

KEYWORD: Personal Conduct; Sexual Behavior; Criminal Conduct

DIGEST: Applicant is a 39-year-old employee of a defense contractor who was formerly a school teacher. He was accused of and admitted to sexual misconduct with a student in 2001 and was relieved of his teaching duties. He failed to report this and other matters on his security clearance application (SF 86). He used marijuana while employed as a teacher between 1997 and 1999 and had an extramarital relationship with a co-worker in 1994. Clearance is denied.

CASENO: 02-26685.h1

DATE: 08/31/2004

DATE: August 31, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-26685

**DECISION OF ADMINISTRATIVE JUDGE**

**CHARLES D. ABLARD**

**APPEARANCES**

**FOR GOVERNMENT**

Eric Borgstrom, Esq., Department Counsel

## FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant is a 39-year-old employee of a defense contractor who was formerly a school teacher. He was accused of and admitted to sexual misconduct with a student in 2001 and was relieved of his teaching duties. He failed to report this and other matters on his security clearance application (SF 86). He used marijuana while employed as a teacher between 1997 and 1999 and had an extramarital relationship with a co-worker in 1994. Clearance is denied.

### STATEMENT OF CASE

On November 27, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On December 24, 2003, Applicant, in a sworn written statement, responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to me on May 12, 2004. A notice of hearing was issued on June 15, 2004. A hearing was held on June 22, 2004. The Government introduced twelve exhibits and Applicant introduced one. All exhibits were admitted into evidence. The Applicant testified as did one other on his behalf. The transcript was received June 22, 2004.

## FINDINGS OF FACT

Applicant is a 39-year-old analyst employed by defense contractor since November 2002. He was formerly a school teacher in two different county systems. He admitted all but one of the allegations in the SOR (1.c.), but offered explanatory comments for others. After a complete review of the evidence in the record and upon due consideration of the record, the following findings of fact are made:

Applicant used marijuana while employed as a teacher between 1997 and 1999. He has not used drugs since 2000 and does not intend to use in the future. He had an extramarital relationship with a co-worker in 1994 for three or four months.

While employed as a school teacher in 2001, he was accused of sexual molestation of a student, was suspended from teaching responsibilities, and lost his provisional teaching certificate. After the school misconduct allegation, Applicant and his wife received marital and mental-health counseling from a professional counselor.

In his security clearance application (SF 86), Applicant did not acknowledge that he had left his teaching position after allegations of misconduct (Question 20), and that he was receiving treatment from a mental health professional (Question 19). Applicant also denied the information when questioned by a security investigator. He did not reveal the information in an effort to gain employment with his current employer which he was successful in doing.

## 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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1)

the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. See Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information See *Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See Executive Order No. 12968 § 3.1(b)

## CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to all allegations set forth in the SOR.

Under Guideline E, Personal Conduct, of the Directive involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. (E2.A5.1.1.) The Government has established by evidence and Applicant's admissions that he has been involved in a pattern of rule violations (E2.A5.1.2.5.) and failure give complete and accurate information on his SF 86 (E2.A5.1.2.2.) Applicant established that the one allegation he denied relating to an alcohol-related driving offense was in error and is thus mitigated. No mitigating conditions are applicable since Applicant admits that his omissions were deliberate in an effort to obtain employment, a deception that was successful in that Applicant was hired and has been working for over three years.

Applicant's marijuana use between 1997 and 1999 and the extramarital relationship in 1994 were also alleged under Guideline E as personal conduct that increases vulnerability to coercion, or duress. (E2.A5.1.2.4.) In view of the age of these incidents, these matters are mitigated. (E2.A5.1.3.2)

Under Guideline J, Criminal Conduct is also applicable to Applicant. Disqualifying Condition E2.A10.1.1. is applicable to Applicant in that he has had a pattern of criminal activity that includes allegation of sexual misconduct with a minor with whom he served in loco parentis as a teacher. Applicant is regretful of this incident, which he describes as the worst event of his life. It could be mitigated by application of the facts in the case to certain of the Mitigating Conditions (MC) if the conduct was not recent, they were isolated incidents, the circumstances leading to the violations are not likely to recur, or there is clear evidence of successful rehabilitation. While the conduct occurred three years ago and Applicant is no longer a teacher with access to students, there is no clear evidence of rehabilitation and the gravity of the conduct is indicative of behavior that requires more time than has now elapsed to be mitigated.

Sexual behavior of a criminal nature under Guideline D is also applicable to Applicant because of the misconduct engaged in with a minor student. (E2.A4.1.2.1.) This is applicable whether or not the individual has been prosecuted. Also applicable is sexual behavior that causes an individual to be vulnerable to undue influence or coercion. (E.2.A.4.1.2.3.) No mitigating conditions are applicable.

Based on the evidence of record, including Applicant's admissions, the Government has established reasons to deny him a security clearance because of personal conduct, criminal conduct, and sexual behavior. Having established such reasons, the Applicant has the burden to establish security suitability through evidence that refutes, mitigates, or extenuates the disqualification and demonstrates that it is clearly consistent with the national interest to grant a security clearance. ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

As the policy prescribes, the burden shifted to the Applicant to show that Mitigating Conditions (MC) are applicable to him. Applicant acknowledges the seriousness of his actions and the breach of trust he committed with the student. He also recognizes that his failure to disclose relevant information on his SF 86 was not acceptable behavior. He has failed to meet the burden of proof requirement to mitigate the allegations.

The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. The "whole person" concept recognizes that we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude that he is not eligible for access to classified information. Thus, I find against the Applicant.

## **FORMAL FINDINGS**

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Paragraph 2 Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Paragraph 3 Guideline D: AGAINST APPLICANT

Subparagraph 3.a.: Against 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 renew a security clearance for Applicant. Clearance is denied.

Charles D. Ablard

Administrative Judge