



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



In the matter of:)	
)	
)	ISCR Case No. 10-09448
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah Minster, Esquire, Department Counsel
For Applicant: *Pro se*

04/10/2012

Decision

CURRY, Marc E., Administrative Judge:

Applicant failed to mitigate the security concerns generated by his 2008 conviction for molesting his daughter. Clearance is denied.

Statement of the Case

On November 28, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D, sexual behavior, J, criminal conduct, and E, personal conduct. 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) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on December 16, 2011, admitting the allegation and requesting a hearing. The case was assigned to me on February 7, 2012. On March 6, 2012, a notice of hearing was issued scheduling the case for April 2, 2012.

The hearing was conducted as scheduled. I received three Government exhibits (GE 1-3), and 36 Applicant exhibits (A-JJ). Also, I considered the testimony of Applicant, eight character witnesses, and a psychologist qualified to testify as an expert in family and mental health counseling. (Tr. 87-88) The transcript was received on April 10, 2012.

Findings of Fact

Applicant is a 60-year-old man with three children, ages 21, 19, and 18. He has been married for 27 years. Applicant is a U.S. Navy veteran, serving from 1971 to 1973. He was honorably discharged.

Applicant earned an undergraduate degree in geography in 1981, and a master's degree in the same field in 1983. Also, he earned a master's degree in information systems in 1993.

Applicant has worked in the systems engineering field since 1983. He held a security clearance from 1984 to 2008. He has worked for the same employer since August 2009.

Between February and June of 2006, Applicant sexually molested his then 13 year old daughter. (AE H at 3) The sexual abuse occurred approximately two to three times per week in the mornings after the rest of the family had left for school or work. As a pretext for the abuse, Applicant told his daughter that he was teaching her sex education, in addition to tactics to repel a sexual assault. (GE 2 at 41) Such "teaching" exercises included engaging his daughter in several role playing situations in which he was the hypothetical attacker. Among other things, he groped her breasts and made her hold a mirror to her genitals. He admits touching her genitals, but denies fondling them. (GE 2 at 41)

Approximately one year later, Applicant's daughter reported the abuse to a counselor.¹ Subsequently, in August 2007, Applicant was arrested and charged with aggravated sexual battery and indecent custodial liberties with a minor. (GE 2 at 24) Applicant pleaded not guilty to both charges and the case went to trial.

On February 20, 2008, the jury found Applicant guilty on both counts, and the court sentenced him to two years incarceration and six months probation. While in prison, Applicant underwent 12 weeks of intensive therapy. (Tr. 58) He served 17 months of the sentence before being released early in July 2009, for good behavior. (Answer at AE L at 3; Tr. 155) As a condition of applicant's probation, he was required to register as a sex offender, undergo sex offender treatment, and not have contact with anyone under the age of 18. (Tr. 155)

¹The counseling was unrelated to the issues of molestation. Rather, the family had been receiving counseling for issues related to Applicant's son. (Tr. 116)

Applicant began his post-prison counseling in July 2009. It consisted of a three phase program known as “the offense cycle.” Phase I included a review of the offense and his sexual history, in addition to the basic concepts of sex offender treatment. Phase II consisted of group therapy, and Phase III consisted of the development of a relapse prevention plan. The counseling was conducted by a licensed clinical psychologist. (GE 2 at 45)

Applicant successfully completed the first two phases, but quit attending the program once probation expired. He never completed Phase III. (GE 2 at 46) The psychologist concluded that Applicant “may be lacking in certain knowledge and/or skills that could potentially further mitigate the risk for reoffense.” (GE 2 at 44)

It is unclear from the record whether Applicant was required to complete the counseling program that he had begun as part of his probation. According to his probation officer, he completed probation satisfactorily. (AE KK)

After Applicant quit working with the court-ordered counselor, he returned to a counselor with whom he had previously consulted from September 2007 to February 2008, before his conviction. (Tr. 72) He continues to work with her once per week. (Tr. 72) According to this counselor, Applicant “is not the typical sex offender” because when the offense occurred, his thinking was impaired by an extremely stressful set of circumstances. Specifically, at work, he had recently been tasked to lead the completion of a challenging project, and while at the same time, he was dealing with a hostile, litigious subordinate who was not following his orders, while at home, he was dealing with issues related to his son who had serious behavioral issues. The management of these issues led to marital strife, as he and his wife disagreed on how their son should be treated. (Tr. 44-45) Applicant was working with his counselor to address these issues when the offense occurred. (Tr. 44)

Applicant’s counselor questioned the conclusion of the court-referred counselor, characterizing it as “cookie-cutter,” and fixated on squeezing Applicant into a “pre-existing mold” rather than addressing the underlying emotional issues that triggered the behavior. (Tr. 79) Consequently, rather than focus on the offense, the counselor focused on the underlying emotional stressors. She diagnosed Applicant with adjustment disorder with depression and anxiety. (Tr. 97) Her therapy consists of identifying triggers that cause stress and helping Applicant develop ways to handle his stress so that it does not become overwhelming. (Tr. 72-74)

According to Applicant’s counselor, her therapy has been successful. She characterized Applicant as “one of the most mentally healthy clients that [she has] worked with.” (Tr. 76) Applicant’s counselor is not an expert on sexual offender treatment. (Tr. 89)

In August 2007, Applicant joined a church and sought spiritual counseling from the pastor. (Tr. 146) Since then, Applicant’s pastor has been working closely with Applicant and his family. (Tr. 146) Having sat through Applicant’s trial, Applicant’s

pastor is well aware of Applicant's criminal offenses. Since leaving prison, Applicant has worked hard to restore his relationship with his family members.

Since leaving prison, Applicant has also developed close relationships with other church members. (Tr. 148) He is active in the church, participating in fundraising and ushering. His fellow parishioners know about his crime. According to one parishioner, she would have no problem allowing Applicant to supervise children at the Sunday school. (Tr. 173)

Currently, Applicant is a registered sex offender. (Tr. 48) He and his spouse are separated, but are attempting to reconcile. Applicant's daughter is a freshman in college. They are also attempting to reconcile. Since leaving prison, Applicant has seen his daughter during holidays.

According to Applicant's second-line supervisor, he is an outstanding, trustworthy employee with a passion for assisting the company's clients. Applicant's immediate supervisor, who recently left the company, was equally impressed with Applicant's work performance. According to both supervisors, Applicant was candid about his crime. (AE N, O)

Policies

In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to 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. 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."

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.

Analysis

Guideline D, Sexual Behavior

Under this guideline, “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.” (AG ¶ 12) Applicant’s molestation of his daughter in 2008 triggers the application of all of the disqualifying conditions under AG ¶ 13, as follows:

- (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 . . . may be symptomatic of a personality disorder,
- (c) sexual behavior that causes an individual to be vulnerable to coercion, and
- (d) sexual behavior . . . that reflects a lack of discretion or judgment.

Applicant was prosecuted, convicted, and imprisoned for his conduct. He was released early from prison and completed probation. His testimony was contrite, and he has been working diligently to repair his relationships with his family through counseling. Also, Applicant is active in church, volunteering and participating actively in ushering and fundraisers. His friends, fellow parishioners, and coworkers know of his crime.

Applicant contends his offense did not reflect a prurient interest in his daughter or in children generally. Instead, he contends that it was caused by significant stress at home and on the job, which impaired his thinking. Further, he contends that, through counseling, he has gained the tools to deal with stress, thus minimizing the possibility of recurrence.

Applicant’s counselor supports Applicant’s conclusion. Applicant’s counselor, however, is not an expert on sexual offender treatment. Consequently, her prognosis about either the possibility of recurrence or the merits of Applicant’s initial treatment has minimal probative value.

Applicant attended court-ordered sex offender counseling while on probation, but never completed it. Under these circumstances, I am not persuaded he has mitigated the security concern.

Guideline J, Criminal Conduct

Under this guideline, “criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness.” (AG ¶ 30) Moreover, “by its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations. (*Id.*) Applicant’s molestation of his daughter led to his conviction for custodial indecent liberties and aggravated sexual assault. AG ¶¶ 31(a), “a single serious crime or multiple lesser offenses,” and 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or formally convicted,” apply.

It is unclear from the record whether Applicant was required to finish the court-ordered rehabilitation program. Consequently, I conclude that AG ¶ 31(e), “violation of parole or probation, or failure to complete a court-mandated rehabilitation program,” does not apply.

In light of the nature and seriousness of the crime, the amount of time that has elapsed since it was committed is insufficient to conclude that the crime was not recent. AG ¶ 32(a), “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cause doubt on the individual’s reliability, trustworthiness, or good judgment,” is inapplicable.

Applicants’ testimony that his decision to molest his daughter was influenced by outside stressors was not credible. AG ¶ 32(b), “the person was pressured or coerced into committing the act and those pressures are no longer present in the person’s life,” is not applicable.

Applicants’ church involvement, good employment record, and good-faith attempts at rehabilitation are sufficient to trigger the application of AG ¶ 32(d), “there is evidence of successful rehabilitation; including, but not limited to . . . remorse or restitution, job training or higher education, good employment record, or constructive community involvement.” Absent the completion of therapy specifically geared toward sex offenders, I cannot conclude that Applicant has mitigated the criminal conduct concern.

Guideline E, Personal Conduct

Under this guideline, “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” (AG ¶ 15) Applicant’s conduct triggers the application of AG ¶ 16(e), “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person’s personal, professional, or community standing.”

Applicant's evidence of mitigation, as discussed in the previous paragraphs, triggers the application of AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." Applicant has not mitigated the personal conduct security concern for the same reasons as set forth earlier in the Decision.

Whole-Person Concept

Under the whole-person concept, 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.

I conducted an evaluation of the whole-person factors in my analysis of the relevant guidelines, and it does not warrant a favorable conclusion.

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
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.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.

MARC E. CURRY
Administrative Judge