



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-04747
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Pamela C. Benson, Esquire, Department Counsel
For Applicant: *Pro se*

April 16, 2010

Decision

HOWE, Philip S., Administrative Judge:

On March 7, 2009, Applicant submitted his electronic questionnaire for investigations processing (e-QIP). On October 29, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J (Criminal Conduct) and D (Sexual Behavior). 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 adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on November 5, 2009. He answered the SOR in writing on November 17, 2009, and requested a hearing before an administrative judge. DOHA received the request on November 19, 2009. Department Counsel was prepared to proceed on January 8, 2010, and I received the case assignment on January 13, 2010. DOHA issued a Notice of Hearing on January 29, 2010, and I convened the hearing as scheduled on February 22, 2010. The Government

offered Exhibits 1 through 4, which were received without objection. Applicant testified and submitted Exhibits A through I, without objection. DOHA received the transcript of the hearing (Tr.) on March 4, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Motion to Amend SOR

Department Counsel moved to amend the SOR by adding "a," after "1" in Paragraph 2(a), alleging the same facts in ¶ 2.a as alleged in ¶ 1.a. (Tr. 8, 9) Applicant did not object to the amendment. (Tr. 9)

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶ 1 and ¶ 2 of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 50 years old, married, and has three children, including two daughters. He works as an engineering manager with a defense contractor. He is separated from his wife since February 2008, and lives with his grandmother, providing her with help in her home. He supports his wife and two daughters, both of whom are attending college. His oldest daughter is a senior in college and is 23 years old. His youngest daughter is a 20-year-old sophomore in college and has a child of her own. His son is married, employed, and self-supporting. (Tr. 35-37, 39, 40, 41, 49, 50, 57, 60, 64, 65; Exhibit 1)

Applicant sexually molested his two daughters in 2000 to 2003 multiple times each while they were sleeping. The daughters were 12 and 10 years old at the time of the incidents. The oldest daughter was molested at least 12 times between 2000 and 2001. The youngest daughter was molested at least 48 times between 2001 and 2003. Applicant molested his daughters by fondling their breasts and pubic areas, including digital penetration of the younger daughter. Applicant ceased his molestations of each girl when the girls awoke during the fondling incidents. Applicant knew his actions were wrong, but thinking his daughters did not know what he was doing to them because they were asleep was "good." Between 2003 and 2008 Applicant did not seek any sexual offender treatment. He was of the opinion that during the 2000 to 2008 period he and his daughters "were fairly close" in their relationship. In February 2008, the oldest daughter reported the incidents to Applicant's wife. His wife did not know about this misconduct until told by her daughter. When confronted by his wife, Applicant confessed his actions and his wife asked him to leave their home. (Tr. 40, 42-50, 61-62; Exhibits 1-4)

The local police arrested Applicant in September 2008 on two counts of sexual imposition under his home state's law. Applicant testified he turned himself in before the

police came to get him. The charges are misdemeanors under the state law. Applicant was convicted on his pleas of the criminal offenses on November 18, 2008. Applicant received a sentence of 60 days in jail on Count I, with all days suspended on condition of good behavior for two years. Applicant received credit for one day time served in jail and two years probation. He is required to register as a sex offender for 15 years under state law. The court ordered Applicant not to have any contact with the victims, his daughters. On November 24, 2008, that restriction in the court order was vacated at the request of his daughters who were his victims. His relationship with his oldest daughter is strained at the present time. Applicant thinks his relationship with the younger daughter is "pretty good" because they visit with "each other regularly" and he plays with his granddaughter often. Applicant thinks his marital relationship is improving and he would be allowed to live in the marital home again, even with his granddaughter in the house. He was also required to undergo one year of sexual offender group counseling from January 2009 to January 2010. On Count II, Applicant received 60 days in jail and court costs. The court ordered two years of probation from November 18, 2008, and the same conditions as under Count I. (Tr. 34, 38, 49-59; Exhibits 1-4)

Applicant submitted his employee evaluations from 2003 to 2008 in support of his contention that he is a hardworking and knowledgeable employee. He has worked for his employer or its predecessors for the past 29 years. He also submitted seven character references from co-workers and his pastor. Applicant submitted seven awards and recognition certificates he received. He submitted a copy of the court order releasing him from his probation term early for good behavior. The order is dated January 5, 2010. He was initially ordered to be on probation until November 2010. Applicant submitted a December 16, 2009, report from the sexual offender program showing he completed the "offense specific treatment program for sexual offenders." Applicant attended the program from January 6, 2009, to December 15, 2009. The program director opined that Applicant is at low-risk to repeat his behavior based on the Sex Offender Needs Assessment Rating (SONAR) and a voice stress analysis. There was no foundation laid by Applicant for either of these tests or the credentials of examiners, and therefore, the tests are given little weight. (Tr. 25, 53-56; Exhibits A to I)

Applicant has a secret clearance, which he has held since 1981. It has never been revoked or suspended. (Tr. 37, 38)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the 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 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, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 states the security 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 describes four conditions that could raise a security concern and may be disqualifying. All four conditions apply to Applicant:

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

Applicant took advantage of his fatherhood role and sexually molested his two daughters over a three-year period of time from 2000 to 2003. These actions are criminal. He was convicted on his guilty plea of two misdemeanor charges under his state's law. AG ¶ 13 (a) applies.

Molestation of Applicant's pre-teen daughters repeatedly over a three-year period shows a pattern of compulsive and high-risk sexual behavior by Applicant. He was not able to stop or control his misconduct during that time period. AG ¶ 13 (b) applies.

Applicant's behavior, which was criminal and contrary to societal norms, makes him vulnerable to coercion, exploitation, and duress. His behavior was unknown to his wife until she was told by her adult daughter. AG ¶ 13 (c) applies.

Molesting a person's underage daughters shows that person cannot control his impulses. Applicant's actions demonstrated a serious lack of discretion and judgment. He perpetrated his molestation in the night when his daughters were asleep. AG ¶ 13 (d) applies.

AG ¶ 14 provides four conditions that could mitigate security concerns. One mitigating condition may potentially apply. The others are clearly not 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.

According to Applicant, the last incident of sexual molestation of his two daughters occurred seven years ago. However, it was not discovered until 2008, when his oldest daughter disclosed the conduct. Applicant is required to register as a sexual offender for a further 14 years. His misconduct is recent, being in the past seven to ten years,. The sexual activity was not infrequent and not under unusual circumstances because it took place multiple times over a three-year period. His evaluator opined that Applicant had a low-risk of recidivism for this sexual molestation, but did not provide a foundation or an explicit explanation of the criteria used to make that finding. I give it little credence. Applicant's behavior was egregious and ongoing. It had a seriously injurious effect on his daughters, and casts great doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 14 (b) does not apply.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining 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.

AG ¶ 31 describes five conditions that could raise a security concern and may be disqualifying. Three conditions apply to Applicant:

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

Applicant committed two serious offenses. His actions, occurring numerous times over a three-year period, were perpetrated on trusting and loving daughters. Applicant admitted he committed the offenses. AG ¶¶ 31(a) and (c) apply.

Applicant had his probation terminated 11 months early. He was required to serve 24 months from November 2008. However, he is required to register as a sexual offender for the next 14 years. That registration with the state authorities makes him subject to state controls and prohibitions on sex offenders during that term. If he commits another sexual offense during the next 14 years, he can be punished by the state court. AG ¶ 31(d) applies.

AG ¶ 32 provides four conditions that could mitigate security concerns. From these four conditions, two may apply:

- (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.

Applicant committed the acts in 2000 to 2003, but they were not reported until 2008. Too little time has elapsed since the behavior was discovered to apply this mitigating condition. The circumstances were unusual only in that Applicant perpetrated his sexual acts upon his sleeping pre-teen daughters, and that unusual aspect is not in Applicant's favor. His actions cast serious and current doubt on his reliability, trustworthiness, and good judgment. AG ¶ 32 (a) does not apply.

Applicant completed his court-ordered sexual offender treatment program. He has a good employment record for 29 years and nothing has changed there in the past eight years. Applicant has not repeated his behavior, nor does he have the type of access to his daughters he had as their father when they were minors and all lived in the same house. However, these treatment activities and the mere lack of sexual molestation actions in the past six years are insufficient evidence of successful rehabilitation under AG ¶ 32 (d).

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 an 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.

AG ¶ 2(c) requires each case must be judged on its own merits. 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. Sexually molesting one's own

children is very serious misconduct. Applicant knew what he was doing when he did it. The conduct happened frequently, and was only discovered recently. There is inadequate evidence of rehabilitation or permanent behavioral changes. Applicant's concupiscence, lust and lack of judgment motivated his conduct between 2000 and 2003, which he never disclosed or admitted until his daughter came forward in 2008. Applicant never came forward to disclose voluntarily his actions. He put the burden of disclosure on his daughters. These actions by Applicant show a serious lack of judgment and trustworthiness.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising from his sexual behavior and criminal activity. I conclude the "whole-person" concept against Applicant.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline D:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.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.

PHILIP S. HOWE
Administrative Judge