

DATE: August 21, 2003

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-05110

**DECISION OF ADMINISTRATIVE JUDGE**

**KATHRYN MOEN BRAEMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Juan J. Rivera, Esquire, Department Counsel

**FOR APPLICANT**

Neal A. Connors, Esquire

**SYNOPSIS**

Applicant's 1997 criminal, personal and sexual misconduct remain of security concern as he "knowingly entered upon the property of a neighbor for a lewd purpose" and deliberately looked into the teenage daughter's bedroom window. While he is remorseful for this conduct and has not subsequently been arrested, he has not provided sufficient evidence of his rehabilitation as he has never sought therapy to deal with the underlying causes. The allegation of falsification of an August 2001 Defense Security Service (DSS) statement is mitigated as he otherwise disclosed details of his arrest at the time of the incident to his supervisor, provided details of his conduct to the local police, and cooperated in a subsequent DSS interview. Further, he has a reputation for honesty at his work place. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on November 29, 2002. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. <sup>(1)</sup> The SOR alleges specific concerns over personal conduct (Guideline E), criminal conduct (Guideline J), and sexual behavior (Guideline D). Applicant received the SOR on December 16, 2002 and responded to these SOR allegations in an Answer notarized on January 20, 2003, where he requested a hearing.

The case was assigned to Department Counsel who on April 8, 2003, attested it was ready to proceed; and the case was assigned to me on April 14, 2003. Subsequently, a mutually convenient date for hearing was agreed to. A Notice of Hearing issued on April 17, 2003, set the matter for May 13, 2003, at a location near where Applicant works and lives.

However, after receiving the notice, Applicant retained counsel who entered his appearance on May 6, 2003, and requested a continuance and a change of location for the hearing. As Department Counsel had no objection, the continuance was granted on May 7, 2003; and the case was reset on May 8, 2003, for June 2, 2003, at the location requested by Applicant's counsel.

At the hearing the Government introduced six exhibits of which Exhibits 1, 2, 3B, 4, and 6 were admitted<sup>(2)</sup> into evidence. (Exhibits 1, 2, 3B, 4, 6; TR 17-27) Applicant's counsel offered two exhibits which were admitted into evidence. (Exhibits A-B; TR 28-29) Applicant testified. The transcript (TR) was received on June 10, 2003.

### FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, who is 49 years old, has worked for Defense Contractor #1 in State #1 since December 2002. Previously he worked for Contractor #2 with the same duties from August 1996 to 2002. He is required to have access to classified information for this position. Formerly he was on active duty in the military from 1972 to 1996 when he retired after 24 years of service with an honorable discharge. While he was in the military in State #1 from 1990 to August 1996 he had performed many of the same duties he now performs as a civilian. He was granted a Top Secret security clearance in March 1978. (Exhibit 1; TR 31-37, 50-51)

Applicant has about three years of college. He attended a college in State #1 in 1996. He was married in 1977 and he and his wife have two children, one born in 1970 and one born in 1983. His wife became a naturalized U.S. citizen in September 1981. (Exhibit 1; TR 37, 53; 76)

#### **Personal Conduct, Criminal Conduct, and Sexual Behavior**

Applicant completed a Security Clearance Application in March 1999 for a periodic review. In response to Question 26 about his police record he disclosed a 1997 arrest for Disorderly Conduct where the charges were dismissed. (Exhibit 1; TR 36-38)

In the 1996-97 period when Applicant was 43, he and his family lived in a subdivision. He was friendly with his neighbors who had two teenage children. He would often play darts with them. At one point the mother of the children expressed concern that someone was looking through the daughter's bedroom window. Hearing her concerns but not revealing his own misconduct that led to the concerns, Applicant offered to install a motion detector. Yet he was the individual who was looking through the windows. For Valentine's Day in 1977 he gave the teenage girl a present that was a heart-shaped balloon; he was trying to anonymously drop the present at the front door when the teenage son opened the door and surprised the Applicant. Even though he knew the mother and teenager were fearful, Applicant continued to look through the window at the teenage girl. He admits he wanted to and did see her naked. (Exhibit 6; TR 55-62, 67-69; 74-75)

A State #1 misdemeanor complaint filed in February 1997 charged him with disorderly conduct as he "knowingly entered upon the property of [his neighbor] for a lewd purpose and deliberately looked into the window of bedroom at that dwelling." (Exhibit 2)

In a voluntary statement to the police department he admitted the following:

I have on 3-5 occasions over the last six months looked in the neighbors windows both in the daytime and at night. I have known the neighbors for about 5 years since they moved into the house. I would consider myself as a friend . . . I have been invited in their home on numerous occasions (*sic*) to talk and play darts with both their son. . . and daughter. . . I have never tried to break into their home. On several occasions (*sic*) I have had conversations with [the mother and daughter] concerning persons around their home and [the daughter's] window on most of these occasions (*sic*) I had not been around the house or [the daughter's] window."

(Exhibit 3B; TR 55-57)

After he was arrested, Applicant's name was reported in the local newspapers which disturbed him very much. (TR 73) Applicant went to his supervisor and notified him of the charge; his supervisor advised him to retain a lawyer, but he was not placed on any kind of probation in the workplace. (TR 39-41, 70) Applicant's lawyer viewed his statement to

the police as a "damning" admission and advised him to plead guilty and accept a \$150 fine and three months probation after which the charges would be dismissed. (TR 40)

In March 1997 the court issued an Order for Court Supervision which found him guilty, deferred the application for supervision for 90 days, and fined him \$150. (Exhibit 3B) He moved ten miles away 18 months later. (TR 75)

In August 2001 Applicant met with Investigator #1 from the Defense Security Service (DSS) and provided a statement admitting he was involved with an incident with a neighbor in 1997 at his previous address. He admits he told the agent that he did not remember all that he had included in his police statement. (Exhibit 4, TR 62-63)

Applicant did disclose the following:

"Their daughter had said that on numerous occasions (*sic*) that someone was walking by her bedroom window in the front of their house. Several times I was asked did I see anyone. I stated that I had never see (*sic*) anyone as I recall. One night I received a call from the [city] police department asking if I would come in to make a statement about the matter. I went to the [city] police department and was informed that I was a suspect in the matter. I gave a statement at that time of my involvement."

(Exhibit 4)

Applicant further stated that he did not remember doing anything or saying anything that should have made him a suspect. By that statement, he did not intend to make a false statement or deny his improper acts. He admitted to the DSS in the Statement that after he was charged with disorderly conduct, his wife paid his bail; and he hired an attorney. After his attorney advised him to accept the District Attorney's offer of three months probation and a \$150 fine, he did so. (Exhibit 4; TR 63, 66-67; 76; 77-78) Applicant concedes that his initial DSS statement was not as "thorough as it should have been. In retrospect, I should have put more stuff on the paper." (Exhibit 4; TR 41-45; 49) He stated he was not sure "what all things they [DSS] wanted." (TR 73) Consequently, I find that Applicant did not knowingly and willfully falsify material facts in his initial DSS statement provided in August 2001. (SOR 1.a.)

Three weeks later in August 2001 Applicant met with Investigator #2 from DSS and had a pre-polygraph interview, but never was polygraphed. (TR 46, 49) In response to the investigator's direct questions, Applicant provided a statement where he provided more details about the incident with his neighbor's daughter; he admitted he did look through her window several times in 1997 and "did see her in her underwear, without clothing on." He also revealed he thought about her and other girls while masturbating. However, he never touched the teenage neighbor and never made any sexual comments to her. Applicant declared that in his previous DSS statement he was "afraid and confused and did not include all the information" he subsequently provided to Investigator #2 as he was afraid that the information could be used against him "by the courts" and he was "fearful of jeopardizing" his security clearance. (Exhibit 6; TR 47-49; 64-67, 70-73)

Applicant admits that he looked in the window of a neighbor who was a teenage girl. He is remorseful for his conduct. (TR 45, 52-53) He has not been subsequently arrested. (TR 51) He never sought therapy for his conduct. (TR 97)

### References<sup>(3)</sup> and Evaluations

Applicant's supervisor who has known him since April 1997 views him as "a conscientious and motivated individual who constantly strives to do the very best job possible in all circumstances. He is extremely knowledgeable individual and is very well respected by both his peers and his supervisors." Applicant's supervisor described Applicant's "honesty and integrity" as being beyond reproach. (Exhibit A)

Applicant submitted several favorable references from a neighbor and a co-worker. (Exhibit A)

A friend who has known Applicant from the military is now his manager and wrote his annual performance reports from 1996 to 2002; he assesses Applicant as being "dedicated, hardworking, trustworthy and sincere." (Exhibit A)

A government official who knows him in his current job also provided a favorable reference: he views Applicant's

knowledge and professionalism as "impeccable." (Exhibit A)

Applicant provide favorable Performance Reviews from 2001 to 2002. His 2002 review described him as one of the company's "brightest stars." (Exhibit B)

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I weighed relevant Adjudication Guidelines as set forth below :

### **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.**

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

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 trust-worthiness determination;
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:**

2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;

### **Guideline J - Criminal Conduct**

**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 admissions of criminal conduct
- b. A single serious crime or multiple lesser offenses.

**Conditions that could mitigate security concerns include:**

None

### **Guideline D - Sexual Behavior**

**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. <sup>(4)</sup> 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:**

1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
2. Compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high-risk behavior or that which is symptomatic of a personality disorder;
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 lack of discretion or judgment.

**Conditions that could mitigate security concerns include:**

None

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. The Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

**CONCLUSIONS**

**Personal Conduct**

The Government advanced security concerns over personal conduct issues as Applicant failed to disclose details of his past sexual behavior and criminal conduct in a DSS interview with Investigator #1 in August 2001. Applicant's behavior could reflect questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations and could indicate that he may not properly safeguard classified information. Conditions that could raise a security concern and may be disqualifying also include: 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 trust-worthiness determination.

Further his 1996-97 conduct (where he for six months looked in the window of his neighbor's teenage daughter) itself raise potential disqualifying personal conduct concerns (as will as concerns discussed below under criminal conduct and sexual behavior) under disqualifying condition 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.

To rebut and overcome the Government's case, Applicant has to demonstrate that he has mitigated<sup>(5)</sup> this conduct. While he failed to disclose all of the details of his misconduct in his initial DSS Statement, he later cooperated in a pre-polygraph interview and answered completely all of the direct questions put to him by the second investigator. Thus, I am persuaded that he was not willfully falsifying when he did not initially provide<sup>(6)</sup> all of the adverse facts of his embarrassing arrest. In reaching this conclusion, I note that Applicant earlier did disclose this arrest immediately after it happened to his supervisor as the arrest and the reason for the arrest were also in the local newspaper. (However, there is no evidence that the contractor filed an adverse information report.) Also, he disclosed many details of his conduct to the local police in a statement when he was arrested. Further Applicant disclosed this arrest and the disposition in his SF 86 that he completed in 1999. Also, notably, Applicant has a current good work record and favorable reference letters which commend him generally for his good character; his supervisor assesses his honesty and integrity as being beyond reproach. Thus, he has mitigated SOR 1.a. under Mitigating Condition (MC) 2: The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

On the other hand his misconduct as alleged in SOR 1.b. continues to raise personal conduct concerns as he has not sought therapy; and there is no expert opinion that he will not return to this conduct. While he might want to put these issues behind him, these concerns persist despite his stated remorse and his decision to move over ten miles away to a new neighborhood.



Hence, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraph 1.a., but against Applicant on subparagraphs 1.b. under SOR Paragraph 1.

### **Criminal Conduct**

The Government maintains security concerns over Applicant's criminal conduct in 1997 where he was arrested and found guilty for his having look into the window of his neighbor's thirteen-year-old daughter's bedroom for a lewd purpose. His conduct had persisted for six months despite his knowledge of the neighbors fears. He was placed on court supervision for 90 days and fined \$150. While since this criminal conduct in 1997 he has not been subsequently arrested, he did not seek therapy so there is no evidence that he fits within MC (d): the factors leading to the violation are not likely to recur or MC (f): clear evidence of successful rehabilitation.

Thus, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraphs 2.a., incorporated under SOR Paragraph 2.

### **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 lack of judgment or discretion.<sup>(7)</sup> 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;

2. Compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high-risk behavior or that which is symptomatic of a personality disorder; 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 lack of discretion or judgment. As discussed above, Applicant's poor judgment led to an arrest filed in February 1997 charged him with disorderly conduct as he "knowingly entered upon the property of his neighbor for a lewd purpose and deliberately looked into the window of bedroom at that dwelling." Subsequently, in a voluntary statement to the police department he admitted that he had "on 3-5 occasions over the last six months looked in the neighbors windows both in the daytime and at night." He engaged in this misconduct repeatedly even though he considered himself as a friend and even though he know of their fright and concerns. On several occasions in an attempt to mislead them he even spoke with the mother and daughter concerning their desire to detect this person and even helped them install a motion detector to deflect attention from himself. Finally, his arrest brought his sexual misconduct to the attention of the community and demonstrated his lack of discretion or judgment. While he has no formal diagnosis, neither has he sought treatment which would assure that he had taken correction action to avoid a repeat of this misconduct.

Applicant has failed to demonstrate that he meets the mitigating conditions.<sup>(8)</sup>

While he provided evidence of his excellent work record and his high regard at his workplace, his references do not acknowledge that they were aware of the 1997 misconduct and considered it. To demonstrate rehabilitation persuasively he would need to show evidence under MC 4, that the behavior no longer serves as a basis for coercion, exploitation, or duress. While there is no evidence that he has repeated this 1997 misconduct, neither is there any evidence that he sought counseling to address the underlying causes.

Thus, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraph 3.a., incorporated under SOR Paragraph 3.

### **FORMAL FINDINGS**

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Paragraph 3. Guideline D: AGAINST APPLICANT

Subparagraph 3.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 a security clearance for the Applicant.

---

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
2. Applicant's counsel objected to Exhibits 3 and 5 as inadmissible hearsay. The Government divided Exhibit 3 into two parts: Exhibit 3A (the first five pages of a police report) and 3B (the last four pages of original Exhibit B). The Government argued that police reports are admissible in civil proceedings as matters personally observed by the reporting officer as well as factual findings resulting from the investigation (relying on ISCR Appeal Board decisions he cited: ISCR Case No. 92-0113 issued January 22, 1993, and ISCR Case No. 96-0575, issued July 22, 1997). Initially, I reserved a ruling on Exhibit 3A and admitted Exhibit 3B into evidence as Applicant's counsel did not object to that part. (TR 17-25) The Government argued that Exhibit 3A should be admitted to provide the circumstances surround the arrest. However, Applicant's counsel objected due to their hearsay nature and distinguished the Appeal Board cases later cited by the Government: ISCR 95-0817 where an Applicant was seeking for a Report of Investigation to be admitted; he argued that ISCR case No. 96-0575 limited police reports to what was "personally observed by the police officer." Exhibit 3A involves information where the police officer was not the witness. (TR 79-82) Based on Applicant's hearsay objections, Exhibit 3A was not admitted, but was retained in the file for review. (TR 82) After Applicant's counsel's objection to Exhibit 5, the Government withdrew the exhibit. (TR 25-27)
3. None of the references stated that they were aware of the 1997 incident, so I give less weight to their comments as they did not personally appear at the hearing and were not subject to cross-examination.
4. **The adjudicator should also consider guidelines pertaining to criminal conduct (Guideline J); or emotional, mental, and personality disorders (Guideline I), in determining how to resolve the security concerns raised by sexual behavior.**
5. **Conditions that could mitigate security concerns include: 1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily; 3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; 4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided; 5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress; 6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information; 7. Association with persons involved in criminal activities has ceased.**

**6. His defense that he was not directly asked for these details by the DSS Investigator #1 is not by itself a mitigating defense as he has a duty to disclose.**

**7. The adjudicator should also consider guidelines pertaining to criminal conduct (Guideline J); or emotional, mental, and personality disorders (Guideline I), in determining how to resolve the security concerns raised by sexual behavior.**

**8. Conditions that could mitigate security concerns include: 1. The behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature; 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.**