



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



In the matter of:)
)
) ISCR Case No. 08-05181
)
)
Applicant for Security Clearance)

Appearances

For Government: Candace Le'i, Esq., Department Counsel
For Applicant: Michael Sawyer, Esq.

December 29, 2009

Decision

HEINY, Claude R., Administrative Judge:

Applicant's sexual behavior was of concern and he was evaluated. Applicant was told what to do and followed that advice. Following his evaluation, he sought and received treatment for the problem, and is not a risk to his children or other children. Applicant did not disclose a denial of an application for SCI eligibility because he completed his security questionnaire as directed by the Director of Corporate Special Security. Applicant has rebutted or mitigated the government's security concerns under sexual behavior and personal conduct. Clearance is granted.

Statement of the Case

Applicant contests the Defense Department's intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance*

Statement of Reasons (SOR) on March 24, 2009, detailing security concerns under sexual behavior and personal conduct.

Applicant's response to the SOR was received April 17, 2009, in which he requested a hearing. On June 10, 2009, I was assigned the case. On July 7, 2009, DOHA issued a notice of hearing scheduling the hearing, which was held on August 4, 2009.

The government offered Exhibits (Ex.) 1 through 3, which were admitted into evidence. Applicant testified on his own behalf and submitted Exhibits A through G, which were admitted into evidence. The record was held open to allow additional information from Applicant. On August 10, 2009, additional material was submitted. Department Counsel had no objection to the material, which was admitted into the record as Ex. H. On August 12, 2009, the transcript (Tr.) was received.

Findings of Fact

In Applicant's Answer to the SOR, he admits the factual allegations in SOR ¶¶ 1.g and 2.b, with explanations. He denies the remaining factual allegations. Applicant's admissions to the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 51-year-old assistant technical center manager who has worked for a defense contractor since August 1993, and is seeking to obtain a security clearance. Coworkers and supervisors state Applicant is level-headed, hard-working, dedicated, a conscientious project leader, and excellent manager who has a stellar reputation. (Tr. 26-32, Ex. D, Ex. E) Applicant was a deputy program manager before becoming a site manager. (Tr. 73)

Applicant admits that at age 13, he attempted sexual intercourse with his six year old sister. (Answer to SOR, Ex. 2, page 14) In 1981, Applicant, then age 23, became sexually aroused when he took a bath with a 4-year-old boy. (Ex. 2, page 12; Ex. 3, page 13) In 1992, Applicant told his one-year-old daughter to touch his penis as he sat on the toilet. He became sexually aroused from the encounter. (Ex. 2, page 12; Ex. 3, page 13, 14) In 1994, Applicant touched his one-year-old son's penis when he was changing his son's diaper. (Tr. 128, Ex. 2, page 13; Ex. 3, page 13) In 1997, Applicant became sexually aroused while rubbing his daughter's buttocks. His daughter was between six and seven years old. (Ex. 2, page 13) At the hearing, Applicant stated he did not recall saying he had become sexually aroused. He stated the "twinge" was one of guilt, that he felt it was wrong to touch his daughter's buttocks. (Tr. 50, 80, 82)

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.

In 1997, a number of these sexual incidents were made known to the government. (Tr. 66) In September 2000, during a security interview, Applicant reported (Tr. 78) that:

approximately once out of every twenty times he masturbates, he fantasizes about having sexual intercourse with his [ten-year-old] daughter. He also tries to visualize what his daughter will look like when she gets older, and he admitted that his daughter reminds him of his ex-girlfriend. (Ex. 3, page 14)

Applicant stated this had occurred when his daughter was age 2 or 3 in 1993 or 1994 due to her hairstyle and the hairstyle of a former girlfriend. (Tr. 127) Applicant denied consciously trying to focus on his daughter's face and her face lessened his arousal. Since 2001, when Applicant revealed these events, he has been involved in no type of sexual misconduct. (Tr. 58)

In 2001, Applicant was referred to the county Department of Juvenile Justice for evaluation of the degree of risk present to children. Applicant and both his children were interviewed in December 2001 and January 2002. (Tr. 46) He underwent the Minnesota Multiphasic Personality Inventory (MMPI). (Tr. 61) During that evaluation, Applicant told the evaluator he fantasized about the faces and features of women in his life while masturbating. His daughter's face was similar in features to an old girlfriend. While masturbating, Applicant's daughter's face appears in his mind. (Ex. 2, page 13) Applicant has not had any images of his daughter while masturbating since 1993 or 1994. (Tr. 106)

The evaluator, a licensed clinical professional counselor (LCPC) found:

[Applicant's] events suggest a periodic chronic pattern of difficulty with managing power and control situations in his life. . . . At other times, [Applicant's] response to stress and isolation has been to utilize poor judgment in his care taking role as parent . . . [Applicant's] does not deny his behaviors and was the person to volunteer the information originally; however, he exhibits no understanding or insight into the rationale of his behaviors . . . [Applicant] exhibited the intellectual capacity and motivation to benefit from treatment . . . [Applicant] does not represent an immediate risk to his children; however, he reports behaviors consistent with others who commit child sexual abuse . . . [Applicant] may benefit from outpatient treatment from a professional with training in sexual offense treatment. (Ex. 2, page 18)

From February 2002 to July 2002, Applicant participated in family counseling. Applicant met with the counselor once a week for individual therapy sessions. The counselor was trained in sexual offense treatment. (Tr. 100) Applicant explained all the sexual conduct to his counselor. (Tr. 102)

From August 2002 through June 2004, Applicant met with another doctor weekly for the same problem. (Ex. 2, page 24 and 28) His therapist stated Applicant appeared not to be withholding any information and was straightforward in his presentation. (Ex. 3) As of November 2002, Applicant had seen her for 16 sessions. (Ex. B) However, the sessions continued for two years. (Tr. 123) His therapist stated Applicant was cooperative and engaged in the process of his therapy. (Ex. 3) Neither doctor found any concern about the safety of Applicant's children. (Ex. 3, page 41, 42, Ex. B, Ex) Counseling stopped when Applicant believed he had worked through all the issues that were of concern. (Tr. 125-126)

In February 2002, Applicant was not granted access to sensitive compartmented information (SCI) based on information gathered during the security process. (Answer to SOR, Ex. 3, page 11) Applicant appealed the denial of his SCI access. In April 2002, his appeal was denied. (Ex. 3, page 16) In May 2002, Applicant was informed he could appeal the decision to the Agency's Access Appeals Panel. (Ex. 3, page 17) In December 2002, Applicant was allowed to continue processing his request for access to SCI. (Ex. 3, page 18, Tr. 53) It was Applicant's understanding that the original decision denying his SCI access had been overturned. (Tr. 117) Applicant did not receive his SCI access, but was allowed to continue the process. The letter granting Applicant the right to continue the process also stated he was scheduled for a psychological evaluation.

In May 2003, when Applicant was informed he was authorized to continue his attempt to obtain SCI, he underwent a fourth polygraph.² (Tr. 56, 67) Applicant withdrew his application for SCI access because he "was tired of going through it." (Tr. 56, 114) Applicant was already doing work which did not require an SCI clearance. (Tr, 42, 56) He was debriefed because there was no need for further action.

In August 2006, Applicant completed a Questionnaire for National Security Positions, Standard Form (SF) 86. Applicant answered "no" to question 26 which asked if his clearance or access authorization had been denied, suspended, or revoked. Applicant asserts his answer was due to having received poor advice. In June 2006, before completing his SF 86, Applicant sought the assistance of the manager for the Special Security Office, who later became the company's Director of Corporate Special Security (now retired). (Tr. 51) On June 29, 2006, the Director sent Applicant an email stating

Based on this, although the [government agency] appeal was successful and you don't need to list the revocation on your paperwork for a PR, it probably would be best to verbally advise the investigator of the revocation and successful appeal since they already have knowledge that there was an issue. That way, it appears you're being very honest concerning the history of your clearance actions. (Ex. G)

² Applicant had additional polygraphs. His first polygraph was in 1992, prior to his first SCI access. (Tr. 64, Ex. 3, pages 14) He had additionally polygraphs in 1997, September 2000, October 2001, and November 2001. (Tr. 65, Ex. 3, page 13-14)

On July 22, 2009, the Director, Corporate Special Security (retired) sent Applicant another email (Ex. F) in which she states:

. . . the email I sent to you concerning your successful appeal thru [government agency]. I remember that my advice to you that it was not necessary to include this event (the revocation and the successful appeal) on future PSQ's was based on guidance I received from the [government agency] security representative at the time. As indicated, I further suggested that you verbally advise the investigator of the details of this event at the time of your personal interview. I see that you did that and it has resulted in the Government indicating that you were untruthful on you SF86.

I would like to make a statement to DOHA that if there is a discrepancy in the paperwork it is due to the fact that [Applicant] was following the guidance of the Director of Special Security (now retired) and there was no intent to conceal this information. I worked with [Applicant] for many years and he never was untruthful and always followed the guidance provided by Special Security.

Applicant followed the guidance. (Tr. 118) When interviewed, Applicant stated he had been denied SCI access, but had won the appeal and explained why he had completed his SF 86 as he had. (Tr. 60) Following the hearing, Applicant and his company attempted to determine his security status. (Ex. H). That status was not available to him.

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 must be considered 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 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 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 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

Guideline D, Sexual Behavior

AG ¶ 12 expresses the security concern pertaining to sexual behavior:

The Concern: Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may 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 expresses conditions that could raise a security concern and may be disqualifying:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (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;

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

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

At age 13, Applicant attempted sexual intercourse with his six-year-old sister. In 1981, Applicant, then age 23, became sexual aroused when he took a bath with a 4-year-old boy. In 1992, he became sexually aroused when his toddler daughter touched his penis as he sat on the toilet. In 1994, Applicant touched his one-year-old son's penis when he was changing his son's diaper. In 1997, Applicant became sexually aroused while rubbing his daughter's buttocks. His daughter was between six and seven years old. At the hearing, he stated the "twinge" was one of guilt, that he felt it was wrong he had touched his daughter's buttocks. In 1997, these sexual incidents were known to the government.

In September 2000, Applicant reported he sometimes visualized his two or three year old daughter's face while masturbating. He did not consciously try to focus on his daughter's face and when he saw her face it lessened his arousal. In 2001, Applicant was referred to the county Department of Juvenile Justice for evaluation. The report indicates Applicant's behavior was consistent with others who commit child sexual abuse. AG ¶13(a) and ¶ 13(d) apply.

The government has been aware of the acts of Applicant's sexual behavior or misconduct since he revealed these acts in 2001. The government knew of the conduct in December 2002, when the agency's Access Appeals Panel found Applicant eligible to continue processing for access to SCI. Since that date, Applicant has not been involved in any additional sexual misconduct.

AG ¶ 14 expresses conditions that could mitigate the security concerns including:

(a) the behavior occurred during or prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;

(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.

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

(d) the sexual behavior is strictly private, consensual, and discreet.

The 2001 evaluation stated Applicant did not represent an immediate risk to his children and could benefit from outpatient treatment from a professional with training in sexual offense treatment. Once a week from February 2002 to July 2002, Applicant

participated in family counseling. The counselor was trained in sexual offense treatment. Applicant explained all the sexual conduct to his counselor. Weekly from August 2002 through June 2004, Applicant met with another doctor for the same problem. His sessions continued for two years. Neither doctor found any concern about the safety of Applicant's children. Counseling stopped when Applicant believed he had worked through all the issues that were of concern.

AG ¶ 14(a) applies to Applicant's conduct at age 13 related to his sister. Since then, there was other sexual behavior of a questionable nature, but no evidence of subsequent conduct related to his sister or underage individuals. The majority of the sexual conduct was known to the government in 1997. The most recent conduct occurred in 2000, when his daughter's face appeared in his mind while masturbating. AG ¶ 14(b) applies.

In 1997, the government was aware of the majority of Applicant's adverse sexual conduct. The government became aware of the remaining conduct in 2000. He fully explained his conduct to the county Department of Juvenile Justice evaluator in 2001. He also told both of his counselors about his conduct while being counseled from February 2002 through June 2004. Having explained his sexual conduct to these individuals, Applicant has taken the positive step of disclosure, eliminating any vulnerability to exploitation, manipulation, or duress. AG ¶ 14(c) "the behavior no longer serves as a basis for coercion, exploitation, or duress," applies.

AG ¶ 14(d) does not apply because the sexual behavior involved children and, therefore, could not be found to be consensual.

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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

As previously stated, the government was aware of Applicant's sexual behavior or misconduct since 2001. Applicant has not been involved in any additional sexual misconduct since the agency's Access Appeals Panel allowed him to continue processing for access to SCI. The only conduct the appeal panel was unaware of when they made their decision was Applicant's response to his August 2006 SF 86 related to his access being denied, suspended, or revoked. The appeal panel knew Applicant's access had been denied because that was the very issue they considered in the appeal. They could not have known of Applicant's SF 86 answer because it occurred three and a half years later. It is this conduct that will be evaluated under the personal conduct concern.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(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;

On his SF 86, Applicant answered "no" to the question which asked if he had ever had a clearance or access authorization denied, suspended, or revoked. In 2002, Applicant's SCI access was denied. I find ¶ 16 (a) applies.

Applicant appealed the denial of SCI access. In December 2002, Applicant was allowed to continue processing his request for access. Applicant's understanding of the letter meant the original decision denying his SCI access had been overturned. The letter stated Applicant was allowed to continue the process. Applicant had a new job not requiring an SCI clearance so he withdrew his application for SCI access.

Before completing his SF 86, Applicant sought the assistance of the manager for the Special Security Office, who later became the company's Director of Corporate Special Security. The Director had checked with the agency's security representative and it was her advice that it was not necessary to include the denial of his SCI, which was later appealed, on future PSQ's. She believed Applicant had won his appeal. (Tr. 118) She specifically stated Applicant did not need to list the revocation on paperwork, but should verbally inform any investigator of the revocation and details of this event at any personal interview. Applicant followed the guidance and, when interviewed, stated he had been denied SCI access, but had won the appeal and explained why he had completed his SF 86 as he had. I find Applicant did not deliberately falsify his answer to question 26 of his SF 86.

Under the Directive, an applicant may mitigate the security concerns arising from questionable personal conduct under certain circumstances. AG ¶ 17 provides conditions that could mitigate security concerns:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

I find AG ¶17(b) applies. Applicant followed the instructions of the Director of Corporate Special Security when answering his SF 86. He did not list this SCI access as having been denied because he was told it was not necessary to include that information on any PSQ. His omission or concealment was the result of improper or inadequate advice of an authorized personnel instructing specifically concerning the security clearance process.

With respect to the sexual behavior, the pertinent disqualifying conditions are AG ¶ 16(d)(3), a pattern of rule violations and AG ¶ 16(e)(1), which states, “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.” Certainly, Applicant’s sexual behavior is conduct a person might wish to conceal, as it adversely affects a person’s professional and community standing. The government was aware of all this behavior before allowing him to continue processing for SCI.

The mitigating condition outlined in AG ¶ 17(e), “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress” applies to Applicant’s sexual behavior. Applicant has taken the positive step of disclosure, eliminating any vulnerability to exploitation, manipulation, or duress. Any personal conduct security concerns related to Applicant’s sexual behavior have already been addressed and need not be repeated here. The Applicant’s sexual behavior does not raise a personal conduct security concern.

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. Applicant's sexual behavior was of concern and he was evaluated. Applicant was told what to do and he followed that advice. Following his evaluation, he sought and received treatment for the problem, and he is not a risk to his children or other children.

The government has been aware of the acts of Applicant's sexual behavior or misconduct since he revealed these acts in 2001. In December 2002, the agency's Access Appeals Panel found Applicant eligible to continue processing for access to SCI. Since that date, Applicant has not been involved in any additional sexual misconduct. The only additional new conduct to be considered since that date resulted from Applicant following his security official's advice in completing his SF 86.

During polygraph evaluations, Applicant described adverse and unusual sexual behavior related to his sister, daughter, son, and a bath with four-year-old boy. The conduct is unusual and disturbing. His conduct was of the type that required review by someone qualified to properly evaluate that type of sexual behavior. The December 2002 appeal indicated Applicant was to undergo a psychological evaluation. The evaluator concluded his behavior was consistent with others who commit child sexual abuse, but that Applicant was not a risk to his children.

The LCPC found Applicant had the capacity and motivation to benefit from treatment and recommended Applicant could benefit from outpatient treatment from a professional with training in sexual offense treatment. Applicant followed the LCPC's advice and attended weekly counseling for four years. Applicant was cooperative, engaged in his therapy, and did not withhold any information from his therapists. Neither of his doctors found any concern about the safety of Applicant's children. Counseling stopped when Applicant believed he had worked through all the issues that were of concern.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his sexual behavior 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, Sexual Behavior:	FOR APPLICANT
Subparagraph 1.a – 1.g:	For Applicant
Paragraph 2, Personal Conduct:	FOR APPLICANT
Subparagraph 2.a - 2.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge