

KEYWORD: Criminal Conduct; Sexual Behavior; Personal Conduct

DIGEST: Applicant is 52 years old, married with two children, retired from military service, and works for a defense contractor. He has two court actions against him dating back to 1979 for theft, and indecent assault in the military in 1999. He deliberately failed to disclose his Chapter 7 bankruptcy, a large delinquent debt, and his 1979 felony arrest on his security clearance application. He failed to mitigate the criminal conduct, sexual behavior, and personal conduct security concerns. Clearance is denied.

CASENO: 06-01655.h1

DATE: 04/30/2007

DATE: April 30, 2007

In re:)	
)	
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SSN: -----)	ISCR Case No. 06-01655
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
PHILIP S. HOWE**

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 52 years old, married with two children, retired from military service, and works for a defense contractor. He has two court actions against him dating back to 1979 for theft, and indecent assault in the military in 1999. He deliberately failed to disclose his Chapter 7 bankruptcy, a large delinquent debt, and his 1979 felony arrest on his security clearance application. He failed to mitigate the criminal conduct, sexual behavior, and personal conduct security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On July 18, 2006, DOHA issued a Statement of Reasons¹ (SOR) detailing the basis for its decision—security concerns raised under Guideline J (Criminal Conduct), Guideline D (Sexual Behavior), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on July 27, 2006, and elected not to have a hearing before an administrative judge. Applicant requested his case be decided on the written record. The case was assigned to me on March 15, 2007.

On January 30, 2007, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) was provided to the Applicant. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant filed a response to the FORM on February 28, 2007, within the 30 day time allowed.

FINDINGS OF FACT

Applicant denied all SOR allegations, except subparagraph 2.b. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following findings of fact:

Applicant is 52 years old, married, and has two children. He is a veteran who now is retired and works for a defense contractor. (Item 4, Response to FORM)

Applicant was arrested on April 9, 1979, for grand larceny after trust and petty larceny. He worked in a restaurant when it was discovered that \$1,100 was missing from the office safe. Applicant had access, along with other employees, to the safe. Applicant was represented by an attorney and upon his advice plead guilty to the petty larceny, a misdemeanor offense. The felony charge of grand larceny was dismissed for want of prosecution. Convicted of the petty larceny charge, Applicant paid a fine of \$100, ordered to spend six months in jail, and ordered to serve 12 months probation, but that probation was stricken by the court. Applicant did not disclose these arrests on his security clearance application (SCA) that was originally submitted on November 11, 2003, and later updated by him on July 6, 2004. (Items 4, 7, 8)

The Government investigated Applicant at his foreign duty station in 1995 for allegedly committing indecent acts or taking liberties with a child after being accused by someone that he was attempting to take nude photographs of a fourteen-year-old girl. The girl was a friend of Applicant's daughter, and the daughter of another military member. Applicant was not charged with any offense after the investigation, and no further action was taken on this allegation. (Item 9, Answer, Response)

¹Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).

In 1999, Applicant was charged with two counts of indecent assault, one specification of assault, and one charge and specification of failure to obey a lawful general regulation, all charges under the Uniform Code of Military Justice (UCMJ). Applicant was accused of engaging in these acts with two other military members, one of whom was a trainee in his military training organization. Applicant pled not guilty to all charges and specifications, but the Special Court-Martial convicted him of indecent acts with another person instead of one of the indecent assault specifications, guilty of the second specification of indecent assault, not guilty of the assault charge and specification, and guilty of disobeying a lawful general regulation by attempting to develop a personal relationship with a trainee in his organization. Applicant was sentenced to six months confinement, reduction from E-6 to E-4, and a reprimand. Applicant is registered as a sex offender in his state of residence, as a result of this conviction. (Items 9-12, 14)

Applicant deliberately did not list his arrest for grand larceny after trust in 1979 on his SCA in 2003. Question 21 (Police Record-Felony Offenses) asked if Applicant ever been charged with or convicted of any felony offense. He answered “no” to that question, claiming he was told by his attorney he was convicted of a misdemeanor. Applicant did not disclose, however, he was charged with a felony that was later dismissed for want of prosecution. (Items 4, Answer, Response)

Applicant filed Chapter 7 bankruptcy on January 21, 2004. He was discharged in bankruptcy on May 4, 2004. Applicant deliberately did not list this bankruptcy on his SCA when he updated it on August 6, 2004, in his answer to Question 33 (in the past seven years have you filed bankruptcy?), instead answering “no.” Applicant claims his bankruptcy is a matter of public record and he made a mistake in not disclosing it. (Items 4, 13, Answer, Response)

Applicant deliberately did not disclose any financial delinquencies over 90 days in duration in response to Question 39 (are you currently over 90 days delinquent on any debt?), when he answered “no” to that question. Applicant owed a bank \$10,088 for a charged off bad debt from July 2003. Applicant claims he lost track of his financial delinquencies because of family health problems and the large credit card balances he carried on those cards. (Items 4, 13, Answer, Response)

Applicant denied all of the SOR allegations except that he is registered as a sex offender. Applicant denies his culpability in the theft, assault, indecent assault, and failure to obey a lawful general regulation charges, citing instead bias by the courts, competency of counsel, and other reasons. Applicant claims he thought he was convicted in the state court in 1979 and in the military court-martial in 1999 of misdemeanor offenses. Applicant did not admit he was arrested in 1979 on a felony charge or disclose it on his SCA, which is the only felony charge the SOR alleges. Deliberately failing to disclose information sought by the Government on the SCA is a violation of 18 U.S.C. §1001 for knowingly and willfully making a false statement or representation to any department or agency of the U.S. Government. Violation of 18 U.S.C. §1001 is a felony offense under federal law. Applicant certified on the SCA that his answers were true, complete, and correct to the best of his knowledge, and are made in good faith. (Items 4, Answer and Response)

POLICIES

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information with Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual’s age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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 disqualify, or may disqualify, the applicant from being eligible for access to classified information. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant’s security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment,

reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). “Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.” Directive ¶ E2.2.2. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531. See Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline J: Criminal Conduct: *The Concern: A history or pattern of criminal activity creates doubt about a person’s judgment, reliability and trustworthiness.* E2.A10.1.1

Guideline D: Sexual Behavior: *The Concern: Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress or reflects lack of judgment or discretion. Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person’s eligibility for a security clearance.* E2.A4.1.1

Guideline E: Personal Conduct: *The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.* E2.A5.1.1

CONCLUSIONS

The Government established by substantial evidence each of the allegations in the SOR. Applicant takes the position that he did not commit the offenses alleged in the SOR or in the state and military courts, and therefore, he should receive a security clearance.

Guideline J: The Guideline J allegations in Paragraph 1 set forth two court convictions in 1979 and 1999, one investigated accusation in 1995, and a felony failure to disclose requested information on his 2003 SCA and updated in 2004. The evidence the Government presented demonstrated Applicant’s culpability and he cannot now deny the underlying facts and events in each of those convictions and allegations. Disqualifying Conditions (DC) 1 (Allegations of criminal conduct, regardless of whether the person is formally charged. E2.A10.1.2.1), and DC 2 (A single serious crime or multiple lesser offenses. E.2.A10.1.2.2) apply.

Considering the Mitigating Conditions (MC) listed in Guideline J, no MC apply. Applicant has a pattern of misconduct, two of which involve sexual misbehavior. He was convicted of four offenses, including the 1979 petty larceny, and the indecent assault and indecent acts, and failure to obey a lawful general regulation in 1999. There is no rehabilitation presented. He voluntarily committed the acts, and was not pressured into committing them. They are not isolated events and

his continued registration as a sex offender, a requirement resulting from his 1999 convictions, makes the sex offense recent.

Guideline D: Under Guideline D, Applicant has two sexual behavior incidents on his record within a four year period. In 1995, the Government investigated accusations that he tried to photograph a 14-year-old girl in the nude. That investigation did not lead to any formal charges. Yet in 1999, he was court-martialled for indecent assault and assault on two young women in the military, and for failure to obey a lawful general regulation not to engage in any relationship with a military trainee under his supervision. Applicant is a registered sex offender in his current state of residence resulting from his 1999 convictions. DC 1 (Sexual behavior of a criminal nature, whether or not the individual has been prosecuted. E2.A4.1.2.1), DC 3 (Sexual behavior that causes a person to be vulnerable to coercion, exploitation, or duress. E2.A4.1.2.3), and DC 4 (Sexual behavior of a public nature and/or that which reflects a lack of discretion or judgment. E2.A4.1.2.4) apply. Applicant, being married, is vulnerable to coercion, etc., for his sexual misconduct with women not his wife. His attempts to form a relationship with a military trainee under his supervision, in direct contravention of a general regulation prohibiting that type of relationship, shows a gross lack of good judgment by a non-commissioned officer in the military.

Reviewing the MC under this Guideline, no MC apply to Applicant. He is a registered sex offender, and the behavior is recent for the purposes of the Guideline D criteria. These convictions relate to two instances of questionable judgment regarding women under his supervision. His behavior could be a basis for coercion, duress, and exploitation because of his multiple acts of sexual misconduct showing he cannot exercise good judgment in that area of interpersonal relationships.

Guideline E: The deliberate failure to disclose requested information on the SCA is the last security concern. Applicant did not disclose the accurate information requested in Question 21 (his felony arrest in 1979), Question 33 (his January 2004 Chapter 7 bankruptcy petition filing), and Question 39 (his financial delinquency over 90 days in duration pertaining to the \$10,088 owed to a bank) of the SCA. DC 2 (The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, or similar form used to determine security clearance eligibility or trustworthiness E2.A5.1.2.2), and DC 4 (Personal conduct that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail. E2.A5.1.2.4) apply. In addition to his deliberate failure to disclose any unfavorable information, the nature of the sexual conduct increases his vulnerability to coercion, exploitation, or duress. Being a registered sex offender decreases his standing in the community.

There are no MC that apply here. Applicant had two opportunities to supply the information about his arrest on felony charges in 1979 on his SCA in 2003 and 2004, but failed to do so. He also had two opportunities to disclose his delinquent bank debt of \$10,008 on the same SCA, but failed to do so. He filed Chapter 7 bankruptcy after he first completed his SCA in November 2003, but failed to disclose it on his August 2004 update. Applicant's claims this information is a matter of public record begs the questions asked on the SCA. Those questions ask for full disclosure from Applicant, not selective disclosures of information that the Government may find on other records if it checked every record depository in the country that might have some information on Applicant. Applicant's disclosures are designed to help the Government make an informed decision on his application for a security clearance, and to allow the Government to compare disclosures to records.

It is not a game of “catch my records if you can, and if you cannot, then I should get a security clearance.” Applicant certified his answers were complete and correct, and were made in good-faith. But the evidence shows that certification was false. His deliberate failure to disclose the requested information is a violation of 18 U.S.C. §1001 and a felony offense.

Whole Person Concept: The “whole person concept” looks at the entirety of Applicant’s conduct and history. His misconduct is serious and of a repeated nature in the sexual behavior realm. It was frequent, and he was an adult of 45 in a supervisory capacity when he committed the indecent assaults. He voluntarily committed all of the acts alleged in the SOR, yet now in his Response and Answer attempts to avoid and deny his culpability even though he was convicted in two courts. There is no rehabilitation or behavioral changes shown by Applicant, and he has the burden of proof and persuasion on that issue also. His motivation for his sexual behavior was to gratify his lust, and his motivation for falsifying his SCA was to cover up his past misconduct so he would obtain a security clearance to keep his job. Within this context he is vulnerable to coercion, as contemplated by the Guidelines. Finally, absent recognition of his misconduct and sufficient rehabilitation, there is strong likelihood of recurrence, and the requirement that he register as a sex offender shows the public’s concern that he will repeat his past behavior. In summary, there is nothing favorable about Applicant under the “whole person concept” to support the issuance of a security clearance.

Therefore, after considering all evidence, I conclude the Guideline J Criminal Conduct security concern against Applicant. I conclude the Guideline D Sexual Behavior security concern against Applicant. I also conclude the Guideline E Personal Conduct security concern for his repeated falsifications against Applicant. Lastly, the “whole person concept” is concluded against Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Paragraph 2. Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Paragraph 3. Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	Against Applicant
Subparagraph 3.c:	Against Applicant

DECISION

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 or continue a security clearance for Applicant. Clearance is denied.

Philip S. Howe
Administrative Judge