

DATE: February 28, 2007

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-14527

## **DECISION OF ADMINISTRATIVE JUDGE**

**CHARLES D. ABLARD**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Nicole Noel, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant mitigated criminal conduct allegation of child neglect in 1974 because of the passage of time but failed to mitigate a 2006 conviction after a plea of nolo contendere for Indecency with a Child-Sexual Contact. He denies doing anything inappropriate but conviction followed his plea of nolo contendere. He also failed to mitigate personal conduct allegation for failure report the 2003 charge and arrest on his security clearance application (SF 86) at Question 23 concerning pending charges filed in 2004. At that time he had been in court at least once during the past eight months on the pending charge. Clearance is denied.

### **STATEMENT OF CASE**

On August 18, 2006, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On September 29, 2006, Applicant, in a sworn written statement, responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to me on November 1, 2006. A notice of hearing was issued on November 17, 2006. A hearing was held on December 8, 2006. The Government introduced four exhibits and asked that official notice be taken of three others which was granted. Applicant offered ten exhibits and seven were admitted into evidence and three were rejected. Applicant, his wife, and his adopted daughter testified. The transcript was received December 29, 2006.

### **PRELIMINARY MATTERS**

Before the hearing, the government filed a Motion in Limine seeking an order to preclude Applicant from re-litigating his 2006 conviction following a plea of nolo contendere based on collateral estoppel (ISCR Case No. 04-5712 Appeal Board October 31, 2006). This issue was the subject of a telephone conference with the government and Applicant on December 4, 2006, and at the hearing. In view of Applicant's stated intent not to formally challenge the conviction and his inability to do so since he did not have access to any of the witnesses that might establish the facts he would need to prove to prove that he was not guilty, no ruling was made on the motion.

Applicant was permitted to introduce into evidence all the materials he wished with the exception of a five year time line showing events relating to his various family members (Exh. F), written comments of an investigator hired by his counsel (Exh. G), documents relating to the well being of his adopted daughter, pictures of rooms in his home, and other investigative reports (Exhs. H and I). The government objected to those documents and the objection was sustained. One of the pictures offered by Applicant showing Applicant and his son with their two daughters was admitted over the government's objection (Exh. J). The first two excluded documents were preserved in the record. The others were returned to Applicant since most were originals.

### **FINDINGS OF FACT**

Applicant is a 54-year-old employee of a major defense contractor since 2004. His work is as a scientist managing a laboratory. Before his present employment he held a comparable position with a university laboratory. He holds both a bachelor's and a master's degree. The SOR alleged criminal conduct, sexual behavior, and personal conduct security concerns. After a complete review of the evidence in the record and upon due consideration of the record, the following findings of fact are made:

Applicant admitted some of facts alleged in the SOR with explanation and denied others. After a complete review of the allegations in the SOR, the documentary evidence, and testimony in the record, I make the following additional findings of fact:

Applicant was married in 1971 and divorced in 1991. They had two children, a daughter who is now 34 and a son who is now 33. Their son is divorced and has a daughter who is 10 years old. Applicant married his second wife in 1993 and they traveled to China and adopted a daughter in 1998 who is now 11 years old.

Over 32 years ago, in 1974, when Applicant was age 21 on active duty in the Army, he and his former wife who was then 19 were charged with child neglect for leaving their two children ages one and two at home alone for one hour while they went to buy carry-out food. When they returned home, the military police had taken the children into protective custody. As a result of this incident he was arrested and taken to the police station.

Applicant had no other criminal record until December 9, 2003 when he was arrested and charged with Indecency with a Child-Sexual Contact as a result of certain allegations regarding his granddaughter, the daughter of his son. The incident occurred in March 2003 and involved bathing the child who was then five years old. He spent one night in jail, and was released on \$40,000 bail.

Coincident with these charges, Applicant's daughter, with whom he was estranged, raised allegations concerning Applicant's behavior with her when she was between five and 18 years old. No evidence is in the record before me to establish the truth of her allegations. The case against Applicant continued for over two years during which time investigations were conducted both by the prosecutor and an investigator hired by Applicant's counsel.

On March 31, 2006, Applicant pled nolo contendere to the charge against him and was sentenced to ten years probation, fined \$500, required to pay court costs and a monthly probation fee, and perform 250 hours of community service. He was prohibited from having contact with his adult daughter, and register as a sex offender (Exhs. 2, 3, and 4). At the end of the ten year probation period the charges will be dismissed if all conditions are satisfactorily performed (Exh. E).

As a registered sex offender, Applicant is prohibited from having contact with the victim, his granddaughter, or any minor except under certain approved conditions. This prohibition extends to his adopted daughter so his wife must be present when he is with her. The usual restrictions on living a certain number of yards from a school were waived for him since he is categorized as a minimum risk offender. He is enrolled in a class for convicted sex offenders which he

attends once a month. He also attends class group activities weekly. He continues to deny the allegations to fellow members of the class and at the hearing in this matter. He regularly reports to a parole officer. He

attributes the charges against him to his former wife and the former wife of his son, the mother of the granddaughter. He also believes they caused his daughter to raise her allegations regarding his conduct with her in her youth. Those issues were never raised until the allegations arose concerning his conduct with his granddaughter.

Applicant filed his Security Clearance application (SF 86) on August 25, 2004, (Exh. 1) while the sexual contact matter was still pending in court. On that application he answered in the negative to Question 23 Police Record-Pending Charges. When the SF86 was filed he had been in court once or twice on the case. This was his first application for a security clearance since he held a top secret clearance while on active duty in the Army between 1971 and 1974.

Applicant is well regarded in his employment and has received numerous commendation and awards during his employment. He shows strengths in organization and ability to complete complex jobs ahead of schedule (Exhs. A-D). His fellow employees are unaware of his status, the reasons for this hearing, and his criminal record. He does not wish them to know about these matters. His annual salary is \$67,000. He owns his own home and is building a new one.

### POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, 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." *Id.* at 527.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information *See Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b).

### CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to all allegations set forth in the SOR:

Under Guideline J, Criminal Conduct, a security concern arises when there is a history of pattern of criminal activity that creates doubt about a person's judgment, reliability, and trustworthiness (E2.A10.1.1.). Conditions that could raise a security concern and may be disqualifying include allegations or admission of criminal conduct, regardless of whether the person was formally charged (E2.A10.1.2.1.), or a single serious offense (molesting a child) or multiple lesser offenses (E2.A10.1.2.2.).

The allegations could be mitigated if the criminal behavior was not recent (E2.A10.1.3.1), or there is clear evidence of successful rehabilitation (E2.A10.1.3.6.). Applicant is attending counseling for sexual behavior but will be on probation for ten years. He pled no contest to the allegation and was convicted. He will be on probation for an extended period. He continues to deny the allegation yet did not contest it when he had the opportunity to do so. Although he attempted to

contest his guilt in the hearing, he could not effectively do so since he had no access to either of the two critical witnesses, his granddaughter and his daughter, because of the court orders arising out of his conviction. No mitigating conditions are applicable. The 1974 incident concerning child neglect occurred over 30 years ago so mitigating conditions are applicable because of the passage of time.

Under Guideline E Personal Conduct, actions involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information (E2.A5.1.1.). The deliberate failure to give complete and accurate information on his SF 86 (E2.A5.1.2.2.) is sufficient to establish reasons to deny a security clearance based on personal conduct. At the time he completed his SF 86 he had been arrested, charged, and spent a night in jail only eight months before. He had appeared at least once in court by his own admission at the hearing. As the policy prescribes, the burden shifts to the Applicant to show that Mitigating Conditions (MC) are applicable to him. His explanation that the form was long and that he thought the question applied only to convictions (TR. 54-56) was not credible in light of the sequence of events and his ability to understand and comprehend complex matters. No mitigating conditions apply.

Under Guideline D of the Directive sexual behavior is a security concern if it involves a criminal offense, and may subject the individual to coercion, exploitation, or duress (E2.A4.1.1.). Conditions that could raise a security concern and may be disqualifying include engaging in sexual behavior of a criminal nature, whether or not the individual has been prosecuted (E2.A4.1.2.1). Based on the evidence of record, the Government established reasons to deny him a security clearance based on sexual behavior which he did not contest and was convicted. Having established such reasons, the Applicant has the burden to establish security suitability through evidence that refutes, mitigates, or extenuates the disqualifying conditions and demonstrates that it is clearly consistent with the national interest to grant a security clearance. ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

Mitigating conditions might include that the behavior was not recent and there is no evidence of subsequent conduct of a similar nature (E2.A4.1.3.2.), or the behavior no longer serves as a basis for coercion, exploitation, or duress. (E2.A4.1.3.4.) The earlier allegation of neglect was not recent and has been mitigated, but the 2006 conviction is recent and precludes the application of mitigating conditions. Since Applicant does not want others to know the circumstances and the conviction, it could serve as a basis for exploitation or coercion.

The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. The "whole person" concept recognizes that we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Applicant in his testimony appeared to be a person of stature who is well educated and has held responsible positions. He showed evidence of being a responsible husband and parent through the testimony of his wife and adopted daughter. Whether he is, in fact, guilty as the court concluded after he elected not to contest the charge, or is innocent, as he claims, is a question impossible to determine from the record. Because collateral estoppel precludes re-litigation of his conviction, the issue is not before me.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude that he is not eligible for access to classified information. Thus, I find against Applicant.

### **FORMAL FINDINGS**

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: Against Applicant

Paragraph 2. Guideline E AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Paragraph 3. Guideline D: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: For 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 renew a security clearance for Applicant. Clearance is denied.

Charles D. Ablard

Administrative Judge