

Date: April 30, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR OSD Case No. 96-0758

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR THE GOVERNMENT

Carla Conover, Esq.

Attorney-Advisor

FOR THE APPLICANT

James Waylon Counts, Esq.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on December 3, 1996. (Copy attached.) The SOR detailed reasons why the Government 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. [\(U\)](#) The SOR consists of allegations based on Criterion D (sexual behavior) in paragraph 1 and Criterion J (pattern of criminal activity) in paragraph 2. Applicant through counsel responded to the allegations set forth in the SOR in a written Answer dated December 20, 1996, and chose to have a hearing.

This matter was originally assigned to another administrative judge on January 16, 1997, but re-assigned to me on January 23, 1997, for workload considerations. On that date we set this case for hearing on February 19, 1997, the date the hearing was held. At this hearing the Government called no witnesses but introduced five government exhibits (GE) which were admitted into evidence. Applicant's counsel called the Applicant and three other individuals as witnesses and introduced three documents which were admitted into evidence as Applicant's exhibits (AE). The transcript (TR) was received on arch 5, 1997.

It is my role as administrative judge to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

PROCEDURAL RULING

At the hearing Department Counsel presented a motion to amend the SOR allegation subparagraph 1.a. to conform to Applicant's Answer: to strike the language "sentenced to six years in prison, suspended" and to substitute "sentencing as

to prison was deferred." The Applicant's counsel after pointing out that Applicant was neither fined nor incarcerated, suggested saying instead: "sentencing was deferred." Department Counsel did not object, so this amendment to 1.a. was granted. TR 8-10.

FINDINGS OF FACT

Applicant admitted in his Answer paragraph 1, subparagraph 1.c, 1.d, and paragraph 2, but denied subparagraphs 1.a., 1.b., and 2.a. of the factual allegations contained in the SOR. The admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following additional Findings of Fact:

Applicant is a 30-year old employee of a defense contractor, who had received a secret security clearance on March 7, 1989. AE A & B.

On October 16, 1995, Applicant timely reported to his supervisor that he had been arrested and charged on October 11, 1995, and later informed them that he was seeing a counselor as that is a requirement of his security clearance. TR 86-87. He did not give the name of the charge(s). The company in turn sent an Adverse Information Report to DISCO on October 30, 1995. AE A. On March 5, 1996, they sent another Adverse Information Report that Applicant was undergoing psychological counseling which had been reported by Applicant on February 20, 1996, along with the name of his counselor. AE B.

After Applicant's stepdaughter, who was then eight year old (DOB: December 23, 1986), confided in her mother that she had felt Applicant touching her inappropriately, his wife confronted him, took this daughter to her parents' house, and told their pastor and family about his sexual behavior. GE 1, TR 97-98. Seven weeks later Applicant's wife's sister contacted the police. Subsequently, Applicant was interviewed and arrested for Criminal Sexual Contact of a Minor, two counts, a third degree felony. GE 1, 3; TR 98.

Later Applicant was interviewed by a DIS Special Agent on July 11, 1996. In addressing this arrest, Applicant provided the following details in a Statement:

Beginning in approximately Sep 94, I began walking into my stepdaughter's room (she was seven years old at the time), when I woke up in the morning, about 0300 or 0400. I masturbated while I watched her sleep. *** When I started to do this, it was about once a month and gradually increased to twice a week. In Aug 95, on two occasions, I pulled down my step daughter's underwear and rubbed her buttocks while she was sleeping and masturbated while rubbing her. I did not touch her in any other way; to include any type of penetration. *** I have never molested a child before this, and have no future intentions to do this to another child or to my stepchild. I had no intention of hurting my stepchild in any way. I have learned through my counseling that I have a sexual addiction.

GE 1 at 1-2, TR 80-81. When Applicant was interviewed by the police, he admitted that he had entered his stepdaughter's room on approximately fifty occasions to look at her and to masturbate while she was asleep (when she was seven to eight years old) and also that subsequently he had pulled down her panties and rubbed her bottom while he masturbated until he ejaculated into his hand on at least three occasions (when she was eight years old). Answer, GE 2 at 5-6, GE 4. The October 11, 1995, Statement of Probable Cause and Criminal Complaint cites an incident in the middle part of August 1995 to which the Applicant confessed. The Criminal Summons issued on November 21, 1995, is for two counts.

Prior to appearing in court, he sought counseling. On March 29, 1996, his counselor, a licensed clinical social worker (LSW) reported to the district judge that she had completed his assessment sessions and found Applicant appropriate for outpatient sexual offender treatment which would need to last not less than three years, to as much as five years. She found that he met her six criteria for entering this outpatient program. His level of minimization and denial was decreasing while his level of commitment to the program and to personal change was increasing. He had not used physical force in his offense pattern. There were no ritualistic or bizarre behaviors and no evidence of preceding anti-social behaviors. Neither did he have any serious underlying psychological problems, and finally, there was an informal monitor for his behavior. Consequently, she did not think incarcerating Applicant would serve the best interests of his family or the community. GE 5.

On April 8, 1996, Applicant entered a plea of no contest to Counts I and II, Criminal Sexual Contact with a Minor.⁽²⁾ GE 3 at 16. On June 10, 1996, when he appeared in court, the court found him guilty of two counts of Criminal Sexual Contact of a Minor, third degree felonies. Applicant's sentence was deferred: he was placed on five years supervised probation and ordered to complete counseling in a sex-offenders program, not have any unsupervised contact with children, attend Alcoholics Anonymous (AA) meetings at least twice a month, and pay for his victim's counseling; probation costs were waived as long as he and the victim were in counseling. GE 1 at 2, GE 2, GE 3 at 23-24.

Applicant's psychotherapist, a licensed independent social worker, is a graduate of one of the top ten schools of clinical social work, is Board certified and academy certified. She has ten years of experience in working with sex offenders and now runs a sex offender out-patient treatment program in which Applicant is enrolled. She pre-screens and does not accept anyone with a serious underlying psychopathology or a long history of anti-social behavior. TR 44-46, 51-52. Applicant came to her before he was court-ordered to do so which shows a higher level of commitment. TR 55. The judge with jurisdiction over Applicant's criminal matter knows this LSW and approves of her program. TR 46.

Applicant, who has been in the psychotherapist's sex offender program for fourteen months, will continue in her program for a minimum of three years and a maximum of five. TR 47, 89-90. The only force Applicant used with his stepdaughter was the force of position as he was her stepfather. TR 47-48. Applicant is progressing in his treatment, is working, and is committed to change. TR 49-50. She works closely with the probation and parole department who also are monitoring Applicant. He has not violated any of the terms of the program. TR 51-51. He only had one mistake on Thanksgiving 1995 where, without his therapist's permission, he went for a short visit with his wife and stepdaughter, TR 74-76, 83-84, 100-101. If Applicant were to re-offend while he was in treatment with the LSW, he would go to prison; or if he were to stop treatment, he would also be sent to prison as his deferred sentence is contingent upon his successfully completing this sex offender program. TR 65-66.

His therapist makes regular reports to the department of probation and parole every six weeks. She has reported that the Applicant is "working consistently with the program, that he is doing all assignments given to him. . ." He also does assignments at home, and he has completed all assignments in a timely and appropriate manner. TR 73. Applicant meets with this therapist for an hour individual session and a two-hour group session every week. If he has any problems, he can call her and she will meet with him. TR 67. He drives 73 miles each way to his therapy sessions and has never missed a session. TR 68. Applicant is working on parenting skills boundaries, physical boundaries, emotional boundaries, feeling boundaries, and thinking boundaries. TR 65. This therapist considers Applicant to be a pedophile, a convicted child molester, who cannot be cured but who can learn to deal with his addiction, to change his behavior and never to molest another child.

This LSW, who has worked with 150 pedophiles for ten years, says only three have re-offended because they did not have a commitment to staying away from children. TR 54-55. Treated pedophiles re-offend only ten per cent of the time. TR 56. Applicant will always have a sexual interest in children, but he has learned to recognize it and through cognitive behavior therapy will learn not to ever act on it again. He is harmless with adults. TR 60-61. She reported she has clients with security clearances as in her view there is nothing that makes them a security risk on their jobs. TR 61-62. This therapist does not believe that this Applicant will relapse and finds his prognosis very, very good. TR 75-78.

Applicant finds this therapist's sex offender out-patient treatment program good and that it helps him to work on issues. He now accepts that he is a pedophile. TR 93-95. Applicant now lives with his parents and is allowed to visit his wife and stepdaughter on Sundays after his victim agreed to this visitation, but he is not to be alone with her or any other child. TR 52-53, 58-59, 71-72. Because of his therapy Applicant does not believe he presents a security risk or that he is going to re-offend as he is now accountable. TR 87. He has fully informed his wife and her family as well as his family about his sexual offense. TR 88.

Applicant's neighbor who is a civilian personnel officer, has known Applicant since July 1996. Applicant voluntarily informed him about his problems "surrounding child abuse issues and stuff like that." TR 25-26. The neighbor is responsible for security risk issues and does not believe other than the sexual abuse issues that there is anything else in Applicant's character that would disqualify him from holding a security clearance. TR 25-26, 85.

Applicant's pastor who has no special education or experience in counseling sex offenders initially counseled Applicant and his wife about the incident with his stepdaughter before legal proceedings were initiated. TR 31-33, 37, 42, 90-91. Since Applicant's grandparents and his wife's grandparents attend his church, the pastor is aware that the family knows about this incident and support him. TR 34-35. The pastor has seen no other evidence of irresponsibility or questionable judgment other than the sex abuse. TR 36.

On February 12, 1997, the corporate Quality Assurance Manager/FSO reported that he was unaware of any additional incidents concerning Applicant that would make him a possible security risk. AE C.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed relevant Adjudication Guidelines as set forth below :

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.⁽³⁾

(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;

Conditions that could mitigate security concerns include:

- (2) the behavior was not recent and there is no evidence of subsequent conduct of a similar nature;
- (3) there is no other evidence of questionable judgment, irresponsibility, or emotional instability;
- (4) the behavior no longer serves as a basis for undue influence or coercion.

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 (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 (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:

- (1) there is no indication of a current problem;
- (2) recent diagnosis by a credentialed mental health professional that an individual's previous emotional, mental, or personality disorder is cured or in remission and has a low probability of recurrence or exacerbation;

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.

Conditions that could mitigate security concerns include:

- (1) the criminal behavior was not recent;
- (4) the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance.

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 after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Criterion D: Sexual Behavior

The Government established its case with regard to Sexual Behavior (Criterion D) as Applicant did engage both in (1) sexual behavior of a criminal nature and in (2) addictive sexual behavior. His behavior with his eight year old stepdaughter was criminal and reprehensible. Applicant admitted to masturbating on 50 occasions from 1994 to 1995 in the presence of his sleeping stepdaughter and to touching her inappropriately for his sexual gratification while he masturbated on at least three occasions in 1995 when she was only eight. Indeed, the court found him guilty of two counts of Criminal Sexual Contact of a Minor, third degree felonies. However, as there is no formal diagnosis in the record, there is no evidence that the Applicant fits within the second part of disqualifying condition (2): "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." The LSW whom the Applicant sought out for treatment initially and whom the court ordered him to continue seeing in a Sex Offender program did state that he was a pedophile, but even in her initial assessment recommended him for the outpatient sexual offender treatment from three to five years. She based her recommendation on several criteria: (1) Applicant had not used physical force in his sexual offense pattern; (2) neither had he engaged in ritualistic or bizarre behaviors, (3) his level of minimization and denial was decreasing while his level of commitment to the program and to personal change was increasing; (4) he had not engaged in anti-social behaviors; (5) neither did he have any serious underlying psychological problems; (6) there was an informal monitor for his behavior. Consequently, she did not think incarcerating Applicant would serve the best interests of his family or the community.

Although he had been in treatment for only fourteen months at the time of the hearing, this LSW, who has expertise and

ten years of experience in sex offender treatment, maintains that his prognosis is very, very good. She cautions that, while he would always have a sexual interest in children, through cognitive behavior therapy he would learn not to ever act on it again. She adjudged he would not be a security risk as he is harmless with adults and unlikely to relapse. While he had one issue that had concerned her at the beginning of his therapy when he visited his family without her permission or approval on Thanksgiving Day, 1995. Subsequently he has worked consistently with the sexual offender program and done all assignments in sessions and at home. A sign of his commitment is that he drives 73 miles each way to his therapy sessions and has never missed either his individual or group weekly session. Should he re-offend, he would go to prison; or if he were to stop treatment, he would go to prison as his deferred sentence is contingent upon his successful completion of this sex offender program.

To mitigate sexual behavior under condition (2) the behavior should not be "recent" and there must be no evidence of subsequent conduct of a similar here. Here there has been no evidence of subsequent conduct and these adjudication guidelines do not provide precise parameters for defining "recent" behavior.⁽⁴⁾ His misconduct last occurred in August, 1995, eighteen months prior to the hearing, thus I conclude that it is not recent; and as there has been no evidence of subsequent conduct of a similar nature, Applicant falls within mitigating condition (2). With respect to condition (3), no other evidence of questionable judgment, all three of Applicant's witnesses -- his neighbor, pastor, and therapist -- assure that there was no other evidence of any questionable judgment irresponsibility, or emotional instability. Finally, with respect to condition (4), whether or not the behavior no longer serves as a basis for undue influence or coercion, Applicant, his pastor, and his neighbor confirm that the sexual behavior for which he was convicted is widely known within his family, to his neighbor, and at his place of employment; so that this conduct could not serve as a basis for undue influence or coercion. Indeed it was from admitting his misconduct within his family that the police learned of his actions which led to his arrest. Consequently, I conclude that these serious security concerns can now be mitigated under (2), (3), and (4).

Criterion I - Emotional, Mental, and Personality Disorders

However, just analyzing Applicant's misconduct under Criterion D, Sexual Behavior, alone is insufficient as that security policy under Criterion D also mandates consideration of both Criterion J, criminal conduct which was separately alleged and will be discussed below, and Criterion I, Emotional, Mental, and Personality Disorders, not separately alleged. Since there is no formal diagnosis in the record, it is difficult to assess whether or not Applicant has a disorder that could result in a defect in psychological, social or occupational functioning. However, the credentialed mental health professional on whom the court relied and whom Applicant called as a witness is a LSW who testified that she considered Applicant to be a pedophile who could not be cured, but who could learn to change his behavior through cognitive behavior therapy never to act on his sexual interest in children again. While he is only part way through her 3 to 5 year therapy program, she reported "no indication of a current problem" which falls within mitigating condition (1) and also reported her assessment that he had a "very, very good" prognosis and would not relapse which falls within mitigating condition (2). While she was never explicitly offered or accepted as an expert in her field, her credentials detailed in my Findings do fall within the guidelines of a credentialed mental health professional as envisioned by this policy and her "expert" views should be considered on both sides of the scale. In sum, Applicant while having manifested a serious sexual disorder (DSM IV 302.2), can now be viewed as meeting this experienced and credentialed LSW's assessment as no longer presenting a security risk as he falls within Criterion I conditions (1) and (2) for mitigation.

Thus, after considering the factors both for and against his security worthiness under both Criteria D, Sexual Behavior, and Criterion I, Emotional, Mental, and Personality Disorders, I conclude Applicant's behavior and disorder can now be mitigated despite his criminal conviction which I weigh heavily and his sexual disorder of pedophilia involving sexual activity with a prepubescent child. For eighteen months Applicant has manifested his sound, responsible behavior and he has been an active and faithful participant in the court-ordered Sexual Offender Program for fourteen months. While he still has many more months of therapy ahead of him, he is highly motivated and has a perfect attendance record. Any slip from this path will lead to a full jail sentence as his sentence is merely deferred. Since the assessment of an individual's behavior is supposed to be an evaluation of the potential for security worthiness and not a punitive program for past misconduct, I conclude there are sufficient indicia of success and sufficient safeguards in the state court oversight of his therapy so that I conclude that Applicant will not be a security risk in the future. In reaching this decision, I have also considered the Adjudicative Process factors. Thus, I find for the Applicant under Paragraph 1 and

subparagraphs 1.a., 1.b, 1.c., and 1.d.

Criterion J - Criminal Conduct

The Government established its case with regard to criminal conduct, Criterion J, as Applicant was indeed found guilty of two counts of Criminal Sexual Contact of a Minor, third degree felonies for sexual misconduct that extended for over a year with his eight year old stepdaughter, who was in his trust. His deferred sentence with 5 years of supervised probation was conditioned on an order to complete 3 to 5 years of counseling in a sex-offenders' program. He was also ordered to have no unsupervised contact with children, to attend Alcoholics Anonymous (AA) meetings at least twice a month, and to pay for his victim's counseling. Clearly, he falls within (1) any criminal conduct, a disqualifying security concern. While the SOR did not cite a specific criminal statute, the Appeal Board has ruled that an SOR is an administrative pleading that should not be held to the strict standards of a criminal indictment.⁽⁵⁾ Here the Applicant had reasonable notice of the nature of the conduct covered by the SOR allegation and a reasonable opportunity to respond to the criminal allegation as the Government offered in evidence the detailed arrest and court records. The October 11, 1995, Statement of Probable Cause and Criminal Complaint cites an incident in the middle part of August 1995 to which the Applicant confessed. The Criminal Summons issued on November 21, 1995, was for two counts. When Applicant plead "no contest" on April 8, 1996, he acknowledged that the range of possible sentences was from a suspended sentence to a maximum sentence of eight (8) years and a fine of \$10,000 as the basic sentence was three years for each count and four years if there is a finding of aggravating circumstances. On June 10, 1996, when he appeared in court, the court found him guilty of two counts of Criminal Sexual Contact of a Minor, third degree felonies. Applicant's sentence was deferred with conditions detailed in my Findings.

Thus, in assessing whether on not this criminal conduct can be mitigated, I note the approach taken by the court who did not chose a punitive approach, but a therapeutic approach. While the security clearance guidelines differ, I assess the significance of his crime in the context of the way the court viewed his actions and the way his conduct was assessed by the court expert LSW on whom the court relied. She clearly found he met her six conditions for a recommendation for outpatient treatment, as discussed above under Criterion D. While these criteria must be separately assessed, they clearly are supposed to be viewed as inter-related as the language of Criterion D incorporates both Criteria I and J. After reviewing Applicant's conduct in this context, I find it can be mitigated because once uncovered in August, 1995, he did not repeat this conduct. Specifically, while he is still on probation and still in the treatment program, I conclude he meets mitigation factor (1), the criminal behavior was not recent, as eighteen months have passed since his last criminal behavior. Further, based on testimony of his therapist I conclude that he also falls within the second half of mitigating condition, (4): the factors leading to the violation are not likely to recur. As discussed above, after fourteen months in therapy in a sex offender program, his therapist gave him a "very, very good" prognosis and assures he will not relapse based on her expertise that he has learned to change his behavior through cognitive behavior therapy. Clearly, he is on the path to meeting the terms of (5), and one does not have to meet each and every mitigation condition, for criminal conduct to be mitigated. Based on my review of the evidence and on my credibility assessments of Applicant and his therapist, I do conclude that he meets mitigating conditions (2) and (4), as the conduct is unlikely to recur, and thus his criminal conduct is mitigated.

Consequently, after also considering the Adjudicative Process factors and the F.3 factors, I find for the Applicant under Paragraph 2 and subparagraph 2.a.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Criterion H: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Paragraph 2. Criterion J: FOR APPLICANT

Subparagraph 2.a. For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), and as amended by Change 3 dated February 16, 1996.

2. When Applicant plead "no contest," he acknowledged that the range of possible sentences was from a suspended sentence to a maximum sentence of eight (8) years and a fine of \$10,000 as the basic sentence was three years for each count and four years for each count if there is a finding of aggravating circumstances.

3.

⁰ 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.

4. The previous adjudication policy factors were more specific and to mitigate the sexual misconduct was to be isolated, have "occurred more than 3 years ago" and "that the individual has no intention of participating in such conduct in the future." DoD Directive 5220.6, dated January 2, 1992. Clearly, by dropping a 3 year rule, the intent of the new guidelines is to give the adjudicator more discretion on recency.

5. Appeal Board Decision and Reversal Order, ISCR Case No. 95-0817 (February 21, 1997), citing ISCR Case No. 94-1213 (June 7, 1996),