

Date: April 23, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR OSD Case No. 96-0718

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR THE GOVERNMENT

Earl C. Hill, Jr., Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

On October 22, 1996, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In a sworn written statement, dated November 17, 1996, the Applicant responded to the allegations set forth in the SOR and requested a hearing. A copy of the SOR is attached to this Decision and incorporated herein by reference.

The case was assigned on December 10, 1996, to Administrative Judge Erck and reassigned on January 28, 1997, for reasons of geographic reallocation to the undersigned Administrative Judge. The undersigned held a hearing on February 20, 1997. The Department Counsel presented seven exhibits ("Exhs") and the testimony of no witnesses. The Applicant's case consisted of the presentation of three exhibits and the testimony of no witnesses besides his own. The undersigned Administrative Judge received the transcript ("Tr") of the hearing on March 4, 1997.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following two criteria: paragraph 1, Criterion J (criminal conduct); and paragraph 2, Criterion D (sexual behavior). The Applicant has admitted the factual allegations contained in each of the subparagraphs of the SOR. Except as noted herein, the Applicant's admissions are hereby incorporated as findings of fact.

The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following additional Findings of Fact:

The Applicant is a 54-year-old ----- employed by a U.S. Government contractor. The Applicant seeks to retain a Secret personnel security clearance.

The Applicant married his wife in 1971. They have four children, the second eldest of which is a daughter, born November 27, 1976, with cerebral palsy due to premature birth. She is a spastic quadriplegic mute and communicates with the assistance of an electronic device. The Applicant had major problems with his wife, born in 1946, because she failed to clean their house and had gained weight. They had little sex life together. In January 1993 he began to fondle his daughter's breasts and vagina while he was bathing and changing her diapers. This activity progressed to the point where he rubbed his penis against her vagina about once a month, commencing in January 1994 when his daughter was seventeen years of age. On at least two occasions he inserted his penis into her vagina with the aid of K-Y jelly. Tr page 56. On the morning of July 17, 1994, the Applicant's wife discovered the Applicant, penis exposed, kneeling between the legs of their nude daughter. His wife called the local police and state investigating officials the next day. Tr pages 57-58. The latter were told that no penetration had occurred. On July 18, 1994, the Applicant moved out of the home at the insistence of the state investigating officials.

In October 1994 the Applicant began seeing a psychologist specializing in family therapy and also a psychiatrist, who treated the Applicant's depression with drug therapy for about the next six months. The Applicant was arrested on July 28, 1995, for attempted sexual battery of a person 12 years of age or older who is known to be mentally defective, which is a felony under state law. On November 3, 1995, the Applicant was tested and evaluated by another psychologist at the request of the Applicant's attorney. The Applicant admitted to the psychologist some molestation and inappropriate touching of his daughter, but only since early 1994, and denied any penetration. ⁽¹⁾ The psychologist concluded that the Applicant was not pedophilic, did not suffer from sexual perversions, and did not present a generalized threat to the community as a whole, but did "fit into the category of adult, regressed sexual abuser." Exhibit 3. The licensed psychologist diagnosed the Applicant at that time with adjustment disorder with disturbance of emotions and conduct (DSM-IV 309.40), reflecting "the current level of mental anxiety and depression, along with his severe degree of mistrust and social alienation from others."

On January 2, 1996, pleaded *nolo contendere* to the felony charge for which he had been arrested on July 28, 1995. Although adjudication of guilt was withheld by the court, the Applicant was ordered to serve one day in jail (with credit for one day's time served), was required to serve 100 hours of community service and pay \$255 in fines and costs, and was placed on supervised probation for ten years. Special conditions of probation included the continuation of current counseling, semiannual psychological evaluations, and medical insurance coverage for his daughter; probation and parole officials were ordered not to contact the Applicant's employer but simply verify employment through paycheck stubs.

In February 1996 the Applicant completed 100 hours of alternative community service. He has paid \$25 monthly to defray the costs of probation supervision and has reported monthly to his probation officer. He has regularly attended and actively participated in weekly group sessions of a sex offender outpatient treatment counseling program at a cost of \$20 a month. The Applicant received a good performance rating at his place of employment. He attends church regularly (sometimes even joined by his wife) and serves on the board of elders of the church at the request of his pastor. By reasonable inference from the evidence in the record, this Administrative Judge finds that the Applicant has not, however, disclosed his felony arrest to the pastor. Tr pages 81-84, 92-93, 121, 132-133. Nor has the Applicant ever told his wife that he had penetrated their daughter or told his probation officer. Tr pages 61-64, 92-97. He currently lives by himself in a trailer. Although not as comfortable as his former home and although he misses his children, on balance he likes living alone better because he does not have "the stresses or unhappiness" he had when he was living at home. Tr pages 74-75, 84-90.

POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluation of an individual's security eligibility. The guidelines are divided into those that may be

considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The criteria, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

CRITERION J - CRIMINAL CONDUCT

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- (1) any criminal conduct, regardless of whether the person was formally charged;
- (2) a single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

None applicable.

CRITERION D - SEXUAL BEHAVIOR

Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, subjects the individual to undue influence or coercion, or reflects lack of judgment or discretion. The adjudicator should also consider guidelines pertaining to criminal conduct (criterion J); or emotional, mental, and personality disorders (criterion I), in determining how to resolve the security concerns raised by sexual behavior. (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)

Conditions that could raise a security concern and may be disqualifying include:

- (1) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (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;
- (3) sexual behavior that causes an individual to be vulnerable to undue influence or coercion;

Conditions that could mitigate security concerns include:

None applicable.

CRITERION I - EMOTIONAL, MENTAL, AND PERSONALITY DISORDERS

Emotional, mental, and personality disorders can cause a significant deficit in an individual's psychological, social and occupational functioning. These disorders are of security concern because they may indicate a defect in judgment, reliability or stability.

When appropriate, a credentialed mental health professional (credentialed mental health professional: licensed clinical psychologist, licensed social worker, or board certified psychiatrist), acceptable to or approved by the government, should be consulted so that potentially disqualifying and mitigating information may be fully and properly evaluated.

Conditions that could raise a security concern and may be disqualifying include:

(1) a diagnosis by a credentialed mental health professional (credentialed mental health professional: licensed clinical psychologist, licensed social worker, or board certified psychiatrist) that the individual has a disorder that could result in a defect in psychological, social, or occupational functioning;

Conditions that could mitigate security concerns include:

None applicable.

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section F.3:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledgeable participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

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 upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge may only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations.

Dept. of the Navy v. Egan, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum *quantum* of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence -- rather than as an indication of the Court's tolerance for error below. [\(2\)](#)

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he is nonetheless eligible to hold a security clearance. [\(3\)](#)

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of the witness who testified, the under-signed concludes that the Government established its case with regard to Criteria J and D.

The record is clear that the Applicant committed a felony more serious than that for which he was arrested within the scope of DC #1 and DC #2, identified on page 4 *supra*. This criminal activity extended over a period of more than a year until as recently as 3½ years ago. By taking advantage of his helpless victim, he violated not only his daughter but his familial obligations of trust and honesty, matters of peculiar and patent relevance to security clearance adjudications. He remains under court-ordered therapy and will be on supervised probation until January 2006. He continues to live with a huge secret buried in his past and exposed to few, both fearful and ashamed of revelation. *See* footnote 1 on page 3 *supra*. He trusts in the protections of the Privacy Act of 1974 (and the discretion of those few who are privy to this "indigestible lump burning in the pit of his stomach") to avoid blackmail and coercion. He is unwilling to come clean even with his wife of 25+ years, who herself shows some signs of reconciliation, if not forgiveness.

There is no direct evidence of "compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high-risk behavior," in the words of DC #2 under Criterion D, identified on page 5 *supra*, but there is some evidence of "sexual behavior . . . which is symptomatic of a personality disorder." An adjudication of allegations under Criterion D should consider the guidelines pertaining to Criterion I in determining how to resolve the security concerns raised by sexual behavior. In this case there is a diagnosis documented by a credential mental health professional that the Applicant had in November 1995 a condition described as adjustment disorder with disturbance of emotions and conduct (DSM-IV 309.40), that reflected "the current level of [the Applicant's] mental anxiety and depression, along with his severe degree of mistrust and social alienation from others." The Applicant has long isolated himself socially from some to whom he would normally be closest. That fits within the scope of DC #1 under Criterion I, identified on pages 5-6 *supra*. There is no prognosis by a credentialed mental health professional that the personality disorder has been "cured" or is in "remission."

The Directive requires that the factors listed in Section F.3 and enclosure 2 to the Directive, identified on page 6 *supra*, be considered, as appropriate, in making this decision. The nature, seriousness, and recency of the conduct all militate against the Applicant as does his age, experience, and education. In absence of evidence of rehabilitation, this Administrative Judge is most hesitant to accept the Applicant's argument that, because he may not make a mistake again, he probably will not. [\(4\)](#)

FORMAL FINDINGS

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Criterion J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Criterion D: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is the determination of the undersigned that it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Jerome H. Silber

Administrative Judge

1. The psychologist stated in his report of the evaluation: "[The Applicant] said he told the truth about what had happened between him and [his daughter] to his wife and to the detectives. He said he had never sexually molested or abused anyone before, nor had he ever thought of doing so." Exh. 3. In fact, he lied to the psychologist because he never told either his wife or the detectives that he had penetrated his daughter. Tr pages 64-68.

2. The rule has been restated as requiring "that security clearances should be revoked [*sic*] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DISCR Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DISCR] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).

3. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).

4. The Applicant testified: "I can tell you that I'm well aware that I don't really have any latitude for any more mistakes. Basically, I guess, that's what they call the bottom line. I just plain and simple cannot afford to mess up again in any way." Tr page 103.