

DATE: March 26, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33091

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Jennifer Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 51-year-old employee of a defense contractor who engaged in sexual behavior in a public place, masturbating in public, and was twice arrested for the offenses. The arrests occurred in public restrooms. Applicant admitted that he was guilty of both in a sworn statement to the investigator. He also admitted that he had engaged in the same conduct since he was a teenager one or more times a year. Applicant failed to list the arrests on his Security Clearance Application (SF 86) and falsified material facts about the arrests in his initial sworn statement to the security investigator. Clearance is denied.

STATEMENT OF CASE

On September 24, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding 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.

In a sworn written statement dated October 20, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on December 30, 2003. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not do so and the case was assigned to me on February 26, 2004.

FINDINGS OF FACT

Applicant admitted to all of the specific facts alleged in the SOR. The admitted facts are hereby incorporated as findings

of fact. After a complete and thorough review of the information in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 51-year-old employee of a defense contractor who engaged in sexual behavior in a public place, masturbating in public, and was twice arrested for the offenses. The arrests occurred in public restrooms in 1998 and 1999. The first resulted in a conviction for Disturbing the Peace. He was fined \$250.00 and placed on one year of probation. The second charge was dismissed but Applicant admitted that he was guilty of both in his sworn statement to the Defense Security Service investigator. He also admitted that he had engaged in the same conduct since he was a teenager one or more times a year.

Applicant failed to list the arrests on his SF 86 prepared in 2001 and falsified material facts about the arrests in his interview with the investigator in 2002.

Applicant attached two separate documents to his answer to the SOR consisting of seven and two pages respectively. In it he detailed more of the specific facts about his conduct and the causes for the conduct as he viewed it. He also attached three character and work references showing that he is a good employee who is well regarded by his supervisors.

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.

Applicant's sexual conduct raises concerns under Guideline D (E2.A4.1.1.) involving sexual behavior that may subject an individual to coercion, exploitation or duress (E2.A4.1.2.3.) and of a public nature that reflects lack of discretion or judgment. (E2.A4.1.2.4.) Applicant's arrests for criminal conduct raise issues under Guideline J (E2.A10.1.1) involving a history or pattern of criminal activity creating doubt about a person's judgment, reliability and trustworthiness (E2.A10.1.2.1.) and a single serious crime or multiple lesser offenses (E2.A10.1.2.2.).

Also alleged is Applicant's failure to report the arrests for public sexual conduct and giving materially false information

to the investigator raising an issue under Guideline E involving questionable judgment, unreliability, and unwillingness to comply with rules and regulations that

could indicate that the person may not properly safeguard classified information (E2.A5.1.1.). This includes personal conduct 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 subject to blackmail. (E2.A5.1.2.4.).

Applicant's sexual misconduct was criminal behavior that exposed him to possible blackmail and coercion so is inconsistent with the requirements for a security clearance.

Applicant's answer and the analysis of the reasons for his conduct do not justify the actions for which he was arrested and admitted to in his formal answer. While they display evidence of a person who may have had work related problems and a statement that he will never engage in such conduct again, the evidence of his past conduct and admissions are more persuasive as reasons for denial of a clearance. His character and work references are strong but do not overcome the allegations he has admitted.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude that it is not clearly consistent with the national interest to grant clearance to Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline D: 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.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Paragraph 3. Guideline J : AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

DECISION

After full consideration of all the facts and documents 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.

Charles D. Ablard

Administrative Judge