

DATE: March 30, 2007

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 06-15228

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Gregory W. Klein, Esq.

SYNOPSIS

Applicant is a 25-year-old machinist for a federal contractor. While in the U.S. Navy in 2001, he engaged in sexual relations with two underage girls. He was given a non-judicial punishment after the first offense and convicted of the second offense at court-martial. He received a bad conduct discharge from the Navy in June 2003. He did not mitigate the security concerns raised by sexual behavior and criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On April 4, 2004, Applicant submitted a security clearance application (SCA). The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on October 31, 2006, detailing the basis for its decision-security concerns raised under Guidelines D (Sexual Behavior) and J (Criminal Conduct) of the Adjudicative Guidelines issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR in writing on November 20, 2006, and elected to waive his right to a hearing before an administrative judge. Subsequently, he requested a hearing. The case was initially assigned to another administrative judge and reassigned to me on January 3, 2007. DOHA issued a Notice of Hearing on January 11, 2007, setting the case for January 31, 2007. The case was continued pursuant to Applicant's Motion for a Continuance. On February 8, 2007, another Notice of Hearing was issued, setting the matter for March 1, 2007.

At the hearing, Department Counsel introduced Government Exhibits (GX) 1-3 into evidence without objections. Applicant testified and called three witnesses. He introduced Applicant Exhibit (AX) A into evidence without an objection. DOHA received the hearing transcript (Tr.) on March 12, 2007.

FINDINGS OF FACT

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

Applicant is 25-years-old. He began his position as a machinist for a federal contractor in September 2004 (GX 1 at 2). Sometime that year, he changed his last name to his biological father's name, after carrying his stepfather's surname since he was 10 years old. He decided he no longer wanted his stepfather's name because his mother had gotten a divorce from him (Tr. 26).

Applicant joined the U.S. Navy in July 2000 when he was 18 years old. In September 2001, he engaged in sexual intercourse with a 14-year-old girl whom he met over the internet. In October, he received non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) for Carnal Knowledge. He was restricted to his ship for 60 days. Approximately three months later, in January and February 2002, he engaged in sexual intercourse with a 15-year-old girl whom he met over the internet. He was tried before a Special Court Martial for Carnal Knowledge under the UCMJ, convicted, sentenced to a reduction in rank from E-3 to E-1, and confined for 150 days. He was fined one-half months' pay and received a Bad Conduct Discharge that was executed in June 2003. (Answer, dated November 20, 2006) He knew both girls were underage (Tr. 22).

As a result of the conviction, Applicant registered with the state's sex offender registry in 2004 as required by state law. He must remain in the registry for a total of ten years (Tr. 31).

Applicant has been married since October 2005. He met his wife sometime in May 2002, while still in the U.S. Navy (Tr. 40). Prior to dating, he told her about the criminal charges (Tr. 38). She is employed as a paralegal for a local law firm and is working on her master's degree online. She uses the internet, but her husband does not (Tr. 40).

Applicant's father-in-law testified. He was in the U.S. Navy for 20 years and retired as a chief petty officer (E-7). He currently works for a federal contractor and has held a security clearance for 35 years (Tr. 42). Although he initially had reservations about his son-in-law after learning of Applicant's criminal problems, he believes Applicant has matured over the years and is trustworthy (Tr. 43-44). Applicant makes better decisions now and readily asks for help when needed (Tr. 49) Applicant personally told his father-in-law about the two offenses (Tr. 50).

Applicant also believes he has matured in the last couple years. He has gotten married, owns a house, and hopes to start a family. His family and employers know about the misconduct (Tr. 30; 37). He acknowledges that his behavior was "extremely stupid and immature" (Tr. 28). He admitted he did not learn a lesson after the first incident (*Id.*). He has not participated in counseling after the incidents because he does not believe it is necessary to help him understand his behavior (Tr. 24, 29). He no longer uses the internet (Tr. 24).

A former employer of Applicant testified. He employed him for two years and believes he is very honest and trustworthy (Tr. 35). Applicant's current supervisor finds him reliable and capable (AX A).

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 . . . 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). Each security clearance decision "must be a fair and impartial common sense determination based upon consideration of all relevant and material information and the pertinent criteria and adjudication policy." Directive ¶ 6.3. 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).

The revised Adjudicative Guidelines (AG) set forth potentially 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

Upon consideration of all facts in evidence and application of the appropriate adjudicative factors and pertinent legal standards, I conclude the following with respect to the allegations set forth in the SOR:

Guideline D: Sexual Behavior

The Concern: Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. (AG ¶ 12)

Based on Applicant's admissions to the allegations contained in the SOR and lack of good judgment, the Government established a disqualification under Sexual Behavior Disqualifying Condition (SB DC) 13(a) *sexual behavior of a criminal nature, whether or not the individual has been prosecuted*, and 13(d) *sexual behavior . . . that reflects lack of discretion or judgment*. Because the behavior involved underage girls, it is the type of conduct that also falls under SB DC 13(c) *sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*.

After the Government raised a security concern, the burden shifted to Applicant to mitigate or rebut the allegations. Based on the testimony from his family, past employer, and himself that he disclosed his misconduct to these people, he provided some evidence of mitigation under Sexual Behavior Mitigating Condition (SB MC) 14 (c) *the behavior no longer serves as a basis for coercion, exploitation, or duress*.

Guideline J: Criminal Conduct

The Concern: Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations. (AG ¶ 30)

The Government's evidence and Applicant's admissions established a disqualification under Criminal Conduct Disqualifying Condition (CC DC), AG ¶ 31(a) *a single serious crime or multiple lesser offenses*, and CC DC, AG ¶ 31(c) *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted* of this guideline. Applicant admitted he was charged with criminal conduct on two separate occasions, one of which resulted in five months of incarceration and a bad conduct discharge. As a result, he is mandated to register with his state's sex offender's registry. Hence, he was convicted of a serious crime and disciplined for a lesser offense.

Applicant has not been involved in any form of criminal conduct for five years. He acknowledged his mistakes and appears to be embarrassed by them. He disclosed his criminal charges to his wife before dating her and subsequently to his father-in-law. His former employer knows of the problems and so does his current employer. Both consider him a capable and trustworthy employee. Over the past five years, Applicant's father-in-law has observed Applicant mature and make better decisions. Thus, Applicant provided some evidence of mitigation under Criminal Conduct Mitigating Condition (CC MC), AG ¶ 32(d), *(there is clear evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement)*.

Whole Person Analysis

In addition to evaluating the disqualifying and mitigating conditions under each guideline, 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 is referred to as the "whole person" analysis. Directive ¶ E2.2. In evaluating the 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.

I considered the totality of the evidence in view of the "whole person" concept, including Applicant's age at the time of the very serious incidents, his honest demeanor while testifying, and the changes in Applicant observed by his father-in-law. I took into account the fact that he has been married for a year and a half to a very supportive wife and recently purchased a house. I also carefully considered his bad conduct discharge⁽¹⁾ and the law that requires him to register with the state as a sex offender for another eight years. In weighing those facts, along with his statement that he did not seek psychological counseling after the incidents because he does not need it, I am concerned that he cannot provide any insight into his impulsive behavior other than it being "immature" and failing to learn from his first Article 15 punishment. While I believe he appreciates the gravity of the misconduct and the effect similar incidents would have on his job, I am not convinced that five years of staying out of trouble and a decision to avoid the internet are sufficient to assure the Government that he will not exercise poor judgment in the future. Thus, Applicant failed to establish sufficient evidence to mitigate the security concerns raised by his sexual behavior and criminal conduct at this time. Accordingly, Guideline D and Guideline J are concluded 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 D (Sexual Behavior) AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Paragraph 2: Guideline J (Criminal Conduct) AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

DECISION

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

Shari Dam

Administrative Judge

1. Under 10 U.S. Code §986(c)(4), a person is disqualified from holding a security clearance if he has been "discharged or dismissed from the Armed Forces under dishonorable conditions. In this case, Applicant received a bad conduct discharge which is a punitive discharge and one step removed from a dishonorable discharge.