



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 10-11190
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: Richard L. Morris, Esquire

December 30, 2011

Decision

MALONE, Matthew E., Administrative Judge:

Applicant was convicted in a 1986 general court-martial of indecent acts with a child, a felony violation of the Uniform Code of Military Justice (UCMJ). He served 15 months of a 30-month prison sentence, and received a bad conduct discharge. However, significant information about his rehabilitation and good conduct over the last 25 years supports a conclusion that the security concerns about his personal and criminal conduct are mitigated. His request for a security clearance is granted.

Statement of the Case

On August 2, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (eQIP) to obtain a security clearance required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA)

issued to Applicant interrogatories¹ to clarify or augment information obtained by investigators. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative finding² that it is clearly consistent with the national interest to grant Applicant's request for access to classified information. On May 25, 2011, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the adjudicative guideline (AG)³ for personal conduct (Guideline E) and criminal conduct (Guideline J).

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on August 1, 2011. Pursuant to a Notice of Hearing issued on August 15, 2011, I convened a hearing in this matter on September 21, 2011. The parties appeared as scheduled. The Government presented three exhibits, which were admitted without objection as Government's Exhibits (Gx.) 1 - 3. Applicant testified and presented five exhibits, identified as Applicant's Exhibits (Ax.) A - E, all of which were admitted.⁴ DOHA received a transcript (Tr.) of the hearing on September 29, 2011.

Findings of Fact

Under Guideline E, the Government alleged that Applicant, while serving in the United States Air Force, pleaded guilty in November 1986 to a violation of UCMJ Article 134 (General Article; Indecent Acts with a Child), for which he was incarcerated for two years and six months at hard labor, was reduced in rank to Airman (paygrade E-1), and given a bad conduct discharge (SOR 1.a). Applicant admitted the allegation, but stated that he was not sentenced to hard labor and was reduced to only to Airman 1st Class (paygrade E-3).

Under Guideline J, the Government cross-alleged as criminal conduct, the information set forth in SOR 1.a. (SOR 2.a) Applicant's admissions are incorporated in my findings of fact. Having reviewed the response to the SOR, the transcript, and exhibits, I make the following additional findings of fact.

Applicant is 58 years old and employed by a defense contractor. Applicant has worked in information technology positions since 1991. For the most part, he has been employed by his current employer since 1991; however, he has been laid off at least twice and his work was sub-contracted to a different company, for whom he worked from 2005 until he returned to his current employer in May 2010. He had not previously

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

³ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006). Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

⁴ Ax. A and Ax. E were admitted over objection by Department Counsel. (Tr. 17 - 21)

required a security clearance for his work, but he is now being considered for a position in his company that requires access to sensitive and classified information. (Gx. 1; Tr. 107 - 109)

Applicant was married from October 1973 until June 1988, when he divorced his ex-wife. They had three children together, a daughter, who is now 37 years old, and twin boys, who are now 35 years old. (Gx. 1) Applicant also served in the United States Air Force from November 1972 until December 1987. (Gx. 1)

Applicant and his family were stationed overseas from 1979 until 1985. While abroad, Applicant sexually molested his daughter as many as 15 times when she was between age five and nine. The last such incident occurred in December 1985. Applicant stopped when he realized the full effect his behavior was having on his daughter. (Answer to SOR; Gx. 2; Ax. A; Tr. 101 - 102)

In 1986, Applicant's daughter told one of her teachers about what Applicant had done to her. Applicant was arrested and charged under UCMJ Article 134 (General Article) with Indecent Acts with a Child. At a general court martial, Applicant pleaded guilty and was sentenced to confinement for two years and six months, reduced in rank to Airman 1st Class, and given a bad conduct discharge. Applicant was incarcerated from November 1986 until February 1988, when he was released early for good behavior. Thereafter, he was on parole until May 1989. (Answer; Gx. 2; Ax. A)

Applicant disclosed his arrest and conviction to his employer when he first applied for work there in 1991. In his eQIP, Applicant also disclosed that he was convicted of a felony and received a bad conduct discharge from the Air Force. He openly discussed the details of his conduct when he was interviewed by a Government investigator in September 2010. Applicant has always taken full responsibility for his conduct with his daughter. But he has stated also that he feels his conduct occurred when his marriage had fallen apart because of his ex-wife's infidelity and alcoholism, and because he himself had been sexually abused as a child. (Gx. 1; Gx. 2; Tr. 99 - 100)

Applicant has not tried to hide from anyone the fact that he is a convicted sexual offender. A former girlfriend and his current girlfriend, each of whom have known Applicant for more than 20 years, testified that Applicant told them about what he did very early in their relationships. Both women have entrusted their own children to Applicant and have witnessed, over many years, examples of Applicant's good character and remorsefulness for what he did. One of the children of his former girlfriend had been molested by her ex-husband, and she met Applicant through a counseling and support group for victims of child sexual abuse. (Gx. 2; Tr. 22 - 43)

While Applicant was incarcerated, he was a model prisoner. (Ax. B) In the last six months he was in prison, he started a 12-step program for sexual offenders. When Applicant was paroled in 1988, a condition of his release was that he attend treatment and counseling programs. Applicant completed all of the requirements and remained an active member of one of the organizations that provided counseling to sexual abusers of children. Applicant has also volunteered to speak to local legislators to ensure continued

funding of sexual offender rehabilitation programs. Applicant's daughter also submitted information in support of her father. She averred that their relationship is good despite what Applicant did to her. (Ax. C; Ax. D; Ax. E)

After Applicant was paroled, he obtained work and lived with his mother. After about a year, his ex-wife called and asked him to visit their children, who were living with her. Applicant and his mother traveled to see the children, but as he left, his ex-wife told him that she did not want to care for the children anymore. She told him that, if he did not take custody, the children would be sent to foster care. Applicant subsequently obtained approval from his parole officer and the courts where he lived to take custody of the children. At the time, his daughter was 15 years old. Applicant and his children lived with his mother. (Gx. 2; Tr. 71 - 78) One of his twin sons later decided to return to Applicant's ex-wife. Applicant's other son, now age 35, testified that Applicant was a good father and that he always felt safe in his care. Applicant's son's wife also testified that Applicant is a good grandparent to her child and that she trusts Applicant's judgment and character. (Tr. 44 - 65)

Applicant completed all required treatment and counseling after he was released. His participation in those endeavors was thorough and he was very active in all respects. His last counseling was in 1991; however, at his daughter's request, he accompanied her to one of her own counseling sessions in 2011. He has never been required to register as a sexual offender. (Tr. 87 - 91)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁶ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (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.

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ Directive. 6.3.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁷ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁸

Analysis

Criminal Conduct

The Government presented sufficient information to support its allegation that Applicant was arrested, charged, and convicted of a felony violation of the UCMJ because he sexually abused his daughter about 15 times between 1979 and 1985. For his crimes, he was given a bad conduct discharge from the military, reduced in rank to E-3, and sentenced to 30 months in prison. He was also on parole from 1988 until 1989. The Government's information about Applicant's criminal conduct raises a security concern about his suitability for access to classified information that is addressed at AG ¶ 30, as follows:

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.

More specifically, the Government's information requires application of the disqualifying conditions at AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*).

By contrast, available information supports application of the mitigating conditions at 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*).

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

or does not cast doubt on the individual's reliability, trustworthiness, or good judgment) and AG ¶ 32(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's last occurrence of criminal conduct was over 25 years ago. He was released from incarceration for good behavior after he served about half of his sentence. Applicant successfully completed extensive counseling and treatment nearly 20 years ago. A pre-sentencing report, as well as information about his post-incarceration conduct showed, at that time, that there was little likelihood he would repeat his conduct. Applicant embraced the counseling and support activities available to him. He also demonstrated that he was reliable as a parent when his children were returned to his custody. Persons who have known Applicant for more than 20 years, and who have been able to observe him closely and continuously during that time, uniformly find him trustworthy, reliable, honest, and remorseful about his past conduct. Applicant has not repeated his criminal conduct from 25 years ago and he is not likely to do so in the future. Security concerns about his suitability for a clearance raised by the information about his criminal conduct are mitigated.

Personal Conduct

Applicant's sexual abuse of his daughter between 1979 and 1985 also raises security concerns about his judgment, reliability and trustworthiness. Those concerns are expressed at AG ¶ 15 as follows:

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.

More specifically, information about Applicant's adverse personal conduct requires consideration of the disqualifying condition at AG ¶ 16(c) *(credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information)*. Available information also requires consideration of the disqualifying condition at 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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group)*.

As to AG ¶ 16(c), Applicant's conduct was criminal, as shown by his conviction and prison sentence. Applicant's conduct is also addressed in the guideline for Sexual Behavior (AG ¶ 12). His conduct was not alleged under AG ¶ 12, and, as noted in the discussion under Criminal Conduct, above, available information was insufficient to disqualify Applicant from holding a security clearance. Nonetheless, because his conduct was such a fundamental breach of the trust a child has in a parent, Applicant's sexual abuse of his daughter raises questions about his judgment, reliability, and trustworthiness. As to AG ¶ 16(e), it is reasonable to assume that information about Applicant's conduct could be used to embarrass him and make him vulnerable to exploitation or pressure to act in a manner that is inconsistent with the national interest.

At the same time, available information supports application of the mitigating conditions at AG ¶ 17(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*), AG ¶ 17(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 AG ¶ 17(e) (*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*). Applicant's conduct occurred more than 25 years ago. All of the information probative of the likelihood of recurrence indicates that there was not much risk of similar conduct as early as 1991. Today, there is virtually no risk of recurrence. Additionally, he has always acknowledged and accepted responsibility for what he did to his daughter. He disclosed his conduct to his current girlfriend and to an ex-girlfriend early in both relationships in the late 1980s and early 1990s. In 1991, he disclosed his arrest and conviction when he applied for work with his current employer. Finally, Applicant completed court-ordered counseling and treatment, as well as rehabilitative efforts he initiated, such as the 12-step program he started in prison and his active participation in a counseling and support organization in his community.

In response to the Government's information, Applicant also established that he is a good parent, and that he has regained the trust of his children, including his victim, all of whom he raised after he was released from prison. Sufficient time has passed since his conduct. He is rehabilitated, there is no risk of recurrence, he is not vulnerable to coercion because of his conduct, and his past conduct does not reflect adversely on his current judgment, trustworthiness, or reliability. Based on all of the foregoing, I conclude that Applicant mitigated the security concerns raised by the Government's information about his personal conduct.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E and J. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 58 years old. He has been employed by the same company for most of the past 20 years. His sexual abuse of his daughter from 1979 until 1985 was the most egregious example of a breach of trust and aberrant judgment imaginable. However, Applicant acknowledged

his crimes and embraced the need to rehabilitate himself. Over the past 25 years, he actively sought treatment, counseling, and group support to ensure that he did not repeat his wrongdoings. Because his personal and professional relationships since 1988 have started with full disclosure of his crimes, he is not vulnerable to pressure because of his past conduct. Applicant has earned the trust of his family and, around the time of his release from prison, was entrusted with the care of his children despite the relative recency of his crimes. Available information shows that Applicant's conduct has not and will not recur, and that his judgment, reliability, and trustworthiness are sufficient for access to classified information. A fair and commonsense assessment of this record shows that Applicant has mitigated the security concerns raised by the Government's information.

Formal Findings

Formal findings 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest to grant Applicant's request for access to classified information. Request for security clearance is granted.

MATTHEW E. MALONE
Administrative Judge