

KEYWORD: Sexual Behavior; Criminal Conduct

DIGEST: Applicant was convicted of four counts of Indecent Behavior with a Juvenile in 1985, and sentenced to two and one-half years in jail on each count, with five years being suspended. He served approximately two years in jail, was paroled in November 1987, and remained on probation until May 1990. Because of the statutory disqualification imposed by 10 U.S.C. § 986, he is unable to mitigate the security concern his criminal conduct has created. Clearance is denied. I do not recommend further consideration of this case for a waiver.

CASENO: 03-09412.h1

DATE: 07/16/2004

DATE: July 16, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-09412

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted of four counts of Indecent Behavior with a Juvenile in 1985, and sentenced to two and one-half years in jail on each count, with five years being suspended. He served approximately two years in jail, was paroled in November 1987, and remained on probation until May 1990. Because of the statutory disqualification imposed by 10 U.S.C. § 986, he is unable to mitigate the security concern his criminal conduct has created. Clearance is denied. I do not recommend further consideration of this case for a waiver.

STATEMENT OF THE CASE

On October 23, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J for criminal conduct, and Guideline D for sexual behavior. The SOR also alleges that 10 U.S.C. § 986 disqualifies Applicant from having a security clearance granted or renewed.

Applicant submitted a sworn answer to the SOR dated November 13, 2003, admitted all SOR allegations, and requested a hearing. He also acknowledged his criminal conviction prohibited renewal of his security clearance because of the applicability of 10 U.S.C. § 986 to his case, and requested his case be referred to the Secretary of Defense for consideration of a waiver.

This case was assigned to me on April 26, 2004. A notice of hearing was issued on May 20, 2004, scheduling the hearing for June 9, 2004. An amended notice of hearing was issued on June 3, 2004, changing the location where the hearing was to be held within the same city and on the same date and time as contained in the original notice of hearing. The hearing was conducted as scheduled. The government submitted eight documentary exhibits at the hearing that were marked as Government Exhibits (GE) 1-8, and admitted into the record without an objection. Applicant testified at the hearing, called his work supervisor as a character witness, and submitted seven documentary exhibits that were marked as Applicant's Exhibits 1-7, and admitted into the record without an objection. The transcript was received on June 18, 2004.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the testimony, pleadings, and exhibits, I make the following findings of fact:

Applicant is 57 years old, has never been married, has no children, and, at the time of the hearing, was engaged to be married. He was awarded a Doctor of Philosophy degree in 1973, thereafter taught at the university level, and was an associate professor at a state university at the time of his arrest in 1984. Following his release from the penitentiary in 1987, he returned to college as a student, and earned a Bachelor of Science degree in computer science. He has been employed by defense contractors since at least September 1990, and is presently working as a senior software engineer.

Applicant was indicted on November 21, 1984, and charged with two counts of Indecent Behavior with a Juvenile and two counts of Pornography Involving Juveniles. The charges were based upon Applicant having sexually fondled two girls, ages seven and nine, on a number of occasions between March 1983 and June 1984. He also took sexually explicit photographs of the girls. His victim's were the daughters of his friends. Applicant's criminal conduct was discovered when the father of one of the victim's found naked pictures of his daughter while caring for Applicant's house. The police were notified, executed a search warrant for Applicant's house, and seized the photographs of the two victims and a large quantity of other child pornography.

Applicant pled guilty and was convicted of four counts of Indecent Behavior with Juvenile on November 15, 1985. He was sentenced to two and one-half years in jail and fined \$1,500.00 on each count. The sentence on two counts was suspended, and he was placed on five years probation on each of those counts, with those sentences ordered to run consecutively and to begin upon the completion of the two terms of imprisonment that were imposed. Applicant was paroled from prison on November 23, 1987, and his probationary sentence was terminated on May 18, 1990. He was granted a First Offender Pardon that became effective on July 15, 1990.

Applicant voluntarily sought psychological counseling from a clinical psychologist in November 1984. He attributes his criminal conduct to the stresses present in his life that arose from a romantic relationship he was involved in with a woman. He continued with that counseling until he began serving his prison sentence, and resumed the counseling after his release from prison. The psychologist continues to see him on an informal basis at present, and believes Applicant is extremely unlikely to repeat this type criminal behavior. There is no evidence to indicate Applicant has any other criminal history.

Applicant's references have had the opportunity to observe him in work and social settings. They opine that he is an outstanding employee, a competent engineer, and an honest, dependable, and trustworthy individual. Applicant has held a secret security clearance since March 1993. There have been no allegations of mishandling classified material or reports of security violations made against Applicant.

Applicant testified he could not be blackmailed based upon his criminal history, because he has revealed his misdeeds to all family, social, and business acquaintances who might have any reason to know. His supervisor testified Applicant had told her about his criminal background, but she understood it involved middle-teenage girls, and did not believe it involved girls under the age of ten.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. 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. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, and Guideline D, pertaining to sexual behavior, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁽⁴⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽⁵⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁶⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹¹⁾

CONCLUSIONS

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

The government has established its case against Applicant under Guideline J. The evidence establishes he was convicted of four counts of Indecent Behavior with a Juvenile, fined a total of \$6,000.00, and sentenced to two and one-half years in jail on each count, although the sentence was suspended on two counts. He served approximately two years in jail before being paroled on November 23, 1987. Disqualifying Conditions (DC) 2: *A single serious crime or multiple lesser offenses*; and DC 3: *Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year* apply in this case.

Applicant has no criminal history other than the convictions for sexually abusing and photographing the two girls who were his victims in the above noted case. He voluntarily sought psychological counseling, both before and after being sent to prison, and the prognosis is that he is extremely unlikely to re-offend. He returned to college following his release from prison and earned a degree in a field in which his criminal history would not create an automatic impediment. He has worked steadily in the defense industry as a software engineer for the past fourteen years, and has earned a reputation as an honest, dependable, and trustworthy employee and individual. He has possessed a security clearance since 1993, with no adverse reports having been made about his handling of classified information.

Mitigating Conditions (MC) 1: *The criminal behavior was not recent*; MC 4: *. . . the factors leading to the violation are not likely to recur* and MC 6: *There is clear evidence of successful rehabilitation* apply in this case. Although these mitigating conditions would otherwise be sufficient to mitigate Applicant's criminal conduct, the statutory disqualification imposed by 10 U.S.C. § 986 mandates that he is unable to mitigate that conduct. Guideline J is decided against Applicant.

Sexual Conduct. 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.

Applicant was convicted of sexual offenses committed against two tender age girls. That conduct was of a type that could have subjected him to coercion, exploitation, and duress, and, at a minimum, exhibited a serious lack of judgment and discretion. However, since his arrest, Applicant has received mental health counseling, the stressors he was previously unable to handle no longer appear to be present in his life, and there have been no reported relapses. His work record, the stability in his private life, and the psychologist's prognosis strongly indicate this type offense is unlikely to recur. Further, Applicant has revealed his criminal history to numerous people to prevent it from being a possible source of blackmail, although it does appear he has attempted to somewhat minimize the seriousness of the conduct.

DC 1: *Sexual behavior of a criminal nature . . .* ; DC 3: *Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*; and 4: *Sexual behavior . . . which reflects lack of discretion or judgment* apply in this case. MC 2: *The behavior was not recent and there is no evidence of subsequent conduct of a similar nature*; and 3: *There is no other evidence of questionable judgment, irresponsibility, or emotional instability* also apply. Under the circumstances present in this case, including the pre and post-conviction mental health treatment and excellent long-term work record, Appellant has mitigated the security concern caused by his sexual conduct. Guideline D is decided for Applicant.

In all adjudications the protection of our national security is the paramount concern. Security clearance decisions are not intended to adjudge guilt or

to impose further punishment for past transgressions. Rather, the objective of the security-clearance process is the fair-minded, commonsense assessment of a persons' trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions, including all criminal conduct, whether or not otherwise mitigated. I do not recommend further consideration of this case for a waiver of the disqualification mandated by 10 U.S.C. § 986.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

SOR ¶ 1-Guideline D: For the Applicant

Subparagraph a: For 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 Applicant. I do not recommend further consideration of this case for waiver of the 10 U.S.C. § 986 disqualification.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.