

KEYWORD: Sexual Behavior; Personal Conduct

DIGEST: Applicant with an otherwise meritorious professional record engaged in an act of public indecency with a park conservation officer in 2000 and was arrested and fined as a result of his actions. Initially concealing the encounters from his wife, family and friends out of personal embarrassment, he has since made a clean disclosure to his spouse and assures his family and friends know about his indiscretion. Overall, he mitigates security concerns arising out of the personal, criminal and sexual behavior aspects of his actions. However, Applicant does not mitigate security concerns associated with his concealing the material arrest/conviction in his SF-86 and failing to disclose it to the interviewing DSS agent for over two years, and only after being confronted with it. Clearance is denied.

CASENO: 03-18373.h1

DATE: 07/28/2005

DATE: July 28, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18373

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant with an otherwise meritorious professional record engaged in an act of public indecency with a park conservation officer in 2000 and was arrested and fined as a result of his actions. Initially concealing the encounters from his wife, family and friends out of personal embarrassment, he has since made a clean disclosure to his spouse and assures his family and friends know about his indiscretion. Overall, he mitigates security concerns arising out of the personal, criminal and sexual behavior aspects of his actions. However, Applicant does not mitigate security concerns associated with his concealing the material arrest/conviction in his SF-86 and failing to disclose it to the interviewing DSS agent for over two years, and only after being confronted with it. Clearance is denied.

STATEMENT OF CASE

On May 17, 2004, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant. The SOR 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, and recommended referral to an administrative judge for determination whether clearance should be granted or continued.

Applicant responded to the SOR on June 10, 2004, and elected to have his case decided on the basis of the written record. Applicant was furnished the File of Relevant Material (FORM) on August 2, 2004, and is credited with receiving it on August 11, 2004. Applicant responded to the FORM within the 30 days provided him with supplemental documentation regarding his public indecency arrest and his ensuing divorce from his spouse. The case was assigned to me on September 7, 2004.

SUMMARY OF PLEADINGS

Under Guideline E, Applicant is alleged to have falsified his security clearance application (SF-86) of October 26, 2001 by omitting his October 2000 arrest and charges of public indecency, for which he was fined \$100.00.

Under Guideline D, Applicant's indecency arrest is incorporated. Applicant is alleged to prefer that his wife, family, and professional colleagues not know about his public indecency arrest.

For his response to the SOR, Applicant admitted each of the allegations. He added a number of explanations. He claimed his arrest was the result of a mistake on his part.

FINDINGS OF FACT

Applicant is a 55-year-old employee of a defense contractors who seeks to retain his security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

In October 2000 Applicant approached a man in a state park and engaged him in a conversation. Applicant pulled down his pants and touched his genitals. Applicant later learned that the man he approached was a state conservation officer (*see ex. 5*). Applicant was subsequently arrested for indecent exposure and fined \$100.00. Applicant's only explanation for his exposing himself was that he consumed a few beers beforehand and knew the park from prior fishing experience and word of mouth to be a place where sexual activity occurred. Out of embarrassment, he did not tell his wife, family, and coworkers of his extemporaneous actions.

Until recently, Applicant kept his indecent exposure arrest a secret from his spouse of 23 years, his 16-year old son, and his friends and coworkers. When he finally elected to disclose the incident and his lifestyle to his wife in July 2004, she filed for divorce and sole custody of their minor son.

In October 2001, Applicant completed an updated security clearance application furnished him by his employer. Answering question 26 (inquiring about his police record), Applicant answered "no." In so doing, he knowingly and wilfully omitted his October 2000 public indecency arrest out of embarrassment.

When interviewed by a DSS agent in June 2003, Applicant initially declined to acknowledge his public indecency arrest. After some prodding from the agent and "a couple of false starts," Applicant disclosed his October 2000 arrest and details of the incident (*see ex. 5*).

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Personal Conduct

Basis: conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Sexual Behavior

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 lack of judgment or discretion.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a

security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant is an experienced employee of a defense contractor who comes to these proceedings with no history of involvement with law enforcement before his arrest and fine in 2000 for public indecency. While just a misdemeanor offense, it involved sexual behavior in the presence of a park conversation officer, which Applicant failed to disclose to his wife, family and coworkers until just recently.

For several years, Applicant withheld his sexual encounter from his family and coworkers out of embarrassment. Applicant admits the encounters and the poor judgment reflected in each of them. Applicant's actions are covered by several disqualifying conditions of the Adjudicative Guidelines for sexual behavior: E2.A4.2.1 (*Sexual behavior of a criminal nature, whether or not the individual has been prosecuted*), E2.A4.1.2.3 (*Sexual behavior that causes and individual to be vulnerable to coercion, exploitation, or duress*), and E2.A4.2.4 (*Sexual behavior of a public nature and/or that which reflects lack of discretion of judgment*).

To his credit, Applicant elected to tell his wife once he received the FORM and assures that his family and friends are now aware of his indiscretion. His disclosures are acknowledged by his spouse, who responded with her initiation of divorce proceedings. With his spouse, family and friends since notified, the risks of any renascent vulnerability would appear to be minimized and manageable for security clearance purposes. Applicant may take full advantage of E2.A4.1.3.4 (*The behavior no longer serves as basis for coercion, exploitation, or duress*) of the Guidelines for sexual behavior.

Taking into account all of the circumstances surrounding Applicant's only documented public indecency encounter in 2000, Applicant makes the convincing case that his acts are sufficiently isolated against a history of his living as a law abiding and responsible citizen. Both the isolated nature of the offense and credits to Applicant's overall character (using whole person assessment) enable him to carry his evidentiary burden. Favorable conclusions warrant with respect to the subparagraphs covered by Guideline D.

More difficult to reconcile with principles of clearance eligibility is Applicant's omission of his 2000 public indecency arrest/fine when he responding to question 26 of his October 2001 SF-86. Embarrassment over his arrest is understandable but is generally insufficient to avert inferences of knowing and wilful omission of material facts considered necessary to complete a security clearance investigation. E2.A5.1.2.2 (*The deliberate omission, concealment, falsification or misrepresentation 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*) of Guideline E is applicable.

Because Applicant did not acknowledge his 2000 arrest until confronted with the material facts by an interviewing DSS agent in June 2003 (over two years later), he may not take advantage of either E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*) or E2.A5.1.3.3 (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*). The Appeal Board has been very explicit about the unavailability of this mitigation condition without both prongs being met. *See* ISCR OSD No. 93-1390 (January 1995).

Considering the record as a whole, including Applicant's satisfactory professional history and unblemished criminal record (save for his 2000 encounter), Applicant's mitigation efforts are still insufficient to (a) surmount his omission of his 2000 arrest under governing Guideline and Appeal Board interpretations and (b) restore his judgment and reliability to levels required for eligibility to hold a security clearance. Unfavorable conclusions warrant with respect to subparagraph 1.a of Guideline E.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2 .2 factors enumerated in the Adjudicative Guidelines of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

GUIDELINE D (SEXUAL BEHAVIOR): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b: FOR 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.

Roger C. Wesley

Administrative Judge

