

KEYWORD: Sexual Behavior; Personal Conduct

DIGEST: Applicant was charged with rape (four counts) in 1988, and with rape and statutory burglary in 1990. The 1988 charges were nolle prossed, and he was found not guilty of the 1990 charges. Applicant failed to disclose these criminal charges and a January 2001 arrest for disorderly conduct in a security clearance application he submitted in March 2001. Applicant has failed to mitigate the security concern that has resulted from the criminal charges brought against him and the false he provided. Clearance is denied.

CASENO: 03-10959.h1

DATE: 08/23/2004

DATE: August 23, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-10959

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco Mendez, Esq., Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant was charged with rape (four counts) in 1988, and with rape and statutory burglary in 1990. The 1988 charges were nolle prossed, and he was found not guilty of the 1990 charges. Applicant failed to disclose these criminal charges and a January 2001 arrest for disorderly conduct in a security clearance application he submitted in March 2001. Applicant has failed to mitigate the security concern that has resulted from the criminal charges brought against him and the false he provided. Clearance is denied.

### **STATEMENT OF THE CASE**

On October 14, 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. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline D (sexual conduct) and Guideline E (personal conduct). Applicant submitted an answer to the SOR dated October 27, 2003. He admitted being charged with the criminal offenses that underlie the sexual conduct SOR allegations and provided explanations for the reasons why the charges were filed. He also admitted his family did not know about the charges and that he did not want them to know about them. Although he admitted providing incorrect answers in the security clearance application he submitted, he denied the answers were deliberate attempts to deceive. Applicant requested a hearing.

The case was assigned to me on April 29, 2004. A notice of hearing was issued on May 20, 2004, scheduling the hearing for June 7, 2004. The hearing was conducted as scheduled.

The government submitted seven documentary exhibits that were marked as Government Exhibits (GE) 1-7, and admitted into the record without an objection. Applicant testified at the hearing but did not submit any documentary evidence. The transcript was received on June 17, 2004.

## FINDINGS OF FACT

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

Applicant is a 40-year-old man who has been employed as an operating engineer by a government contractor since March 2001. He served in the United States Navy from February 1986 to December 1996, and received an Honorable Discharge while serving in the rank of Petty Officer 3, (paygrade E-4). He was twice promoted to the rank of Petty Officer 2 (paygrade E-5), but each time suffered a reduction in rank at a Captain's Mast (the naval term for punishment imposed pursuant to Article 15, Uniform Code of Military Justice). Both rank reductions resulted from assaults Applicant committed against fellow Sailors. The last Captain's Mast occurred in 1996, and was the motivation for Applicant leaving the Navy. He worked steadily at a variety of jobs between the time he left the Navy and his current job, including seven months with his present employer in 1997 before he was laid off.

Applicant was married in August 1991, and divorced approximately two years ago (he does not recall exactly when the divorce was finalized). He has five children between the ages of 9 and 19, including a son who is a product of the relationship that resulted in rape charges being filed against him in 1988.

Applicant was charged with four counts of rape in March 1988. The charges were based upon a consensual sexual relationship he had with a 15-year-old girl while he was 23 years old that resulted in her becoming pregnant. Applicant testified he met the girl in an adult nightclub and was unaware that she was underage when he was having sexual relations with her. On July 6, 1988, the charges were nolle prossed. Applicant maintains an active father-son relationship with the child he fathered during this relationship.

Applicant was charged in July 1990 with rape and statutory burglary. Applicant explained in his SOR answer he was dating two women who lived next door to each other at a university. After engaging in sexual intercourse with one of the women, he told her he had to leave to go visit the second woman who was awaiting his return. The first woman called police and claimed Applicant had broken into her apartment and raped her. Applicant was found not guilty of both charges in a jury trial concluded on March 7, 1991.

Applicant was arrested on January 18, 2000, charged with driving on a revoked license and other traffic offenses, fined \$50.00, and assessed \$138.00 in court costs. He was charged with disorderly conduct on January 21, 2001, after his wife called police and alleged Applicant was following her on a state road. The charge was dismissed by the district attorney on September 12, 2001. He was again charged with disorderly conduct on September 5, 2001, for an incident involving a police officer and the principal at his children's school wherein he apparently lost his temper and swore at them in the presence of the children. That charge was dismissed by the judge when he appeared in court.

Applicant signed a security clearance application (SF 86) on March 20, 2001, in which he answered "No" to questions 21: *Your Police Record - Felony Offenses - Have you ever been charged with or convicted of any felony offense? . . .* and 26: *Your Police Record - Other Offenses - In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150.00 unless the violation was alcohol or drug related.) . . .* His answer to question 21 was incorrect in that he was required to list the 1990 rape and statutory burglary charges, both of which were felonies.<sup>(2)</sup> His answer to question 26 was incorrect in that he was required to list the January 2001 disorderly conduct charge.<sup>(3)</sup>

Applicant provided a statement to a contract investigator for Defense Security Service on November 16, 2001, in which he stated the following about the 1990 criminal charges:

This is the most painful event that has ever occurred in my life. I can't begin to explain the amount of hurt and pain that this has caused me. My family and friends don't know that this has happened. I was willing to never mention this to anyone because it is embarrassing [sic] and disgraceful. I don't know how you explain something to someone that you didn't do. People tend to make judgment regardless of the facts.

### **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 D, pertaining to sexual conduct and Guideline E, pertaining to personal conduct, 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.<sup>(4)</sup> The government has the burden of proving controverted facts.<sup>(5)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(6)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(7)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(8)</sup> 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.<sup>(9)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(10)</sup>

No one has a right to a security clearance<sup>(11)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(12)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(13)</sup>

### **CONCLUSIONS**

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 engaged in a consensual sexual relationship in 1988 with a 15-year-old girl while he was 23 years old that resulted in her becoming pregnant. His testimony that he believed the girl to be of consenting age based upon the location where he met her is credible, however, it does not provide a defense to the criminal charge.<sup>(14)</sup> The record does not contain any explanation for the disposition of the charge, although there is evidence that it was done in contemplation that the girl was to pursue a civil suit against Applicant seeking to collect child support. Disqualifying Conditions (DC) 1: *Sexual behavior of a criminal nature, whether or not the individual has been prosecuted*; and DC 4: *Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment* apply to this conduct.

The only record evidence concerning the criminal charges brought against Applicant in 1990 is (1) he was charged with rape and statutory burglary; (2) he was found not guilty of the charges at a jury trial; and (3) his explanation that the charges were brought by a vindictive paramour after he told her he was going to visit another female shortly after they had engaged in sexual intercourse. While there is insufficient evidence to establish that DC 1 applies to this conduct, the result clearly establishes the applicability of DC 4. Further, such crass conduct, and the fact that Applicant's family is unaware of the charges and his expressed desire to keep them unaware of them, forms an adequate basis for applying DC 3: *Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*.

I have considered all Mitigating Conditions (MC) under Guideline D, and find that only MC 2: *The behavior was not recent and there is no evidence of subsequent conduct of a similar nature* applies. Applicant was 23 and 26 years old when the two rape charges were brought against him, so MC 1: *The behavior occurred during or prior to adolescence . . .* is inapplicable. The two Captain's Mast during the 1990s and the traffic and disorderly conduct arrests that occurred between January 2000 and September 2001 prohibit a finding that MC 3: *There is no other evidence of questionable judgment, irresponsibility, or emotional instability* applies.

Lastly, the fact that Applicant's family is unaware of the sexual charges that were filed in 1990, his desire to keep them unaware of those charges, and his failure to disclose the charges in the SF 86 he submitted in March 2001 demonstrates his desire to keep that part of his life confidential at all costs. The testimony he provided about the hostility displayed towards him by people in the Navy following his arrest, even after he was found not guilty, and how he believes people will view him in a negative fashion if they find out about the charges explains his motivation for wanting to keep everyone unaware of the charges. Those facts prohibit a finding that MC 4: *The behavior no longer serves as a basis for coercion, exploitation, or duress* applies.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Applicant's failure to disclose the 1990 rape and statutory burglary charge and the January 2001 disorderly conduct charge in the SF 86, and the explanations he has provided in an attempt to justify the non-disclosures severely undermine the ability to place trust and confidence in him at the present time, and raise significant security concerns.

In his SOR answer, Applicant indicated he didn't know if the rape and statutory burglary charges were felonies or misdemeanors, which is impossible to accept considering the very nature of the charges, that he was represented by an attorney in the proceedings, and that they were

resolved at a jury trial where he unquestionably had to be aware that he was facing a severe sentence if convicted. He also indicated in his SOR answer and in his hearing testimony that he didn't think he had to list the charges because he was found not guilty of them. However, question 21 makes clear it is seeking information on arrests and charges regardless of the disposition, with the sole exception of certain drug offenses for which an order of expungement has been entered.

Applicant failed to provide an explanation for not disclosing the January 2001 arrest in his SOR answer. During his hearing testimony, he indicated that either he assumed the security officer who prepared the SF 86 knew about the arrest and didn't include it and that he then signed the form without noticing the omission, or she actually knew about the arrest and failed to include it and he then signed the form without noticing the omission. Significantly, the charge was actually pending when he executed the SF 86, not being dismissed until September 2001. His attempt to shift responsibility to the security officer and then indicate he did not notice the omission is not credible.

DC 2: *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities* applies in this case. And again, the fact that Applicant's family is unaware of the sexual charges that were filed in 1990, and his desire to keep them unaware of those charges warrants finding that DC 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* applies. I have considered all Mitigating Conditions under Guideline E and none apply.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find that Applicant has failed to mitigate the security concerns present in this case. Guideline D and Guideline E are decided against Applicant.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline D: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

SOR ¶ 2-Guideline E: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against 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. Clearance is denied.

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. Applicant was also required to list the 1988 felony rape charges [see: ALM GL ch. 265, § 23 and Commonwealth v Knap, 412 Mass. 712 (1992)]. However, the SOR did not allege his failure to list those charges.
3. The September 12, 2001 disorderly conduct charge was not alleged in the SOR.
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
11. *Egan*, 484 U.S. at 528, 531.
12. *Id* at 531.
13. *Egan*, Executive Order 10865, and the Directive.
14. See: Commonwealth v Miller, 385 Mass. 521 (1982) and Commonwealth v Knap, 412 Mass. 712 (1992)