



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 07-17559
)	
Applicant for Security Clearance)	

Appearances

For Government: John B. Glendon, Esquire, Department Counsel
For Applicant: *Pro se*

September 25, 2008

Decision

METZ, John Grattan, Jr., Administrative Judge:

On 9 June 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E, J, and D.¹ Applicant answered the SOR 26 June 2008, and requested a hearing. DOHA assigned the case to me 29 July 2008, and I convened a hearing 9 September 2008. DOHA received the transcript (Tr.) 18 September 2008.

¹DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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 (RAG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Findings of Fact

Applicant admitted the SOR allegations of paragraph 1; he denied the remaining allegations. He is a 50-year-old logistics manager employed by a defense contractor since October 2003. He seeks to retain the security clearance he has held since 1982, while he was in the military. Applicant served twenty years in the military before retiring in 1998. He received multiple military awards and decorations, including six good conduct medals.

In March 2007, Applicant pled guilty, pursuant to a plea agreement, to second degree assault in connection with molesting his then-14-year-old, minor step-daughter in January 2004. He was awarded probation before judgment, awarded four years supervised probation, and ordered to have no contact with the victim. His probation runs until March 2011.

Applicant testified at the hearing, and I found his testimony credible, both regarding the circumstances surrounding the molesting of his step-daughter, and his remorse for his conduct. In addition, Applicant's testimony is corroborated by the testimony of his psychotherapist and the psychiatric examination that was conducted as part of the pre-trial investigation of his criminal charges, as well as by the criminal report of investigation made contemporaneously with the disclosure of the misconduct (G.E. 4). Applicant accepted full responsibility for his misconduct, and stated that he could not offer an acceptable explanation for his conduct, either to himself or anyone else.

Applicant molested his minor step-daughter in January 2004. The step-daughter revealed the misconduct immediately to her mother (Applicant's wife). Applicant and his wife and step-daughter had discussions about the course of action to take, including him turning himself in so his step-daughter could get necessary counseling. However, Applicant's wife (and to a certain extent his step-daughter) urged Applicant to not turn himself in because the family—12 children between Applicant and his wife from previous marriages—relied on Applicant for financial support. Further, Applicant and his wife and step-daughter seem to have been reconciled over his misconduct. Between January 2004 and September 2006, Applicant periodically revisited the issue with his wife, and each time his wife urged him to put the family's financial well-being first and not turn himself in.

By September 2006, Applicant and his wife were experiencing marital difficulties, and she indicated a desire to separate, which they eventually did. They remain separated, but not divorced, and no divorce proceedings are pending. As a result of these issues, Applicant was in counseling for anxiety and depression, with the psychologist who testified at hearing, when the molestation came to light. He remains in counseling with that psychotherapist.

During pastoral counseling with the pastor of their church, Applicant's wife revealed the molestation to the pastor. This was a reportable incident under both state and federal law, but the pastor gave Applicant and his spouse a brief opportunity to

report the incident directly themselves, although it appears the pastor reported the incident before either Applicant or his spouse could act.

During the pre-trial investigation, Applicant's counsel obtained from the state prosecutor a list of acceptable medical experts to perform a psychological examination of Applicant for use by the court. The expert chosen by Applicant was frequently used by the state to prepare its psychological examinations. In addition to extensive testing, the medical expert consulted with Applicant, his psychotherapist, the step-daughter's psychotherapist, Applicant's wife, and his five step-children. The expert's pertinent findings (A.E. A) were that Applicant did not meet the profile of a pedophile, the molestation was a one-time incident, and Applicant was at extremely low risk for recidivism, based on multiple, separate psychometric analyses. Applicant's current psychotherapist concurs with those findings, and would not recommend Applicant for his clearance if he did not think those findings accurately portrayed Applicant.

Based on the psychological evaluation, the pre-trial agreement was structured to accomplish several things. Applicant pleaded to a lesser charge of assault, which did not require him to register as a sex offender. He was awarded probation before judgment, conditioned on four years supervised probation, no contact with the victim, and continuing counseling for four years—or until determined not necessary. The four years was chosen because Applicant was hopeful of getting his family back together, and there was another minor step-daughter who would be 18 years old by the time probation expired. That hope has not been realized, but Applicant's psychotherapist testified that he would have no concerns with Applicant living with any of his children or step-children, including the victim in this case.

Applicant has a good work record. His family is aware of his misconduct, as are significant numbers of his work associates. His church is generally aware of the issue. In addition to the recommendation of his psychotherapist, Applicant has the recommendation of a friend of 10 years, from church, who himself holds a clearance, and is aware of the Applicant's misconduct—having been informed by Applicant during the pending criminal investigation.

Policies

The Revised Adjudicative Guidelines (RAG) list factors to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in RAG ¶ 2(a). The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed where a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guidelines are Guidelines E (Personal Conduct), J (Criminal Conduct), and D (Sexual Behavior).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against granting access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.²

Analysis

The government established a case for disqualification under Guideline E because of Applicant's poor judgment in molesting his minor step-daughter.³ However, Applicant mitigated the security concerns raised by his conduct. This incident is fairly widely known in his personal and professional communities, alleviating the potential vulnerability to exploitation, manipulation, or duress. Further, without minimizing the egregiousness or distastefulness of the conduct, the judicial system resolved it as a relatively minor incident. The incident was a one-time event, unlikely to recur, which occurred nearly five years ago.⁴ Given the favorable prognoses of both his current psychotherapist, and the evaluating psychiatrist, I find that Applicant's circumstances warrant continuation of his clearance, notwithstanding that his probation does not expire until March 2011. I resolve Guideline E for Applicant.

²See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

³¶ 16.(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; (d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. . . . ; (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing;

⁴¶ 17.(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;

Similarly, the government established a case for disqualification under Guideline J, but Applicant mitigated the security concerns. His criminal conduct is potentially disqualifying.⁵ However, the record supports application of mitigating conditions to overcome the security concerns.⁶ The conduct occurred nearly five years ago, was a one-time event unlikely to recur, the circumstances were unusual, and Applicant has demonstrated extreme remorse for his actions. I resolve Guideline J for Applicant.

Finally, the government established a case for disqualification under Guideline D, but again, Applicant mitigated the security concerns. The appropriate disqualifying and mitigating conditions largely parallel those for criminal conduct. The only applicable disqualifying condition relates to criminal sexual behavior.⁷ However, his misconduct was not compulsive,⁸ is widely known so does not potentially subject him to duress,⁹ and did not involve public behavior.¹⁰ Conversely, two mitigating conditions are applicable to Applicant's conduct. The conduct was infrequent, not recent, and under unusual circumstances.¹¹ The fact that the conduct is fairly widely known among personal and professional connections limits the potential for duress.¹² I resolve Guideline D for Applicant.

It would be easy to translate visceral distaste for Applicant's conduct into denial or revocation of his clearance. Such a reaction would be equivalent to a per se denial under the circumstances of this case. However, security clearance determinations are not designed to reward or punish applicants for past conduct that raises security concerns. They are designed to be a clear-eyed assessment of the current risk that a given applicant might deliberately or inadvertently disclose protected information to individuals not entitled to it. Given the judicial resolution of this case, the favorable psychiatric prognoses, and Applicant's past record of access to protected information

⁵¶31.(a) a single serious crime or multiple lesser offenses; (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;

⁶¶32.(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 judgment; (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, . . . good employment record . . .

⁷¶ 13.(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

⁸¶ 13.(b) 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;

⁹¶ 13.(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;

¹⁰¶ 13.(d) sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

¹¹¶ 14.(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;

¹²¶ 14.© the behavior no longer serves as a basis for coercion, exploitation, or duress.

without incident, his recent adverse conduct presents little likelihood that he would waver from that record.

Formal Findings

Paragraph 1. Guideline E: FOR APPLICANT

Subparagraph a: For Applicant

Paragraph 2. Guideline J: FOR APPLICANT

Subparagraph a: For Applicant

Paragraph 3. Guideline D: FOR APPLICANT

Subparagraph a: For Applicant

Conclusion

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 Applicant. Clearance granted.

JOHN GRATTAN METZ, JR
Administrative Judge