

DATE: November 29, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-23592

## **DECISION OF ADMINISTRATIVE JUDGE**

**MARY E. HENRY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Melvin A. Howry, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is a 41-year-old defense contractor employee. Between 1997 and 2001, the police arrested him three times for lewd and lascivious behavior in a public place. He pled guilty to these charges. The court fined him and sentenced him to community service and unsupervised probation. He has not mitigated the government's security concerns regarding his sexual behavior and criminal conduct. Clearance is denied.

### **STATEMENT OF THE CASE**

On December 21, 2004, 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 Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR 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. Specifically, the SOR set forth security concerns arising under Guideline D, Sexual Conduct, and Guideline J, Criminal Conduct, of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On January 19, 2005, Applicant submitted a notarized response to the allegations. He requested a hearing. This matter was assigned to me on September 13, 2005. A notice of hearing was issued on September 26, 2005, and a hearing was held on October 11, 2005. Nine Government Exhibits and one Applicant Exhibit were admitted into evidence. Applicant testified on his own behalf. The record was held open to allow Applicant to submit additional documentary evidence. He submitted the additional documentation to which no government objection was made. The hearing transcript (Tr.) was received on October 19, 2005.

### **FINDINGS OF FACT**

Applicant admitted the allegations in Guideline D (subparagraphs 1.a, 1.c, 1.d, as well as a portion of subparagraph 1.b)

and Guideline J (subparagraph 2.a) of the SOR.<sup>(1)</sup> Those admissions are incorporated here as findings of fact. He denied the remaining allegations of the SOR.<sup>(2)</sup> After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 41-year-old senior production technician for a defense contractor.<sup>(3)</sup> He has worked for this contractor for thirteen years.<sup>(4)</sup> He completed a security clearance application (SF 86) in December 2001.<sup>(5)</sup>

Applicant received his General Education Diploma (GED) and has attended college.<sup>(6)</sup> He cared for his mother prior to her death in 2000.<sup>(7)</sup> His father, four brothers, and sister are alive.<sup>(8)</sup> He has limited contact with his family.<sup>(9)</sup> He lives quietly and alone.<sup>(10)</sup>

In 2001, he missed a significant amount of time from work due to illness.<sup>(11)</sup> He had exhausted his leave while caring for his mother, causing him to use leave without pay.<sup>(12)</sup> He suffered significant financial problems as a result.<sup>(13)</sup> These problems have been resolved.<sup>(14)</sup>

His job requires him to work with his hands and machinery, not computers.<sup>(15)</sup> His supervisors describe his work ethic as very good.<sup>(16)</sup> They named him employee of the month.<sup>(17)</sup> His supervisors and the engineering staff trust his abilities to do the work assigned to him, and have designated him lead technician, a responsibility which includes staff training.<sup>(18)</sup> His employer has sought, and he has been granted, a clearance to transport, ship, receive or possess explosive materials as an employee processor.<sup>(19)</sup>

Applicant is a homosexual.<sup>(20)</sup> He does not discuss his sexuality with his family members nor have they asked him about it.<sup>(21)</sup> His brothers, however, have made unfavorable comments about homosexuals.<sup>(23)</sup> When co-workers ask him about his sexuality, he tells them he is a homosexual.<sup>(24)</sup> He does not openly discuss his sexuality with his co-workers or his boss, in part because he and his co-workers seldom discuss their personal lives.<sup>(25)</sup> He accepts himself and is comfortable with his sexuality.<sup>(26)</sup>

On May 6, 1997, the police arrested Applicant in a public park and charged him with lewd and lascivious acts because he was masturbating in the public bathroom.<sup>(27)</sup> Only the arresting police officer observed the conduct.<sup>(28)</sup> He pled guilty to this misdemeanor charge.<sup>(29)</sup> The court sentenced him to six months of unsupervised probation, fined him \$270.00, and directed he perform 100 hours of community service.<sup>(30)</sup> He complied with the terms of his sentence.<sup>(31)</sup>

On November 28, 1997, the police arrested Applicant a second time, and again charged him with lewd and lascivious acts.<sup>(32)</sup> The police caught him and another male in his car kissing and touching each other.<sup>(33)</sup> No witnesses besides the arresting officer have been identified.<sup>(34)</sup> He pled guilty to this misdemeanor charge.<sup>(35)</sup> The court sentenced him to twelve months of unsupervised probation, fined him \$160.00, and directed he perform 100 hours of community service.<sup>(36)</sup> He complied with the terms of this sentence.<sup>(37)</sup>

On October 9, 2001, late in the evening, an undercover police officer approached him and engaged him in conversation in a public park.<sup>(38)</sup> They talked for more than an hour about various places, including other parks, where men met each other and engaged in sexual conduct.<sup>(39)</sup> During their conversation about what sex act he was willing to perform on the police officer, he groped the police officer's groin.<sup>(40)</sup> The police then arrested him for a third time and charged him with Offers, Aids, Agrees or Solicits an Indecent or Lewd Act.<sup>(41)</sup> He pled guilty to this misdemeanor charge.<sup>(42)</sup> The court sentenced him to one year of unsupervised probation, fined him \$180.00, and ordered him to stay away and not come closer than 1,000 feet to the park where this incident took place.<sup>(43)</sup>

Since 2001, Applicant has gone to a park once.<sup>(44)</sup> On this occasion, he attended his nephew's birthday party.<sup>(45)</sup> Outside of this one occasion, he has not gone to any parks for any reason.<sup>(46)</sup> He does not plan to pursue his past

behavior in the parks, as he wants to continue with his job.<sup>(47)</sup> The record contains no evidence of any arrests since 2001. He has not received any mental health treatment regarding his sexuality issues, although he did benefit from his community service work, which was with a gay support group.<sup>(48)</sup> At the hearing, he credibly testified that he could not be coerced or exploited because of his sexual preference and related convictions.<sup>(49)</sup> He would report any approaches to security.<sup>(50)</sup>

## POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically, these are: (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. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(51)</sup> The government has the burden of proving controverted facts.<sup>(52)</sup> The burden of proof is something less than a preponderance of the evidence.<sup>(53)</sup> Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>(54)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(55)</sup>

No one has a right to a security clearance<sup>(56)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(57)</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>(58)</sup> Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant.<sup>(59)</sup> It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

**Sexual Behavior - Guideline D: 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.**

**Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.**

In addition, the Directive advises adjudicators in cases involving Guideline D issues to consider guidelines pertaining to both criminal conduct (Guideline J) and emotional, mental and personality disorders (Guideline I) in determining how to

resolve the security concerns raised by sexual behavior. In this particular case, a Guideline J issue is already alleged in the SOR. (60) Accordingly, the following guideline is also pertinent to an evaluation of the facts of this case: Emotional, Mental and personality Disorders.

### CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

Guideline D specifically states that sexual orientation or preference may not be used as a basis for or a disqualifying factor. Accordingly, in deciding whether to grant a clearance, I have focused only on Applicant's conduct.

The government has established its case under Guideline D as to allegations 1.a through 1.d and 1.f. Based on all the evidence, Sexual Behavior Disqualifying Condition (SB DC) E2.A4.1.2.1. (*Sexual behavior of a criminal nature, whether or not the individual has been prosecuted*), SB DC E2.A4.1.2.3. (*Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*) and SB DC E2.A4.1.2.4. (*Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment*) apply. Applicant has been arrested three times for sexual conduct in a public park and performed in a public manner. He pled guilty to each of the resulting misdemeanor charges. His decision to seek sexual gratification in a public area and not to discuss his sexuality with his family could leave him vulnerable to coercion, exploitation or duress and shows a lack of judgment.

Applicant's reluctance to discuss his sexuality with his family make him more vulnerable to coercion, exploitation or duress. I have concerns about his failure to correct his criminal conduct after his initial arrest in 1997. Although he understands that his inappropriate decision making in regards to where he should seek sexual gratification are detrimental to him and to his job, he continued to conduct himself inappropriately for a significant period of time, leading to additional criminal arrests in 2001. Just prior to his arrest, he told an uncover police officer about numerous other locations, including parks, where men met each other. He clearly knew public places where men met for sexual gratification. Such sexual conduct in a public place violated the law and placed him in a more vulnerable position. The record is silent as to whether he ever returned to any park for the purpose of meeting men after his arrest in 2001. He has not been arrested in the last four years for anything. However, since it was four years between his first two arrests and his most recent arrest, which occurred four years ago, I conclude Sexual Behavior Mitigating Condition (SBMC) 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.

The government has not established its case regarding allegation 1.e. Applicant denied this allegation and the government failed to produce evidence to support the allegation. He credibly testified that he had no plans to return to the parks to engage in sexual conduct, and his testimony is supported by the absence of more recent sexual conduct in a public place since 2001.

In reviewing this matter under Guideline I, Emotional, Mental and Personality Disorders, Disqualifying Conditions (EMPD DC) E2.A9.1.2.3. (*A pattern of high-risk, irresponsible, aggressive, anti-social or emotionally unstable behavior*) and E2.A9.1.2.4. (*Information that suggests that the individual's current behavior indicates a defect in his or her judgment or reliability*) apply. Applicant's three arrests for lewd and lascivious acts along with his extensive knowledge of public locations for this conduct shows a pattern of high-risk, irresponsible and anti-social behavior. His decision to continue his conduct after being arrested shows a lack of judgment and poor decision making. None of the mitigating conditions apply.

Applicant has failed to mitigate or overcome the government's case under Guideline D. Accordingly, for the reasons stated above, allegations 1.a. through 1.d. and 1.f. of the SOR are concluded against Applicant. Allegation 1.e. is concluded in his favor.

The government has established its case under Guideline J. Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*Allegation or admission of criminal misconduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*) apply. Applicant was arrested for lewd

and lascivious behavior in a public place, misdemeanor criminal offenses, on three occasions between 1997 and 2001. He pled guilty after each arrest. The courts fined him and sentenced him to community service and unsupervised probation.

I considered the Criminal Conduct Mitigating Conditions (CC MC) and conclude that none apply. While Applicant's two arrests in 1997 are eight years old, his most recent arrest four years ago happened four years after his previous arrests. The record evidence clearly indicates that between 1997 and 2001, he continued seeking sexual gratification in public places. He has not been arrested in four years, the same length of time between his 1997 and 2001 arrests. Thus, sufficient time has not elapsed. While he has maintained steady employment for the last 13 years, improved his financial record, and earned the trust of his employer because of his work skills and ethics, there is insufficient evidence that he has changed his sexual conduct completely. Accordingly, Applicant has failed to mitigate the government's case under Guideline J.

For the reasons stated, I find that it is not clearly consistent with the national interest to grant a security clearance to Applicant.

### **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 D (Sexual Behavior): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: Against Applicant

Paragraph 2, Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 2.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 a security clearance for Applicant. Clearance is denied.

Mary E. Henry

Administrative Judge

1. Applicant's Answer to SOR, dated January 19, 2005, at 1.
2. *Id.*
3. Government Exhibit 2 (Security Clearance Application, dated December 17, 2002) at 2.
4. *Id.*

5. *Id.*
6. Tr. at 19.
7. Government Exhibit 2, *supra* note 3, at 3.
8. *Id.* at 3-4.
9. Tr. at 19, 25.
10. *Id.* at 32.
11. Government Exhibit 9 (Applicant's signed statement, dated March 31, 2003) at 1.
12. *Id.*
13. *Id.* at 2.
14. *Id.*
15. Tr. at 37.
16. *Id.* at 20.
17. Applicant Exhibits A (Letter of Recommendation, dated January 21, 2005) and C (Letter of Recommendation, dated October 17, 2005).
18. *Id.*
19. Applicant Exhibit B (Employee Possessor Letter of Clearance, dated May 16, 2005).
20. Tr. at 21-22.
21. [\(22\)](#)
22. Tr. at 25.
23. *Id.* at 25-26.
24. *Id.* at 26.
25. *Id.* at 26-29.
26. *Id.* at 22, 28.
27. Government Exhibit 4 (Police report, dated May 6, 1997) at 1-2.
28. *Id.*
29. Government Exhibit 3 (Court facts database case information sheet, dated March 3, 2003); Tr. at 33.
30. Government Exhibit 3, *supra* note 28, at 1.
31. Tr. at 29-30.
32. Government Exhibit 5 (Police report, dated November 28, 1997) at 1.

33. *Id.*
34. *Id.*
35. Government Exhibit 9, *supra* note 11, at 3; Tr. at 33.
36. Government Exhibit 6 (Court facts database case information sheet, dated March 3, 2003); Tr. at 23.
37. Tr. at 29-30.
38. Government Exhibit 9, *supra* note 11, at 3.
39. *Id.*
40. *Id.*
41. Government Exhibit 7 (Police report, dated October 9, 2001) at 1.
42. Government Exhibit 9, *supra* note 11, at 3.
43. *Id.*; Government Exhibit 8 (State Traffic Ticket and Complaint dated October 9, 2001) at 2.
44. Tr. at 29-30.
45. *Id.* at 24, 27, 30.
46. *Id.*
47. *Id.* at 24, 32.
48. *Id.* at 30.
49. *Id.* at 28.
50. *Id.*
51. ISCR Case No. 96-0277 (July 11, 1997) at 2.
52. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
53. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
54. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
55. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
56. *Egan*, 484 U.S. at 531.
57. *Id.*
58. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
59. Executive Order No. 10865 § 7.
60. Directive, Enclosure 2, ¶ E2.A4.1.1, fn.