

DATE: July 30, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-23189

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's failure to disclose all the facts and circumstances of the attempted robbery in July 1986 to the police and to the court later that month raises initial vulnerability issues which are successfully mitigated by Applicant's forthright disclosures to the government in his sworn statement in August 2002, and at the hearing. Considering all the circumstances leading to his initial statement to the police, Applicant had a good-faith belief he was going to be robbed. Though he subsequently pled guilty to filing a false police report later in July 1986, the positive consequence of maintaining a clean record under a first offender or deferred adjudication sentencing structure was clearly more important to him than a possible criminal record and incarceration if his challenge to the false report was unsuccessful. Clearance is granted.

STATEMENT OF CASE

On October 8, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, amended by Change 4, April 20, 1999, 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 denied or revoked. The SOR is attached. Applicant filed his Answer to the SOR on November 7, 2002.

The case was received by me on January 28, 2003. A notice of hearing was issued on April 21, and the case was heard on May 7, 2003. The Government submitted documentary evidence. The Government called no witnesses. Testimony was taken from Applicant. The transcript was received on May 14, 2003.

FINDINGS OF FACT

The SOR alleges sexual behavior (Guideline D) and personal conduct (Guideline E). In his response to the SOR and at the hearing, Applicant denied subparagraph 1.a. because he did not believe the victim was a minor. (Tr. 31) He admitted

the remaining parts of the allegation. He also denied subparagraphs 2.a., ⁽¹⁾ and 2.b. The factual findings are as follows: Applicant is 58-years-old and employed as an executive secretary for a defense contractor. He seeks a secret clearance.

While Applicant stated on August 30, 2002 (GE 2) he did not know why he had sex with the young male in July 1986, he suggested the activity occurred because of alcohol and he was getting ready to go out of town. At the hearing, Applicant provided a much more persuasive reason that he was going through an employment problem having just been told he was about to be replaced by a younger person. (Tr. 66)

About 10:00 P.M. on June 30 1986, Applicant started drinking alcohol at a bar. (Tr. 38) Shortly after midnight, Applicant began driving his car in the downtown area and picked up a young male on the street about 1 A.M. (Tr. 38) Applicant and the young male had sex at Applicant's home. When Applicant started to dress himself, he panicked after noticing his wallet was missing. Applicant believed the young male had taken it. (Tr. 44) Applicant then drove the young male home. At the young male's request, Applicant picked up the young male's friend during the trip to the young male's house.

Before reaching the young male's house, Applicant decided to return to his house (with the two males in his car) to look for his wallet, but more importantly, to find a policeman along the way and/or choose a route back to his home where he would pass a familiar a police station. (Tr. 45)

When Applicant reached his house, he left the two males in his car while he looked for his wallet inside the house. When he did not find the wallet, he returned to his car, and the two males asked him to take them to an automatic cash machine. Instead, Applicant drove to the police station. On his arrival, Applicant noticed several police officers outside the station. The two males jumped out of his car and ran but were apprehended by the police. At the same time the young males were running from Applicant's car, he was telling other police officers the males had attempted to rob him (Tr. 53), and a gun had been placed at the back of his neck by one male sitting in the back seat of his car. (Tr. 29, 49) ⁽²⁾ He did not tell the police why the two males were in his car.

On July 30, 1986, Applicant was arrested (Tr. 50) and charged with fabricating a police report. He also found out the young male he had sex with was a minor. (Tr. 59) Although Applicant pled guilty to the false police report, and was fined, apparently the charge was dismissed as there is no record of disposition.

Applicant has never been involved in any homosexual activity before or since the activity in July 1986. (Tr. 58-60) Applicant submits he has been living like a priest since July 1986. He attends church regularly and is active in several church committees. He also concentrates a lot time managing his kitchen installing company. (Tr. 61)

Having observed Applicant's demeanor and manner of testifying, I find Applicant a credible witness. Considering the poor judgment Applicant exhibited, he is fortunate a worse fate did not befall him in July 1986. In hindsight, stopping to pick up two strangers, and returning such a long distance to his home with the two in his car to find his wallet, were definitely two decisions a reasonable man would not take. However, those decisions Applicant made cannot be fairly measured against the hypothetical standard since Applicant was frightened. Further, almost 17 years have passed since the incident. Applicant explained the offense to an Agent from the Defense Security Service in August 2002. He also stated he would notify the police and his facility security officer should someone in the future try to threaten or blackmail him about the sexual affair.

POLICIES

Enclosure 2 of the Directive sets forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

Sexual Behavior (Guideline D)

Disqualifying Conditions (DC):

3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;
4. Sexual behavior of a public nature and/or that which reflects a 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;
3. There is no other evidence of questionable judgment, irresponsibility, or emotional instability;
4. The behavior no longer serves as a basis for coercion, exploitation, or duress.

Personal Conduct (Guideline E)

Disqualifying Conditions (DC):

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.

Mitigating Conditions (MC):

5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at pages 16 and 17 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (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 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.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must establish all the factual allegations under sexual behavior (Guideline D) and personal conduct (Guideline E) which establishes doubt about a person's judgment, reliability and trustworthiness. Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

CONCLUSIONS

Sexual behavior is a security concern because it may expose the individual to coercion, exploitation, or duress, or reflects a lack of judgment or discretion. DC 1 of the guideline refers to sexual behavior of a criminal nature, whether or not the individual was prosecuted. Because the victim in this case was a minor at the time of the sexual activity, Applicant's actions with the minor must be considered criminal in nature even though no charges were filed.

Though DC 2 under the sexual behavior guideline is irrelevant because of the isolated nature of the conduct, DC 3 is applicable due to the vulnerability issues that are raised by Applicant's sexual activity with the minor. Applicant's failure to immediately inform the authorities in July 1986 about the sexual behavior made him a target for exploitation. DC 4 is also applicable as the sexual activity reflects a lack of discretion and judgment.

Inappropriate conduct of a sexual nature by an adult may be mitigated under the Directive if it was not recent and there is no evidence of subsequent conduct of a similar nature. (MC 2) There is no evidence Applicant has engaged in this kind of sexual conduct either before or since the single occurrence in July 1986.

MC 3 under the sexual behavior guideline is applicable when there is no other evidence of questionable judgment, irresponsibility, or emotional instability. Applicant's belief he was in danger of being robbed was reasonable given the circumstances in July 1986. Though Applicant pled guilty to the false police report, the fact that he did not receive a criminal record requires consideration of his motivation for taking advantage of a deferred adjudication process so he could avoid the risks of being found guilty, receiving a criminal record, and possibly being incarcerated. (3)

Finally, sexual behavior may be mitigated under MC 4 when the behavior no longer serves as a basis for coercion and duress. Applicant's disclosures of his conduct in his sworn statement in August 2002, and at the hearing, sufficiently remove the vulnerability issues of the sexual conduct to find in Applicant's favor under the sexual behavior guideline.

Personal conduct refers to behavior indicative of poor judgment, untrustworthiness, and unreliability. Having sex with a minor is indicative of poor judgment and may demonstrate the person is unable to safeguard classified information. Having weighed all the facts and circumstances leading up to false police report charge, I find Applicant had a good-faith belief the two males intended to rob him. Even though his wallet had already been taken earlier, given the fact he had been asked to go to a cash machine, and had a metal object pressed against his neck by the male in the back seat, I find Applicant's opinion of their plans was reasonable.

Initially concealing his sexual activity with a minor male clearly could have a negative affect on Applicant's personal, professional and community standing as described in DC 4 of the personal conduct guideline. However, in view of Applicant's revelation of the sexual activity in his sworn statement in August 2002, and in his credible testimony, I find for Appellant under the personal conduct guideline.

In reaching my findings for Applicant under the sexual behavior and personal conduct guidelines, I have also given careful consideration to the general factors of the whole person concept. Considering the evidence as a whole, Applicant violated the criminal law by engaging in sex with a minor male in July 1986. Given Applicant's forthright disclosures in August 2002 and at the hearing, his behavior almost 17 years ago no longer serves as a basis for coercion, exploitation or duress.

FORMAL FINDINGS

Formal findings required by Section 3, Paragraph 7 of the Directive are:

Paragraph 1 (sexual behavior): For the Applicant.

1.a. For the Applicant.

Paragraph 2 (personal conduct): For the Applicant.

1.a. For the Applicant.

1.b. 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 Applicant.

Paul J. Mason

Administrative Judge

1. At the hearing, Applicant changed his answer to subparagraph 2.a. (Tr. 7, 9) Although he had not received the Title 18 USC 1001 admonition before the change, the record evidence clearly supports his contention he did not file a false police report.
2. Applicant believed he was being robbed because a part of a wrench set, which was found in the back seat of his car, was used by the second male to create the feeling of a gun being pressed against Applicant's neck. (Tr. 51)
3. Though Appellant could have entered the plea to avoid disclosing the circumstances of the purported crime but also the earlier sexual behavior, pleading to the false police report does not represent other evidence of questionable judgment.