

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant, a 47-year-old employee of a federal contractor, admitted Guideline J criminal conduct occurring in 1981, 1999, and 2002. In 2002, Applicant was arrested for soliciting fellatio from an undercover police officer. He did not disclose his arrest and probation to his spouse. This makes him susceptible to coercion or undue influence under Guideline E personal conduct. Further, his admissions of criminal activity show a pattern of criminal conduct. He has failed to mitigate the security concerns about criminal conduct and personal conduct. Clearance is denied.

CASE NO: 03-18005.h1

DATE: 04/21/2006

DATE: April 21, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-18005

**DECISION OF ADMINISTRATIVE JUDGE**

**CHRISTOPHER GRAHAM**

**APPEARANCES**

**FOR GOVERNMENT**

Julie R. Edmunds, Esq., Department Counsel

## FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant, a 47-year-old employee of a federal contractor, admitted Guideline J criminal conduct occurring in 1981, 1999, and 2002. In 2002, Applicant was arrested for soliciting fellatio from an undercover police officer. He did not disclose his arrest and probation to his spouse. This makes him susceptible to coercion or undue influence under Guideline E personal conduct. Further, his admissions of criminal activity show a pattern of criminal conduct. He has failed to mitigate the security concerns about criminal conduct and personal conduct. Clearance is denied.

### STATEMENT OF THE CASE

On February 28, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, 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. The SOR alleged facts under Guideline J (criminal conduct) and Guideline E (personal conduct) 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 Applicant's security clearance, and recommended referral to an administrative judge to determine whether a clearance should be granted or denied.

In a sworn written statement, dated March 9, 2005, Applicant responded to the allegations in the SOR, and requested a decision without a hearing. Department Counsel submitted a file of relevant material (FORM) in support of the Government's preliminary decision, a copy of which was received by Applicant on April 27, 2005. Applicant was afforded the opportunity to file objections and submit material in refutation, extenuation, or mitigation by May 27, 2005. Applicant filed no response to the FORM. The case was assigned to me on June 15, 2005.

## FINDINGS OF FACT

Applicant has admitted all three of the SOR allegations pertaining to criminal conduct under Guideline J (subparagraphs 1.a. through 1.c.), and one allegation of personal conduct under Guideline E (subparagraph 2.a.). Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

Applicant is a married, 47-year-old employee of a federal contractor seeking to obtain a security clearance.<sup>(1)</sup> He was employed by this contractor in September 2002.<sup>(2)</sup>

He has a history of criminal conduct. In 1981, he was arrested for exposing himself to two women. Upon a guilty plea, he was sentenced to 1 year of supervised probation and ordered to attend psychiatric counseling.<sup>(3)</sup>

In 1999, after an argument with his wife, he assaulted her and was arrested.<sup>(4)</sup> He was charged with 2<sup>nd</sup> degree assault, was ordered to attend a 12-week anger management program, and the case was placed on the STET docket.<sup>(5)</sup>

In 2002, Applicant and his wife had an argument. Applicant left the home intending to procure the services of a prostitute. While driving around he noticed a woman at a convenience store parking lot. He approached her in his car and he began negotiations over his request for her to perform fellatio. Each accused the other of being an undercover police officer. The woman then told Applicant if he wasn't a cop he should prove it. Applicant then exposed his penis to the woman and he was arrested.<sup>(6)</sup> He was given probation before judgment, a \$100.00 fine, and 1 year unsupervised probation on the prostitution charge, and the indecent exposure count was *nolle prosequi*. Applicant stated he did not tell his wife about this incident because he believed it would only add stress and problems to his marriage.<sup>(7)</sup>

The 1981 indecent exposure offense occurred more than 7 years prior to the signing of his security clearance application and is not required to be reported on the SF 86. The 1999 assault charge and the 2002 prostitution conviction were disclosed on his SF 86.<sup>(8)</sup>

Applicant stated that even though he told his employer about the 2002 charges, he believed he was not susceptible to blackmail or exploitation notwithstanding his lack of honesty with his wife.<sup>(9)</sup> He did not respond to the FORM.

## POLICIES

"[No] one has a 'right' to a security clearance."<sup>(10)</sup> 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."<sup>(11)</sup> 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 coercion, and willingness and ability to abide by regulations governing use, handling, and protection of classified information."<sup>(12)</sup> Eligibility for a security clearance may be adjudicated using the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative factors listed in ¶ 6.3 of the Directive: nature and seriousness of the conduct and surrounding circumstances; frequency and recency of the conduct; age of the Applicant; motivation of the applicant, and the extent to which the conduct was negligent, wilful, voluntary, or undertaken with knowledge of the consequences involved; absence or presence of rehabilitation; and probability that the circumstances or conduct will continue or recur in the future.

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.<sup>(13)</sup> 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.<sup>(14)</sup>

Once the government establishes a disqualifying condition, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.<sup>(15)</sup> An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."<sup>(16)</sup> A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or his own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.<sup>(17)</sup> Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism.

Having considered the SOR allegations and having reviewed the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are those conditions listed under Guideline J (criminal conduct), Directive, ¶ E2.A10.1.1. *A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness*, and Guideline E (personal conduct) (PC), Directive, ¶ E2.A5.1.1. *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*.

## CONCLUSIONS

**Criminal Conduct.** Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

The Government has established its case under Guideline J. Applicant admitted the three incidents listed in the SOR subparagraphs 1.a. through 1.c. Directive ¶ E2.A10.1.2.1. *Allegations or admissions of criminal conduct, regardless whether the person was formally charged applies*.

The criminal conduct mitigating conditions include Directive ¶ E2.A10.1.3.1. *The criminal behavior was not recent, and* Directive ¶ E2.A10.1.3.2. *The crime was an isolated incident*. These fail because there is a pattern or history or criminal activity; the 1981 and 2002 cases are similar in that they both involved indecent exposure to women, and there was no evidence of rehabilitation. I find against Applicant on Guideline J.

**Personal Conduct.** The Guideline E allegation of SOR 2.a. is problematic. Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.4. *(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)* is the disqualifying condition that applies. The government asserts this PC DC because Applicant did not tell his wife about the incident with the "prostitute." Even though he told his employer about the arrest, the fact that he continues to conceal this information from his wife indicates he is concerned about its disclosure and therefore, makes him susceptible to coercion, exploitation, undue influence, or blackmail. No mitigating conditions apply.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guideline. I have also considered the whole person concept as contemplated by the Directive in ¶ 6.3. A fair and commonsense assessment of the positive and negative information about Applicant's history, his truthfulness with the security clearance process, his pattern of criminal conduct, and his concealing derogatory information from his spouse, raise sufficient doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. I conclude Guideline E against Applicant.

### **FORMAL FINDINGS**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

#### **Paragraph 1. Guideline J: AGAINST APPLICANT**

Subparagraph 1.a. Against Applicant

Subparagraph 1.b. Against Applicant

Subparagraph 1.c. Against Applicant

#### **Paragraph 2. Guideline E: AGAINST APPLICANT**

Subparagraph 2.a. Against 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 Applicant's security clearance. Clearance is denied.

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**Christopher Graham**

**Administrative Judge**

1. Item 4 (*Applicant's Application for National Security Clearance SF86*, November 8, 2002) at 1-3.
2. *Id.* at 1.
3. Item 7, Applicant's criminal history record.
4. Item 5, Applicant's Statement, dated January 29, 2004.
5. A STET docket is a group of cases that are generally never reopened, such as probation before judgment or *nolle prosequi*. If a defendant successfully completes probation, the charge(s) are eventually dismissed.
6. Item 5, Applicant's Statement dated January 29, 2004, at 2-3.
7. Item 5, Applicant's Statement dated January 29, 2004, at 3.
8. Item 4 (*Applicant's Application for National Security Clearance SF86*, November 8, 2002) at 6-7.
9. *Id.*
10. See *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1998).
11. *Id.*, at 527.
12. Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995).
13. *Egan, supra*, at 531.
14. See *ISCR Case No. 95-0611* at 2 (App. Bd. May 2, 1996).
15. See *ISCR Case No. 01-20700* at 3 (App. Bd. Dec. 19, 2002).
16. *Id.*, at 3.
17. See *Egan*; Directive ¶ E2.2.2.