

KEYWORD: Sexual Behavior; Personal Conduct

DIGEST: Applicant is a 37-year-old senior technician employed by a defense contractor. Applicant has over a twenty-year history of serious sexual misconduct. Although Applicant sought treatment for his problems, he has failed to meet the ultimate burden of persuasion. Clearance is denied.

CASENO: 02-08355.h1

DATE: 01/06/2005

DATE: January 6, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-08355

**DECISION OF ADMINISTRATIVE JUDGE**

**CAROL G. RICCIARDELLO**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn D. MacKinnon, Esq., Department Counsel

**FOR APPLICANT**

**SYNOPSIS**

Applicant is a 37-year-old senior technician employed by a defense contractor. Applicant has over a twenty-year history of serious sexual misconduct. Although Applicant sought treatment for his problems, he has failed to meet the ultimate burden of persuasion. Clearance is denied.

**STATEMENT OF CASE**

On June 8, 2004, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for applicant. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guidelines D for sexual behavior, and Guideline E for personal conduct.

In a sworn answer dated June 27, 2004, Applicant responded to the SOR and admitted all the allegations, but denied the frequency of the conduct alleged in subparagraph 1.a. Applicant elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the government's case on August 27, 2004. A complete copy of the file of relevant material (FORM) was received by Applicant on September 14, 2004. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the FORM and provided additional material. The government did not object to the additional material. The case was assigned to me on November 1, 2004.

## FINDINGS OF FACT

After a complete review of the evidence in the record, I make the following essential findings of fact.

Applicant is 37 years old and employed by a defense contractor as a senior technician. He worked for the Department of Defense (DoD) for fifteen years, and held a top secret clearance and sensitive compartmented information (SCI) access, before voluntarily resigning in lieu of being disciplined for the conduct alleged in the SOR. Applicant has been married since 1992, and has a 10-year-old daughter and a 7-year-old son.

Applicant first started exposing himself to female bystanders when he was in his teens. He would stand naked in the front door of his residence and wait for females to walk by. Later he would expose himself to females while driving his vehicle and in state parks. Applicant does not remember how many times he exposed himself in this type of situation, but he has a consistent and significant history of doing these acts from the time he was a teenager until at least 1999. On one occasion, Applicant exposed himself and masturbated in a public place while watching females play softball at a high school stadium. Applicant minimized his conduct by stating the females were adults, it did not occur during the school year, and they did not see him. Applicant exposed himself while on temporary duty assignments with DoD. He would stand in front of an open window at his hotel, and expose himself to people walking by. During one of his temporary duty assignments, Applicant stayed a few extra days on leave and paid a prostitute \$20.00 for oral sex. During all of these incidents, Applicant would get sexually aroused at the reactions of his victims and would masturbate. As an adult, Applicant usually exposed himself in his vehicle to women, but sometimes would stand outside his vehicle and expose himself.

Applicant committed oral sodomy on his daughter when she was between two to four months old. On one occasion, when Applicant was 12 or 13 years old, he had his 3-year-old cousin touch his genitalia.

From 1993 through 1999, Applicant admits he would expose himself to women, first directly and later by placing a photograph of his genitalia somewhere conspicuous for women to find, usually on their vehicle's windshield in a parking lot. He took 15-20 pictures of his genitalia that he used for this purpose. Applicant did not know the women and never pursued them. His actions were always opportunistic and "if the circumstances were right" he would do it. Applicant was charged in 1999 for distribution of obscene material, when he was observed putting a photograph on a car. The charges were later dismissed. This incident was investigated by DoD, and Applicant agreed to resign his employment rather than be subjected to disciplinary action. Applicant thought he could handle his behavioral problems by himself, but no information was provided that explained what if any actions he was taking to stop his conduct. In 1999, after his arrest and resignation, Applicant was forced to address the problem and sought professional help. Applicant's family and friends are aware of Applicant's sexual behavior and were involved in his treatment. Applicant is ashamed and not proud of his behavior. Applicant claims he has no intention of engaging in this type of behavior again.

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline D, pertaining to sexual behavior, and Guideline E, pertaining to personal conduct, with their respective DC and MC, apply in this case.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(2)</sup> The government has the burden of proving controverted facts.<sup>(3)</sup> The burden of proof is something less than a preponderance of evidence,<sup>(4)</sup> although the government is required to present substantial evidence to meet its burden of proof.<sup>(5)</sup> Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.<sup>(6)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>(7)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(8)</sup>

No one has a right to a security clearance<sup>(9)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(10)</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>(11)</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>(12)</sup> It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes we should view a person by the totality of their acts, omissions, motivations and various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

## CONCLUSIONS

Under Guideline D, sexual behavior becomes 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 government has established a *prima facie* case for disqualification under this guideline. Based on the allegations in the SOR, 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*, and DC 4: *Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment*, apply in this case. Applicant engaged in sexual misconduct over a twenty-year period. Applicant's misconduct was of a public nature. Applicant sexually abused his infant daughter. Applicant is embarrassed and ashamed by his conduct. Although Applicant claims his family and friends know of his past sexual behavior, no information was provided as to who is actually aware of what. There are many situations where people could use this information against Appellant for coercion, exploitation or duress concerning security issues. I have considered all the mitigating issues under Guideline D, and conclude MC 2: *The behavior was not recent and there is no evidence of subsequent conduct of a similar nature*, applies. Applicant engaged in serious criminal conduct, consistently and repetitively, for a period of at least twenty years. This conduct occurred while he held a top secret clearance and SCI access and Applicant showed no regard for the potential exploitation of this information and still does not comprehend the severity of these implications. Applicant's extensive history of questionable judgment and irresponsibility cannot be overlooked. Applicant's extensive history of misconduct, and extensive history of questionable judgment, leads me to conclude he has failed to mitigate the security concerns engendered by his conduct. I find Guideline D against Applicant.

Under Guideline E, 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. DC 1: *Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*; and 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*, apply in this case. The government has established a *prima facie* case for disqualification under this guideline by showing Applicant resigned from his employment instead of facing disciplinary action due to his illegal sexual misconduct and personal conduct. Applicant works for a new employer and with new coworkers. This is exactly the type of conduct that if known would render Applicant susceptible to blackmail. I have considered all the mitigating conditions under this guideline and specifically considered MC 5: *The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*, and find it and the other mitigating conditions do not apply. Although, Applicant's family and friends may be aware of his conduct, it is not enough to mitigate the security concerns engendered by his misconduct. Applicant's long history of sexual misconduct regarding adults and his own child, is the type of information that is susceptible to exploitation in many situations. I find Guideline E against the Applicant.

I have carefully weighed all the evidence in this case, and I have applied the aforementioned disqualifying and mitigating conditions, as listed under each applicable adjudicative guideline. I have also considered the whole person concept. The evidence as a whole in this case presents an unacceptable risk to the government's compelling interest in ensuring its classified information is properly safeguarded. Accordingly, I find Applicant has not mitigated the security concerns that arose from his sexual behavior and personal conduct concerns.

### **FORMAL FINDINGS**

Formal Findings for or against applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

#### Paragraph 1. Guideline D AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. Against the Applicant

#### Paragraph 2. Guideline E AGAINST THE APPLICANT

Subparagraph 1.a. Against the 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 Applicant. Clearance is denied.

Carol G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Section E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p.3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p.2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp.3-4; Directive, Enclosure 3, Section E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Section E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id.* at 531.
11. *Egan*, Executive Order 10865, and the Directive.
12. Executive Order. 10865. § 7.