

KEYWORD: Personal Conduct; Sexual Behavior

DIGEST: Applicant has a history of choosing inappropriate locations to masturbate. His decision to masturbate in a church pool in 1986/1987, on three occasions in his office after work hours in 1998, and outside his home in January 2002 raise questions about his judgment and reliability. Such conduct is likely to make him vulnerable to coercion. He has not mitigated the security concerns related to this conduct. Clearance is denied.

CASENO: 03-20165.h1

DATE: 05/12/2006

DATE: May 12, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-20165

**DECISION OF ADMINISTRATIVE JUDGE**

**ERIN C. HOGAN**

**APPEARANCES**

**FOR GOVERNMENT**

John B. Glendon, Esquire, Department Counsel

James B. Norman, Esquire, Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant has a history of choosing inappropriate locations to masturbate. His decision to masturbate in a church pool in 1986/1987, on three occasions in his office after work hours in 1998, and outside his home in January 2002 raise questions about his judgment and reliability. Such conduct is likely to make him vulnerable to coercion. He has not mitigated the security concerns related to this conduct. Clearance is denied.

### **STATEMENT OF CASE**

On May 12, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. [\(U\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline D, Sexual Behavior, and Guideline E, Personal Conduct.

In a sworn statement dated June 6, 2005, Applicant responded to the SOR allegations and requested a hearing. The case was assigned to me on February 8, 2006. A notice of hearing was issued on February 16, 2006, scheduling the hearing for March 21, 2006. The hearing was conducted on that date. The government submitted seven exhibits which were admitted as Government Exhibits (Gov. Ex.) 1 - 7. Applicant objected to Gov. Ex. 2-7, claiming they were tainted based on another government agency's failure to follow proper polygraph procedures. Any issue about the lawfulness of the polygraph is made moot by Applicant's formal admission of the underlying conduct in the SOR. I admitted Gov. Ex. 2-7 because they were relevant to Applicant's security worthiness. The Government also submitted three documents for administrative notice which were marked as Administrative Notice documents (Admin. Not.) I - III. SOR subparagraph 1.a was amended to conform with the evidence, specifically, the city where Applicant resides was corrected. Applicant testified on his own behalf and did not submit exhibits. DOHA received the hearing transcript on March 29, 2006.

## FINDINGS OF FACT

Applicant is a 40-year-old software engineer who works for a defense contractor. He submitted a security clearance application on November 1, 2001. (2) He admits to SOR allegations 1.a, 1.b, 1.c, and 2.a, but denies SOR allegations 1.d and 1.e. (3)

Applicant is married and has two children, a son, age 7, and a daughter, age 8. (4) He has been in his current position since June 2001. (5) In August 2002, Applicant was denied access to Sensitive Compartmented Information (SCI) by another government agency. The basis for doing so was under the sexual behavior, drug involvement, criminal conduct and personal conduct concerns. (6)

In 1986/1987, Applicant lived in San Diego, California. In the mid to late 1980s, he had a serious drug problem. On one occasion while under the influence of speed (methamphetamine) and marijuana, he stalked around naked in the woods around his apartment. He discovered a pool behind a church. He entered the pool and masturbated himself. (7) In 1988 he attended drug treatment and has not used illegal drugs since attending treatment. (8)

In 1998, Applicant was under a lot of stress. He was having difficulty at work. He was diagnosed with shingles and he and his wife were having marital problems while expecting their second child. After duty hours, on three occasions, he masturbated at his desk in his office at work. He does not believe anyone saw him masturbating. (9) He sought out counseling with a psychiatrist who diagnosed him as being moderately depressed. He attended counseling for about two months. (10) No counseling records or other documentation from the psychiatrist were offered into evidence.

On January 7, 2002, Applicant was interviewed by an investigator from another government agency pertaining to his SCI background investigation. The interview was in conjunction with a lifestyle polygraph. During the interview, he did not disclose the three occasions in 1998 when he masturbated at his office and the 1986/1987 incident where he ran around naked in the woods near his apartment. Nothing in the record indicates that he was asked specifically about these events or similar types of sexual behavior during this interview. (11)

In mid January 2002, Applicant masturbated outside his home. His wife and two children were out of town. He stood nude in the stairwell which faces his backyard. The incident occurred in the late afternoon. He stepped outside because he liked the cold air. He claims no one saw him during this incident. (12) He claims it occurred in the seclusion and privacy of his home. He believes his conduct was "neither unethical, nor immoral, nor did it constitute a lack of personal

judgment, nor did it constitute sexual misconduct."<sup>(13)</sup>

In February 2002, Applicant had a second polygraph and interview with an investigator from another government agency. During this interview, he disclosed his past acts of masturbation, including the most recent incident which had occurred two weeks prior to his second interview.<sup>(14)</sup> The investigator had no independent knowledge of these incidents prior to Applicant disclosing them. Applicant maintains the second interviewer's interviewing tactics were unethical.<sup>(15)</sup>

In his previous job, Applicant had the additional duty of salvaging archaic computer components to create useful computer systems. His employer sold these computers to employees for \$75.00. He performed much of this work at his home. His supervisor was aware that he was working from home. In 1999, a job location transfer prevented him from continuing this additional duty. During his security investigation with another government agency, he indicated that he may have unintentionally kept some of the computer parts when he left his employment. He has not found any company computer equipment at his home.<sup>(16)</sup>

Applicant states he has worked for the Department of Defense for over four years and that he is not a threat to national security.<sup>(17)</sup>

## **POLICIES**

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."<sup>(18)</sup> In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

**Guideline E - Personal Conduct:** Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that a person may not properly safeguard classified information.

Guideline D - Sexual Behavior: 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. Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." <sup>(19)</sup> An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. <sup>(20)</sup> An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 pertinent 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. <sup>(21)</sup>

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. <sup>(22)</sup> Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. <sup>(23)</sup> An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." <sup>(24)</sup> Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. <sup>(25)</sup>

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. <sup>(26)</sup> It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

## **CONCLUSIONS**

I have carefully considered all the facts in evidence and the legal standards. The government has established a prima

facie case for disqualification under Guideline E, subparagraphs 1.a, 1.b, and 1.c. and all allegations under Guideline D.

## Guideline E - Personal Conduct

Guideline E disqualifying conditions apply with respect to SOR allegations 1.a, 1.b and 1.c.

PC DC E2.A5.1.2.1: (*Reliable, unfavorable information provided by associates, employers, coworkers, neighbors and other acquaintances*) applies in this case. Applicant admitted to the masturbation incidents alleged during a background investigation conducted by another government agency. This unfavorable information was forwarded to the Defense Security Service during their background investigation. In his answer to the SOR and at hearing, Applicant admits to masturbating in the pool of a local church in 1986/1987 while high on drugs. He admits to masturbating at his desk in his office after hours on three occasions in 1998. He also admits to masturbating outside his basement stairwell in January 2002. He takes issue with the accuracy of the dates and locations of the conduct alleged in the SOR but admits to the underlying conduct.

PC DC E2.A5.1.2.4: (*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*) applies. Applicant is potentially vulnerable to coercion since his sexually deviant activities, if known, may affect his personal, professional or community standing and could possibly render him susceptible to blackmail.

I find none of the personal conduct mitigating conditions apply. Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.1: (*The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability*) cannot apply since Applicant's past behavior raises questions about his judgment, trustworthiness and reliability.

Applicant has not provided enough evidence to support the application of PC MC E2.A5.1.3.5: (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). It is unknown whether Applicant took additional steps to deal with his problem. In fact, he did not think that his conduct created any sort of security issue or called into question his judgment. I disagree. Given the sensitive nature of such activity, I find he is still vulnerable to coercion, exploitation, or duress.

I find for the Applicant with respect to SOR allegations 1.d and 1.e. SOR subparagraph 1.d alleges Applicant took company computer equipment to his home which he never returned after leaving the company. Applicant states that he told the investigators that it might be possible he still had some of his former company's computer equipment in his possession. These comments were made during an interview in conjunction with a lifestyle polygraph. He maintains that the interviewer misinterpreted his statements in the interview report. He denies stealing the equipment or keeping the

equipment for his own use. When an applicant denies an allegation, Department Counsel is responsible for presenting witnesses and other evidence to establish controverted facts alleged in the SOR. (27) The only evidence in support of these allegations in the record are unsigned, unsworn reports of investigation from another government agency. (28) I give little weight to these documents because there is no indication who prepared these documents. In this case, I find that an unsigned, unsworn summary of an interview is not sufficient to establish a prima facie case due to its lack of reliability.

SOR subparagraph 1.e alleges Applicant intentionally withheld the information alleged in subparagraphs 1.a, 1.b, and 1.c during his first interview in January 2002. He could not have withheld the information in 1.a since the incident had not occurred yet. This act occurred between his first and second interviews. In addition, I find the government has not established a prima facie case with respect to intentionally withholding the information in subparagraphs 1.b and 1.c for the same reasons mentioned in the above paragraph. There is no reliable evidence in the record which indicates Applicant was specifically asked during his first interview about any sort of questionable sexual conduct. Applicant did not have a duty to disclose information that he was not specifically asked about during his first interview. Applicant denies this allegation and there is no reliable record evidence suggesting otherwise.

Applicant has provided insufficient evidence to mitigate the personal conduct concerns under ¶¶ 1.a, 1.b, and 1.c of the SOR. I find against him under Guideline E.

#### **Guideline D - Sexual Behavior**

Applicant's conduct raises issues under Guideline D that may be disqualifying. Sexual Behavior Disqualifying Conditions (SB DC) E2.A4.1.2.3: (*Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*) applies. Applicant's past actions are of such an embarrassing and sensitive nature that it places him a position of being vulnerable to coercion, exploitation, or duress.

Applicant's actions also support the application of SB DC E2.A4.1.2.4: (*Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.*) He did not use the best judgment when deciding to masturbate in his office at his desk on three occasions in 1998. Although he believes that his decision to masturbate in January 2002 outside his home was appropriate because he was in a stairwell and could not be seen, there was a potential for a third party to see him. His conduct during the 1986/1987 incident where he walked naked through the woods and masturbated in a local church's swimming pool albeit while under the influence of drugs raises concerns as well. His past actions indicate questionable judgment and a lack of discretion. All of the incidents which he admits to were in locations where it is reasonable to assume third parties could potentially observe him.

I have considered the Sexual Behavior Mitigating Conditions (SB MC) and find that none apply. SB MC E2.A4.1.3.1: (*The behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature*) does not apply since the conduct occurred when Applicant was an adult.

SB MC E2.A4.1.3.2: *(The behavior was not recent and there is no evidence of subsequent conduct of a similar nature)* does not apply based on Applicant's history of choosing to masturbate in inappropriate locations. Further scrutiny is raised for the January 2002 incident since he was in the midst of his SCI background investigation at the time of this incident.

SB MC E2.A4.1.3.3: *(There is no evidence of questionable judgment, irresponsibility, or emotional instability)* is not applicable based on all the reasons stated above. Applicant's repeated pattern of behavior, although somewhat sporadic, raises questions about his judgment. Finally, his admitted actions are of such a sensitive nature that is unlikely that he would want his co-workers, family and friends to know about this conduct. There is nothing in the record evidence indicating he has disclosed the incidents to his co-workers, family and friends. As such, I find that SB MC E2.A4.1.3.4: *(The behavior no longer serves as a basis for coercion, exploitation, or duress)* does not apply.

I find against Applicant under Guideline D.

### **FORMAL FINDINGS**

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1 Guideline E: AGAINST APPLICANT

Subparagraph 1.a. Against Applicant

Subparagraph 1.b. Against Applicant

Subparagraph 1.c. Against Applicant

Subparagraph 1.d. For Applicant

Subparagraph 1.e. For Applicant



Subparagraph 1.a. Against 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.

Erin C. Hogan

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. Gov. Ex. 1.

3. Answer to SOR.

4. Tr. at 30.

5. Gov. Ex. 1, question #6.

6. Gov. Ex. 6.

7. *Id.* at 1.

8. Answer to SOR.

9. Tr. at 30-31.

10. Tr. at 35.

11. Tr. at 35-38.

12. Answer to SOR; Tr. at 29-30.
13. Answer to SOR at 3.
14. Tr. at 38-39.
15. Answer to SOR.
16. Tr. at 27-28; Answer to SOR; Gov. Ex. 2 at 3; Gov. Ex. 7 at 5-6.
17. Answer to SOR.
18. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).
19. Directive, ¶ E2.2.1.
20. *Id.*
21. *Id.*
22. Directive, ¶ E3.1.14.
23. Directive, ¶ E3.1.15.
24. ISCR Case No. 01-20700 at 3 (App. Bd. December 19, 2002).
25. Directive, ¶ E2.2.2.
26. EO 10865, § 7.
27. Directive ¶ E3.1.14.
28. Gov. Ex. 3, 4, and 5.