

KEYWORD: Sexual Behavior; Criminal Conduct; Personal Conduct

DIGEST: Applicant has an extended history of engaging in deviant sexual conduct with himself, a boyhood friend, a transvestite, a homosexual stranger, his child, his stepchild, other children, his sister, and his family pet. In 1998, he was convicted of Sexual Battery-Solicitation and placed on five years probation after his 17-year-old stepdaughter reported multiple acts of sexual abuse committed upon her by Applicant between May 1997 and May 1998. Applicant has failed to mitigate the security concern caused by his sexual behavior, and personal and criminal conduct. Clearance is denied.

CASE NO: 02-22088.h1

DATE: 07/02/2004

DATE: July 2, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22088

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has an extended history of engaging in deviant sexual conduct with himself, a boyhood friend, a transvestite, a homosexual stranger, his child, his stepchild, other children, his sister, and his family pet. In 1998, he was convicted of Sexual Battery-Solicitation and placed on five years probation after his 17-year-old stepdaughter reported multiple acts of sexual abuse committed upon her by Applicant between May 1997 and May 1998. Applicant has failed to mitigate the security concern caused by his sexual behavior, and personal and criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On November 13, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline D (Sexual Behavior), Guideline J (criminal conduct), and Guideline E (personal conduct). Applicant

submitted a response to the SOR, dated December 19, 2003, and requested a clearance decision based on the written record without a hearing. In his response to the SOR, Applicant denied the allegations contained in SOR subparagraphs 1.a. and 3.a., but admitted all other SOR allegations.

Department Counsel prepared a File of Relevant Material (FORM) on February 24, 2004, that was mailed to Applicant February 25, 2004. Applicant did not object to anything contained in the FORM or submit additional information for consideration within the 30-day time period provided to him. The case was assigned to me May 10, 2004.

FINDINGS OF FACT

Applicant's admissions to some of the allegations contained in the SOR are incorporated herein. In addition, after a thorough review of the pleadings and exhibits, I make the following findings of fact:

Applicant is 54 years old, has been employed by a defense contractor since October 1987, and is presently working as a shipping supervisor. He quit high school during the 10th grade, subsequently obtained a general educational development diploma, and thereafter obtained an associate's degree. Applicant served in the United States Marine Corps Reserve from December 1967 to December 1973, attaining the rank of Staff Sergeant (E-6). He has been married five times to three different women. He married his present wife in March 1996. He has a daughter who is 22 years old.

Applicant was arrested on May 23, 1998, and charged with sexually abusing his then 17-year-old stepdaughter. The specific allegations were: in May 1997, he rubbed her buttocks over her nightgown; in August 1997, he fondled her breasts, digitally penetrated her vagina, and forced her to masturbate him; and in May 1998, he rubbed her body simulating sexual intercourse. Applicant pleaded guilty to Sexual Battery - Solicitation on October 1, 1998, and was sentenced to five years probation and ordered to complete psychosexual counseling.

During counseling, the full extent of Applicant's basically lifelong sexual deviance was revealed. His first sexual experience occurred at the age of 15 when he was masturbated by a male friend.⁽²⁾ He had another homosexual encounter at a relatively young age while running away from home, and engaged in anal intercourse with a female impersonator when he was 22 years old. His conduct progressed to numerous incidents of inappropriate sexually-oriented touching of minor children who were as young as six years of age, both when he was a juvenile and as an adult, and peeping into the windows of juveniles, which began when he was in late 30s. He had sexual intercourse with his 27-year-old sister when he was approximately 40 years old. Also while he was in his 40s Applicant masturbated a dog, allowed the dog to lick his penis on 3-4 occasions, and, on occasion, would masturbate while driving to work and in the lavatory while at work. Applicant also admitted to inappropriately sexually touching his 14-year-old daughter, and regularly sexually fantasizing about minor-aged children, including a second stepdaughter.

Applicant completed all requirements for graduation from the court-mandated sexual offenders' treatment program on August 27, 2001, and was officially graduated as of that date. As a graduate of the program he is entitled to free follow up care as long as he desires. There is no indication in the FORM whether he has pursued follow up care, and there is no prognosis about the likelihood of continued deviant conduct.

Applicant completed a Personnel Security Questionnaire (DD 48) on October 7, 1987, and checked "No" in response to question 15: *Have you ever used any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP) or Cannabis (to include marijuana or hashish) except as prescribed by a licensed physician?* When he was interviewed during the course of sexual offender treatment on January 31, 2000, he disclosed he had used marijuana and speed, the last use occurring 15 years prior.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon 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. Considering the evidence as a whole, Guideline D, pertaining to sexual behavior, Guideline J, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole 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.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁽⁵⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ 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.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹²⁾

CONCLUSIONS

Sexual behavior. Sexual behavior is a security concern if it involves a criminal offense, may subject the individual to coercion, exploitation, or duress or reflects a lack of judgment or discretion.

Applicant has a history of engaging in deviant sexual behavior that began circa 1965, when he was 15 years old, and continued until he was arrested in 1998, when he was 49 years old. His conduct ranges from the sexual abuse of children to bestiality and incest. He was convicted of a sexual offense and ordered to serve a sentence of probation that was scheduled to terminate in October 2003. Disqualifying Conditions (DC) 1: *Sexual behavior of a criminal nature, whether or not the individual has been prosecuted*; DC 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*; 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* all apply in this case.

Mitigating Condition (MC) 1: *The behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature* clearly does not apply. Considering the nature and extent of Appellant's conduct, I conclude that MC 2: *The behavior was not recent and there is no evidence of subsequent conduct of a similar nature*; MC 3: *There is no other evidence of questionable judgment, irresponsibility, or emotional instability*; and MC 4: *The behavior no longer serves as a basis for coercion, exploitation, or duress* also do not apply. Guideline D is decided against Applicant.

Criminal conduct under Guideline J is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break rules.

Applicant was convicted of Sexual Battery - Solicitation in October 1998 and placed on five years probation for multiple acts of sexual abuse committed against his stepdaughter between May 1997 and May 1998. DC1: *Allegations or admissions of criminal conduct, regardless of whether the person was formally charged* and DC2: *A single serious crime or multiple lesser offenses* apply in this case.

There is no indication Applicant has committed any criminal conduct since 1998. Accordingly, Mitigating Condition (MC) 1: *The criminal behavior was recent* applies. I have fully considered the remaining mitigating conditions and do not find that any apply. While Applicant was only convicted on one occasion for sexually abusing a minor child, the statements he provided during sexual offender treatment clearly disclose this was not an isolated incident as he had sexually abused numerous other children over a span of many years. There is no indication he was pressured or coerced into committing any of the acts, or any credible evidence they were not done voluntarily. (13) Lastly, although Applicant graduated from the sexual offender program there is no evidence to support a finding that he has been rehabilitated or that his conduct is unlikely to recur. Considering all of the evidence, including the whole person factors, I find the sole mitigating condition is substantially outweighed by the disqualifying conditions. Accordingly, Guideline J is decided against Applicant.

Personal conduct under Guideline E is always 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 classified information.

Applicant submitted a personnel security questionnaire in 1987 in which he indicated he had not abused controlled substances. In January 2000 he indicated he stopped using marijuana and speed 15 years earlier, which would seem to indicate he had used those controlled substances as far back as 1985. Applicant emphatically denies he had any intent to intentionally falsify the questionnaire in question. Considering his candor in admitting the numerous sexual allegations contained in the SOR, the circumstances under which he disclosed his prior drug use, and the period of time that had elapsed between when he submitted the questionnaire and provided an estimate on when he last used controlled substances, I find he did not intentionally falsify the questionnaire.

However, Applicant's significant history of engaging in deviant sexual conduct with his daughter, stepdaughter, sister, other children, family pet, and others seriously calls into question his judgment, trustworthiness, reliability, and willingness and/or ability to comply with rules and regulations. 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. No mitigating condition applies to this conduct. Accordingly, Guideline E is decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline D: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against the Applicant

Subparagraph g: Against the Applicant

Subparagraph h: Against the Applicant

SOR ¶ 2-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph a: For the Applicant

Subparagraph 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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. The reports appear to differ on whether this was consensual conduct or abuse.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the 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. *Id* at 531.
12. *Egan*, Executive Order 10865, and the Directive.

13. I have considered Applicant's explanations for the statements he provided during sexual offender counseling and reject them based upon the circumstances and surroundings in which the earlier statements were made, and their repetitiveness.