

DATE: February 10, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-15209

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Michael F. Fasanaro, Jr., Esquire

SYNOPSIS

From late 1997 to late 1999, the Applicant's reaction to stress caused him to repeatedly expose himself while driving his car. In 1998 he was arrested for taking indecent liberties with a child and indecent exposure. In 1999, he was again charged with indecent exposure. From January 2000 through January 2001, the Applicant received therapy. The counselor believes the Applicant is at low risk to be involved similar inappropriate behavior in the future and sees no reason for concern about the Applicant's judgement. The record evidence is sufficient to mitigate or extenuate the negative security implications stemming from his inappropriate conduct. Clearance is granted.

STATEMENT OF THE CASE

On June 21, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On July 15, 2002, the Applicant answered the SOR and requested a hearing. The case was assigned to me on September 30, 2002. A Notice of Hearing was issued on November 7, 2002, scheduling the hearing, which was held on December 2, 2002.

The Government's case consisted of four exhibits (Gov Ex). The Applicant relied on his own testimony, the testimony of two witnesses, and three exhibits (App Ex). Following the hearing, one additional document was received, provisions having been made for its submission following the hearing. Department Counsel (DC) having no objection to its admission, the submissions were admitted as applicant's exhibit D. The transcript (tr.) of the hearing was received on December 11, 2002.

FINDINGS OF FACT

The SOR alleges criminal conduct (Guideline J) and sexual behavior (Guideline D). The Applicant admits the allegations.

The Applicant is 44-years-old, has worked for a defense contractor since November 1998, and is seeking to maintain a secret security clearance. The Applicant is a loving, caring, and dedicated parent, who is constantly involved in his children's activities. (App Ex A) When eight years old, the Applicant was sexually molested by an uncle. (tr. 44) He is an honest person who has accepted the seriousness of his actions and the resulting consequences. (App Ex B) The Applicant is an outstanding employee (tr. 28) whose work has received many compliments and no complaints. He is most clearly an asset to his program and has been promoted because of his outstanding work. (tr. 34) The Applicant's supervisor and co-workers are aware of the Applicant's indecent exposures.

The Applicant served more than 20 years on active duty before retiring as a chief warrant officer. In the later 1990's, the Applicant had been passed over for promotion and lost his sense of moral character (tr. 46) and acted out improperly. (tr. 47) Although the Applicant had good fitness reports, for promotion he needed a certain qualification obtainable only while on sea duty. In November 1997, shortly after being passed over for promotion, the Applicant began exposing himself while driving by himself in his car. From late 1997 until late 1999, the Applicant periodically exposed himself. (tr. 56)

In February 1998, the Applicant was arrested and charged with taking indecent liberties with a child (felony) and indecent exposure. While driving to his car, the Applicant had his penis exposed. A 14 or 15-year-old female in another vehicle saw the Applicant and told her mother. The mother called the police, who arrested the Applicant. In June 1998, the charge was reduced to indecent exposure (a misdemeanor) and the second count was dismissed when the witnesses failed to appear in court. The Applicant was sentenced to 10 days in jail (suspended) and paid \$50.00 in court costs.

The Applicant told his supervisor and commanding officer about the incident exposure incident and was told to keep his mouth shut and not mention it to anybody. (tr. 46) The military took no disciplinary action against the Applicant for this incident. The Applicant volunteered to attend counseling and went to two 20 minute sessions. In July 1998, the Applicant started a new job which was stressful and the Applicant's improper conduct continued. In February 1999, the Applicant was honorably retired from the Navy, having not been selected for promotion twice. The Applicant left the Navy because he had not been selected for promotion, not because of the indecent exposure incident. (tr. 61) Although the indecent exposure incident would have been a factor in future promotions, but it was not the reason he left the Navy.

Following his February 1998 arrest, the Applicant stopped exposing himself. In November 1998, the Applicant started a civilian job which was very different and stressful. Additionally, the lifestyle change from military duty to civilian life was stressful. In mid December 1999, the Applicant went through the drive-thru pharmacy window at a military facility with his penis exposed. He had resumed exposing himself approximately a month or two prior to this incident. (tr. 56) This was the last time he exposed himself. In February 2000, the Applicant pleaded guilty in federal⁽²⁾ court to indecent exposure. In May 2000, he was sentenced to five years supervised probation, six months house confinement, and fined \$2,500.00.

In January 2000, the Applicant made personal changes in his life, which included reading self-help books, focusing on prayer and meditation, and walking with his wife at lunch time. The Applicant has acknowledged his problem, and in January 2000, sought therapy from a licensed clinical social worker (LCSW⁽³⁾). The Applicant attended 30 sessions⁽⁴⁾ with the LCSW, which focused on his understanding of the contributing factors which lead up to his exposing himself, and on his tendency to minimize situations, withhold information, and appear as if he was hiding something. The counselor indicated the Applicant's conduct was a way of reacting to personal stress. When therapy ended, the Applicant was more able to identify situations that made him anxious and he was able to take appropriate action to relieve the anxiety. He was also able to manage stress appropriately, which resulted in the Applicant not having any impulses to expose himself. The Applicant now, at times, remembers past situations where he would expose himself, and would recognize the situation, and understand how stupid he had been. (tr. 49)

The Applicant believes the most effective stress management techniques are preventive in nature. They are meditation, awareness, understanding of what can happen, exercise, and hobbies. (tr. 69) He knows stress is a part of life and understands his previous failing in dealing with stress. He knows he acted out inappropriately, showed very poor judgment, and is ashamed. (tr. 70) The Applicant acknowledges one "of the smartest things I've ever done in my life was to have counseling." (tr. 71)

The Applicant had been raised to cover up and deny both his feelings and situations he was involved in. This tendency was reinforced during his time in the Navy. He was never an open person who could talk about his problems. He would volunteer information when asked, but withheld information not specifically requested. This unhealthy behavior made the Applicant appear unremorseful and as if he was trying to get away with something. Since the 1999 incident, the Applicant was remorseful and depressed for the first time in his life, which helped him question his prior conduct. (App Ex D)

Since therapy, the Applicant learned to be more open, and he understands he does not have to suppress his feelings. (tr. 52) He is more open, honest, communicative, and discusses things with his wife. (tr. 88) He talks more with his children and has told his children what has occurred, including his conduct and counseling. (tr. 65) The Applicant is remorseful not just for the effect this crime has had on the victims, but also how it affected his wife and children.⁽⁵⁾ He understands he has embarrassed himself and his family and is ashamed for his conduct. The Applicant clearly understands the negative effect of his past actions and is committed to doing whatever is necessary to control his behavior. (App Ex D)

In January 2001, having met all the goals that were set for therapy, the LCSW and Applicant mutually agreed to terminate therapy. (App Ex C) They decided to end therapy based on the Applicant's increased ability to manage stress, his lack of inappropriate sexual impulses, and the Applicant's agreement to contact the LCSW should he notice difficulty managing new stresses in his life. Having acknowledged the impossibility of anyone to guarantee the future behavior of another, the LCSW believes the Applicant is at low risk to be involved in the kind of behavior that brought him to therapy and sees no reason for concern about the Applicant's judgment. (App Ex D) The Applicant can go back and talk with his counselor anytime he wants to or needs to talk.

Through therapy and stress management, the Applicant has learned the "triggers" of his inappropriate behavior. Since completing therapy, the Applicant has been in stressful situations, but has managed the situations well. He no longer has the urge to expose himself. Should his inappropriate conduct recur, the Applicant believes it would have very serious consequences that could include: job termination, divorce, legal problems, and a great deal of jail time. (tr. 73) His family, friends, priest, and doctor are aware of his conduct.

The Applicant considers himself to be a very honest person who takes national security very seriously. (tr. 45) While in the Navy he held a security clearance, has held a security clearance for as long as he can remember, and has had much training related to clearances. The Applicant is working on a master's degree and spends most of his free time studying.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

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. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Criminal Conduct (Guideline J) The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.
- b. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent.

d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.

Sexual Behavior (Guideline D) 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.

Conditions that could raise a security concern and may be disqualifying include: E2.A4.1.2.

1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted. E2.A4.1.2.1.

4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment. E2.A4.1.2.4.

Conditions that could mitigate security concerns include: E2.A4.1.3.

3. There is no other evidence of questionable judgment, irresponsibility, or emotional instability; 1 The adjudicator should also consider guidelines pertaining to criminal conduct (Guideline J) and emotional, mental, and personality disorders (Guideline I) in determining how to resolve the security concerns raised by sexual behavior. E2.A4.1.3.3.

BURDEN OF PROOF

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline J (Criminal Conduct). Under Guideline J, a person's security eligibility is questioned when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. In 1998 and 1999, the Applicant was involved in two indecent exposure incidents, which were a significant defect in judgment. Because of these two arrests, Disqualifying Conditions (DC) a. [\(6\)](#) and b. [\(7\)](#) apply.

Stress affects people differently. Stress caused the Applicant to act in a totally inappropriate manner by driving around in his car exposing himself. After the first incident, the Applicant covered up his conduct because his command told him to keep his mouth shut. He attended two 20 minute counseling sessions, which did not alter his reaction to stress. He continued to expose himself in his car, which led to his second arrest. The Applicant did not cover up the second incident because he realized he had a problem, faced up to his problem, and knew he needed therapy to correct the problem. He acknowledges going to therapy as one of the smartest things he has ever done in his life. He attended 30 sessions, both individual and with his wife, with a LCSW that dealt with stress management, the triggers leading to his inappropriate behavior, and how to be more open and more communicative. The Applicant can return to the LCSW at any time should the need occur. The Applicant has told his wife, three children, supervisor, coworkers, LCSW, doctor, and attorney about his inappropriate conduct. He was open with the DSS when he discussed his past conduct.

The LCSW believes the Applicant is at low risk to be involved similar inappropriate behavior in the future and sees no reason for concern about the Applicant's ability to manage sensitive material in a trustworthy and competent manner. The factor leading to the inappropriate conduct was stress and the Applicant will always face stress. However, the Applicant's inappropriate reaction to stress is not likely to recur now the Applicant has completed therapy. He is more open, more communicative, and understands he does not have to keep his feelings closed up inside himself. He is remorseful for his conduct, ashamed, clearly understands the negative effect of his past actions, and is committed to doing whatever is necessary to control his behavior.

Since completing therapy, the Applicant has been in stressful situations, but has managed the situations well with no urges to expose himself. Should his inappropriate conduct recur, the Applicant believes it would have very serious consequences. He has agreed to contact the LCSW should the Applicant notice difficulty managing new stresses in his life. Additionally, he has the support and understanding of his family, friends, coworkers, and others. Mitigating Condition (MC) d. [\(8\)](#) applies because the factors leading up to the violations, i.e., how he dealt with stress, are not likely to recur. I find for the Applicant as to SOR subparagraph 1.a. and 1.b.

The conduct having occurred in February 1998 and December 1999, which is three and four years ago. Even though the most recent incident occurred more than three years ago, it is still a "recent" event. Therefore, MC a. [\(9\)](#) does not apply.

The Government has satisfied its initial burden of proof under Guideline D, (Sexual Conduct). Under Guideline D, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in a criminal offense or reflects lack of judgment or discretion. Between late 1997 and late 1999, the Applicant repeatedly exposed himself while driving his car, which makes MC 1 [\(10\)](#) applicable. Since the indecent exposure occurred in public, DC 4 [\(11\)](#) is also applicable.

The Applicant received counseling in 1998 and therapy from January 2000 through January 2001. Therapy for inappropriate sexual behavior, by itself, is not a disqualifying condition. SOR subparagraph 1.c. and 1.e. are resolved in favor of the Applicant.

MC 2 [\(12\)](#) does not apply to his past conduct because the last incident occurred three years ago and, as such, is still "recent." However, the Applicant has completed 30 counseling sessions and the LCSW believes the Applicant is at low risk to be involved similar inappropriate behavior in the future. Because of the LCSW's findings and Applicant's explanation of how his therapy has altered how he reacts to stress, I find for the Applicant as to SOR subparagraphs 1.a., 1.b., and 1.d.

The Applicant's reaction to stress, which he can now control, caused him to indecently expose himself. There is no other evidence of questionable judgement, irresponsibility, or emotional instability making MC 3 [\(13\)](#) applicable.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline J (Criminal Conduct): FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Paragraph 2 Guideline D (Sexual Behavior): FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: For the Applicant

Subparagraph 2.c.: For the Applicant

Subparagraph 2.d.: For the Applicant

Subparagraph 2.e.: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. The matter went to federal court because the conduct occurred on a federal military installation.
3. The therapist's *curriculum vitae* is found in App Ex D.
4. Sessions were at times weekly and each session lasted 45 minutes or more. Some sessions included the Applicant's wife and some were individual sessions.
5. The Applicant has been married since 1980 and has three children ages 19, 18, and 13.
6. DC a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.
7. DC b. A single serious crime or multiple lesser offenses.
8. MC d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.
9. MC a. The criminal behavior was not recent.
10. MC 1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted. E2.A4.1.2.1.
11. MC 4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment. E2.A4.1.2.4.
12. MC 2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature. E2.A4.1.3.2.
13. MC 3. There is no other evidence of questionable judgment, irresponsibility, or emotional instability.