



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



In the matter of:)
)
) ISCR Case No. 09-05841
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: Richard P. Arnold, Esq.

June 9, 2011

Decision

RIVERA, Juan J., Administrative Judge:

In August 2007, Applicant admitted to sexually molesting his daughter when she was between the ages of 7 and 15. In August 2009, he deliberately made a false statement to a Government investigator concerning the reasons behind the 2007 denial of his access to classified information. His egregious sexual misconduct and falsification show lack of judgment, untrustworthiness, unreliability, and lack of candor. Clearance denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 4, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

On October 19, 2010 and December 9, 2010, DOHA issued Applicant statements of reasons (SOR), which specified the basis for its decision – security concerns under Guideline D (sexual behavior) and Guideline E (personal conduct) of the adjudicative guidelines (AG).²

Applicant responded to the SOR allegations on November 16, 2010 and December 29, 2010, and requested a hearing before an administrative judge. The case was assigned to me on December 23, 2010, to determine whether a clearance should be granted or denied. DOHA issued notices of hearing on January 11, 2011 (convening a hearing on February 2, 2011); on February 1, 2011 (convening a hearing on February 23, 2011), and on March 1, 2011, convening a hearing on March 11, 2011. Applicant retained counsel on January 26, 2011, and the following day he requested a continuance until February 23, 2011. On February 17, 2011, Applicant requested an extension of the continuance until March 11, 2011, because of the unavailability of an expert witness.

The hearing was convened as rescheduled on March 11, 2011. At the hearing, the Government offered exhibits (GE) 1 through 6, which were admitted without objection. Applicant testified, presented two witnesses, and submitted exhibits (AE) 1 through 3. Department Counsel objected to the admissibility of AE 2 (a Diagnostic Summary of Applicant prepared by a licensed psychologist), because the psychologist did not testify and the document lacked proper foundation. She also objected to AE 3 based on foundation grounds. Both exhibits were admitted over the objections. DOHA received the transcript of the hearing (Tr.) on March 21, 2011.

Findings of Fact

Applicant denied the factual allegation in SOR ¶ 1.a, with explanations. He admitted in part, and denied in part, the allegation in SOR ¶ 1.b. He admitted the allegations in SOR ¶¶ 2.a and 2.b. His admissions are incorporated herein as findings of fact. After a thorough review of all the evidence, including Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 52-year-old geographic information systems services manager. He completed an associate's degree in computer science in 1984. Between 1990 and 1993, he worked for a government contractor and possessed access to classified information at the secret level. He has worked for a government contractor since December 2008.

Applicant started dating his wife in December 1996, when her daughter was approximately six years old. They were married in April 1999, when her daughter was nine years old. Applicant adopted his wife's daughter shortly thereafter. From around

² Adjudication of this case is controlled by the AGs, implemented by the DoD on September 1, 2006.

1997 (when his daughter was seven years old) until 2005 (when his daughter was 15 years old), Applicant sexually molested his daughter.

Between the ages of 7 and 12, Applicant sexually molested his daughter three to four days per week. His daughter would sometimes sleep between him and his wife. He would wait until his wife and daughter fall asleep to fondle his daughter's vagina and breasts. Sometimes, he placed his penis between his daughter's legs and against her vaginal area, and inserted his finger in her vagina. After his daughter turned 15, Applicant lost the desire to touch his daughter because she was no longer young and vulnerable. However, he still would touch her breasts and vaginal area over her clothes while she was sleeping. Applicant always masturbated after fondling his daughter. The last time he masturbated after touching his daughter was around May 2007. Applicant knew that sexually touching his daughter was wrongful and felt guilty about it, but he could not stop doing it.

In July 2007, Applicant was sponsored for access to sensitive compartmented information (SCI) with another Government agency (Agency). During an August 2007 interview, Applicant disclosed in detail his sexual molestation of his daughter as described in the preceding paragraphs. He also admitted his sexual desire for one of his daughter's girlfriends. When they had slept over at his home, he would take sneak peaks at the visiting girls.

Additionally, Applicant admitted to viewing online pornography of females aged 14 to 28 years old, collecting pornography, and masturbating after watching the pornography. He stated that he liked young girls, and he would view Internet pornography every one or two days during the last 10 years. The last time he viewed Internet pornography and downloaded pictures was two or three months prior to the August 2007 interview. Applicant stated that he could be bribed, coerced, or blackmailed with this information because he did not want to lose his wife. He also believed that this information would destroy his reputation with his friends and at work.

In September 2007, the Agency denied Applicant's SCI access. He did not appeal the denial decision because, at the time, he believed he had sexually molested his daughter. He felt really bad and guilty about having touched his daughter as he had described during his interview with the Agency investigator. (Tr. 126)

The Agency notified Applicant's state child protective services (CPS) of his admissions. CPS investigated the sexual abuse allegations. When Applicant's wife was informed by CPS of Applicant's admissions of sexual abuse on her daughter, she confronted him. Applicant corroborated his statements to the Agency and admitted to his wife that he was sexually molesting their daughter. His wife discussed with her daughter the allegations. Applicant's daughter denied that she was ever sexually molested by Applicant. Applicant's wife and daughter made statements denying that Applicant ever sexually molested his daughter. (AE 2) CPS concluded that there was insufficient evidence to support a finding of indicated or ruled out child abuse. (GE 6)

In August 2009, Applicant submitted the pending SCA and disclosed that in August 2007, he was denied access to SCI because he failed a polygraph test. That same month, he was interviewed by a Government investigator about the circumstances of the denial of his SCI. Applicant deliberately misrepresented the facts and told the investigator that he was denied SCI access because he was not breathing properly. He deliberately failed to disclose that he was denied SCI access because he admitted to sexually molesting his minor daughter and because of his habit of viewing pornography of women between the ages of 14 and 17.

Applicant admitted that he deliberately made a false statement to the Government investigator. He explained that he did not want to relive the issue; did not want to be questioned again about sexually molesting his daughter; did not want his family to go through another criminal investigation; and he was afraid that if he disclosed the information he would lose his job. (Tr. 111)

When asked at the hearing whether he sexually molested his daughter, Applicant repeatedly stated: "I don't think so because my wife and daughter said it never happened. I really don't know whether it happened." (Tr. 102) He stated that his wife and daughter convinced him that it never happened. (Tr. 126) He admitted feeling aroused by being in close contact with his daughter and feeling guilty about his sexual feelings toward his daughter. He explained that he did not know whether he actually molested his daughter or if it was just a projected dream. Applicant claimed that he "would nightly generate vivid and detailed dreams of (his) fantasies. So graphic and persistent were these dreams that soon (he) mistook them for actual events." (Answer to the SOR.) He explained that the polygraph test was so stressful that it forced him to reveal his dark secret and all the guilt that he had.

Concerning his habit of viewing online pornography, Applicant testified in March 2011, that over the years he has become less enamored with pornography. He stated that he had not looked or actively sought out pornography on the web for at least the past two months or so. (Tr. 111)

Applicant introduced a February 2011 "Diagnostic Summary" prepared by a licensed psychologist after a four-hour interview with Applicant and the administration of numerous tests. He was reluctant to diagnose Applicant with any sexual deviancy personality traits because there was no evidence of previous sexual misconduct and the assessment interview revealed low risk factors.

The Diagnostic Summary has limited evidentiary value. Applicant did not provide the psychologist with his August 2007 statement concerning his prolonged sexual abuse of his daughter. Nor did he disclose his admissions with the psychologist. He also failed to disclose that he was aroused by his daughter when she was between the ages of 7 and 15, his sexual dreams and fantasies about his young daughter, and his sexual desires for his daughter's young girlfriends. Additionally, he failed to disclose his long-term pornography habit of viewing girls between the ages of 14 and 17.

Applicant presented two character reference statements from supervisors. He is considered to be a highly competent and dedicated employee. His supervisors are impressed with his demonstrated ethical standards, professionalism, integrity, and trustworthiness. Both references recommended Applicant receive access to classified information.

Policies

The President of the United States has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that 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. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication that the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden

of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline D, Sexual Behavior

AG ¶ 12 describes the concern about sexual behavior:

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 provides four conditions relating to sexual behavior 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; and
- (d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

Applicant sexually molested his daughter from approximately 1997, when she was 7 years old, until 2007, when she was 17 years old. He also has the habit of watching and collecting pornography depicting girls between the ages of 14 and 17. His behavior constitutes felony offenses and placed him in a vulnerable position to be pressured, coerced, or blackmailed. Although Applicant admitted his repugnant behavior to his wife, she chose not to believe him. Notwithstanding, he is still vulnerable to coercion because of the egregiousness of his behavior and the adverse effects it would have on his reputation if his family, friends, and coworkers become aware of it.

Applicant's long-term sexual abuse of his daughter establishes a pattern of compulsive, self-destructive, high-risk sexual behavior that he was unable to stop and may be symptomatic of a personality disorder. It also shows an absolute lack of judgment. AG ¶¶ 13(a), 13(b), 13(c) and 13(d) apply and create a concern.

AG ¶ 14 lists four conditions that could mitigate security concerns:

(a) the behavior occurred 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; and

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

After considering all the mitigating conditions, I find that none apply to this case. Applicant provided a detailed admission of his long-term sexual molestation of his daughter during a 2007 security clearance interview. He corroborated his admissions to his wife when she confronted him. At his hearing, he stated he did not appeal the other Agency's denial decision because he felt guilty about his behavior.

In his answer to the SOR, and at his hearing, Applicant claimed he did not know whether he actually molested his daughter. He averred he did not believe he abused his daughter because his wife and daughter said it never happened. He explained that he admitted to sexually molesting his daughter out of guilt for his vivid dreams and sexual fantasies about his daughter. Considering the evidence as a whole, I find Applicant lacks credibility and his testimony is disingenuous.

Applicant deliberately misrepresented facts to a Government investigator in August 2009 when he stated that he was denied SCI access because he was not breathing properly. He deliberately failed to disclose that he was denied SCI access

because he admitted to sexually molesting his daughter and because of his habit of viewing pornography of girls between the ages of 14 and 17.

Applicant's false statements to the investigator, and his recantation at his hearing of his 2007 admissions, bring to the forefront the security concerns raised by his sexual misconduct. It demonstrates Applicant's behavior is still a basis for coercion and exploitation. Furthermore, his behavior and falsifications raise serious doubts about Applicant's reliability, trustworthiness, integrity, and judgment. Guideline D is decided against Applicant.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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 Government cross-alleged the conduct involved in SOR ¶¶ 1.a and 1.b under SOR ¶ 2.a. The analysis and comments contained in the Guideline D (sexual behavior) discussions, *supra*, are incorporated under this subheading.

Applicant's long-term sexual molestation of his daughter and his false statement to a Government investigator trigger the applicability of disqualifying conditions AG ¶ 16(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 AG ¶ 16(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."

AG ¶ 17 lists seven conditions that could mitigate personal conduct 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;

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After considering the above mitigating conditions, I find that none apply. Applicant's egregious sexual behavior constitutes felony offenses. Moreover, he made a false statement to a Government investigator and made no effort to correct it. To the contrary, he continued to minimize his questionable behavior and lied at his hearing when he claimed that he did not know whether he sexually molested his daughter. There is no evidence Applicant obtained counseling. He has not taken steps to reduce his vulnerability to exploitation, manipulation, or duress. Applicant's false statement is a serious, recent offense (felony level).³ His behavior shows questionable judgment, untrustworthiness, unreliability, and lack of candor.

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 relevant 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

³ See 18 U.S.C. 1001.

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.

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. AG ¶ 2(c). I have incorporated my comments under Guidelines D and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for being truthful and forthcoming during his 2007 security clearance process. He received outstanding endorsements from two supervisors for his competence, dedication, and professionalism. He is also loved by his wife and daughter.

Notwithstanding, he was less than truthful during his 2009 security clearance process and at his hearing. In light of Applicant's age, education, working experience, and behavior, I find that he does not understand what is required for him to establish eligibility for a security clearance. Applicant's eligibility and suitability for a security clearance is denied.

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
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge