

KEYWORD: Sexual Behavior; Criminal Conduct

DIGEST: Applicant is 63-years-old and married for 40 years. He was arrested for lewd and lascivious acts with a woman not his wife in a car in a public park. The charge was reduced to disorderly conduct, and Applicant received deferred prosecution. He has not told his wife of the incident since it may adversely affect his marriage. Accordingly, the offense is still a basis for undue influence or coercion. Applicant's eligibility for assignment to a sensitive position is denied.

CASENO: 05-01106.h1

DATE: 02/13/2006

DATE: February 13, 2006

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In Re:

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SSN: -----

Applicant for Trustworthiness Determination

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ADP Case No. 05-01106

**DECISION OF ADMINISTRATIVE JUDGE**

**THOMAS M. CREAN**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is 63-years-old and married for 40 years. He was arrested for lewd and lascivious acts with a woman not his wife in a car in a public park. The charge was reduced to disorderly conduct, and Applicant received deferred prosecution. He has not told his wife of the incident since it may adversely affect his marriage. Accordingly, the offense is still a basis for undue influence or coercion. Applicant's eligibility for assignment to a sensitive position is denied.

**STATEMENT OF THE CASE**

On August 3, 2005, the Defense Office of Hearing and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny an application for a position of public trust for Applicant. The action was taken under Department of Defense Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended and modified (Regulation), and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive). Applicant acknowledged receipt of the SOR on August 10, 2005. The SOR alleges security concerns under Guideline D (Sexual Behavior), and Guideline J (Criminal Conduct) of the Regulation.

Applicant answered the SOR in writing on August 18, 2005, denying one and admitting one of the allegations under Guideline D, and denying the allegation under Guideline J. He elected to have the matter decided on the written record in lieu of a hearing.

Department counsel submitted the government's written case on September 21, 2005. Applicant received a complete file of relevant material (FORM) on September 27, 2005, and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. He responded on October 12, 2005, with a detailed explanation of his action to refute the allegations. Department Counsel provided a response to Appellant's answer on December 13, 2005. The case was assigned to me on December 19, 2005.

### **FINDINGS OF FACT**

After a thorough review of the pleadings and exhibits, I make the following essential findings of fact.

Applicant is 63 years old, and employed as an administrative representative for a defense contractor for over 25 years. He served three years of active duty in the United States Army. He has been married for over 40 years, and has two children. He submitted a Public Trust Position Application (SF 85P) on June 6, 2003. <sup>(1)</sup>

Applicant was arrested for lewd and lascivious conduct in 2004. Applicant and a 52-year-old female co-worker were noticed by police in a car parked in a public park at 6 a.m. The couple were talking and engaging in sexual activity, described by Applicant as heavy petting. They were fully clothed at the time. The police issued a citation for lewd and lascivious conduct. The couple subsequently met with a district attorney representative, and the charge was reduced to disorderly conduct. The prosecutor and Applicant agreed to defer prosecution, and Applicant performed 50 hours of community service to defer prosecution. <sup>(2)</sup> Applicant has not informed his wife of the incident. Applicant and the co-worker still work for the same company but in different buildings. They talk occasionally, but do not see each other. <sup>(3)</sup>

### **POLICIES**

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." <sup>(4)</sup> To be eligible to occupy an Information Systems Position designated ADP II/III, an applicant must meet the security guidelines contained in the Regulation. The standard that must be met is that based on all available information, the person's loyalty, reliability, and trustworthiness are such that assigning the person to sensitive duties is clearly consistent with the interests of national security. <sup>(5)</sup>

The Regulation sets out the adjudicative guidelines for making trustworthiness determinations. Appendix 8 of the Regulations sets forth adjudicative guidelines for determining trustworthiness, and lists the disqualifying conditions and mitigating conditions for each guideline. The adjudicative guidelines at issue in this case are:

**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 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 section below.

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. An administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant'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 of recurrence.<sup>(6)</sup>

DoD contractor personnel are afforded the rights to the procedures contained in the DoD Directive before any final unfavorable access determination may be made.<sup>(7)</sup> Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the Applicant from being eligible for access to classified information.<sup>(8)</sup> Thereafter, Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts.<sup>(9)</sup> An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."<sup>(10)</sup> "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability."<sup>(11)</sup> "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."<sup>(12)</sup> Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Regulation, Appendix 8. A person granted access to classified information enters into a special relationship with the government. 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. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant.<sup>(13)</sup> 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.

## CONCLUSIONS

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

The government has established its case under Guideline D, Sexual Behavior. Applicant's citation for lewd and lascivious conduct in a public park with a woman not his wife raises Sexual Behavior Disqualifying Conditions (DC) (1) *sexual behavior of a criminal nature, whether or not the individual has been prosecuted*; and DC (4) *sexual behavior of a public nature and/or that which reflects lack of discretion or judgment*. Applicant's refusal and failure to inform his wife of his conduct raises DC (3) *sexual behavior that causes an individual to be vulnerable to undue influence or coercion*. The lewd and lascivious conduct was a crime, even though downgraded to disorderly conduct and sent to a deferred prosecution program. The action was public since it took place in a public park, even though early in the morning. Such public activity with a woman not your wife shows a lack of discretion or judgment. While this act did not involve sexual intercourse, the refusal of Applicant to tell his wife for fear it will adversely affect their marriage leaves him vulnerable to undue influence or coercion.

Appellant's actions raises Sexual Conduct Mitigating Conditions (MC) (2) *the behavior was not recent and there is no evidence of subsequent conduct of a similar nature*, MC (3) *there is no other evidence of questionable judgment, irresponsibility, or emotional instability*, and MC (4) *the behavior no longer serves as a basis for undue influence or coercion*. The event happened almost two years ago, and there is no evidence of any subsequent conduct of a similar nature. Even though the event happened after Applicant submitted his Application for a Trustworthiness Determination, almost two years have passed with no evidence of further inappropriate sexual activity with the co-worker or any other person not his wife. Accordingly, MC (2) applies. There is no other evidence questioning Applicant's judgment, responsibility, or stability. MC (3) is applicable. However, Applicant's refusal to tell his wife of the incident because it may cost him his marriage shows the event still serves as a basis for undue influence or coercion. A marriage of 40 years should survive an incident like this. For Applicant to be so concerned about telling his wife of the incident is an indicator it could potentially be a source of undue influence or coercion. Applicant has not presented sufficient information to mitigate the security concerns. He is still subject to undue influence or coercion because of his actions.

The government has established its case under Guideline J. There is a security concern for a history or pattern of criminal activity. While there is only one act and thus not a pattern, the one act does indicate a history. The security concern is raised by criminal activity and not whether the activity is prosecuted or stricken from the record. There was no finding of not guilty to indicate Applicant did not commit a criminal act. The deferred prosecution shows the court believed the action was committed by Applicant and was a criminal act. Applicant's citation for lewd and lascivious conduct, even though reduced to disorderly conduct resulting in deferred prosecution, raises Criminal Conduct DC (1) *any conduct, regardless of whether the person was formally charged*. Applicant was cited for a criminal act, entered a plea agreement with a prosecutor, went before a judge, and performed community service. The conduct required court

action establishing the disqualifying condition.

Criminal Conduct Mitigating Condition (2) *the crime was an isolated incident*, and MC (5) *there is clear evidence of successful rehabilitation* apply. There is no evidence of any other criminal activity by Applicant in his 63 years. There is evidence of successful rehabilitation since there is no other evidence of Applicant's inappropriate activity with the women. They may talk occasionally but do not see each other. Applicant presented sufficient information to mitigate the criminal conduct security concerns.

I have considered the factors raised above when considering the "whole person." Applicant was a knowledgeable and voluntary participant in the action. Applicant is old enough and mature enough to understand the nature and consequences of the actions. The evidence is the action happened only one time, and the likelihood of recurring conduct is not high. However, because of his refusal to tell his wife of the incident, particularly when it was not a grave violation of his marriage vows and their 40 year of marriage, there is potential for pressure, coercion, exploitation, and duress. I conclude Applicant has not mitigated the security concern for his sexual behavior. He is not eligible for a position of trustworthiness.

### **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 AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2, Guideline J FOR APPLICANT

Subparagraph 2.a.: For Applicant

## **DECISION**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant's eligibility for assignment to sensitive duties. Eligibility is denied.

Thomas M. Crean

Administrative Judge

1. Item 4 (Standard Form 85P, dated Jun. 6, 2003).
2. Item 3 (Applicant's response to the SOR, dated Aug. 8, 2005) at 3; Item 5 (Applicant's statement, dated Jul. 30, 2004) at 1-2.
3. *Id.*, at 3.
4. *Department of the Navy v. Egan*, 484 U.S. 518 (1988).
5. Regulation ¶ C6.1.1.1.
6. Dod 5200.2-R, Appendix 8.
7. DoD 5200.2-R, ¶ C8.2.1.
8. Directive ¶ E3.1.14.
9. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15.
10. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).
11. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).
12. *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.
13. *See* Exec. Or. 10865 § 7.