



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

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) ADP Case No. 07-09090
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Applicant for Public Trust Position

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: Pro Se

April 25, 2008

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted his Questionnaire for Public Trust Position (SF 85P), on January 12, 2007. On October 15, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline J, Criminal Conduct, and Guideline D, Sexual Behavior, for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on November 2, 2007. He answered the SOR in writing on December 21, 2007, and requested a hearing before an Administrative Judge. DOHA received the request on January 2, 2008. Department Counsel was prepared to proceed on February 25, 2008, and I received the case

assignment on February 27, 2008. DOHA issued a notice of hearing on March 11, 2008, and I convened the hearing as scheduled on March 26, 2008. The government offered Exhibits (Gov Ex) 1 through 4, which were received without objection. Applicant testified on his own behalf, called one witness, and submitted Applicant Exhibit (AE) A, without objection. DOHA received the transcript of the hearing (Tr.) on April 9, 2008. The record closed on that date. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted all of the SOR allegations. In addition, after a thorough and careful review of the pleadings and exhibits, I make the following findings of fact.

Applicant is a 39-year-old male employee of a Department of Defense contractor who is seeking a position of trust. He has a bachelor of science degree in information technology. He is married and has an eight-year-old daughter. He recently learned that his wife is pregnant. (Tr at 5, 47-48; Gov 1.)

In June 2003, Applicant was experiencing some personal problems. He felt that he was never appreciated at work or by his wife and daughter. In order to relieve stress, Applicant began to have sexual fantasies involving young girls. This lead to Applicant exposing himself to young teenage girls on two occasions. The first incident involved a girl between the age of 13-15. He was not arrested for this offense. The second incident occurred a few days later. He saw a 13 year-old girl walking. He drove his car up the street, got out of the car and waited for the girl to walk by. When she walked by, Applicant called to her in order to get her attention. When she looked in his direction, he exposed his lower torso to her. The girl ran away and the Applicant got into his car and drove away. (Tr at 54-55; Gov 2.)

In July 2003, Applicant was contacted by a private investigator who was investigating a charge of indecent exposure. The victim had memorized the license plate number of Applicant's car which was registered to his mother-in-law. The following day, Applicant was arrested at his place of employment. (Gov 2.)

On July 18, 2003, Applicant was arrested and charged with Indecency with a Child By Exposure. On June 3, 2004, Applicant pled guilty to the charge. He was placed on five years supervised probation from June 3, 2004 to June 3, 2009. He was ordered to register as a sex offender and ordered to attend psychological treatment. He paid a total of \$3,007 in fines and court costs and completed 400 hours community service. (Gov 2; Gov 3; Gov 4.) The sex offender registry lists Applicant's risk level as moderate. (Gov 4.)

On October 10, 2004, Applicant started his court-ordered sex offender treatment program. The first phase of the treatment is known as (the intensive phase) and consists of the participant attending a weekly group meeting, and a monthly individual meeting with his counselor. He completed the first phase of the treatment on January 21, 2007. The

second phase of the treatment is considered the maintenance phase and lasts about two years. Applicant is required to attend two monthly meetings. One is a group meeting. The other is an individual meeting with his counselor. When Applicant reaches the third phase, he is required to meet with his therapist every three months. (Tr at 18-19, 52-53; Gov 2.)

Applicant's therapist testified during the hearing. He is Licensed Master Social Worker who has worked with sex offenders since early 1980. The program Applicant attends takes about four to five years to complete and involves cognitive behavioral therapy. Applicant has accepted total responsibility for his behavior and has successfully participated in the program. He has learned to identify risk factors, and how to intervene and successfully avoid future similar behavior. Applicant's prognosis is excellent for continued compliance in the program. He describes Applicant as a "situational sex offender" as opposed to a person who has a deviant sexual attraction to children. The therapist testified that his evaluation is not a psychological or psychiatric evaluation. Applicant is currently in the maintenance phase of treatment. The maintenance phase is supposed to reinforce the techniques learned during the intensive phase. His observations indicate that Applicant is using the techniques that he learned. Nationwide there is an 80% success rate in the program. In the therapist's opinion, it is unlikely that Applicant will reoffend. Applicant has demonstrated that he has everything he needs to lead a deviant free life. He cannot guarantee that Applicant will never reoffend. When asked about the fact that Applicant's risk level was described as "moderate" on the sex offender registry, Applicant's therapist said that he was not familiar with the standards the court applies to assess the risk level.(Tr at 16-46.)

On the advice of his attorney, Applicant saw a psychologist for a few months prior to his court date. The psychologist concluded Applicant was suffering from depression, anxiety, and stress. He was not prescribed any medication. He stopped seeing the psychologist because he thought he was wasting his time. (Tr at 61-63.)

Applicant does not know whether his neighbors are aware that he is registered sex offender. He would be embarrassed if they knew. He does not go around telling people unless required but he has accepted responsibility for his past actions. He has lost some friends based on the offense. His relatives know of the offense. He admits that what he did was wrong and he is trying to change his life. (TR 58-60, 63.)

So far, Applicant has complied with all the terms and conditions of his sentence and probation. His probation does not end until June 3, 2009. (Tr at 52.)

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "The standard that must be met for . . . assignment to sensitive duties 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." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security)

Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

When evaluating an Applicant's suitability for a public trust position, the Administrative Judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

A person who seeks access to sensitive information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order (EO) 10865 provides that 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." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

The security concern raised under the criminal conduct guideline is set forth in ¶ 30 of the Revised Adjudicative Guidelines:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

There are three Criminal Conduct Disqualifying Conditions (CC DC) that apply to Applicant's case. They are CC DC ¶ 31(a) (*a single serious crime or multiple lesser offenses*); CC DC ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*); and CC DC ¶ 31(d) (*individual is currently on parole or probation*). Applicant admits to two incidents of exposing himself to young teenage girls. He was prosecuted for the second incident. He pled and was found guilty of Indecent Acts with a Child by Exposure. He is currently on probation. His probation will not end until June 3, 2009.

The criminal conduct concern can be mitigated. I find that it is premature to apply Criminal Conduct Mitigating Condition (CC MC) ¶ 32(a) (*so much time has elapsed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*) because Applicant is still serving the terms of his probation. Although Applicant has not been arrested or charged with an offense since July 2003, the serious nature of the offense, the fact that Applicant was a mature adult at the time of the offense, and the fact that he committed the offense on two occasions leads me to conclude that insufficient time has elapsed before CC MC ¶ 32(a) can be applied.

It is premature to apply CC MC ¶ 32(d) (*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*) because Applicant remains on probation until June 2009. It is noted that he has made progress through his court-ordered counseling program, and has followed all the terms of probation so far.

At this time, it is premature to conclude that Applicant has mitigated the criminal conduct concern.

Guideline D – Sexual Behavior

The security concern raised under the sexual behavior guideline is set forth in ¶ 12 of the Revised Adjudicative Guidelines:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

There are several Sexual Behavior Disqualifying Conditions (SB DC) that apply to Applicant's case.

SB DC ¶ 13(a) (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*) applies. Applicant admits to two incidents of indecent exposure both involving a young teenage girl. Both of these incidents were criminal in nature.

SB DC ¶ 13(c) (*sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*) applies. Applicant's actions make him vulnerable to coercion, exploitation, or duress. He admitted that he is embarrassed by his past behavior. While he indicates that he discloses his past behavior when he is required, there is still a potential for a situation to arise where Applicant would not want his past arrest and sexual conduct disclosed which makes him vulnerable to coercion, exploitation, or duress.

SB DC ¶ 13(d) (*sexual behavior of a public nature and/or that reflects lack of discretion or judgment*) applies. Applicant exposed himself on two separate occasions to minor teenage girls on a public street. His conduct was sexual behavior of a public nature and reveals a lack of discretion or judgment.

I find for Applicant with respect to SOR ¶ 2.b. It alleges that Applicant received treatment at a sex offender program. Attending a sex offender treatment program is not sexual behavior. Attending treatment is a positive development and represents good judgment by Applicant even though the treatment is court-ordered. No disqualifying conditions apply.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising under sexual behavior. The following Sexual Behavior Mitigating Conditions (SB MC) have the potential to apply:

SB DC ¶ 14(b) (*the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*) is not applicable.

Applicant admits to two incidents of indecent exposure. The victim in each instance was a minor teenage girl. Although several years have passed since his arrest and he has actively participated in his court-ordered therapy, it is premature to apply SB DC ¶ 14(b) because Applicant is still serving probation.

SB DC ¶ 14c (*the behavior no longer serves as a basis for coercion, exploitation, or duress*) cannot be applied. While Applicant has disclosed the nature of his offense to family members and other friends who need to know, he remains embarrassed about his past sexual conduct. Due to the sensitive nature of Applicant's past behavior, there is always a potential that Applicant may be subject to coercion, exploitation or duress. SB DC ¶ 14c does not apply.

Although Applicant made progress through his court-ordered therapy, it is too soon to conclude Applicant mitigated the concerns raised under Sexual Behavior.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a public trust position by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(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) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant was 35-years-old when he committed these offenses. The offenses reveal a lack of judgment and discretion. While he should be commended for the progress that he has made in his therapy sessions, he remains on probation until June 2009. Not enough time has passed to conclude that Applicant is fully rehabilitated. Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant failed to mitigate the trustworthiness concerns arising under criminal conduct and sexual behavior.

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
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Subparagraph 1.a:	Against Applicant
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Subparagraph 1.b:	Against Applicant
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Paragraph 2, Guideline D:	AGAINST APPLICANT
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Subparagraph 1.a:	Against Applicant
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Subparagraph 1.b:	For Applicant
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Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

ERIN C. HOGAN
Administrative Judge