KEYWORD: Sexual Behavior; Criminal Conduct; Drugs; Personal Conduct

DIGEST: Applicant mitigated, rebutted, or explained concerns raised under the sexual behavior, criminal conduct, and drug abuse personnel security guidelines, but failed to rebut, explain, or mitigate his deliberate failure to list an arrest on his security clearance application. Clearance is denied.

CASENO: 02-12586.h2

DATE: 02/02/2005

DATE: February 2, 2005

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 02-12586

REMAND DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant mitigated, rebutted, or explained concerns raised under the sexual behavior, criminal conduct, and drug abuse personnel security guidelines, but failed to rebut, explain, or mitigate his deliberate failure to list an arrest on his security clearance application. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 7 October 2003, DOHA issued a Statement of Reasons[(1)] (SOR) detailing the basis for its decision-security concerns raised under Guideline D (Sexual Behavior), Guideline J (Criminal Conduct), Guideline H (Drug Involvement), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 5 November 2003 and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on 27 April 2004. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on 2 June 2004 and responded on 27 June 2004. The case was assigned to me on 19 July 2004. I determined Applicant had mitigated all of the security concerns except his deliberate failure to list an arrest on his application and denied him a clearance.

THE REMAND

Applicant appealed. The Appeal Board determined that, the omission of relevant and material information from a security clearance application does not establish a rebuttable presumption Applicant did so deliberately and remanded the case.

RULINGS ON PROCEDURE

Applicant posed 37 objections to the FORM. He had 11 objections to the SOR (Item 1) directed at the lack of evidence to support the allegations. The objections to the SOR (1-11) are overruled. All of the allegations in the SOR would, if true, have a bearing on the Applicant's suitability for a security clearance.

Applicant had 16 objections (12-27) to Item 11--the Defense Security Service report of investigation (ROI) on Applicant. Before discussing Applicant's specific objections, it is necessary to resolve the admissibility of the ROI in general. The language of the Executive Order and DoD Directive expressly states that an applicant has a right to a hearing and to cross-examine witnesses. Exec. Or. § 3(3), (6); Directive ¶¶ 4.3.3, E3.1.16. In addition, the procedural guidance provides the following regarding the admission of ROIs into evidence:

E3.1.20. Official records or evidence compiled or created in the regular course of business, other than DoD personnel background reports of investigation (ROI), may be received and considered by the Administrative Judge without authenticating witnesses, provided that such information has been furnished by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary of Defense, or the Department or Agency head concerned to safeguard classified information within industry under E.). 10865 (enclosure 1). An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence (28 U.S.C. 101 et seq. (reference (d)).

By using the term "witnesses," it appears the Deputy Secretary of Defense meant to limit the applicability of these provisions to hearing cases. Nevertheless, the Appeal Board found as "baseless" the government's contention that an applicant waives his right to cross-examination by waiving his right to a hearing. DISCR OSD Case No. 93-0239 (App. Bd. Sep. 7, 1994). The Appeal Board further concluded that an ROI is not admissible against an applicant who represents himself in a FORM case without a knowing and intelligent waiver.[(2)] DISCR OSD Case No. 91-0716 (App. Bd. Jan. 11, 1993). As there is no record evidence of a knowing and intelligent waiver, I will not consider the ROI.

Objections 28-35 are to Items 12-19, because they were "generated by a person of questionable character." Items 12-19 are copies of court documents relating to Applicant. His objections are overruled. Objections 36 and 37 are to the two videotapes (Item 19) as being incomplete. Applicant suggests the failure of the Government to produce a complete copy of Tape 1 impairs his ability to show that Tape 2 is not fabricated. The Government does not contend Tape 2 is fabricated. Applicant himself then claims Tape 2 is of questionable authenticity. Applicant's objections 36 and 37 are overruled.

Applicant submitted 14 items in response to the FORM. To avoid confusion with the Government's items, Applicant's items were re-labeled A-N.

FINDINGS OF FACT

Applicant is a 46-year-old product support engineer for a defense contractor. He served on active duty with the U.S. Air Force from 1977-82 and has held a secret clearance since 1978. He has won numerous awards from his employer for his exceptional performance at work.

Applicant married in 1986. Item 5 at 3. Applicant's wife brought two daughters into the marriage and the couple had two children of their own. *Id.* at 4-5.

The marriage was stormy. Between March 1986 and August 2001, while he was still married, Applicant had a sexual affair with another woman for a couple of months. Answer; Item 2 at 2.

Applicant installed a video camera in the bathroom used by his two stepdaughters and another video camera in the bedroom where he and his wife slept.

Applicant had several run-ins with the law as a result of his deteriorating marriage. He was only charged in one of the cases. Applicant's wife obtained an order of protection from a court in 1991 to keep Applicant away from her. Applicant admits that, in 1991, he violated the court order by going into her home. He was arrested and charged with knowingly violating the terms of the protection order and unlawful use of a weapon (a felony). Answer. The case was dismissed after the couple reconciled.

Applicant's wife apparently was awarded another protection order. In October 1994, Applicant violated the terms of the protection order by going to his wife's place of employment and attempting to videotape her. He claims he wanted to capture "incriminating information" (apparently, of her infidelities). On 5 December 1994, an information was filed charging Applicant with misdemeanor stalking of his wife. The couple reconciled and the charge was dropped. Response at 6; Item J.

On 30 November 1994, Applicant was arrested for violating a protection order by entering his wife's residence. They reconciled and the charge was dropped. Item 5 at 8.

Applicant completed a security clearance application (SCA) on 18 January 2000 that appears to have been electronically transmitted on 4 February 2000. Items 4, 5. Question 26 asked if, in the previous seven years, Applicant had been arrested for, charged with, or convicted of any offense not listed in a previous part of the SCA. Applicant answered "yes" and listed an arrest on 30 November 1994 for violating a protection order, but failed to list that he was also charged with violating a protection order on 18 October 1994. Item 5 at 8. Question 27 asked if, in the previous seven years, Applicant had illegally used any controlled substance, to include marijuana. Applicant answered "no." *Id*.

On 13 February 2002, Applicant refused to cooperate with a Defense Security Service agent who was seeking an interview with Applicant concerning his security clearance. Item 10. Over a year later, on 21 February 2003, Applicant was given another chance to cooperate. Item 6. On 28 April 2003, Applicant was interviewed about his SCA. He denied abusing alcohol and insisted that he never used illegal drugs to include marijuana, never physically abused his wife or stepchildren, was never involved in deviant sexual behavior, and did not falsify any information in the SCA. He refused to cooperate further. Item 8.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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.

CONCLUSIONS

Guideline D--Sexual Behavior

In the SOR, DOHA alleged Applicant "attempted to or did secretly videotape" his former wife and stepdaughters while they were in the bathroom from 1986 to August 2001 (¶ 1.a) and his former wife in the bedroom, "including during intimate sexual moments" (¶ 1.b); and engaged in adultery between March 1986 and August 2001 (¶ 1.c). 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. Directive ¶ E2.A4.1.1.

After reviewing the evidence, I conclude Applicant's video taping of his children and his wife were not incidents of sexual behavior. Applicant was obsessed with obtaining evidence of his wife's infidelities and his stepdaughters' use of illegal drugs. While such conduct demonstrates poor judgment, it is not sexual behavior as contemplated by the guideline. Therefore, I find for Applicant on ¶¶ 1.a and 1.b.

The adultery is an incident of sexual behavior covered by the guideline because it may render an individual subject to coercion, exploitation, or duress. DC E2.A4.1.2.3. But the behavior occurred some time ago and there is no evidence such conduct recurred. MC E2.A4.1.3.2. Applicant admits this behavior occurred, so the behavior no longer serves as a basis for coercion, exploitation, or duress. MC E2.A4.1.3.4. I find for Applicant.

Guideline J--Criminal Conduct

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

In ¶ 2.a, DOHA alleged Applicant violated a state criminal statute by pushing his wife at least one time during the five year time period between March 1986 and August 2001. There is no legible evidence to support this allegation other than a summary of his wife's statement in the ROI that was excluded. Therefore, I find for Applicant.

In ¶ 2.b, DOHA alleged Applicant violated a state statute by slapping one or both of his stepchildren during a five year

period between March 1986 and August 2001. The state domestic assault, third degree, statute makes it a criminal offense for a family member to knowingly cause "physical contact with such family . . . member knowing the other person will regard the contact as offense." Item 25. Family member is specifically defined as an adult. Therefore, unless the stepdaughters were adults, slapping them is not a violation of the statute alleged. Although Applicant admits slapping one or both of his stepchildren, it is not clear whether they were adults at the time of the slapping. Therefore, I find for Applicant.

In ¶ 2.c, DOHA alleged Applicant violated the protection order by driving his motor vehicle by his wife's home. The state's courts have held that this is not sufficient to make out a case of violating a protection order. The evidence must demonstrate a pattern of conduct. Item 32 at 4. Applicant denies the event and there is no evidence to support his wife's allegation. I find for Applicant.

In ¶ 2.f, DOHA again alleged Applicant violated the protection order by entering his wife's residence. Applicant denies the event, and there is insufficient legible evidence to conclude he did so. Under the circumstances, I must find for Applicant.

In ¶ 2.d, DOHA alleged Applicant violated the protection order by entering his wife's residence. Applicant denies the event, but admits it in his SCA. In ¶ 2.e, DOHA alleged Applicant violated the terms and conditions of a protection order by going to her place of employment and attempting to videotape her. Applicant admits doing so. He claims his "intent was to film her and see sexual type marks on her neck such as hickeys, which I needed for court." Item 9 at 2. Such conduct violates the state's criminal stalking statute. In ¶ 2.g, DOHA alleged that, in October 1991, Applicant knowingly violated the terms and conditions of a protective order by entering his wife's home. Applicant admits that he was arrested for violating the protection order and for unlawful use of a weapon. The charges were nolle prosequi after Applicant reconciled with his wife.

Applicant's admissions of serious criminal conduct are disqualifying. DC E2.A10.1.2.1 and E2.A10.1.2.2. But the criminal behavior was not recent (MC E2.A10.1.3.1) and the factors leading to the violation are not likely to recur (MC E2.A10.1.3.4). The parties divorced in 2001 and they do not speak to each other. Under the circumstances, I find for Applicant.

Guideline H--Drug Involvement

In the SOR, DOHA alleged Applicant used marijuana from March 1986 until December 1998. ¶ 3.a. The improper or illegal involvement with drugs raises questions regarding an applicant's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. Directive ¶ E2.A8.1.1.

The sole evidence Applicant used marijuana is a summary of an oral statement Applicant's wife made to a DSS agent that is contained in the excluded DSS ROI. Applicant has consistently denied ever using illegal drugs. I conclude the Government failed to establish by substantial evidence that Applicant used marijuana. I find for Applicant.

Guideline E--Personal Conduct

In the SOR, DOHA alleged Applicant deliberately falsified his SCA by failing to disclose that he was charged with a criminal offense in October 1994 for violating an order of protection (¶ 4.a) and that he had used an illegal drug in the previous seven years (¶ 4.b). Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The Government failed to establish Applicant deliberately falsified material facts about his use of drugs. As the evidence was insufficient to establish he used marijuana, there is insufficient evidence to conclude he deliberately falsified his SCA concerning such use.

The Government established that Applicant failed to disclose in his SCA that he been charged with a criminal offense in October 1994 for violating an order of protection. The deliberate omission, concealment, or falsification of relevant and material facts from an SCA may disqualify an applicant from obtaining a security clearance. DC E2.A5.1.2.2. Applicant denies he deliberately failed to list the October 1994 arrest for violating the protection order (Answer), but admits the arrest. Applicant was charged with violating a protection order by going to her place of business to videotape her and capture "incriminating information." He was charged with stalking. The very next month Applicant was arrested for violating the order of protection by entering his wife's residence. Under the circumstances, Applicant's claim that the omission was not deliberate is not credible. It is clear from the record evidence that this was an important event in his life. I conclude he deliberately omitted information about his arrest on his SCA. None of the mitigating conditions listed under the guideline apply. I find against Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline D: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Paragraph 2. Guideline J: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: For Applicant

Subparagraph 2.e: For Applicant

Subparagraph 2.f: For Applicant

Paragraph 3. Guideline H: FOR APPLICANT

Subparagraph 3.a: For Applicant

Paragraph 4. Guideline E: AGAINST APPLICANT

Subparagraph 4.a: Against Applicant

Subparagraph 4.b: For Applicant

DECISION

In light of all of 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.

James A. Young

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).

2. The Appeal Board did not discuss why the applicant does not forfeit the issue by failing to raise it in his response to the FORM. Even some constitutionally protected rights are forfeited by failing to raise the issue. *See United States v. Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984) (right against double jeopardy), *cert. denied sub nom. Hobson v. United States*, 472 U.S. 1017 (1985); *United States v. Whitten*, 706 F.2d 1000, 1018, n. 7 (9th Cir. 1983) (right to confront adverse witnesses), *cert. denied*, 465 U.S. 1100 (1984). Nor did the Appeal Board explain what provision of the Directive or of law grants a pro se applicant an entitlement to greater protection than one represented by counsel.