

DATE: October 31, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 06-05328

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Lee Deschamps, Esq.

SYNOPSIS

On three occasions between 1996 and 1998, the then 55-year-old Applicant fondled the breast of his 11-13-year-old stepdaughter. Applicant failed to mitigate criminal conduct and sexual behavior security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. In accordance with Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan 2, 1992), as amended (Directive), DOHA issued a Statement of Reasons (SOR) on 8 June 2006 detailing the basis for its decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline D (Sexual Behavior) of the Directive. Applicant answered the SOR in writing on 1 August 2006 and elected to have a hearing before an administrative judge. The case was assigned to me on 11 August 2006. On 15 September 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 21 September 2006.

FINDINGS OF FACT

Applicant is a 64-year-old electro-optical field engineer for a defense contractor. He has held a Secret security clearance since January 1984. He intends to retire as soon as he is eligible, in October 2007.

In 2001, Applicant's stepdaughter was referred to counseling. She had attempted suicide by slashing her wrists, was involved in drug abuse, and had become a disciplinary problem at school. During her counseling sessions, she accused Applicant of inappropriately fondling her breast on three occasions between 1996 and 1998, when she was between 11 and 13 years old. It appears Applicant's wife, the stepdaughter's mother, may have known of the sexual contact before the arrest, but never reported it. Tr. 23.

In July 2001, Applicant was arrested and charged with criminal sexual contact of a minor, a felony. When he was

interviewed by police, Applicant admitted the allegations. He told police that somehow his hand had found its way to her breast area. The charge was dismissed because his step-daughter refused to testify. Applicant insists there have been no other incidents of this nature.

Applicant completed a security clearance application (SCA) in January 2005. Question 21 of the (SCA) asked if Applicant had ever been charged with or convicted of any felony offense. Applicant answered "yes," and listed a 2001 offense of sexual contact with a minor that was dismissed.

Applicant was interviewed by a security investigator about his clearance and the allegations of sexually abusing his stepdaughter. Applicant claimed she came into the bedroom and climbed up on the bed while he was lying there, and snuggled up to him. He thought she wanted to learn about sex, although she had never so indicated. He enjoyed the sexual closeness he had with her. He was approximately 56-58 years old at the time of the offenses.

Applicant insists that, long before the police arrived to arrest him, he had cured his problem. He realized what he was doing was wrong, and stopped. He believes there is no likelihood that his misconduct will recur. Applicant has never sought treatment or counseling because of the incidents with his stepdaughter. In preparation for the hearing, Applicant's attorney referred him for a psychological examination. The psychological exam was not completed in time for the hearing. Applicant testified he is willing to take whatever actions the psychologist recommends.

Applicant currently lives with his wife, the 21-year-old victim and her 3-year-old daughter, and another step-daughter who is 25 years old. Tr. 13.

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. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Guideline J--Criminal Conduct

In the SOR, DOHA alleged Applicant was arrested and charged with criminal sexual contact of a minor (felony). SOR ¶ 1.a. In his Answer, Applicant admitted the allegation.

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. It is potentially disqualifying for an applicant to admit criminal conduct (DC E2.A10.1.2.1), especially a serious offense (DC E2.A10.1.2.2). Applicant admitted inappropriately fondling his stepdaughter's breast on three occasions. This is a serious criminal offense. The Government established both potentially disqualifying conditions.

An applicant may mitigate criminal conduct security concerns by establishing that the criminal behavior was not recent

(MC E2.A10.1.3.1); the crime was an isolated incident (MC E2.A10.1.3.2); he was pressured into committing the act and those pressures are no longer present in his life (MC E2.A10.1.3.3); he did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur (MC E2.A10.1.3.4); he was acquitted (MC E2.A10.1.3.5); or there is clear evidence of successful rehabilitation (MC E2.A10.1.3.6).

Applicant established that the criminal behavior was not recent. None of the other mitigating conditions apply. The crime was not isolated-he committed the offense on three separate occasions. There is no evidence he was pressured into committing the offenses. Neither did he establish what factors led him to commit the offenses. He was not convicted, but neither was he acquitted. In fact, he admitted the offenses. Although there is no evidence that he has committed any further offenses, there is no evidence, other than the passage of time, that he is rehabilitated.

Guideline D--Sexual Behavior

In the SOR, DOHA alleged Applicant fondled his stepdaughter's breasts on three occasions when she was between 11 and 13 years old. SOR ¶ 2.a. In his Answer, Applicant admitted the allegation.

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. DC E2.A4.1.1. It is potentially disqualifying to engage in sexual behavior of a criminal nature, whether or not it has been prosecuted. (DC E2.A4.1.2.1) or sexual conduct that causes an individual to be vulnerable to coercion, exploitation, or duress (DC E2.A4.1.2.3). Applicant's conduct raises these disqualifying conditions. Applicant's conduct was criminal and could have subjected him to exploitation.

An applicant can mitigate sexual behavior security concerns by establishing the behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature (MC E2.A4.1.3.1), the behavior was not recent and there is no evidence of subsequent conduct of a similar nature (MC E2.A4.1.3.2), and there is no other evidence of questionable judgment, irresponsibility, or emotional instability (MC E2.A4.1.3). The first mitigating condition does not apply. Applicant was 55 years old at the time of his transgression. Applicant established the second and third mitigating conditions.

Whole Person Analysis

"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. . . . The adjudicative process is the careful weighing of a number of variables known as the whole person concept," including (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. Directive ¶ E2.2.1.

Applicant failed to establish it is in the national interest to grant him a security clearance. Applicant was approximately 55 years old at the time he molested his 11-13-year-old stepdaughter on three separate occasions. It wasn't Applicant's remorse that led to the victim receiving the help she needed in coping with these events. It was only after his stepdaughter acted out at school, started using drugs, attempted suicide by slashing her wrists, and was referred to counseling that the abuse came to light. There is no evidence Applicant molested any children other than his own stepdaughter on the three occasions alleged. Nevertheless, there is also no evidence Applicant ever received an extensive evaluation or treatment for this problem. He received his SOR in June, yet failed to complete a psychological evaluation in time for the September hearing. Under all the facts and circumstances, I find against Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Paragraph 2. Guideline D: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge