

KEYWORD: Criminal Conduct; Sexual Behavior; Personal Conduct

DIGEST: Applicant is a 47-year-old man and the sole owner and a key management official for a computer services company. He is a twice-convicted sex offender who is under a suspended sentence to confinement in his state of residence, and who is now on supervised probation in another state. As a result of the convictions, he is a registered sex offender. Applicant is unable to successfully mitigate or extenuate the related security concerns. Clearance is denied.

CASENO: 03-18735.h1

DATE: 10/06/2005

DATE: October 6, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18735

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 47-year-old man and the sole owner and a key management official for a computer services company. He is a twice-convicted sex offender who is under a suspended sentence to confinement in his state of residence, and who is now on supervised probation in another state. As a result of the convictions, he is a registered sex offender. Applicant is unable to successfully mitigate or extenuate the related security concerns. Clearance is denied.

STATEMENT OF THE CASE

On July 1, 2003, the Deputy Secretary of Defense for Security and Information Operations authorized the suspension of Applicant's top-secret clearance. On June 15, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J for criminal conduct, Guideline D for sexual behavior, and Guideline E for personal conduct. Also, Guideline J included a violation of 10 U.S.C. § 986, the so-called Smith Amendment. Applicant answered the SOR and it was received by DOHA on August 10, 2004. Applicant admitted to the factual allegations under Guidelines J and D, but denied the falsification allegation under Guideline E.

The case was assigned to me to conduct a hearing on August 15, 2005. The delay from August 10, 2004, until my assignment is accounted for by a moratorium involving all cases alleging a violation of 10 U.S.C. § 986. The moratorium was lifted or rescinded in August 2005. A notice of hearing was issued on September 2, 2005, scheduling the hearing for September 20, 2005. Applicant appeared without counsel and the hearing took place as scheduled. The record remained open until September 30, 2005, to allow Applicant to submit additional documentary evidence. Applicant made a timely submission and it is admitted, without an objection, as Exhibit C. DOHA received the hearing transcript on October 5, 2005. Under ¶ 6.4 of the Directive, I endeavored to expedite Applicant's case due to the suspension of his security clearance.

RULINGS ON PROCEDURE

Department Counsel moved to withdraw subparagraph 1.c under Guideline J, because 10 U.S.C. § 986 no longer applies to Applicant based on a change in the law. Effective October 28, 2004, subsection 986(c)(1) was amended to read as follows: "the person has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year." In other words, the statute is applicable only if an applicant was actually confined for more than one year. Applicant had no objection, the motion was granted, and no formal findings will be made for subparagraph 1.c of the SOR.

Also, Department Counsel moved to amend the SOR by adding a subparagraph 1.d under Guideline J (Appellate Exhibit I). The amendment is merely a cross-reference to the falsification allegation under Guideline E, the effect of which is to allege that the falsification allegation was also a violation of federal criminal law; namely, 18 U.S.C. § 1001 (making a false statement within the jurisdiction of a federal agency). Applicant had no objection and the motion was granted.

FINDINGS OF FACT

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

Applicant is a 47-year-old man with a bachelor's degree in electrical engineering. He is the sole owner and a key management official of a computer services company. He has held a top-secret clearance for his company's work since May 1994.

He is a twice-convicted sex offender who is under a suspended sentence to confinement in his state of residence, and who is now serving supervised probation in another state. As a result of these convictions, he is a registered sex offender. Both convictions stem from incidents during the mid-1980's, and both convictions involved minor females who were nieces of Applicant.

Applicant's first felony conviction was in his state of residence. The first victim was approximately eight years old at the time of the offense. In July 2001, Applicant entered an *Alford* plea to the offense of aggravated sexual battery on a female child who was less than 13 years old. In October 2001, the state court accepted the plea and found Applicant

guilty. Under a plea agreement, the court sentenced Applicant to, among other things, the following: (1) to be confined for five years, which was suspended for 15 years; (2) to serve supervised probation for two years; and (3) to register with the state's sex offender registry. As part of his probation, Applicant was subject to monitoring/maintenance polygraph examinations. During the hearing, Applicant presented documentary evidence that he passed one such examination in December 2001 (Exhibit A).⁽²⁾

Applicant's second felony conviction was in a nearby state. The second victim was approximately 14 years old at the time of the offense. In April 2002 he was indicted for first-degree statutory sexual offense and taking indecent liberties with a child under the age of 16.

In July 2002, Applicant was interviewed by a special agent of the Defense Security Service. He explained he was divorced in December 2000, and that the allegations stemmed from his divorce and another relationship. In his sworn statement, Applicant denied having any sexual contact with any minors (Exhibit 3).

In October 2002, Applicant was again interviewed by the DSS. In a sworn statement, Applicant admitted being untruthful in his previous interviews and sworn statement because he thought the questions being asked meant that he had sexual intercourse (Exhibit 4). He also stated that he had been in denial of the fact that he had wrongfully touched the two minor females. In the remainder of his sworn statement, Applicant described the facts and circumstances surrounding his wrongful touching of the two minor females.

In March 2003, Applicant pleaded guilty to the indecent liberties offense and the other offense was dismissed. As part of his guilty plea, Applicant agreed to accept intermediate punishment as well as the condition that he successfully complete a sex offender treatment program. The state court accepted his plea, found him guilty, and sentenced him to, among other things, confinement for five years, but suspended the execution of the sentence and placed him on supervised probation for three years until March 2006; the probation was transferred to Applicant's state of residence. In making its judgment, the court found as an aggravating factor that Applicant took advantage of a position of trust or confidence to commit the offense. In addition, the court required Applicant to register as a sex offender.

Applicant has been in treatment/counseling since at least January 2002 and has since completed the group therapy portion (Exhibit C). Exhibit C is a letter signed by a licensed clinical psychologist. It indicates Applicant continues to be involved with aftercare services, which require him to attend an individual session every other month. Exhibit C makes no mention of a prognosis, either favorable or unfavorable.

At the hearing, Applicant explained the circumstances surrounding his sexual misconduct, which he did not dispute. He said when he was five or six years old, he was a victim of child-sexual abuse by an adult family member. He believes his misconduct is related to his own victimization. He expressed heartfelt remorse and regret for his actions. He also emphasized he has been working for years to atone for his misconduct. Applicant appears to have been a very successful businessman who was extensively involved in his community. Exhibit B consists of examples of the numerous letters and certificates of appreciation Applicant has received over the years attesting to his good works and generosity.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on 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.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.⁽³⁾ Instead, it is determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

BURDEN OF PROOF

The only 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.⁽⁴⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁵⁾ The government has the burden of proving controverted facts.⁽⁶⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁷⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁸⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁹⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽¹⁰⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹¹⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹²⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access

to classified information will be resolved in favor of protecting national security.

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. 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.

Here, based on the record evidence as a whole, the government established its case under Guideline J. Applicant's stands convicted of two felony sex offenses involving minor females stemming from incidents in the mid-1980's. He is under a suspended sentence until 2016 in one state, he is on probation until March 2006 in the other state, and he is a registered sex offender. In addition, a security concern for criminal conduct is raised by Applicant's false statement (discussed under Guideline E) provided to an investigator of the Defense Department in violation of 18 U.S.C. § 1001. Given these circumstances, both DC 1⁽¹³⁾ and DC 2⁽¹⁴⁾ apply against Applicant. The totality of Applicant's criminal conduct creates serious doubt about his judgment, reliability, and trustworthiness.

I reviewed the six mitigating conditions under Guideline J and conclude Applicant receives some credit in mitigation because his criminal behavior involving the sexual misconduct took place about 20 years ago.⁽¹⁵⁾ The credit is limited due to Applicant's suspended sentence and ongoing supervised probation, as both indicate that neither sentence has been completed. Indeed, although not a *per se* bar to a favorable clearance decision, the fact that Applicant is now serving probation is evidence that undercuts a claim of successful reform and rehabilitation.⁽¹⁶⁾ And Applicant continues to receive treatment or counseling stemming from his second felony conviction. Given these circumstances, there is not "clear evidence" of reform and rehabilitation.⁽¹⁷⁾ There is some evidence of reform and rehabilitation, but the totality of evidence is insufficient to justify a favorable decision. Although I do not question the sincerity of Applicant's expressions of remorse and regret, what is lacking here is strong, compelling, and clear evidence of successful rehabilitation. Accordingly, Guideline J is decided against Applicant.

Under Guideline D, 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. Sexual orientation or preference is not disqualifying.

Here, Applicant's sexual behavior is intertwined with his criminal conduct. Although many years have passed since he engaged in the underlying sexual behavior and there is no evidence that it has recurred, both criminal cases remain

ongoing as neither sentence has been completed. At this time, it is too soon to tell if Applicant's sexual behavior no longer presents a security concern. Accordingly, following the rationale discussed under Guideline J, Guideline D is decided against Applicant.

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. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully. An omission of relevant and material information, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the arrest had been expunged from the record and did not need to be reported.

Here, based on the record evidence as a whole, the government established its case under Guideline E. I conclude Applicant deliberately provided false or misleading information in a sworn statement provided to an investigator of the Defense Department when he denied having any sexual contact with any minors. His sworn statement in July 2002 was plainly false as he had yet to accept what he had done and was still in denial of his criminal conduct. Given these circumstances, DC 3-[\(18\)](#) applies against Applicant. I reviewed the mitigating conditions under Guideline E and conclude none apply. Falsification of a security-clearance application is a serious matter, not easily mitigated or extenuated. Accordingly, Guideline E is decided against Applicant.

To conclude, Applicant has failed to meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I considered the evidence as a whole, both favorable and unfavorable, the whole-person concept, the clearly-consistent standard, and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline J: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Withdrawn

Subparagraph d: Against Applicant

SOR ¶ 2-Guideline D: Against Applicant

Subparagraph a: Against Applicant

SOR ¶ 3-Guideline E: Against Applicant

Subparagraph 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 a security clearance for Applicant. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. Although Exhibit A was admitted, I have given it little, if any, weight because Applicant did not present any evidence showing either (1) the reliability of polygraph examinations in general or (2) the reliability of this particular polygraph examination, including the qualifications of the person who administered the test. *See United States v. Scheffer*, 523 U.S. 303, 312 (1998) ("state and federal courts continue to express doubt about whether such evidence is reliable").

3. Executive Order 10865, § 7.
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
6. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
7. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
8. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
9. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
10. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
11. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
12. *Egan*, 484 U.S. at 528, 531.
13. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
14. E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
15. E2.A10.1.3.1. The criminal behavior was not recent.
16. *See* ISCR Case No. 96-0710 (June 20, 1997).
17. E2.A10.1.3.6. There is clear evidence of successful rehabilitation.
18. E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.