

KEYWORD: Sexual Behavior; Criminal Conduct

DIGEST: On August 11, 2002, when Applicant was 35 years old, he inappropriately fondled the breasts of his 14 year old niece. He was arrested and pled guilty to Gross Or Open Lewdness with A Minor, which was amended to Annoy a Minor. In preparation for this hearing he consulted a psychologist, who submitted a Psychosexual Evaluation. Applicant failed to furnish honest and complete information about his extracurricular sexual activities to the psychologist. Mitigation has not been shown. Clearance is denied.

CASENO: 03-25256.h1

DATE: 07/27/2005

DATE: July 27, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-25256

**DECISION OF ADMINISTRATIVE JUDGE**

**MARTIN H. MOGUL**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

Joseph S. Sciscento, Esq.

**SYNOPSIS**

On August 11, 2002, when Applicant was 35 years old, he inappropriately fondled the breasts of his 14 year old niece. He was arrested and pled guilty to Gross Or Open Lewdness with A Minor, which was amended to Annoy a Minor. In preparation for this hearing he consulted a psychologist, who submitted a Psychosexual Evaluation. Applicant failed to furnish honest and complete information about his extracurricular sexual activities to the psychologist. Mitigation has not been shown. Clearance is denied.

**STATEMENT OF THE CASE**

On January 10, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant which 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 for Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

In a signed and sworn statement, dated January 24, 2005, Applicant responded in writing to the SOR allegations. He requested a clearance decision based on a hearing record.

This case was originally assigned to another Administrative Judge, but because of a scheduling conflict, this case was assigned to this Administrative Judge on April 6, 2005, to conduct a hearing and issue a written decision. The case was originally set to be heard on May 6, 2005, but as a result of a request by Applicant's Counsel, the hearing was continued. A Notice of Hearing was issued to the parties on May 9, 2005, and the hearing was held on July 6, 2005.

At the hearing, Department Counsel offered five documentary exhibits (Government Exhibits 1 through 5), and no witnesses were called. Applicant offered three documentary exhibits (Applicant Exhibits A through C), and offered his own testimony and that of his wife and immediate supervisor. All of the documents were entered into evidence without objection. The transcript (TR) was received on July 15, 2005.

### **FINDINGS OF FACT**

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline D and Guideline J of the Directive. The SOR contains two allegations, 1.a. and 1.b., under Guideline D (Sexual Behavior) and one allegation, 1.a., under Guideline J (Criminal Conduct). In his response to the SOR, Applicant admits both allegations under Guideline D, but did not plead to the Criminal Conduct allegation. The admitted allegations are incorporated as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the testimony of Applicant and the two witnesses, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is a 38 year old electronics technician of a defense contractor that wants him to have a security clearance for his employment. He is married, and he has a four year old daughter.

#### **Paragraph 1 (Guideline D - Sexual Behavior)**

On August 11, 2002, at approximately 2 o'clock a.m., Applicant and his wife were in their spa in the backyard of their home with their 14 year old niece. While Applicant's wife was massaging their niece's feet, Applicant was massaging her back. He then reached around, put his

hands under his niece's swimsuit and inappropriately fondled his niece's breasts for a period of 30 seconds to one minute. Applicant's wife was not aware of the fondling when it occurred.

Applicant has maintained that he asked his niece if his action was alright with her, and she had replied that it was. There

is conflicting evidence as to whether Applicant's wife was informed of the incident first by the niece or by Applicant. However, when she did become aware of the incident, she was extremely upset and ultimately she told a friend. Her friend informed the police of the incident.

The police conducted an investigation and prepared a report (Exhibit 3). As a result of the investigation, Applicant was arrested and charged with Gross Or Open Lewdness with A Minor, which was amended to Annoy a Minor. Applicant pled guilty to this charge. After he met all the requirements of his guilty plea, including receiving 8 hours of Anger Management/ Impulse Control counseling at an outpatient counseling program, his case was dismissed (Exhibits 4 and 5).

In preparation for this hearing, Applicant consulted a psychologist, who submitted a Psychosexual Evaluation (Exhibit C). Applicant informed the psychologist that he had communicated regularly about sex with one woman on the internet, but he claimed that he had never met the woman. At the hearing, Applicant's wife testified that Applicant communicated regularly about sex with three women and that he had met one of the women on one occasion in January 2005, to have a sexual encounter. During his testimony, Applicant testified that he had actually had two sexual encounters with this woman. Applicant could give no valid explanation for why he had failed to furnish honest and complete information about his extracurricular sexual activities to the psychologist.

While the psychologists report indicated that the likelihood that Applicant would engage in sexual activities is low, I do not give great weight to the report, because of the untruthful information that Applicant furnished to the psychologist.

### **Paragraph 2 (Guideline J - Criminal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal conduct. As a result of Applicant fondling his 14 year old niece, he was arrested and pled guilty to Gross Or Open Lewdness with A Minor, which was amended to Annoy a Minor.

### **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented.

Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, etc.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (*See* Directive, Section E2.2.1. of Enclosure 2).

### **BURDEN OF PROOF**

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

### **CONCLUSIONS**

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the Government must be able to repose a high degree of trust an

confidence in those individuals to whom it grants access to classified information. 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 certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Additionally, Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national security 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. Nothing in this decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

Based on the evidence of record, the Government has established a reason to deny Applicant a security clearance because of Guideline D (Sexual Behavior) and Guideline J (Criminal Conduct).

**(Guideline D - Sexual Behavior)**

Regarding Guideline D, Applicant was criminally prosecuted for his criminal action of illegally and inappropriately fondling his 14 year old niece. Disqualifying Condition (D C) E2.A4.1.2.1. applies because Applicant's conduct was sexual behavior of a criminal nature, whether or not the individual has been prosecuted. DC E2.A4.1.2.4. applies because the type of sexual behavior exhibited by Applicant reflects a lack of judgment and a failure to exercise sound discretion.

Regarding the Mitigating Conditions (MCs), I cannot rule that MC E2.A4.1.3.2. applies because Applicant's conduct in fondling his 14 year old niece in 2002 is so serious, that it must still be considered recent. Also, MC E2.A4.1.3.3. may not be considered to apply in this case, because the evidence of Applicant's failure to furnish honest and complete information about his extracurricular sexual activities to the psychologist who examined him and prepared a psychosexual evaluation for this case, shows additional questionable judgement and irresponsibility. The finding is against Applicant.

**(Guideline J - Criminal Conduct)**

The Government also established by substantial evidence that Applicant engaged in criminal conduct in 2002, when he fondled his 14 year old niece.

DC (E2.A10.1.2.1.), allegations or admissions of criminal conduct, regardless of whether the person was formally

charged, and DC (E2.A10.1.2.2), a single serious crime or multiple lesser offenses, apply in this case. Applicant has not mitigated this allegation. Paragraph 2 is found against Applicant.

After considering all of the evidence of record on these issues, I conclude that the disqualifying evidence supporting the SOR substantially outweighs the mitigating evidence.

### **FORMAL FINDINGS**

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

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

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

#### **Paragraph 2. Guideline J: 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 a security clearance for Applicant.

Martin H. Mogul

Administrative Judge