

DATE: May 9, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-04524

## **DECISION OF ADMINISTRATIVE JUDGE**

**CLAUDE R. HEINY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jonathan Beyer, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

In 1998, the Applicant was found guilty of indecent exposure and harassment. The behavior is not recent, there is no evidence of subsequent similar conduct, nor is there evidence of other questionable judgment. This coupled with his change in lifestyle is sufficient to mitigate or extenuate the negative security implications of his indecent exposure incidents. The additional allegation of making a false statement is unfounded. Applicant did not make a false signed, sworn statement. The facts he gave comport with those in the police report. Clearance is granted.

### **STATEMENT OF THE CASE**

On December 5, 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<sup>(1)</sup> it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On December 10, 2002, the Applicant answered the SOR and requested a hearing. The case was assigned to me on January 9, 2003. A Notice of Hearing was issued on January 23, 2003, scheduling the hearing, which was held on February 19, 2003.

The Government's case consisted of seven exhibits (Gov Ex). The Applicant relied on his own testimony and nine exhibits (App Ex). Following the hearing, the *curriculum vitae* of the psychologist who provide a psychological evaluation (App Ex A) was received, provisions having been made for its submission. Department Counsel (DC) objects to the *curriculum vitae* and renews the objection to App Ex A, because there had been no opportunity to cross examine the psychologist. DC argues the evaluation should be given little weight. The exhibit was admitted and given the appropriate weight. The transcript (tr.) of the hearing was received on February 28, 2003.

The SOR alleges personal conduct (Guideline E) and sexual behavior (Guideline D). The Applicant admits the personal conduct, and neither admits nor denies the sexual behavior allegation.

### **FINDINGS OF FACT**

The Applicant is 30-years-old, has worked for a defense contractor since June 1999, and is seeking a security clearance.

The Applicant had a strict religious upbringing that did not permit any type of sex before marriage and taught homosexuality was a violation of the Bible and sinful. The Applicant was a shy and insecure adolescent. In 1991, he graduated from high school. A male coworker at a grocery store sexually came onto the Applicant. The other individual sexually fondled the Applicant, against his wishes. The Applicant's parents instead of being supportive believed their son was gay. The Applicant left the area to attend college. While in college, the Applicant became engaged to a woman. The Applicant was devastated when the woman broke off the engagement.

The Applicant returned to working at the grocery store. Coworkers at a grocery store told the Applicant one of their fellow employees was homosexual, but the Applicant did not believe it. After a period of drinking, the other person sexually assaulted the Applicant in the form of oral sex. The Applicant stopped the action and left, but the two remained friends. Being confused about his sexual orientation and never having had sex with a woman, he requested his current girlfriend have sex with him. She refused and broke off their relationship. The Applicant sought out willing women to prove his sexual desirability to females. These women did not resolve his conflict. During this period the Applicant was arrested for indecent exposure and harassment. He had gone outside naked when he saw one of his neighbors.

On November 17 and 18, 1998, when a neighbor woman whom the Applicant found attractive was going to her car at 7:45 a.m., the Applicant went outside in the nude. On the second occasion, the Applicant was masturbating. The victim contacted the police and on November 24, 1998, the police were present when the woman went to her car. They observed the nude Applicant at his window, with the blinds open, masturbating. (Gov Ex 4, 5) The Applicant made a confession (Gov Ex 6) in which he admits walking outside nude on two different days. He admitted masturbating on the second day and also masturbating in front of his window prior his arrest. The Applicant was found guilty and sentenced to 20 days in jail and fined \$500.00, which he served and paid. In June 1999, when he completed his Security Clearance Application, SF 86, (Gov Ex 1) he indicated he had been arrested for indecent exposure, was fined \$500.00, and served 20 days in jail.

In July 1998, four months before the incident, after finishing his master's degree, the Applicant received a \$20,000.00 annual fellowship to pursue his doctoral degree, which was one of the highest marks of recognition the university could give its graduate students. (App Ex D)

In January 1999, the Applicant sought counseling on his attorney's advice. The Applicant attended 15 counseling sessions over a two-month period. This counseling helped him to deal with tension, worries, and anxiety. (tr. 59) He also attended counseling through his church. During the two-week period before the hearing, the Applicant visited a psychologist three times, was evaluated, and a psychological evaluation (App Ex A) made. After reflecting on the matter and talking to the counselors, the Applicant realizes he was lonely, depressed, and traumatized by the actions of his gay friends, and felt sexually undesirable to women. (tr. 50) His conduct was a subconscious action to prove to himself he was not gay and he was sexually desirable to women, not just to men. (tr. 82) Before the incident, his only sexual experiences had been with two men. His girlfriend at the time had rejected him. (tr. 53) Before the indecent exposure incidents he was spending most of his time with male friends, now he spends his time with his wife.

The recent psychological evaluation (App Ex A) finds the Applicant to be free of any mental or emotional illness. The Applicant has a clear understanding of his responsibility in the arrest and what led to this inappropriate behavior. The Applicant has a great deal of remorse and is clearly committed not to repeat this behavior. The conflict leading to his behavior is now resolved.

In June 1999, the Applicant moved to another state and no longer associates with or is in contact with the victim, the two men, or his former girlfriends. The Applicant regularly attends church. In August 1999, he met the woman he married in April 2000. His marriage changed him and he started settling down. (tr. 45) Following his marriage, the Applicant felt sexually comfortable and the urges to expose himself disappeared. (tr. 66) One of his counselors told him most people come into marriage with "baggage" and telling their mate of events prior to the marriage could create more marital problems than they solved. For this reason, the counselor suggested the Applicant not tell his wife about the incident. The Applicant followed this advice. (tr. 63)

There has been no inappropriate sexual behavior from the date of his marriage to the present, nor has he been involved in any criminal activity or other adverse conduct. The Applicant is remorseful and committed to never repeat such action. The Applicant states the factors leading to the exposure incident will not repeat themselves. (tr. 78) He is now a family man with a happy marriage, a home, a cat, and his wife is getting working on her business degree at the community college. In contrast, at the time of the incident, he was a very lonely, traumatized college student. (tr. 78)

In January 2000, the Applicant completed a signed, sworn statement wherein he said he had been arrested in November 1998 for indecent exposure, that he had gone outside naked when he saw a woman from his neighborhood, and had gone outside onto his patio naked one other time about two months earlier. (Gov Ex 2) He did not mention masturbation in his statement.

## 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:

**Personal Conduct** (Guideline E) The Concern: 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:

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

1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances. (E2.A5.1.2.1.)

Conditions that could mitigate security concerns include:

None Apply.

**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.

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. 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:

2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature. E2.A4.1.3.2.
3. There is no other evidence of questionable judgment, irresponsibility, or emotional instability. E2.A4.1.3.3.

### **BURDEN OF PROOF**

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, at page 528 (1988), "no one has a 'right' to a security clearance." As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has the ultimate burden of establishing 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.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, at 531. 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 E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. In 1998, the Applicant was arrested for indecent exposure and harassment. Disqualifying Condition (DC) 1 <sup>(2)</sup> applies.

In November 1998, over the course of one week, the Applicant exposed himself to a neighbor. He did this by walking outside naked on two occasions. He masturbated on one of these occasions and also masturbated in front of his open window while watching his neighbor go to her car. He was arrested, fined \$500.00, and served 20 days in jail. The factors leading to the exposure incident are not likely to repeat themselves. At the time of the incident he was a very lonely, confused, traumatized college student. Two different men had attempted to engage him in sexual activities. After counseling, he understands his action was an unconscious attempt to prove to himself he was not gay and was attractive to females.

The Applicant regularly attends church and is a happily married family man. His marriage has changed him, settled him down, and he has found his marriage to be nurturing. Following his marriage, his urges to expose himself have disappeared. He is remorseful and committed to never repeat such action. His most recent psychological evaluation finds the Applicant free of any mental or emotional illness and understands his responsibility in the arrest and what led up to his inappropriate behavior. Since his arrest, more than four years ago, he has not been arrested, not been involved in inappropriate sexual behavior, nor involved in any other adverse conduct. In applying the whole persons factors <sup>(3)</sup>

I considered the nature, extent, and seriousness of the conduct, the Applicant's age and maturity at the time of the incident, the circumstances surrounding the conduct, the motivation for the conduct, the frequency and recency of the conduct, and the probability the conduct would recur. Because of the passage of time, coupled with his counseling, and no other adverse incidents, I find for the Applicant as to SOR subparagraph 1.a.

The allegations of falsification under SOR subparagraph 1.b. are unfounded. In his SF 86 the Applicant listed his arrest for indecent exposure and his punishment. It is alleged his sworn statement should have mentioned masturbating and did not. The fact that his statement does not mention masturbation does not make the statement false. The omission does not prove the Applicant deliberately failed to disclose information about the incident. His signed, sworn statement says he was arrested for indecent exposure and states he went outside naked on two occasions. His statement corresponds to the facts in the police report that indicate he went outside nude twice. His action occurred on consecutive days, however, his statement incorrectly says the two events were separated by two months, which, although a discrepancy, is not material. The police report also indicates he was arrested one week after the first incident as he stood in his house in front of the window masturbating. His sworn statement does not say his arrest occurred when he was walking outside naked. The facts given in his statement, i.e., he was arrested and was outside naked on two occasions, comports to the facts of the police report. The Applicant did not provide false material facts in his sworn statement. I find for the Applicant as to SOR subparagraph 1.b.

The Government has satisfied its initial burden of proof under guideline D, (Sexual Behavior). Under Guideline D, 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. The Applicant was arrested for indecent exposure. Therefore, DC 1<sup>(4)</sup> applies. Additionally, the Applicant walked around outside nude and masturbated where he could be seen by the public. DC 4<sup>(5)</sup> applies.

The Applicant's conduct was serious, antisocial behavior. However, it occurred more than four years and three months ago and is not recent. There is no evidence of subsequent conduct of a similar nature. Mitigating Condition (MC) 2<sup>(6)</sup> applies. There is no other evidence of questionable judgment, irresponsibility, or emotional instability. MC 3<sup>(7)</sup> applies.

The Applicant has followed his counselor's advice and not told his wife of his arrest which occurred prior his marriage. I do not find this makes the Applicant vulnerable to coercion, exploitation, or duress.

### **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 E (Personal 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

### **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.

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**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. DC 1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances. (E2.A5.1.2.1.)
3. 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.
4. DC 1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted. E2.A4.1.2.1.
5. DC 4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment. E2.A4.1.2.4.
6. MC 2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature. E2.A4.1.3.2.
7. MC 3. There is no other evidence of questionable judgment, irresponsibility, or emotional instability.  
E2.A4.1.3.3.