
3. Department Counsel objected to Exhibit A, the opinion of a licensed clinical social worker (LCSW); it contained no documentation on her credentials. Although admitted into evidence, it was not accepted as the opinion of an expert. Further, she provided no diagnosis or prognosis, so I could give it limited weight. (Exhibit A; TR 23)
4. In a subsequent Affidavit in January 2005 Applicant claimed that later in a family therapy session his stepdaughter claimed "6 or 7 months after the incident" that she had not told the police that Applicant had touched her breasts and that the police had misunderstood her statements. (Exhibit 2) He also testified that the child "recanted during a family therapy session." However, she never did so in writing. (TR 26; 87) As a result, I give his statement that she recanted little weight in the light of his guilty plea and in the light of his having provided no statement or affidavit from the child. Neither the child nor her mother testified or provided a statement. The therapist provided a letter for Applicant confirming his therapy, but she did not confirm that the child had recanted. (Exhibit A)
5. Applicant was dropped from the Sex Offender Therapy after ten months because he denied what "really happened" and was not being honest as he continued to insist he had not touched the child's breasts. He was later assigned to another therapy program which he attended to complete his probation. (TR 69-72)
6. **The adjudicator should also consider guidelines pertaining to criminal conduct (Guideline J); or emotional, mental, and personality disorders (Guideline I), in determining how to resolve the security concerns raised by sexual behavior.**
7. **E2.A4.1.2. Conditions that could raise a security concern and may be disqualifying include: E2.A4.1.2.1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted; E2.A4.1.2.2. Compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high-risk behavior or that which is symptomatic of a personality disorder; E2.A4.1.2.3. Sexual behavior; E2.A4.1.2.4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.**
8. **E2.A4.1.3. Conditions that could mitigate security concerns include: E2.A4.1.3.1. The behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature;**
E2.A4.1.3.2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;
E2.A4.1.3.3. There is no other evidence of questionable judgment, irresponsibility, or emotional instability; E2.A4.1.3.4. The behavior no longer serves as a basis for coercion, exploitation, or duress.