

DATE: August 26, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17807

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, 46, failed to disclose his conviction for sexual lewd and lascivious acts on his

security clearance application. The conviction for sexual conduct in a public location and the subsequent falsification raises serious questions concerning Applicant's qualifications for a security clearance. His actions failed to demonstrate the high degree of judgment, reliability, and trustworthiness required of persons handling classified information. Clearance is denied.

STATEMENT OF THE CASE

On February 14, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guideline E (Personal Conduct) and Guideline D (Sexual Behavior) 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 conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a notarized statement, dated March 31, 2003, Applicant responded to the SOR allegations. He admitted the allegations in Paragraph 1.a. There was no page with any answer to the allegations in Paragraph 2.a. in the case file. He requested a hearing.

This case was originally assigned to Administrative Judge Joseph Testan on April 10, 2003. The case was reassigned to me on May 8, 2003 due to caseload considerations. A Notice of Hearing was issued on May 27, 2003, setting the hearing for July 2, 2003. On July 2, 2003, I convened the hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government presented four exhibits which were admitted

into evidence. A Government witness also testified. Applicant testified and did not have any exhibits to offer into evidence. I received the transcript of the hearing on July 11, 2003.

FINDINGS OF FACT

Applicant admitted the allegations in Paragraph 1.a. under Guideline E (Personal Conduct), and Paragraph 2.a. of Guideline D (Sexual Behavior) of the SOR. His admissions to Paragraph 2.a. were made on the record at the hearing (Tr. 6) because they were not in writing in the file. These admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make these additional findings of fact:

Applicant is 46 years old. He works as a composite technician for a defense contractor. He has worked for that contractor for 21 years, starting as a janitor. He builds models for the contractor when needed in the production of defense equipment. He has been married to his present wife for eight years. He has a son from a prior marriage and two stepchildren in the present marriage. He has been married four times. (Tr. 26, 27, 39)

Applicant was arrested on January 26, 2001, for lewd and lascivious acts with another male person. He was observed by a police officer receiving oral sex from a man, both Applicant and the other perpetrator being in a booth in a video peep shop. Applicant stopped there on the way home from work. Applicant told his wife immediately about his arrest. He pled guilty to the charge. Now applicant goes directly home from work and does not stop at such shops anymore. (Tr. 30)

Applicant did not disclose this 2001 arrest on his security clearance application or in his first statement to the defense investigator in September, 2002. Later that day, in another statement, Applicant did disclose the 2001 arrest and conviction. He did not disclose the arrest previously because he was embarrassed due to the subject matter and the fact that the investigator was a female asking him about a sex offense. (Tr. 16-18, 30, 31; Govt. Ex. 1, 2, 3, and 4 at 7)

Applicant submitted his security clearance application when he was transferred to a building where a higher clearance was needed. Since the filing of the application, Applicant has been transferred to a position and building in which a higher level clearance has not been needed. (Tr. 25, 26)

POLICIES

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 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of: (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.

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 E - Personal Conduct: 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. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(1.2) Refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personnel security or trustworthiness determination.

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

(2.2) The deliberate omission, concealment, or falsification 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;

(2.3) Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination;

(2.4) Personal conduct or concealment of information 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.

Conditions that could mitigate security concerns include:

None

Guideline D - Sexual Behavior: 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 a lack of judgment or discretion.

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

(1) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

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

Conditions that could mitigate security concerns include:

None

Under the provisions of the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, I drew only those inferences and conclusions which have a reasonable and logical basis in the evidence of record. Likewise, I avoided drawing any inferences that are based on mere speculation or conjecture.

CONCLUSIONS

Upon consideration of all the facts in evidence, under the appropriate legal precepts and factors, I conclude the following with respect to the Guidelines:

Under Guideline E, disqualifying conditions are divided into two categories of security concerns. First, those which normally will result in an unfavorable clearance action. Second, those which may be disqualifying.

Regarding Guideline E and Paragraph 1.a., Disqualifying Condition (DC) 1.2 applies because Applicant did not list all his arrests in the past seven years as required in response to Question 26 on the security clearance questionnaire. That disqualifying condition is one which normally will result in an unfavorable clearance action.

Next, when questioned by the investigator, Applicant still did not provide the full facts about his arrest in 2001. He had to be confronted with the information before he acknowledged it. Therefore, DC 2.3 applies. The sexual nature of the offense makes Applicant vulnerable to coercion, exploitation, or duress. DC 2.4 applies.

The Mitigating Conditions (MC) applicable are none. This event was recent and Applicant had to be confronted with the information by the investigator before he would discuss it. I cannot find any positive steps Applicant has taken to reduce his vulnerability to coercion. The finding is against Applicant.

Regarding Guideline D, Paragraph 2.a., Applicant was criminally prosecuted for his lewd and lascivious actions. DC 1 applies. The sexual acts are of the type to cause Applicant to be vulnerable to coercion, exploitation, or duress. DC 3 applies. The sexual acts were in a peep shop and in a cubicle with half doors, so the police officer or any other person could observe them. That type of sexual behavior reflects a failure to exercise sound discretion and a lack of judgment. DC 4 applies.

The MC applicable are none. The conduct was recent, and the embarrassment Applicant still feels about the incident could make him vulnerable to coercion in exchange for keeping the incident quiet. The questionable judgment is of such a magnitude that it alone creates cause for concern by the Government on the issuance of a security clearance. The finding is against Applicant.

Two comments need to be made here. First, a person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Second, Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national security and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline E: Against the Applicant

Subparagraph 1.a.: Against the Applicant

Paragraph 2 Guideline D: Against the Applicant

Subparagraph 2.a.: Against the Applicant

DECISION

In light of all the circumstances and facts 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.

Philip S. Howe

Administrative Judge