

DATE: February 27, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-02437

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Deputy Chief Department Counsel

FOR APPLICANT

Colleen McCoy, Esq.

SYNOPSIS

Applicant, with an otherwise meritorious work record, has a recurrent history of masturbating in public, most recently in August 1999, which he has not disclosed to his employer, court-referred evaluator, and private polygrapher. Initially concealing his actions from his wife, he has reportedly been forthcoming with her, but with no one else. He continues to withhold the true facts about his actions from his children, his employer, his court-referred evaluator, and his private polygrapher out of personal embarrassment and concern for his job and security clearance. Applicant fails to mitigate Government concerns over his vulnerability to coercion and duress as a result of his continued withholding of the truth about his actions. Applicant fails also to mitigate security concerns associated with his concealing the factual details of his actions associated with his 1999 arrest and earlier incidents in another state from the DSS agents who interviewed him before confronted with the facts in his last interview with the DSS polygrapher. Clearance is denied.

STATEMENT OF THE CASE

On August 7, 2003, 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. The SOR 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 September 9, 2003, and requested a hearing. The case was assigned to me on November 17, 2003. The hearing was scheduled and convened on December 17, 2003, 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 no exhibits. The transcript (R.T.) of the proceedings was received on December 29, 2003.

PROCEDURAL ISSUES

Before the close of the hearing, Department Counsel moved to amend subparagraph 1.c of the SOR to strike the words "signed, sworn statement executed by you" and substitute them with the words "in an interview with another special agent of the Defense Security Service." There being no objections from Applicant, and good cause being shown, Department Counsel's motion was granted. Applicant's denial of giving a false statement in response to sub-paragraph 1.c was unchanged by the amendment.

SUMMARY OF PLEADINGS

Under Guideline E, Applicant is alleged to have (a) been arrested in August 1999 for indecent exposure for masturbating in his car near an elementary school in State A, to which he pleaded no contest, was fined \$300.00, assessed court costs, and ordered to perform 24 hours of community service, as part of a deferred adjudication program, (b) deliberately falsified a signed, sworn statement submitted to an interviewing DSS agent in November 2001 re: the facts covered by his August 1999 arrest by denying any exposure of his genitals for masturbating for sexual gratification, (c) deliberately falsified statements given to another special agent in a December 2001 interview by repeating the same false story regarding the August 1999 incident, (d) been detained by private security guards in State B in September 1981 after they discovered his masturbating in a parked car while watching female patrons enter the mall, and (e) masturbated in public on at least one other occasion.

Under Guideline D, Applicant is alleged to have engaged in sexual behavior as covered by the acts and incidents covered under Guideline E.

For his response to the SOR, Applicant admitted his August 1999 arrest but denied the underlying acts, and denied each of the remaining allegations.

STATEMENT OF FACTS

Applicant is a 49-year-old sprinkler maintenance technician for a defense contractor who seeks to retain a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant is a technician with a meritorious work record of over 20 years with his current defense contractor. In February 1999 he had given up smoking to help him lose weight. He kept his smoking resumption from his spouse and his two children, who he had long counseled not to smoke and drink (exs. 1 and 2). Both his children are involved in sports. To avoid being seen by any of his family members, he limited his smoking to his morning work commutes. Applicant credits his smoking with his losing about 25 pounds.

While on his way to work in the morning of August 18, 1999, Applicant turned down a side street to find a place to park and smoke. As he approached an elementary school, he turned around and drove out of sight of the school before pulling over to the curb. After smoking a few cigarettes, he unzipped his pants, exposed his genitals, and masturbated (contrary to his insistent claims that he exposed himself just to relieve an itch).

Unbeknown to Applicant at the time of the August 1999 incident, a female bystander was situated outside his car and observed his unzipping his pants and stroking his erect sexual organ in a manifestly overt act of masturbation. This witness (W) then screamed at Applicant to leave the scene immediately, which he did. She also made a note of Applicant's license plate and called "911" to report her observations to the police. After further investigation, police came to Applicant's residence and questioned him about the incident. Once Applicant confirmed he was at the scene of the reported incident, the police advised him there would be an officer out to arrest him.

In the evening of August 23, 1999, other police officers arrived at Applicant's residence and arrested him for indecent exposure and escorted him to the local police station where he was formally charged. Applicant's spouse covered his bail, and he was released from jail the same night.

After appearing in court with his attorney on three occasions in the hopes of plea bargaining his charges Applicant accepted his attorney's advice on his fourth such appearance and pleaded no contest to the charge of indecent exposure. As a condition to the court's deferred adjudication, he was fined \$300.00, ordered to perform 24 hours of community

service, and subjected to required psychological evaluations, in addition to accepting the court's imposed one year of supervised probation.

Applicant was subsequently evaluated by a court-appointed psychologist in October 2000. In this initial evaluating session, the psychologist recommended Applicant take a voluntary polygraph examination under the administering supervision of a polygrapher chosen by the psychologist. Applicant acceded to the psychologist's recommendation and appeared for a scheduled polygraph evaluation in November 2000. In this polygraph examination, Applicant repeated the same innocent explanation of his August 1999 conduct as he has had told his wife and the police: that while parked on the side street in August 1999, he scratched his exposed genitals to relieve an itch, and not with the intention of masturbating and exposing his genitals to the woman who observed him (*see ex. 2*). Applicant was told by his psychologist that he passed his polygraph test and would not need counseling.

Applicant didn't immediately tell his wife or his employer about his masturbating actions for which he was arrested and charged in August 1999. When up for his security update in December 2000, he repeated the same story he told the police and his wife earlier out of concern for his job and clearance (*ex. 1*). Afforded the opportunity to disclose the truth about his actions that prompted his August 1999 arrest in a series of DSS interviews in November 2001, he again repeated the same story he had told police, his wife, his private polygrapher and his employer earlier. In each of these first two sessions with Agent A he failed to disclose his acts of masturbation when observed by the female bystander. He compounded his misstatements in these interviews by his assurances he had never previously engaged in any public acts of masturbation for sexual gratification.

Scheduled for a polygraph with Agent B in December 2001, Applicant initially stuck to his same story about his exposing and scratching his genitals to relieve an itch. Only when repeatedly confronted by Agent B about his actions did he choose to become fully candid about not only his August 1999 action, but his earlier acts of public masturbation as well in other states. Specifically, Applicant admitted to not being honest with Agent A about his intentions regarding the event leading up to his August 1999 arrest and proceeded to admit that he had been masturbating in his car on the morning of August 18, 1999, when he was observed by a female bystander (*ex. 2*). Applicant claims he was coerced into making these admissions by the Agent B who denied bathroom and lunch breaks and led him in his questioning in search of desired answers (R.T., at 48-49). Applicant provides no documented proof of agent coercion or improper interrogation methods, and his statement contains initials and an acknowledged opportunity to review his statement and make corrections (R.T., at 50-53). Applicant failed to delete or alter his admissions, and they are accepted as true (*see ex. 2*).

Applicant also acknowledged to Agent B his masturbating in public on other occasions. On one of these occasions, he was observed by private security guards masturbating in his car in a parking lot of a mall in State B while watching female patrons enter the mall. He acknowledged, too, to have masturbated in public on at least one other occasion, without providing any specifics. In neither of these incidents was Applicant arrested. Public acts of indecency such as the ones Applicant knowingly and willingly performed are generally recognized as illegal in all of the states and must be presumed to be in State B.

Except for his wife, Applicant has not disclosed his acts of public masturbation for which he was arrested for in August 1999 to either his children, his private polygrapher, his professional evaluator, or his employer out of continuing embarrassment and concern about his job and clearance.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require 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:

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: None

Personal Conduct

The Concern: 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 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.

DC 5 A pattern of dishonesty or rule violations.

Mitigating conditions: None.

Burden of Proof

Under the Directive, a decision to grant or continue an Applicant's 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 SOR and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, 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

By all accounts, Applicant has a meritorious professional record and no history of involvement with law enforcement

before his arrest for indecent exposure in August 1999. While it had been many years before he had returned to any acknowledged masturbation in public, he does have some history of similar conduct over the past 25 years, including an incident in 1978 or 1979 where he was found masturbating in his car by shopping mall security guards and released. His actions raise security concerns about his judgment and reliability under the guidelines covered by Guideline E (personal conduct) and Guideline D (sexual behavior).

Following his 1999 incident, Applicant withheld his true actions associated with his 1999 arrest and previous such experiences from his wife and children, his employer, his court-referred evaluator and the polygrapher who tested his veracity and the first DSS agent who interviewed him in October 2001 out of embarrassment and concern it might jeopardize his job and clearance. His actions entitle the Government to invoke two of the disqualifying conditions for personal conduct: DC 1 (reliable unfavorable information) and 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 in his post-polygraph interview with Agent B. Despite Applicant's hearing efforts to recant these admissions (claiming them to be the result of coercion and undue influence on him over an intense, grueling post-polygraph interview with Agent B), his post-polygraph admissions and explanations were accepted as true (ex. 2) under all the circumstances considered.

While Applicant elected to tell his spouse about his sexual-related incidents once his clearance update commenced in 2000, he has provided none of these details to his children for understandable reasons, nor to his employer, court-referred evaluator, and private polygrapher. Applicant justifies his failure to come forward with corrected explanations of his covered incidents as necessary to protect him from further embarrassment with his employer, as well as the potential loss of his job and clearance. With only his spouse since notified, the risks of any recurrent vulnerability remain and cannot be minimized or managed for security clearance purposes. Applicant may not avail himself of any of the mitigating conditions based on the record evidence and fails to absolve himself of adverse risks of coercion, exploitation or duress (prerequisites for invoking MC 4 of the Guidelines for so long as he continues to cover up his actions with members of his family (his children), his employer, his court-referred evaluator and his private polygrapher.

Taking into account all of the circumstances surrounding Applicant's recurrent public indecency actions in 1999 and earlier acknowledged incidents, Applicant fails to demonstrate that his acts are sufficiently isolated to enable him to carry his evidentiary burden. Unfavorable conclusions warrant with respect to the underlying conduct covered by subparagraphs 1.a, 1.d, and 1.e of Guideline E and subparagraph 2.a of Guideline D.

Difficult to reconcile with principles of clearance eligibility, too, are Applicant's repeated misrepresentations to interviewing DSS agents (not to mention his spouse, children, employer, his court-referred evaluator and private polygrapher) about his sexually-oriented actions that resulted in his August 1999 arrest, and his prior history of acts of masturbation while parked on public streets. Embarrassment and concern over how it might affect his job and 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 3 (providing false and misleading information to an investigator) and DC 5 (pattern dishonesty or rule violations) of the Adjudicative Guidelines covering Guideline E. Because Applicant did not acknowledge his acts of masturbation associated with his 1999 arrest or previous acts of masturbation in a public facility until confronted with the material facts by Agent B in a third DSS interview in November 2001, 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 Case No. 93-1390 (January 1995).

Considering the record as a whole, including Applicant's meritorious professional history and unblemished criminal record (save for his 1999 encounter), Applicant's mitigation efforts are still insufficient to (a) surmount his repeated misstatements about his actions associated with his 1999 arrest and previous acts for sexual gratification in public facilities or roads and (b) restore his judgment and reliability to levels required for eligibility to hold a security clearance. Unfavorable conclusions warrant with respect to sub-paragraphs 1.b and 1.c of Guideline E.

In reaching my decision, I have considered the evidence as a whole, including each of the factors set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the 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

Subpara. 1.a: AGAINST APPLICANT

Subpara. 1.b: AGAINST APPLICANT

Subpara. 1.c: AGAINST APPLICANT

Subpara. 1.d: AGAINST APPLICANT

Subpara. 1.e: AGAINST APPLICANT

GUIDELINE D (SEXUAL BEHAVIOR): AGAINST APPLICANT

Subpara. 2.a: AGAINST 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