

DATE: December 28, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33719

ECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 36-year-old employee of a defense contractor who was arrested in 2000 in a restroom after accepting an offer by a local police officer for oral sex. He plead nolo to indecent exposure and was fined and given a suspended sentence of one year with supervised probation . This one arrest is the only criminal conduct with which the Applicant has been charged either before or since except for traffic violations. Applicant acknowledged the incident on his SF 86. He has expressed chagrin about the incident, indicated that he has learned his lesson, and that such an incident would never re-occur. Clearance is granted.

STATEMENT OF CASE

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 an undated 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. It was received by Applicant on February 24, 2004. 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 February 26, 2004, 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 June 16, 2004. 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 August 13, 2004.

FINDINGS OF FACT

Applicant admitted to the allegations in the SOR but offered extenuating and mitigating circumstances. 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 36-year-old employee of a defense contractor. He was arrested in May, 2000 in a public restroom after accepting an offer by a local police officer for oral sex. He plead no contest to indecent exposure and was given a suspended sentence of one year with supervised probation, fined \$700.00, and ordered to pay court costs.

Applicant had served in the Army for 12 years having been discharged a few months prior to his arrest. He has worked for his employer the past three years. This one arrest is the only criminal conduct with which the Applicant ever has been charged except for traffic violations. Applicant acknowledged the incident and his arrest on his SF 86. His wife and employer are aware of the incident. In his answer to the SOR he expressed chagrin about the incident, indicated that he has learned his lesson, and stated that such an incident would never recur.

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 behavior raises concerns under Guideline D (E2.A4.1.1.) since it 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.) However, certain mitigating conditions (MC) may be applicable. These would include the fact that the behavior was not recent and there is no evidence of subsequent conduct of a similar nature (E2.A4.1.3.2.), and that the behavior no longer serves as a basis for coercion (E2.A4.1.3.4.). Applicant's record since the offense in 2000 and the knowledge of the incident by his wife and employer justifies the application of both mitigating conditions.

Applicant's arrest for criminal conduct raises 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.). Applicant's answer indicates that the police officer and not Applicant affirmatively suggested sex and the FORM accepts that interpretation. Applicant was only charged with

indecent exposure and did not contest that lesser offense. I conclude that the allegation is mitigated by the fact that it was not recent since it occurred over four years ago (E2.A10.1.3.1.), and is an isolated incident (E2.A10.1.3.2.) since it was the only criminal offense of Applicant.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. 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. The entire record of Applicant and his credible statements in his answer relating to his embarrassment and his firm intent never to let such an event occur leads me to a favorable conclusion for him.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude that the Applicant record indicates that he is a trustworthy and reliable person whose record of conduct and employment justifies a finding that it is clearly consistent with the national interest to grant a security clearance to him.

FORMAL FINDINGS

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

Paragraph 1. Guideline J : FOR APPLICANT

Subparagraph 1.a.: For Applicant

Paragraph 2. Guideline D: FOR APPLICANT

Subparagraph 2.a.: For Applicant

DECISION

After full consideration of all the facts and documents presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Charles D. Ablard

Administrative Judge