

DATE: February 3, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-07826

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

James Klimaski, Esq.

SYNOPSIS

Applicant is 53 years old, married, and works for a defense contractor as an information systems technologist. He was arrested for lewd and lascivious conduct in February 1998. The charges were dismissed. Applicant failed to list the arrest on his 2002 security clearance application. The Government's Statement of Reasons alleged Personal Conduct, Sexual Behavior, and Criminal Conduct security concerns. Applicant did not mitigate these security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On May 7, 2004, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline E (Personal Conduct), Guideline D (Sexual Behavior), and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on June 2, 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on July 29, 2004. On October 25, 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on November 3 2004.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 53 years old, married with two adult children. For the past decade he has been employed by a defense contractor as an information system technologist. Applicant is regarded by his supervisor as a valued employee, highly

skilled, and trusts him. Applicant's performance evaluations from 1997 to 2003 show he is a very competent employee. (Tr. 14 to 18, 20; Exhibits 1 and A)

Applicant was arrested on February 11, 1998, for masturbating in his car while driving home from work. Two women in the adjacent car witnessed Applicant masturbating. He claims he did it then and several times over two years because his youngest daughter was being rebellious, and marital sexual relations with his wife were not as frequent as they had been previously in their marriage. He relieved his stress over these two issues through this activity. Applicant was arrested and charged with an ordinance violation for lewd and lascivious conduct. Represented by an attorney, Applicant was able to convince the local court to dismiss the charges and he paid \$19 in court costs. Applicant was initially accused of the same conduct on February 10, 1998, but that charge was also dismissed and the licence plate number given the police by the witnesses was registered to someone else at the time of the incident. In May 1998 at his wife's urging, Applicant sought counseling from a psychiatrist and took Prozac until August 1999 when Applicant ceased counseling. Applicant was never arrested prior to this incident, nor since then. (Tr. 20 to 34; Exhibits 2, 3, B to E)

Applicant currently holds a secret clearance. When his renewal of his security clearance occurred in 2002, he completed the electronic version of the security clearance application (SCA). He did not disclose his arrest in February 1998 on his SCA. He claimed he did not want the secretary who proof-reads the answers and corrects grammatical mistakes to know of his embarrassing arrest. Later, Applicant told the government investigator the other reasons he did not disclose his arrest were two, first that he thought it was a traffic offense and did not have to be listed, and secondly, that his attorney on the charges told him he did not have to list that he had ever been convicted because the charges were dismissed. Question 26 on the SCA asks if Applicant had ever been arrested or charged with an offense in the past seven years that was not already disclosed on previous questions on the SCA. Applicant answered "No" to Question 26. (Tr. 35, 36; Exhibit 2)

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. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring

pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "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* Exec. Or. 12968 § 3.1(b).

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:

Guideline E - Personal Conduct:

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

Refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personal security or trustworthiness determination.

Conditions that could raise a security concern and may be disqualifying also include:

(2) The deliberate omission, concealment, or falsification of relevant and material facts from any personal security questionnaire, personal history statement, or similar form used to conduct investigations, determine security clearance eligibility or trustworthiness.

(3) Deliberately providing false or misleading information concerning relevant and

material matters to an investigator in connection with a personnel security or trustworthiness determination.

(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.

Conditions that could mitigate security concerns include:

None

Guideline D - Sexual Behavior

The Concern: 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 a lack of judgment or discretion.

Conditions that could raise a security concern and may be disqualifying include:

- (1) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (3) Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.
- (4) Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

Conditions that could mitigate security concerns include:

- (2) The behavior was not recent and there is no evidence of subsequent conduct of a similar nature.
- (3) There is no other evidence of questionable judgment, irresponsibility, or emotional instability.
- (4) The behavior no longer serves as a basis for coercion, exploitation, or duress.

Guideline J - Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- (1) Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
- (2) A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

- (1) The criminal behavior was not recent.
- (2) The crime was an isolated incident.

CONCLUSIONS

In the SOR, DOHA alleged Applicant deliberately failed to disclose his 1998 arrest. The Government proved that allegation. Disqualifying Conditions (DC) 2, DC 3, and DC 4 apply. Applicant was asked for arrest information, and he deliberately failed to disclose it to save himself the personal embarrassment in the eyes of a company secretary. When asked about the arrest in the course of the Government's investigation, he gave the investigator two other reasons. Both reasons are not persuasive, because the lewd and lascivious conduct ordinance was not a traffic offense and his lawyer's advice that he had not been convicted of anything is clearly not applicable to a question about arrests. Furthermore, Applicant's deliberate failure to disclose his arrest occurred four years after the arrest, during which time he continued to work at the same company, shows his falsification was calculated and planned even though any concern was attenuated after those four years.

Because Applicant withheld relevant and material information from the Government without a persuasive or justifiable reason, I find no Mitigating Conditions (MC) applicable here. I conclude the Personal Conduct guideline against Applicant.

Regarding the Sexual Behavior guideline, DC 1, DC 3, and DC 4 apply. Applicant conducted his sexual activity in public, demonstrating a clear lack of discretion and good judgment. He admitted he masturbated several times in his car over a two year period because of his stress at the time. His justifications for doing it in his car on the road are not persuasive.

This public sexual behavior was six years ago, Applicant obtained a year's worth of counseling, and he has not repeated his actions. MC 2 and MC 3 apply. However, the fact he hid the arrests on his SCA show me he still is hiding them from other people, thereby making him vulnerable to exploitation. I conclude this guideline against Applicant.

The Criminal Conduct guideline applies to these facts. DC 1 and DC 2 apply. Applicant was arrested for two offenses, denies one offense, but succeeded in having both ordinance offenses dismissed by the local court. His deliberate falsification of his SCA constitutes a violation of 18 U.S.C. 1001.

MC 1 and MC 2 apply here to the 1998 offense. This offense occurred six years ago, and was an isolated incident and time in his 53 years of life. The Government conceded this guideline was mitigated (Tr. 47). However, the falsification occurred in 2002 and is not mitigated by the passage of time. Therefore, I conclude this guideline against Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Paragraph 2. Guideline D: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Paragraph 3. Guideline J: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: For 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 or continue a security clearance for Applicant. Clearance is denied.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).