

KEYWORD: Sexual Behavior; Personal Conduct

DIGEST: Applicant engaged in illegal sexual acts in a public place at least seven times between 1995 and 1997, for which he was twice arrested. In 1996, he was arrested for and convicted of one count of felony solicitation to commit, and given a two-year suspended jail sentence. When interviewed by a government investigator during his background investigation, Applicant knowingly made a false statement about the details of his conduct leading to his 1997 conviction. He failed to mitigate the security concerns about his sexual conduct and personal conduct. Clearance is denied.

CASENO: 03-21958.h1

DATE: 01/26/2006

DATE: January 26, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-21958

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant engaged in illegal sexual acts in a public place at least seven times between 1995 and 1997, for which he was twice arrested. In 1996, he was arrested for and convicted of one count of felony solicitation to commit, and given a two-year suspended jail sentence. When interviewed by a government investigator during his background investigation, Applicant knowingly made a false statement about the details of his conduct leading to his 1997 conviction. He failed to mitigate the security concerns about his sexual conduct and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to give Applicant a security clearance. On December 3, 2004, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline D (sexual behavior) and Guideline E (personal conduct). Applicant timely submitted a responsive pleading and requested a hearing.

Originally assigned to another administrative judge on August 10, 2005, the case was transferred to me on August 24, 2005, due to workload considerations. I convened a hearing on September 23, 2005. The parties appeared as scheduled and the government presented five exhibits (GE 1 through 5), which were admitted without objection. Applicant testified, but proffered no documents. DOHA received the transcript (Tr) on October 6, 2005.

FINDINGS OF FACT

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

Applicant is 47 years old and employed by a defense contractor as a consulting field engineer. He has worked for his current employer since October 1992. Prior to that, he served 11 years as an aviation electronics technician in the United States Navy. In July 1992, he took an early-retirement bonus and left the Navy with an honorable discharge as a Petty Officer First Class (paygrade E-6) eligible for selection as a Chief Petty Officer. Applicant first obtained a clearance in 1981 after he joined the Navy.

In 1995, he began experimenting with bisexual behavior, engaging in sexual acts with men he did not know. These acts consisted of oral sex and usually took place in the bathroom of a local department store where Applicant knew such activity occurred. He asserts he was going through a very stressful time, but has not provided details about what caused that stress, and estimates he had or attempted at least seven such encounters. Applicant also claimed he was sexually abused when he was about 12 years old by a family member and cites that experience as contributing to his sexual behavior as an adult.

On February 7, 1996, Applicant, went to the aforementioned department store bathroom hoping to receive oral sex. He exposed himself to a man who turned out to be an undercover policeman. Applicant was issued a summons charging him with indecent exposure and solicitation for immoral purposes. Applicant's attorney advised him to enroll in a 12-step program for sex offenders. His attorney also succeeded in having the trial on these charges twice continued to allow Applicant to repeat the program. When the matter finally went to trial, the charges were dismissed.

In June 1997, while Applicant was awaiting trial on his February 1996 charges, he was arrested in the same bathroom for the same conduct. Hoping to receive oral sex, Applicant exposed his penis to an undercover policeman in the next stall and asked him to "suck it."⁽²⁾ Applicant was issued a summons charging him with felony criminal solicitation. He later surrendered at police headquarters, was fingerprinted, photographed, and jailed until his wife posted bail. On March 10, 1998, Applicant pleaded guilty and was sentenced to two years in jail, suspended on condition of good behavior for two years, and assessed court costs.

The day he pleaded guilty and was sentenced, Applicant signed a "Proffer of Fact,"⁽³⁾ which detailed his conduct when he was arrested, and which served as the evidentiary basis for his conviction and sentence. When Applicant submitted his security clearance application (SF 86) on November 21, 2000, he stated in the remarks section (question 43) he pleaded guilty to avoid going to jail and that the details of his conduct in the arresting officer's report did not match the aforementioned proffer. On June 4, 2003, Applicant was interviewed as part of his background investigation by a Defense Security Service (DSS) agent. After the interview, he signed and attested to a written statement about his sexual conduct and criminal charges. Therein, he specifically denied exposing himself to the policeman when he was arrested the second time.⁽⁴⁾ Applicant took issue during the DSS interview and at his DOHA hearing with the allegation he actually exposed himself, claiming he had signed a different statement before trial which "was an accurate account of the incident."⁽⁵⁾

Applicant has not been able to locate a copy of that other statement. At his hearing, Applicant testified he could not remember the details of his conduct when he was arrested the second time, but claims he told the truth when he submitted his written statement to DSS. Applicant also testified he was uncomfortable being interviewed by a female DSS agent. Because he was convicted of a felony in this matter, Applicant is collaterally estopped from claiming he did not engage in the conduct for which he was convicted. He is allowed to collaterally attack the conviction on procedural grounds, but has failed to show his conviction was flawed in any way. Accordingly, I specifically find that Applicant exposed himself to the undercover officer as outlined in the aforementioned "Proffer of Fact."

Applicant and his wife have been married since August 1986 and have an 18-year-old son. Until she had to bail him out of jail, Applicant's wife was unaware of his earlier arrest or of his sexual conduct. After the second arrest, they went through joint counseling in 1997 in connection with his 12-step program, and even separated for about seven months in 2002. Applicant asserts his marriage is now much stronger having survived these events, but did not tell his wife about the hearing in this matter for fear it would cause her too much anxiety. Applicant has not told his son about his conduct or arrests, and only his company security officer knows the basis of the government's concerns about continuing Applicant's clearance.

POLICIES AND BURDEN OF PROOF

The Directive sets forth adjudicative guidelines⁽⁶⁾ to be considered in evaluating an applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive.⁽⁷⁾ The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline D (sexual behavior) and Guideline E (personal conduct).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁸⁾ for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the applicant bears a heavy burden of persuasion.⁽⁹⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.⁽¹⁰⁾

CONCLUSIONS

The government alleged under Guideline D that Applicant was charged in February 1996 with indecent exposure and with solicitation for immoral purposes (SOR ¶ 1.a), and that he was convicted, after a March 1997 arrest, of felony criminal solicitation (SOR ¶ 1.b). The government further alleged under Guideline E that he deliberately falsified a June 2003 sworn statement to DSS about the latter arrest (SOR ¶ 2.a).

The government has produced sufficient information to support the allegations under Guideline D. Sexual behavior becomes 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.⁽¹¹⁾ Available information shows that Applicant, then in his late 30s, engaged in multiple instances of high-risk sex with strangers in public places. His conduct demonstrates a disregard for the law, his own health, and the health of others, including his wife. It further appears from all of the available information that these events are still the cause of embarrassment and discomfort for Applicant, thus raising a concern he may be coerced or blackmailed into acting contrary to the national interest. In turn, the government is legitimately concerned Applicant may lack the requisite discretion, willingness to obey rules and regulations, and judgment for continued access to classified information. Based on the foregoing, Guideline D disqualifying condition (DC) 1,⁽¹²⁾ DC 3,⁽¹³⁾ and DC 4⁽¹⁴⁾ apply.

After reviewing the Guideline D mitigating conditions (MC), only MC 2⁽¹⁵⁾ applies, because over eight years have passed since Applicant's last known instance of this type of sexual behavior. However, any mitigation from MC 2 is diminished because the record indicates his conduct remains a source of embarrassment to him. He did not want to tell his wife he was at his hearing for this case for fear it would upset her, and likely would never even have told his wife he had been arrested the first time if she not had to bail him out after the second arrest. Further, for reasons discussed under Guideline E, below, I still question Applicant's judgment as it relates to his willingness to be candid about his conduct and accept full responsibility for his actions. Based on the totality of available information, I conclude Guideline D against the Applicant.

The government has also produced sufficient information to support the allegations under Guideline E. Personal conduct becomes a security concern when it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information.⁽¹⁶⁾ Here, Applicant deliberately falsified his statement to DSS by claiming he did not expose himself to an undercover policeman. The record evidence establishes he did expose himself to an undercover policeman and was convicted of a felony as a result. It also establishes he denied in his statement that he exposed himself. This, in turn, gives the government pause when assessing the accuracy of anything else Applicant has said about his criminal record or his sexual behavior.

Applicant's claim there exists a court or police document with a different version of the events during his second arrest is untenable. Indeed, Applicant was concerned enough about this claimed discrepancy to note it in his SF 86 in November 2000. He also made the claim in his June 2003 interview with DSS. If such a document exists, Applicant bore the burden of producing it to refute or mitigate the government's case. Nor is his claim at hearing that he was uncomfortable with being interviewed by a female DSS agent enough to justify a false statement to the government. An applicant is expected to be truthful and forthcoming at all times in response to questions from investigators. That did not happen here.

Based on all of the foregoing, Guideline E DC 3⁽¹⁷⁾ applies. By contrast, I have reviewed the listed mitigating conditions under Guideline E, and conclude none apply. He has persisted in this falsification, which further underscores the government's concerns about his judgment. In light of the foregoing, I conclude Guideline E against the Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guideline. No single fact or adjudicative factor is dispositive of my decision in this case; rather, I have considered Applicant's suitability in light of the record evidence in its entirety. A fair and commonsense assessment⁽¹⁸⁾ of this record shows reasonable doubts persist, based on Applicant's criminal sexual conduct and his lack of candor regarding that conduct, about his ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to mitigate these doubts, which Applicant has failed to provide, I cannot conclude he has overcome the government's case.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline D (Sexual Behavior): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 2.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 the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. GE 4.
3. Id.
4. GE 2.
5. Id.
6. Directive, Enclosure 2.
7. Commonly referred to as the "whole person" concept, these factor are as follows:

1. Nature and seriousness of the conduct and surrounding circumstances.
2. Frequency and recency of the conduct.
3. Age of the applicant.
4. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
5. Absence or presence of rehabilitation.
6. Probability that the circumstances or conduct will continue or recur in the future;
8. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
9. *See Egan*, 484 U.S. at 528, 531.
10. *See Egan*; Directive E2.2.2.
11. Directive, E2.A4.1.1.
12. Directive, E2.A4.1.2.1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

13. Directive, E2.A4.1.2.3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;
14. Directive, E2.A4.1.2.4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.
15. Directive, E2.A4.1.3.2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;
16. Directive, E2.A5.1.1.
17. Directive, E2.A5.1.2.3. 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. Directive, E2.2.3.