

Date: August 8, 1997

In re:

Applicant for Security Clearance

ISCR OSD Case No. 97-0039

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR THE GOVERNMENT

William S. Fields, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on January 21, 1997. (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 alleges Criterion J (pattern of criminal activity) in paragraph 1, Criterion D (sexual behavior) in paragraph 2, and Criterion H (drug use) in paragraph 3. Applicant responded to these SOR allegations on February 24, 1997, and requested a decision on the record; he attached a supporting letter from his counselor dated February 21, 1997. On March 10, 1997, Department Counsel prepared a File of Relevant Material (FORM) which Applicant received on April 10, 1997. While he had 30 days after receipt of the FORM to object to any exhibits or to submit information on his own behalf, he did not respond and the record closed.

Subsequently, this matter was assigned to me on June 2, 1997, to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

FINDINGS OF FACT

Applicant admitted in his Answer all individual factual allegations in the SOR except subparagraph 3.e. which he neither admitted nor denied. I incorporate herein these admissions 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 40-year old (DOB: 07/16/57) welder and employee of a defense contractor where he has worked since shortly after his high school graduation in 1976.

His first marriage ended in divorce in 1983. Then in 1987 he began living with a woman who had a five-year-old daughter. When she was ten to eleven years old, he helped her with her bath and then would sexually fondle her. This

sexual fondling continued for eighteen months from 1993 to July 1995. Even though he was acting as a parental figure for this child, he began to see her as his "equal." He does not take full responsibility for this conduct but blames the mother for giving him "too many opportunities to be alone" with her daughter even though she did not know of his misconduct in fondling the child after he gave her a bath. Then on July 19, 1995, when she was fourteen, he performed oral sex on her to "punish her" for wandering in the neighborhood the previous night. Later, he rationalized his behavior by saying both that he did this oral sex as a result of his anger to show her "what a criminal could do to her."

Subsequently, Applicant was arrested on July 26, 1995, for felony sodomy on this child on or July 19, 1995. On December 20, 1995, he pled guilty to Sodomy, a felony, and was sentenced to confinement in the penitentiary for twelve years, but the Court suspended the sentence imposed for twenty years⁽²⁾ as long as the Applicant met the conditions of the court: to not have any further contact with the victim, to pay the cost of the victim's counseling, and to continue in counseling himself and follow all treatment recommendations.

Applicant had been evaluated by a psychologist on August 1, 7, 14, 18 and September 18, 1995, and continues in therapy with this psychologist. This expert diagnosed him on admission with an Adjustment Disorder, with Mixed Anxiety and Depressed Mood (DSM-IV 309.28), but this expert has submitted no current diagnosis or prognosis. Initially, Applicant in his sessions revealed his sexual abuse of the child victim. Applicant also revealed that he himself as a child had been sexually abused by his older uncle when the Applicant was four years old and by his older brother when Applicant was ages eight to ten.

From this history this psychologist assessed Applicant to have grossly impaired impulse control and judgment and to lack insight. This expert found him to be a regressed sex offender with a primary sexual interest in adult woman, not a pedophile, with almost addictive sexual behavior. At the recommendation of this therapist, Applicant also attended the Parents United group.

Applicant began attending that Parents United group on November 15, 1995, and initially attended eleven out of twelve group therapy sessions. Initially, he was diagnosed with Major Depression, recurrent, severe with suicidal ideation without a plan. A social worker for this group reported on April 9, 1996, that Applicant continued to have problems with self disclosure and understanding of sexual arousal; he assessed Applicant as needing to show more motivation and insight into his behavior and to develop external controls to prevent himself from being placed in high risk situations.

On February 21, 1997, his individual counselor recommended that Applicant retain his security clearance based on his being actively engaged in counseling and therapy since August 1995; he reported Applicant has made many gains to understanding himself better and made significant changes in his life. He found Applicant no longer uses marijuana and is more stable and more psychologically and emotionally healthy than at any point in his life. However, this counselor did not provide a current diagnosis or prognosis on his sexual behavior.

Applicant began to smoke marijuana in his late 20's and continued to use it until spring 1995 about six times a year.⁽³⁾ He purchased marijuana half the time and spent \$10 each time. He also snorted cocaine once fifteen years ago and "crank" about eight to ten years ago. He has no intent to use these drugs or any others in the future, but has never sought or received any specific counseling for his drug abuse.

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 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:

(2) a single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

None

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.⁽⁴⁾

(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;

(3) sexual behavior that causes an individual to be vulnerable to undue influence or coercion;

Conditions that could mitigate security concerns include:

None

Criterion H - Drug Involvement

Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

Drugs are defined as mood and behavior altering:

(a) drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens) and

(b) inhalants and other similar substances.

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

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

(1) any drug abuse (see above definition);

(2) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;

(3) failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. Current drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will normally result in an unfavorable determination.

Conditions that could mitigate security concerns include:

(1) the drug involvement was not recent;

- (2) the drug involvement was an isolated or infrequent event;
- (3) a demonstrated intent not to abuse any drugs in the future;

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 J - Criminal Conduct

The government established its case with regard to criminal conduct, Criterion J. Applicant engaged in sexual misconduct from 1993 to July 1995 which culminated in felony sodomy on a minor child in July 1995 to which Applicant plead guilty. This conviction for felony sodomy retains its security significance as he was sentenced to 12 years in prison. While the court suspended the sentence for twenty years and put him on supervised probation as long as he met the terms, the court required continuing counseling as well as requiring him to pay the costs of the victim's counseling. Applicant is still on probation and will be for many years to come. He is still in court-ordered counseling. Consequently, he comes within disqualifying condition 2, detailed above. While his counselor submitted a supportive letter that Applicant has made many gains to understanding himself better and made significant changes in his life, this counselor did not provide a current diagnosis or prognosis. He simply reported that Applicant no longer uses marijuana and is more stable and more psychologically and emotionally healthy than at any point in his life. Applicant submitted no other evidence of his rehabilitation or of his current good character. Consequently, I find he cannot mitigate under Mitigating Factor (5) where there must be "clear evidence of successful rehabilitation." The counselor's supportive letter does not meet that standard in light of the recency of the crime and the seriousness of his felony sexual misconduct when he was in the role of a father to his girlfriend's teenage daughter. Consequently, after considering the Adjudicative Process factors and the F.3 factors, I decide against Applicant under subparagraph 1.a. under Paragraph 1.

Criterion D - Sexual Behavior

The government established its case with regard to sexual behavior, Criterion D, as Applicant has not only the felony sodomy conviction, discussed above, but also his admitted additional sexual fondling of a minor child from 1993 to July 1995 when he was in a parental role with this child. This sexual behavior raises a security concern even though he did receive court ordered counseling. Indeed, Applicant is required to be in therapy with a psychologist and follow all treatment recommendations. Nevertheless, he comes within disqualifying conditions 1 and 3, detailed above. He has not yet met conditions⁽⁵⁾ to mitigate this security concern: (1) he was an adult at the time; (2) the behavior is recent, within the past two years; (3) there is other evidence of questionable judgment in his drug abuse; (4) there is still potential for the behavior to serve as a basis for undue influence or coercion as there is no evidence as to how widely this conduct is known so he remains vulnerable for it even though his conviction is a matter of public record.

While his psychologist found Applicant showed remorse for the harm he had done the victim, I note that at the time he gave a Statement to DIS on May 24, 1996, he still placed the blame for his conduct in part on the child's mother who gave him "too many opportunities to be alone" with the child. Further, he justified his behavior by saying that he saw the 14-year old child as an "equal, rather than as a child." As recently as April 9, 1996, his group therapist reported that Applicant continued to have problems with self disclosure and understanding of sexual arousal; he assessed Applicant as needing to show more motivation and insight into his behavior and to develop external controls to prevent himself from being placed in high risk situations.

To his credit Applicant is still in counseling where he evidently is making significant progress, but without more evidence of his current diagnosis and prognosis from an expert, I unable to mitigate this recent sexual behavior with a minor. Consequently, after considering the Adjudicative Process factors and the F.3 factors, I decide against Applicant under subparagraphs 2.a. through 2. e. under Paragraph 2.

Criterion H - Drug Involvement

The government also established a security concern based on his drug involvement which included marijuana use and purchases until spring 1995 as well as dated use of cocaine and "crank." Thus, he comes within disqualifying conditions 1 and 3, detailed above. However, this conduct is mitigated by (1), (2), and (3), detailed above. While Applicant has not formally entered a drug treatment program, he has been in counseling with a therapist over his sexual behavior which has also addressed his marijuana use. Based on the favorable reference from his psychologist, I find that he has demonstrated his intent not to abuse any drugs in the future given his two years abstention from marijuana use and purchase. His other drug use was minimal and not recent, so that can also be mitigated. While the government also alleged a concern over his use of drugs while he had a security clearance, they offered no evidence to support this allegation which Applicant did not admit. Consequently, after considering the Adjudicative Process factors and the F.3 factors, I decide for Applicant under subparagraphs 3.a. through 3. e. under Paragraph 3.

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 J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Paragraph 2. Criterion D: AGAINST APPLICANT

Subparagraph 2.a. Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against Applicant

Paragraph 3. Criterion H: FOR APPLICANT

Subparagraph 2.a. For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For Applicant

Subparagraph 2.e.: For Applicant

DECISION

In light of all 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 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. Appellant states he is on supervised probation for ten years but the records show twenty years.
3. The Government alleges Applicant used marijuana while he had a Company Confidential security clearance issued on September 17, 1976, but provided no evidence to support this allegation which Applicant failed to answer.
4.
⁴ 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.
5. (1) the behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature; (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.