

DATE: October 22, 2002

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-13894

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant with an otherwise meritorious professional record had sexual encounters with male strangers on three separate occasions in a public park and was arrested and convicted as a result of his last encounter in 1996. Initially concealing the encounters from his family and colleagues out of personal embarrassment, he has since made a clean disclosure to his spouse and colleagues, while withholding the details from his children out of fear of hurting them. Overall, he mitigates security concerns arising out of the personal, criminal and sexual behavior aspects of his actions. However, Applicant does not mitigate security concerns associated with his concealing the material arrest/conviction in his SF-86 and failing to disclose it to the interviewing DSS agent for over a year, and only after being confronted with it. Clearance is denied.

STATEMENT OF THE CASE

On April 16, 2002, the Defense Office of Hearings and Appeals, pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on May 20, 2002, and requested a hearing. The case was assigned to this Administrative Judge on July 29, 2002. The hearing was scheduled for hearing and convened on September 5, 2002, to consider whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of five exhibits; Applicant relied on one witness (himself) and one exhibit. The transcript (R.T.) of the proceedings was received on September 16, 2002.

STATEMENT OF FACTS

Applicant is a 58-year-old staff scientist for a defense contractor who seeks a security clearance.

Summary of Allegations and Responses

Applicant is alleged to have (a) been arrested in September 1996 for public indecency (*viz.*, engaging in sexual activity with another person while in a public place), pleaded guilty, been fined \$300.00 (\$200.00 suspended) and been ordered to attend AIDS awareness classes and stay out of the local park where he was apprehended, (b) engaged in similar acts of public indecency on two prior occasions in the preceding year and (c) falsified his security clearance application (SF-86) of March 1998 by failing to answer question 23 pertaining to his police record and knowingly and wilfully seeking to conceal his 1996 arrest.

Applicant's three acts of public indecency between 1995 and 1996 are alleged to constitute sexual misbehavior covered by Guideline I of the Adjudicative Guidelines.

And Applicant's arrests and SF-86 falsifications are alleged to constitute criminal conduct covered by Guideline J

For his response to the SOR, Applicant admitted each of the allegations, while claiming lack of knowledge that any of his public acts were illegal.

Relevant and Material Factual Findings

The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Applicant is a staff scientist with a meritorious work record of over fifteen years with his current defense contractor. He engaged in multiple acts of public indecency with male strangers he encountered in a local public park over a two-year period spanning 1995 and 1996. During the last such encounter (in September 1996), he was interrupted by an undercover police officer who placed him under arrest and escorted him back to the police station. On advice of counsel, Applicant pleaded guilty to a single act of public indecency, and was fined \$300.00 (\$200.00 suspended), ordered to attend AIDS awareness classes, and directed to stay away from the local public park where he was apprehended.

Within the year preceding his 1996 arrest, Applicant engaged in two separate public acts of indecency with male strangers he encountered in the same local park. In neither of these incidents was Applicant arrested or detected (*see* R.T., at 33-34). He insists he had no advance knowledge of any of the indecent acts (performed out of public view) he participated in were illegal (R.T., at 34-35). Applicant's education, experience and exhibited understanding at hearing make these claims difficult to accept. Public acts of indecency such as the ones Applicant knowingly and willingly participated in are generally recognized as illegal in all of the states and provide Applicant with no credible cover for his participation in any of the admitted instances at bay.

Prior to 1998, Applicant had not disclosed his arrest or any of the other underlying encounters to his spouse, work colleagues or children for embarrassment reasons. Since initiation of his clearance update investigation in 1998, however, Applicant has disclosed the incidents to his spouse and work colleagues (*see* R.T., at 36, 39, 42). Since making his disclosures, he assures he has been able to satisfactorily resolve the pertinent issues with his spouse and move on. The experiences forced Applicant and his spouse to take inventory of their lives and responsibilities, which has produced a much better understanding of each other and has helped each to forge much stronger marriage bonds.

Still, Applicant has failed to tell any of his five children about his 1996 park incident or previous encounters (*see* ex. 3; R.T., at 40), citing continuing concerns about hurting the children.

When asked to complete his SF-86 in March 1998, Applicant failed to answer question 23, which inquired about his police record. He knew the question covered his 1996 arrest but hoping to spare himself embarrassment and possibly jeopardize his security clearance, he thought at the time it would be better if he simply left the question blank. So, he failed to answer the question, hoping to avoid embarrassment. He believes the disclosures he has since made to his spouse and colleagues are enough to avert any risk of blackmail or compromise. Applicant now acknowledges he should have answered the question affirmatively. Inferences of knowing and wilful omission are unavoidable.

Applicant was interviewed for the first time in the Summer of 1998 by Agent A of DSS, who confronted him with his 1996 indecency arrest. Once confronted by Agent A about his 1996 arrest, he openly acknowledged it to the agent (*see* R.T., at 44-45). In a follow-up DSS interview with Agent B in July 1999, Applicant again was confronted with his 1996 arrest and acknowledged the same (*see* ex. 3; R.T., at 37).

Applicant's colleagues at work (including his facility security officer) regard Applicant as reliable and trustworthy; even though, Applicant was late by his company's security requirements in reporting his 1996 indecency arrest (R.T., at 48-49).

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list "binding" policy considerations to be made by Judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires 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:

Personal Conduct

Basis: conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Disqualifying Conditions:

DC 2 The deliberate omission, concealment, falsification or misrepresentation of relevant and material facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status,

determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Mitigating conditions: None.

Sexual Behavior

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.

Disqualifying Conditions:

DC 1 Sexual behavior of a criminal nature, whether or not the individual has been prosecuted.

DC 3 Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

DC 4 Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

Mitigating Conditions:

MC 2 The behavior was not recent and there is no evidence of subsequent conduct of a similar nature.

MC 4 The behavior no longer serves as a basis for coercion, exploitation, or duress.

Criminal Conduct

Disqualifying Conditions:

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

Mitigating Conditions:

MC 1 The criminal behavior was not recent.

MC 2 The crime was an isolated incident.

MC 6 There is clear evidence of successful rehabilitation.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for 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 fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's eligibility to obtain or maintain a security clearance. The required showing of nexus, 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.

CONCLUSION

Applicant comes to these proceedings with a meritorious professional record and no history of involvement with law enforcement before his arrest and conviction in 1996 for public indecency with another. Applicant's arrest/conviction was preceded by two similar incidents the previous year and raises security concerns about his judgment and reliability under the guidelines covered by Guideline E (personal conduct) and Guideline D (sexual behavior).

For several years, Applicant withheld his sexual encounters from his family and colleagues out of embarrassment and concern it might cause hurt. His actions entitle the Government to invoke two of the disqualifying conditions for personal conduct: DC 1 (reliable unfavorable information), DC 4 (personal conduct that increases an individual's vulnerability to coercion, exploitation, or duress). Applicant's actions raise security concerns as well over his same actions under the sexual behavior guidelines covered by Guideline D. Applicable disqualifying conditions (DC) under this guideline include: DC 1 (sexual behavior of a criminal nature), DC 3 (sexual behavior that causes the individual to be vulnerable to coercion, exploitation, or duress) and DC 4 (sexual behavior of a public nature). Applicant admits the encounters and the poor judgment reflected in each of them.

To his credit, Applicant elected to tell his spouse and colleagues about his sexual encounters, once his clearance investigation commenced in 1998. Assuring he and his spouse have forged a stronger marriage as the result of his

disclosures and mutual efforts to work through the issues, Applicant is credited with making a solid effort to correct the judgment lapses associated with his sexual encounters. Only with his children has he declined to disclose the encounters, which he justifies as necessary to minimize emotional hurt to them. With both his spouse and colleagues since notified, the risks of any renascent vulnerability would appear to be minimized and manageable for security clearance purposes. Applicant may take full advantage of MC 5 (positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress) of the Adjudicative Guidelines for personal conduct, and MC 2 (behavior not recent) and MC 4 (behavior no longer serves as basis for coercion, exploitation, or duress) of the Adjudicative Guidelines for sexual behavior.

Taking into account all of the circumstances surrounding Applicant's public indecency encounters in 1995 and 1996, Applicant makes the convincing case that his acts are sufficiently isolated against a history of his living as a law abiding and responsible citizen. Both the isolated nature of the offenses and credits to Applicant's overall character (using whole person assessment) enable him to carry his evidentiary burden. Favorable conclusions warrant with respect to the sub-paragraphs covered by Guidelines E and D.

More difficult to reconcile with principles of clearance eligibility are Applicant's implicit omissions of his 1996 public indecency arrest/conviction when he failed to answer question 23 of his March 1998 SF-86. Embarrassment and concern over how it might affect his clearance are understandable but are generally insufficient to avert inferences of knowing and wilful omission of material facts considered necessary to complete a security clearance investigation. Government may invoke DC 2 (falsification of a security questionnaire) of Guideline E. Because Applicant did not acknowledge his 1996 arrest until confronted with the material facts by Agent A in his July 1999 DSS interview with Agent A (over a year later), he may not take advantage of the prompt, good faith mitigation provisions of MC 3 (prompt, good faith disclosure before being confronted). Our Appeal Board has been very explicit about the unavailability of this mitigation condition without both prongs being met. *See* ISCR OSD No. 93-1390 (January 1995).

Considering the record as a whole, including Applicant's meritorious professional history and unblemished criminal record (save for his 1995-1996 encounters), Applicant's mitigation efforts are still insufficient to (a) surmount his omissions of his 1996 arrest under governing Adjudicative Guidelines and Appeal Board interpretations and (b) restore his judgment and reliability to levels required for eligibility to hold a security clearance. Unfavorable conclusions warrant with respect to sub-paragraph 1.c of Guideline E.

Both Applicant's sexual encounters and omissions, while initially subject to the criminal conduct guidelines, are sufficiently isolated and mitigated by the steps he has taken to correct his judgment lapses to enable to carry his mitigation burden as it relates to the criminal conduct guidelines covered by sub-paragraphs 3.a and 3.b of Guideline J.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors set forth in the Procedures section (paragraph 6) of the Directive, as well as E.2.2 of the Adjudicative Process of Enclosure 2 of the same 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, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

GUIDELINE D (SEXUAL BEHAVIOR): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT

Sub-para. 3.a: FOR APPLICANT

Sub-para. 3.b: FOR APPLICANT

DECISION

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.

Roger C. Wesley

Administrative Judge