



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



In the matter of:)
)
-----) ISCR Case No. 07-08294
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

December 30, 2008

Decision

WESLEY, Roger C., Administrative Judge:

Statement of Case

On July 30, 2008, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, and Department of Defense (DoD) Regulation 5200.2-R, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on August 24, 2008 and requested a hearing. The case was assigned to me on October 16, 2008. It was scheduled for hearing on November 14, 2008. A hearing was held on November 14, 2008, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, or deny, Applicant's application for a security clearance. At hearing, the Government's case consisted of seven exhibits; Applicant relied on one witness (himself) and no exhibits. The transcript (R.T.) was received on December 14, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Summary of Pleadings

Under Guideline D, Applicant is alleged to (a) have been charged with a lewd or lascivious act with a child under age 14, to which he pleaded no contest and was sentenced to three years of probation, one year in jail, and a fine, (b) have been in therapy for the past four years trying to understand his behavior that led to the charge, (c) be a registered sex offender, (d) have accessed pornographic web sites about once or twice a week in 2003 on his computer while company employed, for which he was issued a final written warning in December 2003, and (e) have installed a "purity scan" software on his computer in 2003 while company employed. The allegations covered under Guideline D are incorporated under Guideline J as well.

For his answer to the SOR, Applicant admitted most of the allegations with explanations, but denied installing any programs on his company computer without first obtaining pre-approval from his employer. He also denied any unwillingness to comply with laws, rules, and regulations, and any failure to provide clear, truthful, and honest answers, and cooperate with the security process. Acknowledging he was wrong in accessing pornographic web sites on his company computer, he claimed he has not accessed such sites since 2003.

Findings of Fact

Applicant is a 59-year-old-logistics specialist for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Applicant married W2 in 1997 and divorced her in 2004 (see ex. 1). He was previously married to W1 and has several children from this marriage (see ex. 2).

Applicant enlisted in the U.S. Navy in 1971 and was discharged from active duty in 1984 (ex. 2). He served in the Navy reserves until 1990 and was honorably discharged with the rank of LCDR (ex. 2). Throughout his Navy service, Applicant held a security clearance.

In 2003, Applicant was telephoned by the mother of a minor he had sexually abused several years earlier (see ex. 2). Challenged by the girl's mother, Applicant admitted his guilt. After being subsequently hospitalized for attempted suicide following the disclosure, Applicant voluntarily enrolled in a 30-day inpatient substance abuse program. He completed this program and proceeded to live in a sober living group house for the ensuing year and a half (attending AA meetings during this time frame).

Applicant was eventually prosecuted for sexually abusing the minor daughter of the mother he confessed to in his February 2003 telephone conversation. In October 2003, Applicant pleaded no contest to a single charge of child molestation, a felony (see ex. 2; R.T., at 34, 36). He was sentenced to three years of formal probation and ordered to register as a sex offender. The sentencing court accepted Applicant into a work furlough program that released him to work during the day while incarcerated at

night (ex. 2). The sentencing court also ordered Applicant to pay restitution (\$620.00) and pay for his work furlough program (\$1,600.00 a month).

Applicant was released from this program after eight months and completed his probation in September 2006 (R.T., at 34). He has no further obligations under his probation terms (R.T., at 34). Records confirm that Applicant self-reported his 2003 arrest and conviction to his company supervisors (see ex. 7; R.T., at 30). Applicant also told W2 of his 2003 arrest. She initially supported him and attended initial court hearings. Eventually, she stopped attending the hearings, though, and divorced him in 2004 (see ex. 2).

Following his 2003 child molestation arrest, Applicant accessed pornographic web sites on his company computer. He did this twice a week and freely acknowledges his knowing violations of company work policy. He was issued a formal warning in December 2003 (see ex. 6). The warning letter informed Applicant that he had been the subject of a company ethics investigation concerning his use of company owned equipment for an unauthorized purpose. His formal warning cited him for violating his company's standards of business conduct and the employee handbook (ex. 6). The warning characterized his violation as "serious misconduct" and afforded him one final opportunity to demonstrate that he can be a productive employee who adheres to his company's policies and procedures.

Since his 2003 conviction and ethics warning, Applicant has violated no laws or company ethics requirements, and has not committed any acts of sexual misconduct. However, he continues to be a registered sex offender with no pre-determined date of release from the registry (see ex. 3). Concerned about his arrest and conduct at work, he enrolled in an outpatient therapy program. He continues to receive therapy in an effort to better understand his behavior (see ex. 2). Asked what prompted him to sexually abuse a child and access pornographic work sites, he could not explain his actions (ex. 2).

Applicant denies installing a purity scan on his company computer (R.T., at 31). Such software is designed to erase a user's steps to a particular site. In an e-mail from one of his security managers in November 2003 (see ex. 7), this writer claims that detection of Applicant's accessed pornographic web sites was complicated by purity scan hardware installed by Applicant (ex. 7). Applicant assures that at the time, he did not know what a purity scan software actually was and never installed such a device on his company computer (R.T., at 31). Without any more probative evidence of his installing such software, his denials are accepted as credible .

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued

or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Sexual Behavior

The Concern. Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress, 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. See Adjudicative Guidelines (AG), ¶ 18.

Criminal Conduct

The Concern. 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, ¶ 18.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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. AG, ¶ 18.

Burden of Proof

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences

which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted facts alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

Analysis

Applicant is a seasoned defense contractor and retired Navy officer who pleaded no contest to a charge of a lewd or a lascivious act with a child under the age of 14 in 2003 and was sentenced to three years of probation, one year in jail, and fined. Additionally, he was ordered to register as a sex offender. Security concerns are raised over Applicant's 2003 conviction and ensuing therapy for the past four years to gain a better understanding of his actions. Security concerns are raised, too, over his accessing pornographic web sites on his company computer, and initially over his alleged installation of purity scan software on his company computer.

Applicant's 2003 conviction

Applicant's sexual molestation conviction and ordered registration as a sex offender raise specific security concerns under both the sexual behavior and criminal conduct guidelines. Most of Applicant's conduct is covered by Guideline D and can be resolved under that Guideline. Nonetheless, there are discrete disqualifiers under both guidelines that cover different aspects of Applicant's actions associated with his 2003 conviction.

Judgment and blackmail concerns exist over Applicant's 2003 sexual molestation conviction. His conduct reflects serious criminal activity and judgment lapses, as well as actions that expose him to risks of potential blackmail. Applicant's criminal conduct is expressly covered by Guideline J, and is entitled to independent cognizance under this Guideline according to the Appeal Board. See ISCR Case No. 06-20964, at 6 (April 10, 2008). Where (as here) there are additional probative adverse information covered by Guideline D that is not covered by Guideline J, and which reflects a recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior, independent grounds do exist for considering questionable judgment and trustworthiness and exploitation and coercion risk allegations under Guideline J and Guideline D, respectively. Authority for considering overlapping conduct under both guidelines is

contained in the guidance provided in Enclosure 2, ¶ 2(d) of the Directive's August 2006 amendments.

Applicant's 2003 criminal conviction is expressly covered by DC ¶ 31(a), "a single serious crime or multiple offenses," of Guideline J. While Applicant has completed his court-ordered jail time and three-year probation period, he continues to be registered as a sex offender. Whether he is eligible for cancellation of his registration status is unclear. Without more to indicate his continued registration as a sex offender is an ongoing condition of his probation or not, DC ¶ 31(d) may not be applied in these circumstances.

Turning to the specific allegations covered by Guideline D (several of which overlap with those under Guideline J), the pertinent ones associated with Applicant's 2003 conviction are fully covered by two of the disqualifying conditions in Guideline D. Applicable to the particular facts surrounding Applicant's conviction are DC ¶ 13(a), "sexual behavior of a criminal nature, whether or not the individual has been prosecuted" and DC ¶ 13(d), "sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

While there still exists some possibility of Applicant's being exposed to blackmail over his 2003 conviction, the likelihood is small. He is of record in advising his wife of his 2003 charges, and his company managers of both his charges and conviction. Moreover, as a registered sex offender, his crime must be presumed to be well known in his community and to law enforcement. So, whatever risk of blackmail that Applicant might be exposed to over his conviction is quite small and unlikely to occur. By contrast, neither his disclosures nor registration status absolve him of security concerns about his judgment and trustworthiness. His 2003 sexual molestation conduct reflects not only poor judgment but a reckless disposition towards a young minor that could create lasting emotional scars.

Considering the seriousness of Applicant's behavior, his actions reflect considerable recurrence risks associated with his judgment lapses and sexual behavior that are very difficult to reconcile with minimal judgment and trustworthy standards for continuing clearance eligibility. Applicant's collective pattern of recurrent behavior is independently covered by the disqualifying conditions previously set forth under Guideline D.

The serious judgment lapses that inhere in Applicant's 2003 charges and conviction preclude safe predictive judgments at this time that he will not engage in any similar activity in the foreseeable future. Considered together, the timing of his actions, the accompanying circumstances, and the recurrence risks preclude the application of any of the mitigating conditions in Guideline J and Guideline D. So recurrent and recent is his conviction and continuing registration as a sex offender that the likelihood of such conduct occurring again cannot be safely discounted.

Despite his therapy efforts to gain a better understanding of his actions, Applicant still does not know what stressors prompted him to engage in the conduct associated with his 2003 conviction. Without a better understanding of the causes and stressors

associated with his actions, he is limited in what he can do to prevent a recurrence. For so long as risks of recurrence exist, Applicant's conduct cannot be mitigated, either under the guidelines or under the whole person concept.

From a whole person perspective, Applicant has established a good relationship of trust with his employer. His managers appear to value his service and contributions in their e-mail write-up. He is a retired Navy officer who has held a security clearance without any reported security or criminal incidents for most of his military and civilian career. These credits reflect qualities necessary for fulfilling his fiducial responsibilities in protecting accessed classified information. But these credits are not enough to overcome the recurrent risks that are inherent in the conduct that resulted in his 2003 conviction, sentencing and sex offender registration.

Taking into account all of the circumstances surrounding Applicant's 2003 conviction, sentencing and continuing registration as a sex offender, it is still too soon to absolve Applicant of security risks associated with his conduct. Based on his underlying conduct reflecting questionable judgment and trustworthiness concerns, his conviction and sentencing, and his continued registration as a sex offender, Applicant does not mitigate the Government's security concerns. Unfavorable conclusions warrant with respect to the underlying conduct covered by subparagraphs 1.a and 1.c of Guideline J and Guideline D.

Applicant's accessing of pornographic web sites

Additional security concerns are raised in connection with Applicant's accessing of pornographic web sites on his company computer in 2003. Core judgment and trustworthiness concerns covered by D.C. ¶ 16(d), "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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," of Guideline E are applicable in this case. Expressly pertinent are D.C. ¶ 16(d)(1) (untrustworthy or unreliable behavior . . .) and DC ¶ 16(d)(3) (pattern of dishonesty or rule violations).

While Applicant assures that he has learned his lessons from this experience and has not since repeated the exercise, it is difficult to separate risks that inhere in his 2003 conviction from his turning to pornographic web sites to absorb his emotional needs at the time. It is still too soon to credit Applicant with any of the available mitigating conditions covered by Guideline E.

A whole person assessment does not enable Applicant either to avert recurrence risks at this time. While he warrants considerable praise for his military and civilian service and counseling services he has utilized to help in acquiring a better understanding of what prompted his accessing pornographic work sites on his company computer, too little is known about his counseling efforts and prognosis to enable him to surmount recurrence risks and concerns that he will take reckless, untrustworthy actions in the future with respect to non-authorized web-sites. Unfavorable conclusions warrant with

respect to the allegations covered by subparagraphs 1.a, 1.c, and 1.d under Guideline D and E. Favorable conclusions warrant with respect to Applicant's positive counseling efforts covered by subparagraph 1.b of Guideline D (even if not successful in helping him to better understand his actions). The allegations covered by subparagraph 1.e of Guidelines D and E are unsubstantiated and concluded favorable to Applicant.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Enclosure 2(a) of the Adjudicative Guidelines of the Directive.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE D: (SEXUAL BEHAVIOR):	AGAINST APPLICANT
Sub-para. 1.a::	Against Applicant
Sub-para. 1.b::	For Applicant
Sub-para. 1.c::	Against Applicant
Sub-para. 1.d::	Against Applicant
Sub-para. 1.e::	For Applicant
GUIDELINE J: (CRIMINAL CONDUCT):	AGAINST APPLICANT
Sub-para. 1.a:	Against Applicant
GUIDELINE E: (PERSONAL CONDUCT):	AGAINST APPLICANT
Sub-para. 3.a:	Against Applicant

Conclusions

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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

