

DATE: October 25, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-09618

DECISION OF ADMINISTRATIVE JUDGE

MARC E. CURRY

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant's participation in inappropriate sexual conduct with a stranger in a public restroom, followed by his subsequent arrest, raises sexual behavior and criminal conduct security concerns. He informed both his domestic partner and his employer of the incident, successfully completed probation, and voluntarily attended counseling. He has engaged in neither such conduct nor any other criminal conduct since the incident. Clearance is granted.

STATEMENT OF THE CASE

On September 1, 2004, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) stating it was unable to find that it was clearly consistent with the national interest to grant or continue a security clearance. 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 (Directive). The SOR alleges a security concern under Guideline D for sexual behavior, and Guideline J for criminal behavior. Applicant answered the SOR on September 15, 2004, and requested a hearing.

The case was assigned to me on July 11, 2006. I issued a notice of hearing on August 4, 2006, scheduling it for August 30, 2006. The hearing was held as scheduled. During the hearing, I received five government exhibits and Applicant's testimony. DOHA received the transcript on September 7, 2006.

FINDINGS OF FACT

The admissions to the SOR are incorporated in my findings of fact. In addition, I make the following findings of fact.

Applicant is a 40-year-old single man who lives with his domestic partner and a 7-year-old foster child. He also provides financial assistance to his partner's adult son who attends college and lives away from home.

Applicant is a veteran of the U.S. Navy where he served from 1989 to 1996. While in the Navy, he earned the Navy

Achievement Medal.⁽¹⁾ Currently, he is the facility security officer (FSO) for a staffing firm that serves clients with security clearances.⁽²⁾ He has worked intermittently in this capacity since 1997.

In October 2003, a police officer observed Applicant engaging in a sexual act with another person in front of a urinal in a department store restroom. Subsequently, Applicant was arrested and charged with perverted practice and indecent exposure. He received six months of unsupervised probation before judgment, and was fined \$55. The perverted practice charge was dismissed and the indecent exposure charge was nolle prossed after he served the probation.

Information whether he engaged in this type of activity in public restrooms before the incident that provoked the arrest is conflicting. Applicant denied any previous such activity in a May 2003 signed, sworn statement, and at the hearing.⁽³⁾ On a witness statement form, he appeared to have admitted engaging in such activity on two prior occasions.⁽⁴⁾

The witness statement has little probative value. Although it appears to be Applicant's statement, it was actually written and signed by the arresting police officer.⁽⁵⁾ Applicant neither agreed with its contents, nor signed it.⁽⁶⁾ Moreover, the statement is dated November 19, 2003, three weeks after Applicant was booked for the offense. I find that Applicant had never engaged in such conduct before the incident.

Shortly after the incident, Applicant voluntarily enrolled in individual counseling. Also, he enrolled in relationship counseling with his partner. He completed both satisfactorily. He promptly informed his employer and his partner of the incident after it occurred, and has not engaged in such conduct since the incident.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching impartial, common sense decisions. 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.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future.

The following adjudicative guidelines are raised:

Guideline D - Sexual Behavior: Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, subjects the individual to undue influence or coercion, or reflects lack of judgment or discretion.

Guideline J - Criminal Conduct: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, are set forth and discussed in the conclusions below.

Since the protection of national security is the paramount consideration, the final decision in each case must be reached by applying the standard that the issuance of the clearance is "clearly consistent with the national interest."⁽⁷⁾ In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The government is responsible for presenting witnesses and other evidence to establish facts in the SOR that have been controverted. The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the government, and has the ultimate burden of persuasion as to obtaining a favorable security decision.

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 and 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Applicant's loyalty is 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 interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

Sexual Behavior

Applicant's participation in a sexual act with a stranger in a public restroom was illegal. Moreover, since anyone could have walked into the bathroom and seen him engaged in the sexual act, he rendered himself extremely vulnerable to coercion. Sexual Behavior Disqualifying Condition (SB DC) E2.A4.1.2.1 (*Sexual behavior of a criminal nature, whether or not the individual has been prosecuted*), SB DC E2.A4.1.2.3 (*Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*), and SB DC E2.A4.1.2.4 (*Sexual behavior of a public nature and/or which reflects lack of discretion or judgment*) apply.

The incident occurred nearly three years ago, and he has not engaged in any such conduct since that time. No record evidence exists of any other examples of questionable judgment, irresponsibility or emotional instability. Both Applicant's partner and his employer know about the incident. Sexual Behavior Mitigating Condition (SB MC) E2.A4.1.3.2 (*The behavior was not recent and there is no evidence of subsequent conduct of a similar nature*), SB MC E2.A4.1.3.3 (*There is no other evidence of questionable judgment, irresponsibility, or emotional instability*), and SB MC E2.A4.1.3.4 (*The behavior no longer serves as a basis for coercion, exploitation, or duress*) apply.

Criminal Behavior

Applicant's conduct also raises Criminal Conduct Disqualifying Condition (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*). The criminal behavior was isolated and occurred approximately three years ago. In addition, Applicant voluntarily attended and completed counseling after the incident. Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1 (*The criminal behavior was not recent*), CC MC E2.A10.1.3.2 (*The crime was an isolated incident*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*) apply.

Whole-Person Concept

In engaging in a sexual act in a public restroom with a stranger, Applicant brazenly disregarded the health risks of such

activity, and its potential legal consequences. Consequently, although the crime appears minor based upon the light sentence he received, it is extremely serious when analyzed in a security context.⁽⁸⁾

Applicant was 37-years old when he committed the crime, therefore, its significance is not mitigated by immaturity.⁽⁹⁾ Conversely, he had never engaged in such conduct in the past, and has not engaged in such conduct since the incident. He voluntarily enrolled in counseling, and informed both his partner and his employer promptly after the arrest. The nature and seriousness of the conduct are outweighed by its isolated, dated nature,⁽¹⁰⁾ the presence of rehabilitation,⁽¹¹⁾ and the absence of any potential for pressure, coercion, exploitation, or duress.⁽¹²⁾ Having evaluated the disqualifying and mitigating conditions of Applicant's conduct in the context of the whole-person concept, I conclude he has mitigated the security concerns.

FORMAL FINDINGS

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1-Guideline D: FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2-Guideline J: FOR APPLICANT

Subparagraph 2.a: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Marc E. Curry

Administrative Judge

1. Tr. 32.
2. Tr. 31.
3. Exhibit 2, Signed, Sworn Statement, dated May 6, 2003, at 2; Tr. 20.
4. Exhibit 5, Witness Statement Form, dated November 19, 2003, at 2.
5. *Id.*
6. Tr. 18-19.
7. *See* Directive, Sec. 2.3, Sec. 2.5.3, Sec. 3.2, and Sec. 4.2.
8. Directive ¶E2.2.1.1.
9. Directive ¶E2.2.1.4.
10. Directive ¶E2.2.1.3.
11. Directive ¶E2.2.1.6.

12. Directive ¶E2.2.1.8.