

KEYWORD: Criminal Conduct; Sexual Behavior; Personal Conduct

DIGEST: Applicant, who is on supervised probation for a felony sexual crime, did not inform his employer of his conviction and sentence. He failed to mitigate security concerns under Guideline J, Criminal Conduct, Guideline D, Sexual Behavior, and Guideline E, Personal Conduct, of the Directive. Clearance is denied.

CASENO: 05-03141.h1

DATE: 03/30/2006

DATE: March, 30, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-03141

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Fahryn E.Hoffman, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, who is on supervised probation for a felony sexual crime, did not inform his employer of his conviction and sentence. He failed to mitigate security concerns under Guideline J, Criminal Conduct, Guideline D, Sexual Behavior, and Guideline E, Personal Conduct, of the Directive. 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 October 12, 2005, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct), Guideline D (Sexual Behavior), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on October 24, 2005, and requested that his case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on January 4, 2006. The FORM contained documents identified as Items 1 through 11. By letter dated January 6, 2006, a copy of the FORM was forwarded to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the FORM January 17, 2006. He did not submit any information or objections within the required time period. On March 1, 2006, the case was assigned to me for a decision.

FINDINGS OF FACT

The SOR contains three allegations of disqualifying conduct under Guideline J, Criminal Conduct, two allegations of

disqualifying conduct under Guideline D, Sexual Conduct, and one allegation of disqualifying conduct under Guideline E, Personal Conduct. (Item 1.) In his answer to the SOR, Applicant admitted all six allegations. (Item 3.) Applicant's admissions are incorporated as findings of fact.

Applicant is 33 years old and employed as a systems engineer by a defense contractor. He is married and the father of a son, aged eleven, and a daughter, aged nine. From 1992 to 1997, he served as a Sergeant (E-5) in the U.S. Army. He has held a security clearance since 1996. (Item 4; Item 10.)

Applicant has a history of criminal conduct. His first brush with the law occurred in February 1992, when, at the age of 19, he was cited for (1) Open Container and (2) Possession of Beer Under 21. He completed a pre-trial intervention program for Count (2). Count (1) was *nolle prosequi*. (Item 6.)

In March 1999, Applicant was arrested and charged with (1) Simple Possession of Marijuana and (2) Possession of Drug Paraphernalia. He was found guilty and fined \$650. (Item 7.)

In November 2001, Applicant was arrested and charged with (1) Object Sexual Penetration (Under Age 13), a felony, and (2) Forcible Sodomy, a felony. The warrant for Applicant's arrest specified that the felonious conduct occurred between June and August 1997. (Item 9.) Applicant pled guilty to Count (1) and was sentenced to ten years in the penitentiary. His sentence was suspended, and, commencing September 30, 2002, he was placed on five years supervised probation, followed by five years unsupervised probation, He was ordered to participate in a sex offender treatment program. He was also ordered to pay restitution of \$650, continuing costs for the victim's therapy, and court costs of \$426.50. Count (2) was dismissed. (Item 8; Item 9.)

As a result of his conviction and sentence for Object Sexual Penetration, Applicant was identified as a registered sex offender with the state police of his state of residence. As of October 2002, his name, home address, photograph, physical characteristics summary, and sex offender conviction record were posted on the state police web site. (Item 11.) Applicant's work address information was listed as "Not Reported."

Applicant deliberately failed to notify the facility security officer at his place of employment of his status as a registered sex offender. On June 26, 2003, Applicant's facility security officer learned from other sources of Applicant's status as a registered sex offender and reported this information to the Defense Industrial Security Clearance Office (DISCO). (Item 10.) In a signed, sworn statement, dated May 4, 2004, and witnessed by an authorized investigator of the Defense Security Service, Applicant stated he had not informed his facility security officer of his felony conviction because he was "still going threw [sic] the court system trying to find out the outcome." (Item 5 at 2.)

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. 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." Exec. Or. 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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

CONCLUSION

Guideline J - Criminal Conduct

In the SOR, DOHA alleged Applicant was cited in February 1992 with (1) Open Container and (2) Possession of Beer Under 21, completed a pre-trial intervention program for Count (2), and Count (1) was *nolle prosequi* (§ 1.a.); and that he was arrested in March 1999 and charged with (1) Simple Possession of Marijuana and (2) Possession of Drug Paraphernalia, found guilty, and fined \$650.00 (§ 1.b.). DOHA also alleged that Applicant was arrested in November 2001 and charged with (1) Object Sexual Penetration (Under Age 13), a felony, and (2) Forcible Sodomy, a felony, and that he pled guilty to Count (1), was sentenced to ten years in the penitentiary, suspended, placed on ten years probation, and ordered to participate in a sex offender treatment program. Applicant was also ordered to pay restitution of \$650.00, the victim's continuing therapy costs, and court costs of \$426.50. Count (2) was dismissed.(§ 1.c.).

Applicant's admitted criminal conduct raises security concerns under Disqualifying Conditions (DC) E2.A10.1.2.1 and E2.A10.1.2.2 of Guideline J. His history or pattern of criminal activity raises doubts about his judgment, reliability and trustworthiness. Directive E2.A10.1.1. A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. Where the facts proven by the Government or admitted by the applicant raise doubts about the applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nevertheless security worthy.

Applicant's admitted criminal conduct spans the period from 1992 to 1999. In 2001, he was arrested and charged with two felonies, committed in 1997. In September 2002, he was convicted of one felony and the second felony count was dismissed. Applicant was sentenced to 10 years in prison, suspended, and placed on five years supervised probation followed by five years unsupervised probation. His probation is in effect at this time and will run until 2012. As a result of his conviction, Applicant is a registered sex offender and identified on the web site of the state police in his state of residence.

We turn to an examination of mitigating conditions that might be applicable to Applicant's disqualifying conduct under Guideline J. Applicant's last criminal actions occurred in 1999, and thus are not recent, making Mitigating Condition (MC) E2.A10.1.3.1 applicable to his case. However, Applicant's criminal actions spanned a period of several years and were not isolated events but instead demonstrated a pattern of criminal conduct. As a consequence of his felonious sexual conduct in 1997, Applicant is currently subject to supervised probation and is ordered to remain under supervised probation until 2007 and unsupervised probation until 2012. At this time there is no clear evidence of successful rehabilitation. Thus, neither MC E2.A10.1.3.2 nor MC E2.A10.1.3.6. of Guideline J applies to Applicant's Guideline J conduct. No other mitigating conditions under Guideline J are applicable to the facts of Applicant's case. Accordingly, the Guideline J allegations in the SOR are concluded against the Applicant.

Guideline D - Sexual Behavior

Under Guideline D of the Directive, DOHA alleged the criminal sexual conduct alleged at § 1.c. of the SOR (§ 2.a.) and further alleged that, as a result of his conviction for Object Sexual Penetration (Under Age 13), Count (1), Applicant

was, since October 10, 2002, a registered sex offender with the state police of his state of residence (¶ 2.b.).

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. Directive E2.A4.1.1. Applicant's conduct raises security concerns under three Disqualifying Conditions (DC) under Guideline D. First, Applicant's sexual behavior was criminal and raises a security concern under Disqualifying Condition (DC) E2.A4.1.2.1. Second, Applicant's sexual behavior raises a concern under DC E2.A4.1.2.3. because it causes him to be vulnerable to coercion, exploitation, or duress. Third, Applicant sexual behavior raises a concern under DC E2.A4.1.2.4. because it reflects lack of discretion or judgment.

Applicant's disqualifying sexual behavior occurred when he was an adult of 24 years, and thus Mitigating Condition (MC) E2.A4.1.3.1 is inapplicable. Applicant's disqualifying sexual conduct occurred in 1997, nearly nine years ago. However, his sentence of ten years probation for the felonious sexual offense is on-going and will continue until 2012, making it a recent and present circumstance. Applicant's arrest and conviction for simple marijuana possession and possession of drug paraphernalia occurred in 1999, after he committed the sexual offense but before he was arrested and charged. Applicant's drug-related criminal conduct provides additional evidence of questionable judgment. Additionally, his ten-year sentence of probation and his sexual offender status indicate his criminal sexual behavior could continue to serve as a basis for coercion, exploitation, or duress. Accordingly, MC E2.A4.1.3.2., MC E2.A4.1.3.3., and MC E2.A4.1.3.4. do not apply. Accordingly, the Guideline D allegations of the SOR are concluded against the Applicant.

Guideline E - Personal Conduct

In the SOR, DOHA alleged Applicant raised concerns under Guideline E, Personal Conduct, when he deliberately failed to notify the facility security officer at his employer that he had been arrested in November 2001 and convicted on September 30, 2002 of the sexual offense alleged in ¶ 1.c. of the SOR (¶ 3.a.)

Guideline E conduct, which involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

Applicant's deliberate refusal to provide his facility security officer with full, frank, and truthful information about his arrest and conviction as a sexual offender raises security concerns under ¶¶ E2.A5.1.2.1., E2.A5.1.2.2., E2.A5.1.2.4., and E2.A5.1.2.5 of Guideline E of the Directive. Applicant did not tell his employer about his arrest and conviction as a sexual offender, but the employer received reliable, unfavorable information about Applicant's sex offender status from an unidentified source, raising a concern under ¶ E2.A5.1.2.1. of Guideline E. Applicant's deliberate omission or concealment of this information from his facility security officer raises a concern under ¶ E2.A5.1.2.2 of Guideline E, for the information he withheld was necessary to determine his security clearance eligibility and his trustworthiness.

Applicant's concealment from his employer of his status as a convicted sex offender also increased his vulnerability to coercion, exploitation or duress, raising a security concern under ¶ E2.A5.1.2.4. of Guideline E. Finally, Applicant's concealment of this information from his employer reveals a pattern of dishonesty or rule violations, raising a concern under ¶ E2.A5.1.2.5. of Guideline E. Applicant's reticence to reveal the truth about his conduct suggests that, under some circumstances, he may put his interests before those of the Government.

Mitigating condition (MC) E2.A5.1.3.1 does not apply to the facts of this case: the information Applicant withheld is pertinent to a determination of his judgment, trustworthiness, and reliability. Only two other mitigating conditions under Guideline E might be applicable to the instant case. The security concern raised by Applicant's disqualifying conduct could be mitigated if the falsification was an isolated incident, was not recent, and if the Applicant subsequently provided the correct information voluntarily. MC E.2.A.5.1.3.2. Applicant did not supply the correct information voluntarily. His actions to conceal material facts relevant to a determination of his security worthiness were multiple and occurred in recent past time. Accordingly, MC E.2.A.6.1.3.2. does not apply to the facts of Applicant's case. Since Applicant took no positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress, MC E2.A5.1.3.5 is also inapplicable. The Guideline E allegation in the SOR is concluded against the Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Paragraph 2. Guideline D: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.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.

Joan Caton Anthony

Administrative Judge

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