

KEYWORD: Sexual Behavior; Personal Conduct; Criminal Conduct

DIGEST: Applicant committed acts of indecent exposure at least twice a month from April 2001 to October 2002. He was arrested in October 2002 and charged with Public Indecency. Between October 2002 and March 2004, he continued to commit acts of indecent exposure on eight occasions. His conduct as well his deliberate omission of mental health counseling on his security clearance application raise security issues about his judgment and candor. Clearance is denied.

CASENO: 04-11934.h1

DATE: 04/05/2006

DATE: April 5, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-11934

DECISION OF ADMINISTRATIVE JUDGE

ERIN C. HOGAN

APPEARANCES

FOR GOVERNMENT

Jeff A. Nagel, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant committed acts of indecent exposure at least twice a month from April 2001 to October 2002. He was arrested in October 2002 and charged with Public Indecency. Between October 2002 and March 2004, he continued to commit acts of indecent exposure on eight occasions. His conduct as well his deliberate omission of mental health counseling on his security clearance application raise security issues about his judgment and candor. Clearance is denied.

STATEMENT OF CASE

On September 7, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline D, Sexual Behavior; Guideline E, Personal Conduct; and Guideline J, Criminal Conduct.

In a sworn statement dated September 26, 2005, Applicant responded to the SOR allegations. Applicant elected to have his case decided on the written record. Department Counsel submitted the government's file of relevant material (FORM) on October 18, 2005. The FORM was mailed to Applicant on November 7, 2005, and received on November 14, 2005. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant responded on December 10, 2005. The case was assigned to me on January 6, 2005.

FINDINGS OF FACT

Applicant is a 26-year-old soft-ware engineer who works for a defense contractor. He submitted a security clearance application on July 30, 2003. ⁽²⁾ He admits to all of the allegations in the SOR. ⁽³⁾

In response to question "26. Your Police Record - Other Offenses" Applicant listed an October 28, 2002, arrest for Disturbing the Peace. ⁽⁴⁾ Subsequent investigation revealed he was initially charged with Public Indecency but pled to Disturbing the Peace and underwent a diversion program. ⁽⁵⁾ Applicant was arrested after he was observed masturbating in his car by a woman and her three minor children. ⁽⁶⁾

The diversion program consisted of 30 hours of community service, a \$150.00 program fee and Applicant was required to complete an approved counseling program. ⁽⁷⁾ From March 3, 2003 to April 23, 2003, he attended six sessions at an approved counseling program. ⁽⁸⁾ He completed the requirements of the diversion program on May 3, 2003. ⁽⁹⁾

Applicant answered "No" in response to question 19. "Your Medical Record. In the last 7 years, have you consulted a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health related condition?" ⁽¹⁰⁾

He did not list the counseling sessions he attended from March 2003 to April 2003. In a signed, sworn statement provided to the Defense Security Service on September 8, 2004, he stated that he did not list the counseling on his security clearance application because he was scared this would put him in a "bad light" and that it would jeopardize his employment position. ⁽¹¹⁾

In addition to the October 28, 2002, incident which resulted in his arrest, Applicant admits to committing other acts of indecent exposure (ie. public masturbation). He exposed himself in the same manner approximately twice a month over a period of eighteen months prior to his October 2002 arrest. On the day of his arrest, he committed two other similar acts of indecent exposure. ⁽¹²⁾ Since his arrest, he has committed at least eight additional acts of indecent exposure. He recalls the last time being around February 2004. ⁽¹³⁾

On each occasion, Applicant would expose himself to a lone single woman. He is not proud of these acts. He would get these feelings of "exhibition" and could not control himself. He believes that he is now able to control his urges. ⁽¹⁴⁾ Applicant admits that his behavior reflected a great lack of judgment and discretion. ⁽¹⁵⁾ He is confident that he has put such behavior in the past. He claims there is no chance that he would jeopardize national security.

In his answer to the SOR, Applicant claims that he did not deliberately intend to falsify his security clearance application. He claims he initially filled out the security clearance application in February 2003, prior to attending the

counseling sessions. He was contacted by his security office in July 2003 to sign the security clearance application and forgot to add the counseling in response to question 19. He provided complete details about his counseling sessions when interviewed by the Defense Security Service. ⁽¹⁶⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial common sense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. 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. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. ⁽¹⁷⁾ The government has the burden of proving controverted facts. ⁽¹⁸⁾ The burden of proof is something less than a preponderance of evidence. ⁽¹⁹⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him. ⁽²⁰⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. ⁽²¹⁾

The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials. Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. ⁽²²⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. ⁽²³⁾ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of all the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline D - Sexual Behavior: 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.

Guideline E - Personal Conduct: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that a person may not properly safeguard classified information.

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

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

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a prima facie case for disqualification under Guidelines D, E, and J.

Guideline D - Sexual Behavior

Applicant's conduct raises issues under Guideline D that may be disqualifying. 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*) applies. Applicant was arrested on at least one occasion for his conduct. He admits to committing indecent exposure on numerous occasions between April 2001 to March 2004. There is insufficient detail in the record evidence as to the times and locations of these acts so it is unclear whether his conduct was criminal in all jurisdictions, but at the very least, his conduct was criminal in the jurisdiction where he was arrested.

SB DC E2.A4.1.2.3: (*Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*) applies. Despite his assurances that he would never compromise classified information, Applicant's history of committing acts of indecent exposure is of such an embarrassing and sensitive nature that it places him a position of being vulnerable to coercion, exploitation, or duress.

Applicant's actions support the application of SB DC E2.A4.1.2.4: (*Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.*) His repeated acts of public masturbation shows a lack of judgment and discretion. He continued this behavior even after being arrested in October 2002. He committed acts of indecent exposure after the completion of his court-ordered counseling and pending his security clearance application. He was aware his behavior had the potential to jeopardize his employment.

I have considered the Sexual Behavior Mitigating Conditions (SB MC) and find that none apply. SB MC E2.A4.1.3.1: (*The behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature*) does not apply since the conduct occurred while Applicant was a young adult. SB MC E2.A4.1.3.2: (*The behavior was not recent and there is no evidence of subsequent conduct of a similar nature*) does not apply since Applicant continued his acts of indecent exposure after his arrest on at least eight occasions. His admitted last act occurred in March 2004 and occurred after he completed counseling sessions. I find his actions recent when weighed against his past history of indecent exposure.

SB MC E2.A4.1.3.3: (*There is no evidence of questionable judgment, irresponsibility, or emotional instability*) is not applicable based on all the reasons stated above. Applicant's repeated pattern of behavior is of such a sensitive nature that is unlikely that he would want his co-workers, family and friends to know about this conduct. As such, I find that SB MC E2.A4.1.3.4: (*The behavior no longer serves as a basis for coercion, exploitation, or duress*) does not apply.

I find against Applicant under Guideline D.

Guideline E - Personal Conduct

The following Personal Conduct Disqualifying Conditions (PC DC) apply to Applicant's case. PC DC E2.A5.1.2.2: (*The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.*) applies. Applicant deliberately left off his court-ordered counseling in response to question 19 on his security clearance application. He indicated in a signed sworn statement provided during his background investigation that he did not list the counseling because he was concerned it would put him in 'a bad light' and would jeopardize his employment position. Though he now claims that he did not intend to omit his counseling and that it was an oversight, I find his first statement to be more credible.

PC DC E2.A5.1.2.4: (*Personal conduct or concealment of information that increases an individual's vulnerability to*

coercion, exploitation or duress, such as engaging in activities, which if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail) applies based on the reasons mentioned under the sexual behavior concerns. If made known, Applicant's sexually deviant activities would affect his personal, professional or community standing and could possibly render him susceptible to blackmail.

I find none of the personal conduct mitigating conditions apply. Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.1: (*The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability*) cannot apply since Applicant's past behavior raises questions about his judgment, trustworthiness and reliability.

PC MC E2.A5.1.3.3: (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*) does not apply. Applicant did not provide the details related to his mental health counseling until his interview with a Defense Security Service agent. Over a year had passed between the time Applicant submitted his security clearance application and the interview. His disclosure was not prompt.

Applicant has not provided enough evidence to support the application of PC MC E2.A5.1.3.5: (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). Aside from attending court-ordered counseling sessions, it is unknown whether Applicant took additional steps to deal with his problem. Considering he continued to commit acts of indecent exposure even after completing his counseling sessions, I find he is still vulnerable to coercion, exploitation, or duress.

Applicant has provided insufficient evidence to mitigate the personal conduct concern. I find against him under Guideline E.

Guideline J - Criminal Conduct

Under the criminal conduct concern, 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 E2.A10.1.2.2: (*A single serious crime or multiple lesser offenses*) applies with respect to Applicant's arrest for Public Indecency in October 2002. Although only arrested once, he admits to committing numerous acts of indecent exposure over a four-year period. His deliberate falsification of his security clearance application violated Title 18 U.S.C. § 1001, a felony.

No Criminal Conduct Mitigating Conditions (CC MC) apply. Applicant's criminal behavior was recent. It was not an isolated incident. I cannot conclude Applicant has been successfully rehabilitated since he continued to commit acts of

indecent exposure even after he was arrested and after he completed his diversion program. His deliberate falsification is a violation of Title 18 U.S.C. §1001. I find against Applicant under Guideline J.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered all the evidence provided and also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I find Applicant has failed to mitigate the security concerns raised under the sexual behavior, personal conduct, and criminal behavior concern. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance.

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 E: AGAINST APPLICANT

Subparagraph 1.a. Against Applicant

Subparagraph 1.b. Against Applicant

Subparagraph 1.c. Against Applicant

Subparagraph 1.d. Against Applicant

Paragraph 2 Guideline E: AGAINST APPLICANT

Subparagraph 1.a. Against Applicant

Subparagraph 1.b. Against Applicant

Paragraph 3 Guideline J: AGAINST APPLICANT

Subparagraph 1.a. Against Applicant

Subparagraph 1.b. 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..

Erin C. Hogan

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. Item 5.

3. Item 3.

4. Item 5.
5. Item 6; Item 7; Item 8.
6. Items 7; Item 8, p. 7-9; Item 9, p. 2.
7. Item 9, p. 2.
8. Item 8, p. 10.
9. *Id.* at 11.
10. Item 4; Item 5.
11. Item 9, p. 3.
12. Item 9, p .2.
13. Item 9, p. 2.
14. Item 9, p. 3.
15. Item 3; Response to FORM, dated December 10, 2005.
16. Item 3.
17. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
18. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
19. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
20. ISCR Case No. 94-1075 (August 10, 1995) at pp.3-4; Directive, Enclosure 3, ¶ E3.1.15.
21. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15
22. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
23. Executive Order 10865 § 7.