

DATE: June 3, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21711

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 36-year-old divorced man, is unable to successfully mitigate the security concerns associated with his sexual behavior of a criminal nature in 1998, and his deliberately providing false or misleading information about the 1998 incident during an interview with a security investigator in April 2002. Clearance is denied.

STATEMENT OF THE CASE

On July 22, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline D for sexual behavior and Guideline E for personal conduct.

In his answer to the SOR, dated August 15, 2003, Applicant requested a clearance decision based on a written record in lieu of a hearing. He also admitted all SOR allegations. Thereafter, Department Counsel prepared and submitted their written case. The File of Relevant Material (FORM) was mailed to Applicant on or about February 3, 2004, and was received by Applicant on February 13, 2004. Applicant's written response to the FORM was received at DOHA on March 1, 2004. The case was assigned to me March 5, 2004.

FINDINGS OF FACT

Applicant's admissions are incorporated into my findings, and after a thorough review of the pleadings and the record evidence, I make the following essential findings of fact:

Applicant is a 36-year-old man. He has recently divorced and is a single parent of a four-year-old son. He served in the U.S. Army from November 1986 to November 1989.

Previously granted a secret-level security clearance on November 10, 1998, Applicant came to the attention of security

officials when an adverse information report concerning him was submitted in January 2001. The report disclosed that Applicant had been arrested for public indecency in August 1998. The report indicates the information was provided by Applicant.

On March 30, 1998, while driving his car on a public road, Applicant exposed his erect penis to a woman who was driving a semi-truck next to him. Unknown to Applicant, the woman had her 13-year-old daughter with her in the truck. The woman gave a detailed accounting of the event to the state highway patrol (Item 7), including a description of Applicant, the car, and the license plate number. She also told police this had happened to her before with the same man in the same vehicle about ten months earlier.

In June 1998 a complaint was filed in state court against Applicant charging him with the crime commonly known as public indecency, a fourth-degree misdemeanor. Applicant was summoned to appear in court on June 17, 1998, which he did and he pled not guilty. On August 13, 1998, Applicant pled no contest to the charge and was awarded a sentence of a \$150.00 fine, 30 days in jail with 25 days suspended, and probation for two years. Applicant was also required to attend sex-offender counseling as a condition of probation.

On November 3, 1998, Applicant was interviewed by an agent of the Defense Security Service (DSS) as part of his initial background investigation. The interview produced a sworn statement (Item 5), in which Applicant discussed his current financial situation. No mention is made in the sworn statement of Applicant's quite recent criminal conduct and disposition in the state court, and thus, I presume Applicant did not bring the matter up during the interview as it surely would have been included in the statement as part of the regular course of business.

From August 31, 1998, to February 26, 1999, Applicant received counseling services as a condition of his probation (Item 9). He was required to attend and participate in group counseling for persons convicted of a sex offense and to reduce the anxiety connected to his involvement with the legal system. According to the outpatient counselor, Applicant "maintained his innocence of the charge for which he was convicted." The counselor also noted Applicant demonstrated an understanding of the educational material and involved himself in the counseling.

Based on the adverse information report, Applicant was interviewed in April 2002 by a DSS agent. Asked about the exposing himself in 1998, he denied doing so and instead explained that he had been urinating in a bottle.

Applicant was interviewed again in May 2002 by the same DSS agent. The interview produced a sworn statement (Item 6), in which Applicant acknowledged and described in detail the facts and circumstances of exposing himself as follows:

While driving down the road, I pulled up beside a semi truck with a female driver. When I noticed that it was a female driver, I unzipped my pants and exposed myself to her. I made eye contact with her and lifted myself off of the seat to make sure that she could see my penis.

When initially questioned by the police in 1998 about this incident, Applicant said he did know what they were talking about. In his sworn statement, Applicant also stated the following: (1) he has not told anyone else, other than the DSS agent, about it as he was too embarrassed to do so; (2) he denied exposing himself at any other time; (3) he admitted lying about the incident to the DSS agent during the April 2002 interview; and (4) he intended to tell the truth about the incident at the start of the May 2002 interview, but did not do so.

In his response to the FORM, Applicant claims he has taken full responsibility for his actions. He also notes it was he who brought it to the attention of his employer in January 2001. He notes he has been in no other trouble with the law as an adult or juvenile other than speeding tickets. He believes he has learned his lesson and that he is not a threat to national security.

Applicant is employed as a test associate for a major defense contractor. The character of his job performance is not developed in the record.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. 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.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁾ There is no presumption in favor of granting or continuing access to classified information.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁵⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.⁽⁸⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. Sexual Behavior

Under Guideline D,⁽¹¹⁾ 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. Exhibitionism is of particular concern because it is high risk, illegal behavior that is a definite security concern.

Here, based on the record as a whole, the government has established its case under Guideline D. The record evidence demonstrates Applicant engaged in sexual behavior of a criminal nature by engaging in exhibitionism in March 1998. Not only did Applicant engage in the underlying offensive conduct, he was held accountable for his conduct through the legal system when he pled no contest to the charge of public indecency in August 1998. He was fined, sentenced to jail, required to serve probation, and attend sex-offender counseling. Given these facts and circumstances, DC 1⁽¹²⁾ applies against Applicant. For the same reasons, DC 4⁽¹³⁾ applies against Applicant. And given Applicant's reluctance to admit his wrongdoing, coupled with his secrecy about this incident, DC 3⁽¹⁴⁾ applies against him. Applicant is greatly embarrassed by his actions and has told no one, other than the DSS agent during the May 2002 interview. Indeed, Applicant did not admit to wrongdoing during his court-ordered counseling. Given these circumstances, it is not a stretch to say his sexual behavior may subject him to coercion, exploitation, or duress.

I have reviewed the mitigating conditions and conclude that MC 2⁽¹⁵⁾ applies in Applicant's favor. The record evidence shows the incident took place in March 1998, more than six years ago, and Applicant pled no contest in August 1998. His probation was completed in about August 2000. Given these circumstances, his behavior was not recent and there is no evidence of subsequent conduct. The remaining MC do not apply based on the facts and circumstances.

The record shows Applicant engaged in high risk, illegal behavior. He stands convicted of the fourth-degree misdemeanor offense of public indecency, for which he was duly punished by the state. Although six years have passed since he exposed himself in March 1998, the passage of time without recurrence is insufficient to mitigate the security

concern for the following reasons: (1) Applicant is still embarrassed and secretive about the incident; (2) he remains vulnerable to coercion, exploitation, or duress; and (3) he deliberately provided false or misleading information about the 1998 incident during an interview in April 2002 with the DSS agent, which is discussed below. Accordingly, Guideline D is decided against Applicant.

2. Personal Conduct

Personal conduct under Guideline E-(16) is a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard and handle classified information. The deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance, processing for a position of responsibility, or in other official matters is a security concern. It is "deliberate" if it is done knowingly and willfully. Omission of a past arrest or past drug use, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the arrest had been expunged from the record and did not need to be reported.

Here, considering the record evidence as a whole, the government has established its case under Guideline E. Applicant deliberately provided false or misleading information during his April 2002 interview with the DSS agent. His "urinating in a bottle" explanation does not wash with the woman's detailed description of the March 1998 incident, and Applicant eventually admitted lying when he was re-interviewed in May 2002. Given these facts and circumstances, DC 3-(17) applies against Applicant. And DC 4-(18) applies against Applicant for the same reasons Sexual Behavior DC 3 applies against him, as discussed above.

I have reviewed the mitigating conditions under Guideline E and conclude none apply. Applicant's falsification is neither extenuated nor mitigated because he was embarrassed about his misconduct. Applicant had his first opportunity to reveal the complete story of his exhibitionism during his initial DSS interview in November 1998, when he was in the initial months of his two-year term of probation. He had his second opportunity to reveal the complete story during his DSS interview in April 2002. He took neither opportunity. Consequently, it is my commonsense judgment that Applicant cannot be relied on or trusted to tell the truth when the truth presents possible adverse or harmful consequences to his own interests, and as such, he cannot be relied on or trusted to properly safeguard and handle classified information. For all these reasons, Guideline E is decided against Applicant.

FORMAL FINDINGS

As required by ¶ E3.1.25 of Enclosure 3 to the Directive, below are my conclusions as to the allegations in the SOR:

SOR ¶ 1-Guideline D: Against the Applicant

Subparagraph a: Against the Applicant

SOR ¶ 2-Guideline E: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: 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.

Michael H. Leonard

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. 02-18663 (March 23, 2004) at p. 5.

4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

5. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

10. *Egan*, 484 U.S. at 528, 531.

11. Directive, Enclosure 2, Attachment 4, at pp. 25-26.

12. "Sexual behavior of a criminal nature, whether or not the individual has been prosecuted."

13. "Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment."

14. "Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress."

15. "The behavior was not recent and there is no evidence of subsequent conduct of a similar nature."

16. Directive, Enclosure 2, Attachment 5, at pp. 27-28.

17. "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."

18. "Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress, such as engaging in activities which, in known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail."