



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



In the matter of:)	
)	
)	ISCR Case No. 08-02713
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: John B. Glendon, Esq., Department Counsel
For Applicant: *Pro Se*

June 8, 2009

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guidelines J, Criminal Conduct and E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

On December 31, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and E. 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) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on January 22, 2009 and February 19, 2009, and requested a hearing before an administrative judge. The case was assigned to me on March 26, 2009. DOHA issued a Notice of Hearing on April 7, 2009. I

convened the hearing as scheduled on May 7, 2009. The Government offered Exhibits (GE) 1 through 9. Applicant did not object and they were admitted. Applicant testified and offered Exhibits (AE) A through E. The Government did not object and they were admitted. DOHA received the transcript of the hearing (Tr.) on May 18, 2009.

Findings of Fact

Applicant admitted all of the allegations in the SOR, except ¶ 2.b. His admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 47 years old and retired from the Navy in 2000, in the rank of E-7. He was married in 1986 and has three children, a daughter age 21, and two sons, ages 14 and 11. He and his wife divorced in December 2007. He held a security clearance while he was in the Navy.¹

Applicant stated that while in the Navy he participated in four highly classified special missions while deployed on a submarine. He stated the missions were vital to national security. He stated personnel from the U.S. intelligence agencies and National Security Agency were on the missions. He explained the missions were very stressful.²

In 2004 Applicant was working for a federal contractor. In August 2004, a complaint was made with the police department by Applicant's then 15 year old daughter that he had molested her. With his attorney, Applicant turned himself in to the police in September 2004 and was charged with four felony charges of indecent liberties with a minor. The allegations were that Applicant molested his daughter by asking her to undress and then masturbating while he looked at her. The allegations also stated that in July 2004 Applicant pulled open his daughter's shirt and touched her breast beneath her bra.³ Applicant was charged with indecent liberties with a minor, specifically as the custodial parent by having his daughter expose her breasts and then on separate occasions touching her breasts both outside and inside her shirt. Applicant pled guilty to the two charges of touching his daughter.⁴

In April 2005, Applicant was found guilty and sentenced to incarceration for a term of five years for each offense, a total of ten years. The court suspended nine years and imposed supervised probation and required sexual offender treatment and counseling. Applicant served his sentence and was released from jail in March 2006. He stated he is on supervised probation until 2015. He reports to his probation officer once

¹ Tr. 34-35.

² Tr. 26.

³ Tr. 27; GE 2.

⁴ Tr. 38-48; GE 3.

a month; is subject to home visits and has to take a polygraph every six months. He has passed his polygraphs. He is required to register as a sex offender and update his registry every three months or it is a violation of his probation.⁵

At his hearing, Applicant denied he ever touched his daughter's breasts. He stated his attorney told him to plead guilty and he would get the charges reduced at sentencing. Applicant stated he did not want to plead guilty. However, he stated once he pled guilty his attorney did not attempt to "plea bargain" or get the sentence reduced. He further stated: "I [pled] guilty because my attorney told me to do so and would get the charges reduced." At his hearing Applicant admitted he asked his daughter to expose her breasts between five to eight times from June 2004 to August 2004. He denies he masturbated. He denies he ever touched his daughter, despite his guilty pleas. He stated he understands what he asked his daughter to do was wrong and takes responsibility for his actions.⁶

Applicant was arrested and charged with malicious wounding, a class 3 felony, in domestic court. Applicant and his wife were involved in an altercation on January 2, 2007. They were separated at the time. Applicant admitted he and his wife had a conversation by phone shortly before he went over to her residence. He went to her home and they spoke to each other in the doorway. He admitted he had his foot in the door entryway. She attempted to remove him from the door jam area and push him back. He stated he walked away and she ran after him with an object, so he raised his steel toe work boot and kicked her from behind. He stated he was trying to leave the premises and his foot struck her knee. The police report notes "bruises and cuts."⁷ He admitted he did not use good judgment going to her home. The charge is listed as "under advisement" which is equivalent to a deferred adjudication. The charge was dismissed on March 19, 2009.⁸

Applicant was aware that a condition of his probation was not to get in any trouble. His wife had filed for divorce while he was in jail. His daughter who was over 18, no longer lived with his wife, but his two sons did. Applicant stated that after he was incarcerated his daughter was placed in foster care because she had made allegations against her mother.⁹

A protective order was issued against Applicant after the altercation directing him to stay away from his wife and sons. Prior to then he had supervised probation with his

⁵ Tr. 49-52; GE 4.

⁶ Tr. 27, 44-48, 97.

⁷ GE 5.

⁸ Tr. 28-29, 58-74, 92-99; GE 8.

⁹ *Id.*

sons. The protective order prohibited him from having any type of contact or communication at all with his sons from January 2007 to January 2008.¹⁰

On March 17, 2007, Applicant was charged with violating the protective order. The court determined that Applicant was attempting to indirectly contact his sons. Applicant explained that while at the bowling alley he said to a woman, whom he knew had contact with his sons, "I just wish I could tell my boys I love them." The woman then told the boys and they told their mother. Applicant did not think he did anything wrong by making this statement. He stated he did not ask her to do anything. He explained that this incident shows that he loves his kids and it was very difficult because he was not permitted to see his boys. He further stated "It is hard because I destroyed their lives with what I did."¹¹

Applicant was charged with violating the protective order. On August 27, 2007, the court found "facts sufficient to find guilt but defer adjudication." Applicant appealed the case. The guilty finding was then taken "under advisement," requiring Applicant to remain out of trouble and the charge would be dismissed. The charge was dismissed on September 29, 2008.¹²

Applicant submitted his application for employment on July 7, 2006, Applicant indicated he was convicted of "two class 6 felonies on 18 April 2005, sentenced to 1 year in [city] jail, and probation for 9 years."¹³ Applicant stated that he told his Foreman and General Foreman in January 2007 and March 2007, about his convictions. He did not tell his facility security officer. He stated he assumed that because he told his Foreman and listed the felonies on his job application that he would be asked about the offenses. He was not advised nor was he aware that he needed to tell his facility security officer about his record. When he turned in his job application he was asked what the nature of the felonies were and he stated he divulged they were sex crimes, but did not divulge the crimes involved a minor.¹⁴

Applicant stated that due to the stressful deployments he was on while serving in the Navy he used pornography to help him relax following his retirement. He then became addicted to viewing pornography. He saw a counselor for approximately six months, but said the counselor kept falling asleep during his sessions. He did not get another counselor. He stated he chose to act out on his daughter rather than other outlets. He stated he hated himself for it. While in jail he participated in group sessions for sex offenders once a week for a year. After his release he participated in weekly group counseling for sexual addiction and at the same time attended individual

¹⁰ *Id.*

¹¹ Tr. 29-30, 76-85.

¹² AE B.

¹³ AE A.

¹⁴ Tr. 30-33, 52-58, 84-91, 100-104.

counseling on a weekly basis. He did this for a year. Approximately six months ago his counseling was reduced to twice a month and recently it was reduced further to once a month. He does not have the internet in his house.¹⁵

Applicant's sons are aware of the offenses. Applicant visits them once every six weeks because they live in another state. He must get permission and a travel pass to travel outside of the state and must contact his probation officer upon his return. All visits are supervised as part of the terms of his probation. He speaks with the boys and his ex-wife three to four times a week. Some people at work know of the offenses and some do not. Applicant is engaged and his fiancée is aware of his offenses. She is a foster parent to a 17-year-old girl. The foster child is also aware of his past. Applicant can not spend the night at his fiancée's house and can not have any unsupervised contact with a girl under the age of 18. Applicant has no contact with his daughter and does not know where she lives. He learned from his ex-wife that she is now married and has a child. He can not have any contact with her while he is on probation.¹⁶

Applicant stated that his problems were due to post-traumatic stress due to stressful deployments he had while serving in the Navy. His counselor provided a letter and stated:

[Applicant] was trying to balance a bad marriage, a stressful military career, and was submerged in an under water vessel in enemy territory for extended periods of time.

* * *

[Applicant] continues to be focused on his treatment, and committed to a healthy life.

* * *

He has learned from his past mistakes, loves his family, his country, and refused to tarnish or disappoint either of those which he holds in the highest esteem.¹⁷

Applicant stated he made a horrible mistake, but it has nothing to do with his job. He stated he has never violated his probation, but admitted he had two incidents that were "under advisement." He stated he is not unreliable, but made some bad choices. He is complying with the terms of his probation. He stated he is not a horrible human being, but made gross mistakes. When asked what his explanation was for his actions

¹⁵ Tr. 99, 106-111, 119.

¹⁶ Tr.74-76,112-118.

¹⁷ AE D.

against his daughter he stated: “My counselor has told me that some of it is post-traumatic stress.” He does not know why he chose to act out against his daughter instead of other ways.¹⁸

Applicant provided copies of awards he received while in the Navy that I considered.

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 useful 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense 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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining 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 protect or

¹⁸ Tr. 118-121.

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

Analysis

Criminal Conduct

AG ¶ 30 sets out the security concern relating to criminal conduct:

Criminal activity creates doubt about a person’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.

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and especially considered:

- (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; and
- (d) individual is currently on parole or probation.

Applicant was convicted of two charges of indecent liberties with his minor daughter, both felonies. He also was charged with violating a protective order and malicious wounding. The court found there was sufficient evidence for a finding of guilt and deferred adjudication. The charges were eventually dismissed. Applicant served eleven months in jail and is on supervised probation until at least 2015. He is required to register as a sex offender. I find all of the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 23 and especially considered the following:

- (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;
- (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.

Applicant pled guilty to indecent liberties, including touching his daughter. I did not find his statements credible that he did not commit the aggravated offense of touching his daughter. Applicant is on supervised probation for another six years. He has been in counseling and appears to be getting his life in order. However, subsequent to his release from jail he had two incidents resulting in charges of malicious wounding and violating a protective order. Both charges were held "under advisement" and were not dismissed until September 2008 and March 2009. These charges occurred while Applicant was on probation and a determination was made that there was sufficient evidence for a finding of guilt. I have considered the seriousness of the offenses; Applicant's actions subsequent to his release from jail; and the fact he continues on supervised probation. I find all of these matters cast doubt on his reliability, trustworthiness and good judgment. Although there is some evidence that he is remorseful for his actions, there is still a level of inconsistency in his attitude regarding his offenses. He pled guilty to indecently touching his daughter, but denies he did it and that he was only doing what his lawyer told him to do. He does admit he asked her to lift her shirt up on numerous occasions. He retired from the Navy in 2000 and admitted he was addicted to pornography as a stress reliever and he suffers from post-traumatic stress disorder. I find under the circumstances although there is evidence of some rehabilitation, it is not enough to overcome the seriousness of Applicant's conduct and lack of good judgment regarding the sexual offenses and his subsequent criminal charges. I find none of the above mitigating conditions apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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. I have specifically considered the following:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and

(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.

I have considered all of the facts and find Applicant provided sufficient notification to his employer that he was a convicted felony. He expressly stated on his employment application the felony convictions, that he served time in jail, and was on probation for nine years. No evidence was provided that showed Applicant was required to provide this information specifically to the facility security officer. Therefore, I find he did not deliberately fail to divulge this information. His employer was sufficiently on notice regarding his felonies.

I have considered all of the evidence presented regarding the allegations in SOR §§ 1.a, 1.b and 1.c and conclude Applicant's personal conduct, that is his sexual offenses and his conduct after his release from jail create a vulnerability to exploitation, manipulation, or duress. There are some people that are aware of Applicant's criminal conduct, others are not. I have considered the nature of the conduct and if known, conclude it is likely to affect his personal, professional and community standing. Therefore, I find disqualifying condition (e) applies.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG § 17 and especially considered the following:

(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.

Applicant's offenses are not minor and he remains on probation for felony offenses for another six years. Applicant must continue to register as a sex offender. The concerns under this guideline and the analysis are the same as was addressed under the criminal conduct guideline.

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 common sense 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. Applicant served twenty years in the Navy and deployed on important missions. He pled guilty to indecent liberties with his daughter and was convicted of two felonies. He served eleven months in jail and was placed on supervised probation for nine years. There are six years remaining in his probation. Applicant admitted he made a horrible mistake. He also stated he did not commit the offense he pled guilty to, but only did so because his lawyer told him to. He has supervised probation with his sons. He was charged with two offenses related to his family after he was released from jail. His counselor believes he has learned from his mistakes and is committed to a healthy lifestyle. I have concerns about Applicant's judgment. Overall, the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from criminal conduct and personal conduct.

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 J:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph, Guideline E:	AGAINST APPLICANT

Subparagraph 2.a:
Subparagraph 2.b:

Against Applicant
For Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge