

DATE: November 27, 2006

In re:

SSN: -----

Applicant for Security Clearance

P Case No. 06-09383

DECISION OF ADMINISTRATIVE JUDGE

ERIN C. HOGAN

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's May 2004 conviction for Indecent Exposure raises security concerns under criminal conduct and sexual behavior. Although he has successfully completed two years of probation, four years remain. Considering his admitted history of similar conduct approximately 150 times prior to his arrest, it is too soon to conclude that he has been successfully rehabilitated. Applicant did not meet his burden to mitigate the security concerns raised under criminal conduct and sexual behavior. Applicant's eligibility for assignment to a sensitive position is denied.

STATEMENT OF THE CASE

On September 13, 2004, Applicant submitted an application for a position of public trust - an ADP I/II/III position. The Defense Office of Hearings and Appeals (DOHA) declined to grant the application under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (the "Directive").⁽¹⁾ On July 10, 2006, DOHA issued Applicant a Statement of Reasons (SOR) detailing the basis for its decision. The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline J, Criminal Conduct, and Guideline D, Sexual Behavior.

In a sworn statement dated July 28, 2006, Applicant responded to the SOR allegations and requested a hearing. The case was assigned to me on August 29, 2006. A notice of hearing was issued on September 18, 2006, scheduling the hearing for October 5, 2006. The hearing was conducted on that date. The government submitted three exhibits that were marked as Government Exhibits (Gov Ex) 1-3, and admitted without objection. Applicant testified on his own behalf, and submitted two exhibits which were marked and admitted as Applicant Exhibits (AE) A-B without objection. DOHA received the hearing transcript (Tr.) on October 13, 2006.

FINDINGS OF FACT

In his SOR response, Applicant admits to all of the allegations in the SOR. Applicant's admissions are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following

findings of fact:

Applicant is 38 years old and is employed as a phone center specialist with a Department of Defense contractor since September 2004. He is a team leader. He is seeking a position of public trust. He has two years of college. He is married but his wife filed for divorce in May 2006. He has two daughters, ages 15 and 7. [\(2\)](#)

On May 3, 2004, Applicant was driving back from a dental appointment. He drove by two young women, who were 17 years old, and asked them if they needed a ride. They said "No." He drove around the block and drove by them again and asked them once again if they needed a ride. At some point during this encounter, Applicant was masturbating. The young women got Applicant's license plate number and reported the incident to the police. [\(3\)](#)

On May 5, 2004, Applicant was called in by the sheriff's department for questioning. He initially denied his conduct but eventually admitted to the offense. He was arrested and charged with two counts of Obscenity - Promotion to Minor, a felony and one count of Indecent Exposure to Minors and Adults, a misdemeanor. He pled guilty to Indecent Exposure and the two other charges were dismissed. He was sentenced to six years supervised probation, fined \$5,750, ordered to mandatory group therapy for sex based offenders, and ordered to take mandatory polygraph tests. He was also ordered to register as a sex offender. He is not allowed to have contact with minor children to include his two daughters. [\(4\)](#)

So far, Applicant has followed the terms of his probation. His probation will not end until 2010. He attends group therapy every Monday evening. It is a sex offender based therapy group. He is learning to understand what causes his behavior. He does not attend individual therapy. [\(5\)](#) He admits to encountering some stumbling blocks in the therapy process. In May 2006, he attempted suicide by swallowing eight sleeping pills. Since his suicide attempt, he is working the program the therapists have set up for him. He is becoming more involved and interactive in the group. [\(6\)](#)

Applicant admits to engaging in similar exhibitionist behavior approximately 150 times prior to his May 2004 arrest. He was arrested on one other occasion when he was eighteen. He has not engaged in similar conduct since his May 2004 arrest. [\(7\)](#) He denies any inappropriate touching or exposing himself to his daughters. He indicates that when his oldest daughter was five she walked in on him while he was masturbating. [\(8\)](#)

From January 25, 2005, to April 5, 2005, Applicant served in the United States Army. He received a discharged in lieu of court-martial with an under other than honorable conditions discharge. It was alleged that he entered the women's shower area while naked and touched a female soldier on her breast and buttocks. [\(9\)](#)

Applicant is highly regarded at his place of employment. A co-worker, who is a supervisor at the call center where Applicant works, testified at hearing. She describes him as being honest and reliable. His handling of sensitive information, such as social security numbers and medical records, is very professional. She is aware of the allegations in the SOR. She still believes he is an asset to the company. [\(10\)](#) His manager submitted a letter on Applicant's behalf. He works with him daily. He describes Applicant as being "dependable, honest, trustworthy and reliable in the performance of his duties." He has no reason to suspect his integrity or loyalty to his job, company or country. [\(11\)](#)

Applicant's wife wrote a letter on his behalf. She has known her husband for over 17 years. She indicates her husband has a tremendous work ethic and takes pride in his job. She says he is supportive of his co-workers and is a true asset and model for customer service. [\(12\)](#)

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." [\(13\)](#) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance or access to sensitive information, an applicant must meet the security guidelines

contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

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

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.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions 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."⁽¹⁴⁾ An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.⁽¹⁵⁾ An administrative judge should consider the following factors: (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 individual'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 or recurrence.⁽¹⁶⁾

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.⁽¹⁷⁾ Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts.⁽¹⁸⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."⁽¹⁹⁾ Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.⁽²⁰⁾ The same rules apply to trustworthiness determinations or for access to sensitive positions.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. I make the following conclusions.

Criminal Conduct

Based on all the evidence, 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*) applies to Applicant's case. Applicant admits to indecently exposing himself to two young women on May 5, 2006. He was initially charged with two felony counts and a misdemeanor offense. He pled guilty to the misdemeanor offense. There is no issue that his conduct was criminal.

I considered the Criminal Conduct Mitigating Conditions (CC MC). I cannot apply CC MC E2.A10.1.3.1 (*The criminal behavior was not recent*). The criminal behavior is recent. The offense occurred in May 2004. I cannot apply CC MC E2.A6.1.3.2 (*The crime was an isolated incident*) since Applicant admits to committing similar offenses approximately 150 times prior to his arrest.

There is nothing in the record evidence to support the application of CC MC E2.A10.1.3.3 (*The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*); CC MC E2.A10.1.3.4 (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*); and CC MC E2.A10.1.3.5 (*Acquittal*).

Applicant has been meeting the terms of his probation for over two years. He has four more years of probation before he successfully completes the terms of his probation. Since he has only completed one third of his probationary term, I cannot conclude that CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*) applies. Since he is still serving probation and has a past history of similar behavior, questions remain as to whether he will be able to successfully resolve the problem which caused these behaviors. Applicant is making progress but it is too soon to conclude that he has been successfully rehabilitated.

Applicant has failed to mitigate the concern under Guideline J.

Sexual Behavior

Under the sexual behavior concern several disqualifying conditions apply. 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's actions on May 3, 2004, can be considered criminal sexual behavior since he indecently exposed himself to two young women.

SB DC E2.A4.1.2.3 (*Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*) applies. Applicant's conduct is of such a sensitive nature that one can easily conclude that Applicant could be vulnerable to coercion, exploitation or duress. While Applicant disclosed the arrest to his family and several friends, the conduct committed is not something a reasonable person would want disclosed.

SB DC E2.A4.1.2.4 (*Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment*) applies. Applicant's actions were public. He masturbated in his car on a city street in broad daylight. The two young 17 year old women noticed his actions since they reported it to the police. Applicant was 36 years old at the time of the offense. He was old enough to know better. His actions showed a lack of discretion and judgment.

The sexual behavior concern can be mitigated. I find that none of the mitigating conditions apply. Sexual Behavior Mitigating Condition (SB MC) E2.A4.1.3.1 (*The behavior occurred during or prior to adolescence and there is not evidence of subsequent conduct of a similar nature*) does not apply. Applicant was an adult at the time of his last offense. He admits to committing acts of exhibitionism at least 150 times prior to his last offense. One can conclude not all of these offenses occurred when he was an adolescent.

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. Although there is no evidence of similar conduct occurring after Applicant's arrest, the behavior was recent. SB MC E2.A4.1.3.3 (*There is no other evidence of questionable judgment, irresponsibility, or emotional instability*) is not applicable considering Applicant's admitted history of committing similar acts. The conduct which led to his discharge from the Army also raises questions about his judgment. Although I find Applicant to have been forthcoming during the hearing, the sensitive nature of his past conduct still leaves him vulnerable to coercion, exploitation or duress. As such SB MC E2.A4.1.3.4 (*The behavior no longer serves as a basis for coercion, exploitation, or duress*) does not apply.

In all adjudications, the protection of our national security is the paramount concern. The objective of the trustworthy determination process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for assignment to sensitive duties. 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 have considered all the evidence and the "whole person" in evaluating Applicant's trustworthiness. An applicant with a good or even exemplary work history may engage in conduct that has negative trustworthiness implications. Although Applicant is meeting the terms of his probation, he still has four more years to serve. It is too soon to conclude that Applicant has mitigated the criminal conduct and sexual behavior concerns. He was a mature adult at the time of his last offense. He has history of committing similar sexual offenses, and is still on probation for this offense. I am persuaded

by the totality of the evidence that he failed to mitigate the trustworthiness concerns regarding Guidelines J and D, and that it is not clearly consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. Eligibility is denied.

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 J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Paragraph 2. Guideline D: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

DECISION

In light of all of the evidence presented in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. Eligibility is denied.

Erin C. Hogan

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended; and the November 19, 2004, Memorandum of the Deputy Under Secretary of Defense for Counterintelligence and Security titled "Adjudication of Trustworthiness Cases."
2. Tr. at 6-7, 39; Gov Ex 1.
3. Tr. at 32-33; Gov Ex 2.
4. Tr. at 32-34; Gov Ex 2; Gov Ex 3.
5. Tr. at 35-36.
6. Tr. at 40-41.
7. Tr. at 37.
8. Tr. at 39.
9. Tr. at 37-38, Gov Ex 1, question #11.
10. Tr. at 25-29.
11. AE A.
12. AE B.

13. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

14. Directive, ¶ E2.2.1.

15. *Id.*

16. *Id.*

17. Directive, ¶ E3.1.14.

18. Directive, ¶ E3.1.15.

19. ISCR Case No. 01-20700 at 3 (App. Bd. December 19, 2002).

20. Directive, ¶ E2.2.2.