

DATE: October 1, 1997

In re:

Applicant for Security Clearance

ISCR OSD Case No. 97-0081

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR THE GOVERNMENT

William S. Fields, Esq.

Department Counsel

FOR THE APPLICANT

Michael S. Mulkey, Esq.

Attorney for Applicant

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended by Change 3, issued a Statement of Reasons (SOR) dated January 30, 1997, to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive 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 conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. A copy of the SOR⁽¹⁾ is attached to this Decision and included herein by reference. Applicant filed his answer to the SOR on February 26, 1997.

The case was assigned to me on April 1, 1997. A notice of hearing was issued on April 2, 1997, and the case was heard on April 16, 1997. At the hearing, held as scheduled, six Government exhibits (Gov Ex) and two Applicant exhibits (App Ex) were admitted into evidence. Testimony was taken from one government witness, two Applicant's witness, and the Applicant. A transcript of the hearing was received on April 24, 1997.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following findings of fact:

Applicant is a senior designer for a defense contractor and seeks a secret level security clearance. He has worked for that company since September 1996.

On September 14, 1995, a misdemeanor arrest warrant was issued for the Applicant on the charge of assault and battery on a household member. Applicant has been receiving treatment at the Department of Social Service since September

21, 1995. (App Ex A) At Social Service he made a full admission that from Winter 1994 to August 1995 he had sexually molested his minor daughter. (Gov Ex 1) Applicant fondled his daughter a dozen times or more. Applicant admits what he did was terribly wrong and it was entirely his fault. (Tr. 76)

Applicant pled guilty to the charge and was sentenced to: twelve months in jail, which was suspended; to pay \$99.00 in costs and fee; to continue with counseling; and, ordered to have no contact with his daughters.

Five years previous, approximately 1991, Applicant had also fondled his older daughter one time when she was 19 years old. He was never arrested or charged concerning this incident. Following that incident he vowed it would never happen again.

Since November 16, 1995, Applicant has been under the supervision of a community corrections program. Applicant has been very cooperative and conscientious in meeting the requirements of supervision. Applicant is an exceptional client, who is extremely motivated. (App Ex B) Applicant's motivation, desire to change, and the high level of remorse he experienced regarding his past offenses, indicate he is an excellent treatment candidate.

Since September 21, 1995, Applicant has actively participated in individual and group counseling through an outpatient service. The treatment program is specifically focused on the behavioral skills necessary for sex offenders to control their behavior, and successfully remain in recovery. (App Ex A) During treatment he was honest and up front about his problem. (Tr. 44) As of the hearing date, Applicant had completed all assignments necessary for successful completion of treatment.

On November 12, 1996, Applicant was interviewed by DIS (Gov Ex 1). When he provided his sworn statement to DIS he was cooperative, very forthcoming, and volunteered information. Applicant acknowledged if someone confronted him about his past action he would admit it and could not be coerced. (Tr. 78).

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the seriousness, recency, frequency and motivation for an applicant's conduct; the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the circumstances or consequences involved; the age of the applicant; the absence or presence of rehabilitation, the potential for coercion or duress, and the probability that the conduct will or will not recur in the future. *See* Directive 5220.6, Section F.3. and Enclosure 2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

SEXUAL BEHAVIOR

(CRITERION D)

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. ⁽²⁾

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;

(4) sexual behavior of a public nature and/or that which lacks of discretion or judgment.

Conditions that could mitigate security concerns include:

(4) the behavior no longer serves as a basis for undue influence or coercion.

CRIMINAL CONDUCT

(Criterion J)

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

* * *

In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, then the applicant must remove that doubt with substantial evidence in explanation, mitigation, or extenuation, or refutation, sufficient to demonstrate that despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an applicant has demonstrated a lack of respect for the law in his private affairs, then there exists the possibility that an applicant may demonstrate the same attitude toward security rules and regulations.

One additional comment is worthy of note. Applicant's loyalty and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms

of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than loyalty and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied decision as to applicant's loyalty or patriotism.

CONCLUSIONS

Having considered the evidence of record, and having assessed the credibility and demeanor of those who testified, I conclude that the Government has established its case with regards to Criteria D and J.

Cognizable as a security concern under Criteria D and J, Applicant placed his daughters in situations potentially injurious to their mental health and well being. Applicant's repeated sexual misconduct is particularly egregious because the persons Applicant sexually molested were his own minor daughters. This behavior reflects a tendency on Applicant's part to act without due regard to legality or propriety and is incompatible with retention of a security clearance.

In assessing the current security significance of Applicant's sexual misconduct, I must consider the Adjudicative Guidelines pertaining to both sexual behavior and criminal conduct. With respect to Criterion D, Disqualifying Conditions (DCs) 1, 3, and 4 are pertinent to an evaluation of his security worthiness. Applicant's sexual behavior was criminal in nature and demonstrative of a serious lack of judgment. Sexual misconduct with one's daughter is conduct which renders a person especially vulnerable to undue influence. On reviewing the mitigating conditions (MCs), only MC 4 applies. Applicant has stated he cannot be coerced about the conduct, that the court proceeding is a matter of public record, and he would admit his actions if he should ever be confronted about his past actions.

Both DC 1 and 2 under the criminal conduct guidelines apply. None of the corresponding mitigating factors work to Applicant's benefit. In considering the mitigating conditions for criminal conduct MC 1 does not apply because the criminal behavior is considered recent.⁽³⁾ Here Applicant's sexual misconduct continued to August 1995.

MC 2 does not apply because the crime was not an isolated incident. The fact that Applicant was convicted on a single occurrence of assault and battery does not mean the other sexual misconduct cannot be considered.⁽⁴⁾ Applicant admitted he molested his younger daughter 12 or more times during the period from the Winter of 1994 until August 1995. He also admitted a single incident of sexual misconduct with his older daughter 5 years previous, when that daughter was 19 years old. Applicant's misconduct was not an isolated incident.

Applicant's acts of misconduct did not occur during his childhood or adolescence. Applicant's upbringing during childhood or adolescence may have contributed to Applicant's actions, but those actions occurred when the Applicant was in his 40's. This was not the immature action of a child or teenager.

Whether or not an applicant has reformed and rehabilitated himself depends not only on recognition and acknowledgment of the criminality of his conduct, but also on whether he demonstrates by conduct over a measurable period of time that he is willing and able to adhere to applicable laws and regulations. Applicant is currently in treatment and is to be commended on the progress he has made. He now realizes what he did was terribly wrong and that it was all his fault. He has experienced a high level of remorse. During treatment he was honest and up-front about his problem and highly motivated to change. His acknowledgment of the criminality of his conduct is also shown when he talked to the DIS. During the interview with the DIS he was very cooperative, forthcoming, and volunteered information.

The more difficult question is, will the conduct repeat itself? Applicant's counselor testified that individuals who successfully complete the sex offender-specific treatment have a 97 percent success rate of remaining in recovery with no further misconduct in the future. (Tr.45) Statistically the possibility of additional criminal misconduct in the future is very small. I can consider statistics, but must base my decision on the individual.

Applicant says that this won't ever happen again. This belief must be critically evaluated. I cannot rely solely on his stated belief. His statement must be evaluated viewing all the past circumstances. In this regard his progress in treatment is very encouraging. But more than his treatment must be considered. In approximately 1991, Applicant sexually molested or assaulted his older daughter on one occasion, when she was age 19.⁽⁵⁾ Applicant vowed he would never

molest her again and there is no evidence that he ever did. But approximately three years later, in the Winter of 1994, he started to molest his younger daughter. Applicant did not have the advantage of medical treatment following the first misconduct, but even so he did relapse 3 years after specifically vowing it would not happen again.

His efforts in treatment are assessed positively. But at this point not enough time has passed to conclude Applicant is successfully rehabilitated. Subparagraph 1.a., 1.b., and 2. a. are found against him.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1. Criterion D: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Paragraph 2. Criterion J: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the 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 Applicant.

Claude R. Heiny

Administrative Judge

1. At the hearing SOR subparagraph 1.a. was amended to strike the word "sexual" as it appeared before "assault and battery."
2. 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.
3. The fact that less than 2 years have passed since the last act of sexual misconduct does weigh against the Applicant.
4. That he was never charged or convicted for other incidents of sexual misconduct does not negate the criminal conduct for purposes of assessing his clearance suitability. *See* DOHA Case No. 94-0215 (April 13, 1995).
5. The daughter was age 24 in November 1996 (Gov Ex 1). It is inferred the misconduct with that daughter then occurred during 1991, for the daughter was 19 years-old at the time the misconduct occurred.