

DATE: December 27, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-17084

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 41 years old and works for a federal contractor. In 1995, he was convicted of Aggravated Sexual Battery and subsequently incarcerated for more than four years. Recently, he paid in full a significant amount of money he owed for child support. He mitigated the security concerns raised by financial considerations, but did not mitigate those raised by his criminal conduct and sexual behavior. Based on his incarceration, he is disqualified from holding a security clearance under federal law. Clearance is denied.

STATEMENT OF THE CASE

On November 7, 2003, Applicant submitted a security clearance application (SCA). On April 21, 2006, the Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended. The SOR detailed reasons under Guidelines J (Criminal Conduct), D (Sexual Behavior), and F (Financial Considerations), why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to the Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On May 2, 2006, Applicant filed an Answer to the SOR and elected to have the case decided on the written record in lieu of a hearing. On August 10, 2006, Department Counsel prepared a File of Relevant Material (FORM), along with Items 1 through 9, and mailed Applicant a complete copy the following day. Applicant received the materials on August 14, 2006, and submitted additional information in refutation, extenuation, or mitigation. Department Counsel did not object to the documents that I subsequently marked Applicant Exhibits (AX) A and B. The case was assigned to me on November 7, 2006.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his Answer to the SOR, I make the following additional findings of fact:

Applicant is 41 years old. Since May 2003, he has been employed as an outside machinist for a federal contractor. He submitted a security clearance application (SCA) in November 2003. He served as a Petty Officer Second Class (E-5) in the U.S. Navy from September 1983 until July 1994, when he received a General Discharge. (Item 5)

Applicant admitted that he was arrested in October 1995 and charged with two counts of Aggravated Sexual Battery. In April 1996, he was found guilty on four counts of Aggravated Sexual Battery and sentenced to 20 years in the state penitentiary with all but five years suspended. He served four years and eight months. (Item 6) He registered as a sex offender in June 1996. (Item 8) According to his Answer, there was no evidence in the case and he was convicted because she was a minor. (Item 4) He was age 30 at the time of the arrest.

Applicant also admitted that in May 2000, a civil judgment was issued against him in favor of the Division of Child Support Enforcement in the amount of \$32, 881 for child support owed since 1988. He paid that debt in full by refinancing his house in January 2006. (AX B) He asserted he paid a \$100 medical bill delinquent since January 2005. (Item 9) However, he did not submit any documentation to confirm the payment.

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth the criteria that must be evaluated when determining security clearance eligibility. Within those guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence to reach a fair, impartial and common sense decision.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. The essence of scrutinizing all appropriate variables in a case as the "whole person concept." Directive ¶ E.2.2. In addition to evaluating the disqualifying and mitigating conduct of the applicant, an administrative judge should consider: (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.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. *See* Directive ¶ E2.2.2. The decision to deny an individual a security clearance is not necessarily a judgment of the applicant's loyalty. *See* Executive Order 10865, § 7. Instead, it is a determination that the applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Directive presumes a rational connection between past proven conduct under any disqualifying condition and an applicant's present security suitability. *See* ISCR Case No. 95-0611 at 3 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the position of the government. *See* ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *See* 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 clearance." *Id.*

Based upon a consideration of the evidence, the following adjudicative guidelines are pertinent to an evaluation of this case:

Guideline J - Criminal Conduct: A security concern may arise when an individual's history or pattern of criminal activity creates doubt about his judgment, reliability and trustworthiness

Guideline F - Financial Considerations: A security concern may exist when an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

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.

CONCLUSIONS

I considered all facts in evidence and the application of the appropriate legal standards, including the "whole person" concept, and concluded the following with respect to the allegations set forth in the SOR:

Guideline J - Criminal Conduct

Based on the evidence, the Government established a potential disqualification under Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admission 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*). Applicant admitted he was convicted of the criminal conduct alleged in the SOR, consisting of four counts of Aggravated Sexual Battery with a minor, a serious felony.

The Government having established its case, the burden shifted to Applicant to mitigate or rebut the allegations. I reviewed all mitigating conditions under this guideline, in particular, three of them: (1) Applicant was convicted in 1996, ten years ago, which provides some mitigation under Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1 (*The criminal behavior was not recent*); (2) It is the only crime alleged in the SOR, such that CC MC E2.A10.1.3.2 (*The crime was an isolated incident*) applies; and (3) Because those two conditions are insufficient to mitigate the serious nature of the offense and lengthy sentence and period of incarceration, I reviewed the record for substantive evidence of rehabilitation. Other than documenting payment of delinquent child support, he did not provide any other meaningful evidence of rehabilitation that would trigger the application of CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*).

In addition, under 10 U.S.C. § 986 (c)(1) any person who has been convicted of a crime, sentenced to imprisonment for a term exceeding one year, and incarcerated as a result for not less than one year, may not be granted access to classified information, unless he receives a waiver from the Secretary of Defense or his designee. In this instance, Applicant was sentenced to 20 years and served four years and eight months in a state penal institution, which constitutes a disqualification pursuant to the federal statute.

Guideline F: Financial Considerations

The Government established a potential disqualification under Financial Considerations Disqualifying Condition (FC DC) E2.A6.1.2.1 (*A history of not meeting financial obligations*), and FC DC E2.A6.1.2.3 (*Inability or unwillingness to satisfy debts*). Applicant admitted that he owed the two debts listed in the SOR, which included a delinquent child support obligation dating back to 1988.

I reviewed all of the mitigating conditions, in particular, Financial Considerations Mitigating Condition (FC MC) E2.A6.1.3.6 (*The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*), and conclude it was established. In January 2006, Applicant refinanced his house in order to pay his outstanding child

support in full, which resolved the bulk of the debt alleged in the SOR. Although he did not submit proof to confirm payment of the delinquent \$100 medical bill, he is not required to be debt free under the Directive. *See* ISCR Case No. 04-10671 at 3 (App. Bd. May 1, 2006). He initiated a good-faith effort to manage his debts.

Guideline D: Sexual Behavior

Based on Applicant's convictions for aggravated sexual battery, the Government established a potential disqualification under Sexual Behavior Disqualifying Condition (SB DC) E.2.A4.1.2.1 (*Sexual behavior of a criminal nature, whether or not the individual has been prosecuted*). The nature of the criminal conduct makes it an offense that could subject one to exploitation or duress, and also established a potential disqualification under SB DC E.2.A4.1.2.3 (*Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*).

After reviewing the Sexual Behavior Mitigating Conditions (SB MC), I conclude SB MC E2.A4.1.3.2 (*The behavior was not recent and there is no evidence of subsequent conduct of a similar nature*) offers some mitigation. As stated above, the conviction was entered in 1996 and there is no evidence that Applicant was involved in any subsequent sexual misconduct. Because the record does not contain evidence addressing the steps he has taken to eliminate potential exploitation or pressure from others arising from the conviction, SB MC E2.A4.1.3.4 (*The behavior no longer serves as a basis for coercion, exploitation, or duress*) cannot apply. Nor does SB MC E2.A4.1.3.3 (*There is no other evidence of questionable judgment, irresponsibility, or emotional instability*) apply.

The Whole Person Analysis

In addition to evaluating the disqualifying and mitigating conditions under each guideline, I considered the totality of the evidence in view of the "whole person" concept, including Applicant's age (30) at the time of the offense, years of military service, and his current position for the last three years. I paid particular attention to the fact that he is now 41 years old, and continues to deny responsibility for his previous conduct. While he may not be legally obligated to make an admission of wrongdoing, his failure to demonstrate any insight regarding his past behavior, to exhibit some remorse for the very serious incident and victim, or to provide any evidence of treatment or counseling, indicates a lack of overall rehabilitation. *See* ISCR Case No. 96-0360 (App. Bd. Sep. 25, 1997) Accordingly, Applicant mitigated the security concerns raised by his financial problems, but did not mitigate those raised by his criminal conduct and sexual behavior. Guideline F is found in his favor and Guidelines D and J are found against him.

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 as follows:

Paragraph 1: Guideline J (Criminal Conduct) AGAINST APPLICANT

Subparagraphs 1.a through 1.c: Against Applicant

Paragraph 2: Guideline H (Sexual Behavior) AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Paragraph 3: Guideline F (Financial Considerations) FOR APPLICANT

Subparagraphs 3.a. through 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 continue a security clearance for Applicant. Clearance is denied.

Shari Dam

Administrative Judge