

KEYWORD: Criminal Conduct; Sexual Behavior

DIGEST: Applicant was arrested and charged with sodomy involving a juvenile, and contributing to the sexual delinquency of a minor in 2000. At the time of this arrest, video tapes were seized from his residence which were later determined to contain child pornography. This determination resulted in Applicant being arrested and charged with four counts of encouraging child abuse in 2001. Following Applicant's guilty pleas to lesser misdemeanor charges, the court's sentence included, among other things, 60 months of probation. Application will have completed his probation in June 2006. These facts raised criminal conduct and sexual behavior concerns, which Applicant was unable to mitigate. Clearance is denied.

CASE NO: 04-04231.h1

DATE: 05/11/2006

DATE: May 11, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-04231

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant was arrested and charged with sodomy involving a juvenile, and contributing to the sexual delinquency of a minor in 2000. At the time of this arrest, video tapes were seized from his residence which were later determined to contain child pornography. This determination resulted in Applicant being arrested and charged with four counts of encouraging child abuse in 2001. Following Applicant's guilty pleas to lesser misdemeanor charges, the court's sentence included, among other things, 60 months of probation. Application will have completed his probation in June 2006. These facts raised criminal conduct and sexual behavior concerns, which Applicant was unable to mitigate. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On May 3, 2005, DOHA issued a Statement of Reasons (SOR) [\(1\)](#) detailing the basis for its decision—security concerns raised under Guideline J (Criminal Conduct), and Guideline D (Sexual Behavior) of the Directive. Applicant answered the SOR in writing on June 6, 2005, and elected to have a hearing before an administrative judge.

The case was assigned to me July 7, 2005. On July 20, 2005, DOHA issued a notice of hearing scheduling the case to be heard on September 15, 2005. The hearing was conducted as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The government offered five documents, which were admitted without objection as Government Exhibits (GE) 1 through 5. The Applicant offered four documents, which were admitted without objection as Applicant Exhibits (AE) A through D. DOHA received the transcript on September 28, 2005.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated as findings of fact. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 37-year-old unmarried man. Since June 2002, he has been employed as a systems integrator for a defense contractor. He seeks a security clearance as a condition of his employment. Tr. 35. He served in the Air Force from September 1987 to May 1988, and was discharged as an Airman Basic. He graduated from college in June 1995 with a bachelor of science degree with a major in psychology and youth counseling. Two years later, he completed his teacher's certification at the same college. He was unable to find work as a teacher and because of his knowledge of computers was able to find work in computer-related employment.

In June 2000, Applicant was arrested and charged with Sodomy in the First Degree, and Contributing to the Sexual Delinquency of a Minor, both felonies. In June 2001, he pled guilty to Contributing to the Delinquency of a Minor and Attempted Sodomy, each a Class A misdemeanor.

On the charge of Contributing to the Delinquency of a Minor, imposition of sentence was suspended for 60 months under probation supervision of the county correction center. Applicant was further ordered to provide a blood sample per probation officer and reimburse county sheriff for costs, immediately report to county department of corrections and abide by their rules and regulations, submit to HIV testing per probation officer, and pay total fines of \$565.00.

On the charge of Attempted Sodomy, imposition of sentence was suspended for 60 months under probation supervision of the county corrections center. Applicant was further ordered to provide a blood sample per probation officer and reimburse county sheriff for costs, immediately report to county department of corrections and abide by their rules and regulations, forfeit computer and possess no computers except for legitimate work purposes (probation officer to verify need), not access the internet without probation officer and therapist's approval, and pay total fines of \$725.00.

Additional conditions of supervision imposed were to submit to a polygraph examination by a qualified polygraph examiner designated by the Court or Probation Officer under terms and conditions set by the Court, refrain from knowingly associating with persons under age 18 except under specific circumstances specified in writing by the Court or Probation Officer, report immediately to county department of corrections, complete sex offender treatment, avoid places minors congregate, no involvement with any organization that would place defendant in contact with minors (e.g. scouts, teaching, coaching), no pornography, and register as a sex offender.

Applicant stated the minor in question was a 17-year-old boy, who was living with his parents. The minor got Applicant's e-mail address from a gay website and sent Applicant an e-mail indicating he wanted to meet him at his parent's house. Applicant testified the minor told him he was age 18, out of high school, and living with his parents, and Applicant testified he believed him. The minor and Applicant went on two "dates" and both times had consensual oral sex. At the time, Applicant was 30 years old. Upon reflection, Applicant felt the age difference was too great and the minor was too immature. Applicant terminated the relationship and the minor went "ballistic." The minor threatened to tell his parents and it was at that time the minor told Applicant he was 17 years old.

Some time after Applicant broke the relationship off, the minor attempted to donate blood and on his intake questionnaire at the blood bank indicated he had been involved in a sexual relationship with a 30-year-old man. Blood

bank personnel reported this to the local police and shortly after that Applicant was arrested.

At the time Applicant was arrested in June 2000, the police searched his residence and confiscated about 15 pornographic video tapes. Applicant stated he purchased the pornography from a "legitimate" website or from an adult book store and believed all the actors in the videos were adults. It was later determined when the videos were analyzed by the police that two or three of them, which Applicant stated were nothing but "static," turned out to be tapes processed in a European format called Pan-American Language and contained images of minors engaging in sexual conduct.

In October 2001, Applicant was arrested and held in jail for about one week. Applicant was charged with four counts of Encouraging Sex Abuse in the 2nd Degree, all felonies. In November 2001, Applicant pled guilty to Encouraging Child Sexual Abuse in the third degree (Class A Misdemeanor), and was sentenced to two years probation, fined \$2,948.00, and ordered to register as a sex offender.

Applicant moved to a different state in November 2001, which required permission from his Probation Officer.

Applicant testified he completed over three years of supervised probationary mandated behavioral reconstruction through therapy. He described it as a sex offender deviant therapy course that sex offenders must complete in lieu of going to prison. Tr. 24. He further testified through that treatment, he identified his psycho deviancy and knows what "triggers" led to his offense and why he was in that state of mind at the time. He "learned how to control those triggers, how to anticipate them, and how to escape them." Tr. 24. He offered that as a gay male, he was of the view that once he had reached 30 years old, he was out of the dating pool. Viewing himself as an older man, he was quite taken with the notion that a younger man, who he thought was 18 years old was interested in him. Tr. 25.

Applicant testified he is an openly gay man and that, "Everybody knows about me." He has informed his family, friends, and employer who he is and the extent of his criminal past, concluding his status and past can never be used against him. Tr. 80. He expressed remorse for what he did. Tr. 81.

Applicant's Probation Officer testified on behalf of Applicant. She has been a Probation Officer for 14 years, whose caseload has ranged from a high of 70 probationers to her current 37 probationers. Applicant is a Level I offender. Levels range from Level I being the lowest to Level III being the highest. All her probationers are sex offenders. Applicant has been one of her probationers since November 2001. Among the terms of Applicant's probation are that he is required to keep a 24 hour logbook, submit to random polygraph examinations, subject to random visits from his Probation Officer at his residence, which include forensic searches of his computer, and is required to report unintentional contact with minors. Applicant has completed all his court ordered treatment and is in full compliance with the terms of his probation. Applicant's Probation Officer described him as "very low maintenance." His probation ends on June 6, 2006. Regarding recurrence, Applicant's Probation Officer stated it would be difficult to project the future, but did add per his clinical psychologist Applicant is at a very low risk to reoffend in the future. Tr. 51-52.

Applicant's supervisor submitted a letter of reference on his behalf. Per the supervisor, Applicant is an excellent employee with a strong work ethic, who is making a significant contribution and performs his duties in an exemplary manner. The supervisor is aware of Applicant's past criminal history. Applicant is on a two year appointment with an expiration date of May 3, 2007. He has completed two computer-related security courses. AE B through D.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, administrative judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

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. 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.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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. 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 for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the Government must establish, by substantial 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. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "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 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

Guideline J - Criminal Conduct

In the SOR, DOHA alleged two allegations under criminal conduct (SOR ¶¶ 1.a. and 1.b.) to include a June 2000 arrest for sodomy and contributing to the delinquency of a minor, and an October 2001 arrest for encouraging child sexual abuse. Both arrests were charged as felonies and Applicant was allowed to plead to reduced misdemeanor charges. Applicant remains on probation until June 2006.

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Directive E2.A10.1.1.

The government established its case under Guideline J by Applicant's admissions and evidence submitted for each of the allegations contained in the SOR under ¶ 1. Such conduct gives rise to Criminal Conduct Disqualifying Conditions (CC

DC) E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*); and CC DC E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*).

I have carefully considered the Criminal Conduct Mitigating Conditions (CC MC) under E2.A10.1.3. and have determined none apply. Although Applicant's arrests occurred in 2000 and 2001, the court viewed the offenses serious enough to impose probation for 60 months, which will end in June 2006. The fact that the court considered these offenses serious enough to warrant oversight of Applicant for such a period of time is reason enough not to apply CC MC E2.A10.1.3.1. (*The criminal behavior was not recent*).

Under the facts of this case, a discussion regarding the applicability of rehabilitation is warranted. Applicant has complied with all of the court imposed requirements of his probation to include successfully completing a program of therapy for sex offenders, and is under the continued scrutiny of his Probation Officer. In fact, his Probation Officer describes him as a "low maintenance" probationer. The fact remains that Applicant is still under probation and has every motivation to comply with the terms of probation for any number of reasons. Completing therapy is one aspect of Applicant's rehabilitation. Another aspect, and more importantly, is successfully completing the term of his probation. Until that occurs, I cannot conclude CC MC E2.A.10.1.3.6 (*There is clear evidence of successful rehabilitation*) applies. Rehabilitation is ongoing. Moreover, a better measure of Applicant's rehabilitation would be his post-probation behavior absent the level of his current scrutiny. I find against Applicant on this concern.

Guideline D - Sexual Behavior

In the SOR, DOHA listed one allegation under personal conduct (¶ 2.a.), which restated the allegations under ¶¶ 1.a. and 1.b. and incorporated them under this security concern.

The 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. Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance. Directive E2.A4.1.1.

The government established its case under Guideline D by Applicant's admissions and evidence submitted for each of the allegations contained in the SOR under ¶ 2.

The discussion and analysis under Criminal Conduct above applies here. Such conduct gives rise to Sexual Behavior Disqualifying Conditions (SB DC) E2.A4.1.2.1. (*Sexual behavior of a criminal nature, whether or not the individual*

has been prosecuted). Applicable Sexual Behavior Mitigating Conditions (SB MC) are SB MC 3 (*There is no other evidence of questionable judgment, irresponsibility, or emotional stability*); and SB MC 4: (*The behavior no longer serves as a basis for coercion, exploitation, or duress*). I view the concerns raised under Sexual Behavior as a reiteration of the concerns raised under Criminal Conduct and cumulative. The Disqualifying Condition outweighs the Mitigating Conditions. I find against Applicant on this concern.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2: Guideline D: AGAINST APPLICANT

Subparagraph 2.a.: 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 continue a security clearance for Applicant. Clearance is denied.

Robert J. Tuider
Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.