



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
)	ISCR Case No. 07-02293
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Gregg Cervi, Esq., Department Counsel
For Applicant: *Pro Se*

March 29, 2010

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated Sexual Behavior, Personal Conduct, and Criminal Conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On September 23, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D (Sexual Behavior), E (Personal Conduct), and J (Criminal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG).

Applicant answered the SOR on November 29, 2009, and requested a hearing before an administrative judge. The case was assigned to another administrative judge on January 28, 2010, and reassigned to me on February 25, 2010. DOHA issued a notice of hearing on February 18, 2010, and the hearing was convened as scheduled on

March 9, 2010. The government offered Exhibits (GE) 1 through 4, which were received without objection. Applicant testified on his own behalf and submitted Exhibit (AE) A, which was admitted without objection. DOHA received the transcript of the hearing (Tr.) on March 17, 2010.

Findings of Fact

Applicant is a 57-year-old employee of a defense contractor. He has worked for his current employer, or a predecessor company, since 1989. He is seeking to obtain a security clearance. He attended college for several years but did not earn a degree. He was married from 1972 until his divorce in 1976. He married again in 1984. He has three children, ages 24, 23, and 19. He also has a 30-year-old stepdaughter.¹

Applicant's stepdaughter was five years old when he married her mother. He was a frequent drug user, using marijuana and methamphetamine on a regular basis. He started sexually molesting the girl when she was about seven years old. The molestation continued until she was 13 years old, in 1992 or 1993. Applicant used methamphetamine on many of the occasions he molested his stepdaughter. In 1994, he and the girl had an argument after she would not follow his instructions, and he slapped her. She went and told her mother about the molestations. Applicant's wife reported the abuse to the police department.²

Applicant was charged with the felony offense of indecency with a child by sexual contact. He obtained a deferred adjudication in which there was no adjudication of guilt, but which carried probation for ten years, mandatory treatment, payment of fees, and registration as a sex offender. Terms of his probation included no illegal drug use and no contact with children under the age of 18, including his own children. He also had to undergo regular polygraph examinations looking into probation violations. He had two violations during the probation period. He asked his wife to give a Valentine's Day card to his stepdaughter in about 1998, and he had inadvertent contact with his sister's child in 2002.³

Applicant completed his counseling and probation in 2005. The discharge summary from the sex offender treatment program stated:

Client attended 523 sessions. Client cancelled/failed to attend 24 scheduled sessions. Client completed a psychological evaluation on 09-18-96. Client assumed full responsibility for the offense. The problem identified in the treatment plan was deviant arousal and behavior. Progress in the area was moderate. Client modified his deviant sexual arousal by successfully completing behavioral work. However, his most

¹ Tr. at 16, 20-22; GE 1.

² Tr. at 22-28; Applicant's response to SOR; GE 1, 2; AE A.

³ Tr. at 28-35, 45-48; Applicant's response to SOR; GE 1-4; AE A.

recent penile Plethysmograph of 01-08-05 indicates he again has elevated deviant arousal to Female Teen Persuasive. Client maintained a failure rate of 4.4%. Participation in the program was good. The risk of reoccurrence of inappropriate sexual behavior is thought to be moderate as evidenced from his current elevation of deviant arousal to female teen. However, he has completed all of his treatment goals. He has completed a relapse prevention plan and child safety/avoidance plan to assist him after probation and for the rest of his life. His wife and sister who are his support system have been fully informed of the Relapse Prevention Plan and what their roles need to be to assist [Applicant].

[Applicant] passed his exit polygraph concerning whether he had any deviant thoughts, arousal, or fantasies about any minors for the past year or if he has violated any supervision or treatment rules. He answered no and the polygraph showed No Deception. [Applicant] has been informed that he is eligible to participate in After Care at [counseling center] on an as needed basis. It was further recommended that he and his family participate in family therapy to assist them in their reunification process.⁴

Applicant has not received counseling since he was discharged from the sex offender treatment program in 2005. The counselor recommended continued counseling, but Applicant believes it is not necessary, stating that counseling teaches people that eventually they must “take responsibility for [their] own actions.” He also indicated that the counselors have to earn a profit. He did not agree with the discharge summary about the risk of reoccurrence. He stated that he stopped using drugs on a regular basis in the late 1980s, and he has not used any illegal drugs since his arrest in 1995. He reunited with his wife and family after his probation ended in 2005. He and his stepdaughter have reconciled. She has a ten-year-old son. She and her son visit Applicant and his wife. Applicant continues to be a registered sex offender, and he notifies other states when he travels. His friends and family are aware of his actions and status. His information as a sex offender is available over the internet. He notified his supervisor in 1995 of his arrest. His co-workers are aware of his status. There is no evidence that he has molested anyone other than his stepdaughter. Applicant testified that he has changed his behavior and he has “the tools and know-how” to avoid ever committing a similar offense.⁵ He testified:

I cannot put myself in any situation where it might be misconstrued that I might be in danger of molesting anybody. I can go - - when I go to the store, I never even go to the toy department, I never go to movies alone. I don't go to parks. I've changed my behavior significantly. I've dumped any friends that I know that engage in any drugs.⁶

⁴ AE A.

⁵ Tr. at 22-24, 35-44, 48-50, 54-56; Applicant's response to SOR; GE 2.

⁶ Tr. at 37-38.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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." See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline D, Sexual Behavior

The security concern relating to the guideline for Sexual Behavior is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which can 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. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (a) a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and
- (d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

Applicant sexually molested his stepdaughter for about six years. All of the above disqualifying conditions are established.

SOR ¶ 1.b alleges that Applicant was treated in the sex offender program at a counseling center from 1996 to 2005. Counseling and treatment are matters in mitigation. The allegation does not raise a disqualifying condition. SOR ¶ 1.b is concluded for Applicant.

SOR ¶ 1.c alleges that Applicant is a registered sex offender. That is true, but it does not state any sexual behavior that is not already alleged in SOR ¶ 1.a. I conclude SOR ¶ 1.c for Applicant.

Conditions that could mitigate Sexual Behavior security concerns are provided under AG ¶ 14. The following are potentially applicable:

(b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress.

Applicant started sexually molesting his stepdaughter when she was seven years old. The molestation continued until she was about 13 years old. She is now 30 years old, so it has been about 16 or 17 years since the molestations occurred. That is a long time ago. However, for AG ¶ 14(b) to be applicable, there must also be a finding that the sexual behavior is unlikely to recur and that it does not cast doubt on Applicant's current reliability, trustworthiness, or good judgment. Applicant is a registered sex offender. He received treatment for ten years. His counselor recommended continued counseling, but he declined. His counselor's discharge summary does not inspire confidence, noting "[t]he risk of reoccurrence of inappropriate sexual behavior is thought to be moderate as evidenced from his current elevation of deviant arousal to female teen." Despite the passage of time, I am unable to make a determination that the behavior is unlikely to recur. It continues to cast doubt on Applicant's current reliability, trustworthiness, and good judgment. AG ¶ 14(b) is not applicable.

Applicant stated that his arrest is common knowledge. That has lessened, but not eliminated, his vulnerability to coercion, exploitation, and duress. AG ¶ 14(c) is partially applicable.

Applicant's actions were so egregious that Sexual Behavior concerns remain despite the presence of some mitigation.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or

duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant's crimes led to probation for ten years and registration as a sex offender. That conduct created a vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(c) is not applicable for the same rationale discussed under the Sexual Behavior analysis. Applicant received counselling as a requirement of his probation. However, I cannot make an affirmative finding that the behavior is unlikely to recur. AG ¶ 17(d) is partially applicable. Applicant's actions are common knowledge, which has lessened his vulnerability to coercion, exploitation, and duress. AG ¶ 17(e) is partially applicable.

In sum, I conclude that Personal Conduct concerns are still present despite the presence of some mitigation.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant committed serious crimes when he repeatedly sexually molested his stepdaughter. Both of the above disqualifying conditions are established.

Two Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is 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.

AG ¶ 32(a) is not applicable for the same rationale discussed under the Sexual Behavior analysis. There is evidence of rehabilitation, warranting the application of AG ¶ 32(d). However, based upon his counselor's opinion that the risk of reoccurrence of inappropriate sexual behavior was "moderate," Applicant's evidence of rehabilitation is insufficient to counter the security concerns raised by his criminal actions.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments

under Guideline, D, E, and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant sexually molested his stepdaughter from the time she was seven years old until she was thirteen. I considered Applicant's long and stable work history. I also considered the length of time since his last offense. However, he is a registered sex offender, and his counselor noted that the risk of reoccurrence of inappropriate sexual behavior is moderate. That is an unacceptable risk. I continue to have significant concerns about his judgment, reliability, and trustworthiness.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated Sexual Behavior, Personal Conduct, and Criminal Conduct security concerns.

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:

Paragraph 1, Guideline D:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

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

Edward W. Loughran
Administrative Judge