

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant was charged with the felony offenses of Rape and Sodomy I on October 22, 1993. He was adjudicated a youthful offender under the applicable state statute based upon a finding he committed the lesser-included offense of sexual abuse (two counts) and was sentenced to concurrent sentences of 3 years confinement, and 5 years probation. Applicant failed to list the charges in a Security Clearance Application he submitted on September 6, 2001. Applicant has failed to mitigate the security concern caused by his personal and criminal conduct. Clearance is denied.

CASE NO: 02-26517.h1

DATE: 06/14/2004

DATE: June 14, 2004

In Re:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-26517

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was charged with the felony offenses of Rape and Sodomy I on October 22, 1993. He was adjudicated a youthful offender under the applicable state statute based upon a finding he committed the lesser-included offense of sexual abuse (two counts) and was sentenced to concurrent sentences of 3 years confinement, and 5 years probation. Applicant failed to list the charges in a Security Clearance Application he submitted on September 6, 2001. Applicant has failed to mitigate the security concern caused by his personal and criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On October 2, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(U\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E (personal conduct) and Guideline J (criminal conduct). Applicant submitted a response to the SOR, dated October 14, 2003, and requested a clearance decision based on the written record without a hearing. In his response to the SOR, Applicant denied the then sole SOR allegation alleged under Guideline E.

Department Counsel prepared a File of Relevant Material (FORM) on January 21, 2004, that was mailed to Applicant January 23, 2004. Applicant submitted a response to the FORM, dated February 22, 2004, that contained a series of e-mails as enclosures. Department Counsel executed a memorandum dated March 2, 2004 indicating she did not object to Applicant's responses. The case was assigned to me March 22, 2004.

PROCEDURAL MATTERS

Consistent with the authority granted to me by Department of Defense Directive 5220.6, Enclosure 3 (Additional Procedural Guidance), paragraph E3.1.17, I amended the SOR by adding an allegation under Guideline J. Notice of the amendment was served upon Department Counsel and Applicant. ⁽²⁾ Department Counsel was given to May 13, 2004, and Applicant to May 27, 2004 to file any additional information they wanted considered in light of the amendment. Department Counsel filed a Supplemental File of Relevant Material on May 13, 2004. Applicant did not respond to the Notice or otherwise submit any additional information for consideration.

FINDINGS OF FACT

After a thorough review of the pleadings and exhibits, I make the following findings of fact:

Applicant is a 30-year-old man who has been employed by a defense contractor as a software engineer since September 2000. He graduated from college in August 2000, and was previously employed as an electrician from July 1996 to March 2000. He has been married since July 1996, and has one 3-year-old daughter.

Applicant was charged with Rape and Sodomy I on October 22, 1993. The charges were based upon him sexually abusing his sister from 1985 to 1991. He pleaded guilty to reduced charges (two counts) of sexual abuse on June 9, 1994, and was sentenced to 10 years, ⁽³⁾ 3 years confinement, and 5 years probation on each count. Applicant was sentenced as a youthful offender under the applicable state statute, ⁽⁴⁾ and is therefore not deemed to have been convicted of a crime. ⁽⁵⁾ Applicant was actually confined in a penal institution from June 1994 to May 1995, and thereafter served one year of supervised probation.

Applicant provided a statement to a special agent for the Defense Investigative Service on May 22, 2002 in which he stated the charges arose from "inappropriate sexual conduct" between him and his sister that began in 1985. He also asserted in that statement that "The behavior was by mutual consent." The Security Clearance Application (SF 86) he submitted on September 6, 2001 ⁽⁶⁾ indicates he had one sister living at the time he commenced the series of sexual acts that led to him being charged with Rape and Sodomy I. That sister became six years old on November 1, 1985.

Applicant failed to disclose the above charges in the September 6, 2001 SF 86. Specifically, he answered "NO" to question 21: *Your Police Record - Felony Offenses - Have you ever been charged with or convicted of any felony offense? (Include those under the Uniform Code of Military Justice.) For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.* Applicant has consistently maintained the reason he answered the questioned incorrectly is because the computer program would not allow him to enter a correct answer because the charges occurred more than seven years before he prepared the SF 86.

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 E, pertaining to personal conduct, and Guideline J, pertaining to criminal 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.⁽⁷⁾ The government has the burden of proving controverted facts.⁽⁸⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁽⁹⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽¹⁰⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹¹⁾ 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.⁽¹²⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹³⁾

No one has a right to a security clearance⁽¹⁴⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁵⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹⁶⁾

CONCLUSIONS

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 deliberately provided a false answer in the SF 86 he submitted in an attempt to conceal his criminal history. The explanation he provided to the special agent, in his answer to the SOR, and in his response to the FORM, namely: the computer program would not allow him to input a correct answer, is not credible. The question he falsified does not have a seven-year limitation, and it is unbelievable that the program chose to impose such a limitation without Applicant calling it to anyone's attention.⁽¹⁷⁾ Further, Applicant personally signed the SF 86 on March 4, 2002, certified his answers were true and correct, and thus was clearly provided with the opportunity to change any incorrect information contained in the

SF 86.

Disqualifying Condition (DC) 2: *The deliberate omission, concealment, or falsification of relevant and material facts from any personal security questionnaire, personal history statement, or similar form used to conduct investigation, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;* and DC3: *Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other representative in connection with a personnel security or trustworthiness determination* apply in this case.

I have considered all mitigating conditions under Guideline E and none apply in this case. Specifically, I again note Applicant provided false information to a special agent, in his answer to the SOR, and in his response to the FORM. He has done nothing to correct that false information, and instead continues to blame his false answer on a computer program mistake. Guideline E 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 adjudicated a youthful offender based upon his commission of sexual offenses against his sister who was no more than six years old when the conduct began. Rape and Sodomy I charges were filed against him after he confided in his parents what he had been doing and then turned himself into authorities. 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.

Although Applicant's criminal conduct continued for approximately six years, there is no indication he has repeated that conduct since 1991. Accordingly, Mitigating Condition (MC) 1: *The criminal behavior was recent* applies. I have considered the remaining mitigating conditions and find that none apply. There is no indication Applicant was pressured or coerced into committing the acts, and while the applicable state law mandates that he be deemed to not have been convicted of an offense, he was not acquitted.

The SF 86 Applicant executed on March 4, 2002 states just above his signature that "a knowing and willful false statement on this form can be punished by fine or imprisonment or both." Despite being advised of the criminality of making a deliberate and false statement, Applicant chose to do just that. Further, Applicant outrageously asserted in the statement he provided on May 22, 2002 that the sexual activity with his six-year-old sister was consensual. I cannot find criminal activity is unlikely to recur or there is evidence of successful rehabilitation in view of the recent false explanations he has provided alleging consensual sexual activity with a tender age child and his falsification of the SF 86.

Considering all of the evidence, including the whole person factors, and with particular note be given to the recent fabrications he has made in support of his security clearance application, I find the mitigating condition is substantially outweighed by the disqualifying conditions. Accordingly, Guideline J is decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph a: Against the Applicant

SOR ¶ 2-Guideline J: Against 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. Proof of service of the notice upon Applicant is included in the Supplemental FORM filed by Department Counsel on May 13, 2004.
3. The arrest records attached to the FORM do not disclose what the "10 years" refers to. Applicant in his statement indicated he was sentenced to 10 years in prison.
4. Code of Ala. § 15-19-1, et. seq.
5. Because Code of Ala. § 15-19-7, specifically provides that determinations made under that chapter are not deemed to be convictions, consistent with rules of statutory construction, the provisions of 10 U.S.C. § 986 which by its plain language applies only to "convictions" are inapplicable to this case.
6. The date the SF 86 was prepared, as listed on page 1 of the document, is listed as September 6, 2001. However, the SF 86 was not signed and certified by Applicant until March 4, 2002.

7. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

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

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

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

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

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

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

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

15. *Id* at 531.

16. *Egan*, Executive Order 10865, and the Directive.

17. I note question 26 does have such a limitation, but that question refers to offenses other than those inquired about in question 21, among others. It is unreasonable to believe Applicant did not realize that charges of Rape and Sodomy I were felonies, and thus required to be listed in response to question 21 as opposed to question 26.