

KEYWORD: Sexual behavior; Personal conduct

DIGEST: Applicant, a 45-year-old engineer scientist who has held a security clearance for 22 years failed to mitigate security concerns arising from his having been a cross-dresser for many years. During the past five years, he has done so three to five times a month with fellow cross-dressers, using women's restrooms and obtaining and using a credit card with a modification of his name in a female form. He failed to report cross-dressing in past investigations and did not report the use of another name on a 2003 SF 86. He now intends to transition to a female. His conduct has exposed him to potential pressure and coercion over the past five years and intends to engage in conduct that will continue to do so in the future. Clearance is denied.

CASE NO: 04-01935.h1

DATE: 06/21/2006

DATE: June 21, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-01935

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq. , Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 45-year-old engineer scientist who has held a security clearance for 22 years failed to mitigate security concerns arising from his having been a cross-dresser for many years. During the past five years, he has done so three to five times a month with fellow cross-dressers, using women's restrooms and obtaining and using a credit card with a modification of his name in a female form. He failed to report cross-dressing in past investigations and did not report the use of another name on a 2003 SF 86. He now intends to transition to a female. His conduct has exposed him to potential pressure and coercion over the past five years and intends to engage in conduct that will continue to do so in the future. Clearance is denied.

STATEMENT OF CASE

On June 23, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, 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 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. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On August 8, 2005, Applicant, in a sworn written statement, responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to me on November 22, 2005. A notice of hearing was issued on February 24, 2006. A hearing was held on March 15, 2006. The Government and Applicant each introduced three exhibits. All exhibits were admitted into evidence. Applicant testified. The transcript was received March 23, 2006.

FINDINGS OF FACT

Applicant is a 45-year-old engineer scientist employed by a major defense contractor since 1981. He has held a security clearance for 22 years with periodic reviews every five years. He also has a special access clearance for certain programs. He admitted all of the allegations in the SOR but offered explanatory comments. After a complete review of the evidence in the record and upon due consideration of the record, the following findings of fact are made:

Applicant has cross-dressed for many years beginning when he was in high school. Approximately ten years ago he began to do so with greater frequency and during the last five years he has engaged in cross-dressing two or three times a month at meetings and dinners for cross-dressers. While attending these events dressed as a woman he has used women's restrooms. He has been seen by psychologists and is currently working with one who has diagnosed him as having a gender identity disorder and trans-gender (Exhs. I and II). The psychologist encourages more cross-dressing. Applicant is the president of a group of employees at his company who are gay, lesbian, bi-sexual, and trans-gender. Those fellow employees are aware of his cross-dressing but members of his work group are not.

Applicant recently decided, with the support of his psychologist, that he will transition from male to female and is undergoing hormonal and other treatments before making this change (Tr. 24). He has discussed this plan with his wife but not his children or his fellow employees. At the time this occurs it will be evident to all that he has made this change since he will wear women's clothing and appear as a woman. He intends to continue in his present work.

In 2000 Applicant used his office computer to seek information regarding sexual transition. He was found out, and disciplined with a two-week suspension for computer misuse. His special access was terminated pending investigation but was restored six months later.

Since 1996, Applicant has used a female name when cross-dressing and obtained a credit card using a female first name similar to his own, his family name, and his home address. He used the card while he was cross-dressing and presenting himself as a woman to commercial establishments. He has paid those credit card bills in a timely fashion. He did not reveal this information in response to Question 2 on his February 20, 2003, application for a security clearance (SF 86) regarding use of other names (Exh. 1). He filed a second SF 86 on October 27, 2004, listing the information about the use of the name, his suspension, and details about cross-dressing at Question 43 (Exh. C).

Until the current security investigations, Applicant did not reveal his cross-dressing to investigators. He has not wished to reveal this conduct to his fellow employees or the public but denies that he was fearful of exploitation or harassment. He has not revealed any of the information to his parents, siblings, or children.

Applicant has a B.S. degree in engineering, two Master's degrees in business and math, and a law degree. He is married

with two sons ages 18 and 20. Letters of support from Applicant's supervisor and program security officer support his continued security clearance and attest to his abilities and work ethic for his employer (Exhs. A and B). He has had no security violations during his employment.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." *Id.* at 527.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (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 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. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information *See Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b).

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to all allegations set forth in the SOR.

Under Guideline D of the Directive sexual behavior that causes an individual to be vulnerable to undue influence or coercion. (E.2.A.4.1.2.3.) is potentially disqualifying. Also, a security risk may arise where an applicant has engaged in high risk behavior symptomatic of a personality disorder. (E.2.A.4.1.2.2) While sexual preference is not a disqualification for a security clearance, conduct which places a person in a position where he might be exploited or coerced does present security issues. Applicant has been engaged in cross-dressing for many years and most actively in the last five years. This conduct could have created security problems because he had no wish to reveal his activities to more than a few people and to his wife but not his children. While this is understandable from his perspective, it raises concerns from a security standpoint. The fact that he intends to take further steps which could lead to further pressures and potential exploitation provides additional reasons to deny a clearance to him.

Based on the evidence of record, including Applicant's admissions, the Government has established reasons to deny him a security clearance based on sexual behavior. Having established such reasons, the Applicant has the burden to establish security suitability through evidence that refutes, mitigates, or extenuates the disqualification and demonstrates that it is clearly consistent with the national interest to grant a security clearance. ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

The alleged conduct is continuing and further actions are contemplated that would raise even greater possibilities for coercion or undue influence. No mitigating conditions are applicable.

Under Guideline E, Personal Conduct, of the Directive, 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. (E2.A5.1.1.) The Government has established by evidence and Applicant's admissions that he has been involved in a pattern of rule violations (E2.A5.1.2.5.), and failure give complete and accurate information on his SF 86 (E2.A5.1.2.2.) is sufficient to establish reasons to deny a security clearance based on personal conduct.

As the policy prescribes, the burden shifted to the Applicant to show that Mitigating Conditions (MC) are applicable to him. He knew his failure to disclose relevant information on his 2003 SF 86 was not correct so he re-filed it 18 months later with the omitted information included. He asserts that his action was no different than applying for a credit card for another family member since it was he who used the card as the person whose name was on the card since he was only using the card when presenting himself as a female. However, he was using another name himself and that information was requested. His explanation is an insufficient response to the allegation. He has failed to mitigate the allegations.

Applicant misused his office computer and he was disciplined by his employer. His conduct as a cross-dresser and the use of another name, while not criminal, was inconsistent with the conduct required by this guideline. No mitigating conditions are applicable.

Applicant has placed himself at risk for several years and intends to continue to do so by his present and intended actions. One who is granted a security clearance has a fiduciary responsibility with the government. He has an obligation not to place himself in positions where he might be exploited. Applicant's contention that this has never

happened and that he would not succumb to such pressure if it occurred in insufficient to mitigate the allegations. DISCR OSD Case No. 91-0259.

The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. The "whole person" concept recognizes that we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Applicant is well regarded in his work and is supportive of his family. He believes his conduct is not creating a security risk but common sense tells me that the risks his conduct has created has been great, continues to be so, and will likely increase with his planned transition.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude that he is not eligible for access to classified information. Thus, I find against the Applicant.

FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline D: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or renew a security clearance for Applicant. Clearance is denied.

Charles D. Ablard

Administrative Judge