



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



In the matter of:)
)
-----) ISCR Case No. 09-04014
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco J. Mendez Jr., Esq., Department Counsel
For Applicant: Eric A. Eisen, Esq.

November 22, 2010

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for a security clearance to work in the defense industry. The evidence shows that Applicant—in reaction to learning of his wife’s infidelity—demonstrated questionable judgment by engaging in a pattern of odd if not bizarre conduct during 2002–2004 that, while falling short of the criminal offense of attempt, consisted of preparatory steps (for example, buying a firearm and digging graves) to carry out the murder of his wife’s paramour. Applicant remains married to his wife and has had individual and marriage counseling for the last several years to present. He has made great strides in counseling and his marriage is vastly improved. Nevertheless, insufficient time has passed to fully mitigate the security concerns raised by his questionable judgment. Accordingly, as explained in further detail below, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on March 24, 2010, the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) explaining it was unable to find it is clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the factual basis for the action under the security guideline known as Guideline E for personal conduct. The SOR also recommended that the case be submitted to an administrative judge to decide whether to deny or revoke Applicant's security clearance.

Applicant answered the SOR in a timely fashion and requested a hearing. Thereafter, the SOR was amended on August 6, 2010, by adding new language for ¶ 1.a and by withdrawing ¶¶ 1.e and 1.f. The case was assigned to me August 10, 2010. The hearing took place September 13, 2010. The hearing transcript (Tr.) was received September 20, 2010.

Findings of Fact

Applicant is a 59-year-old employee of a federal contractor. An electrical engineer by training, he is a manager of a system engineering group. He has worked for the same company since 1997. He has an excellent employment record as shown by the favorable evidence produced during the hearing.² He has been married to the same woman for more than 30 years. He and his spouse have four children, the first two were adopted and the second two were their own. The children are now young adults between the ages of 24 and 19.

In 2002, Applicant's spouse revealed to him that she had a multiple-year affair with a coworker. The coworker was also a trusted family friend of Applicant as both families interacted on a regular basis. This news proved devastating to Applicant, as he felt betrayed by both his spouse and the family friend. In particular, Applicant's spouse had tried to end the affair a few years earlier, but her paramour threatened her with disclosure of the affair. Based on this information, Applicant felt his spouse had been blackmailed to continue the affair, and this circumstance greatly angered Applicant.

Following the revelation in 2002, Applicant initially sought and participated in counseling, but discussing the situation proved too difficult and he discontinued

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

² Exhibit B and testimony of character witness.

counseling. Within the next few months, Applicant purchased a firearm, a pistol, and took the required safety course, which included firing the weapon. He never purchased ammunition for the firearm and never fired it again. He told his spouse he bought the firearm because he knew doing so would upset her. Buying the firearm was part of a revenge fantasy of taking action against his spouse's paramour that preoccupied Applicant for the next couple of years. In addition to buying the firearm, it included grave digging (two graves located in the woods), buying a cutting tool, and buying a canvas to wrap the body.

Applicant's digging took place, weather permitting, during the months of about May–September on Saturdays when his spouse was at work. His spouse was aware of his digging activity in general because he bought a collapsible shovel for the task and he would put his dirt-covered clothing in the laundry. Applicant was careful in selecting a site in the woods where he thought his grave-digging activity would not be detected. Likewise, he brought along a book about fossils in the local region to use as a cover story in case he had to explain his digging. Toward the end of the first summer in 2002, he had the impression that someone had discovered the hole, and so he found a new location in the same woods and began digging a second grave. His digging followed the same pattern in 2003 and 2004, when it ended. Applicant never confronted the paramour directly and spoke to him but once in 2002 on the telephone. Likewise, Applicant never went to the paramour's home or place of work with the firearm or any other weapon. Applicant also sold the firearm and resumed counseling, which he has continued on a fairly regular basis until present.³ In addition, Applicant confessed his thoughts and actions to a priest in about 2003 or 2004.⁴

Applicant's activities went undiscovered until about October 2004, when he disclosed the information under questioning by another governmental agency that was processing him for access to sensitive compartmental information (SCI). During subsequent processing and questioning, Applicant disclosed additional derogatory information, to include the following: (1) in 2002, he considered buying a suppressor (silencer) for his firearm, but did not pursue it when he discovered doing so was illegal in his state of residence; (2) in 2003, Applicant's good friend told him that his wife was having an affair, and Applicant offered his help to his friend in killing the paramour, although neither man took any action to do so; (3) from the early 1990s to about 2003, Applicant masturbated, about six times, undetected, in his office at work; and (4) from the early 1990s to about 2000, Applicant masturbated about 30 times, undetected, while driving his car.⁵

³ Exhibit A-1.

⁴ Tr. 91–92.

⁵ Exhibit 2 at 99–100.

In due course, Applicant was denied access to SCI by another governmental agency in 2005, and his access to SCI was revoked by a second governmental agency in 2006. Applicant had two psychological evaluations while contesting these actions.⁶

The first evaluation took place in February 2005, at Applicant's attorney's request, and was conducted by a clinical psychologist experienced in clinical and forensic psychology.⁷ The evaluation concluded that Applicant was not in need of mental-health treatment, but was well advised to continue counseling. The evaluation characterized Applicant's grave-digging activity as "ritualistic behavior [that] is more or less healthy expression of overwhelming feelings. The obsessive compulsive ritual serves the purpose of a non-aggressive expression of emotional anguish and affords relief from the pain of a traumatic experience."⁸ Also, the evaluation concluded that Applicant's grave-digging activity was "an anxiety driven, compulsive ritual that caused no harm to anyone other than to [Applicant] and perhaps to his wife."⁹

The second evaluation took place in July 2005, at request of another government agency, and was conducted by a clinical psychologist.¹⁰ The evaluation concluded that Applicant did not meet the criteria for any diagnosable mental disorder that would impair his functioning, but Applicant did have obsessive compulsive personality traits. The evaluation agreed that Applicant's behavior was best explained by the description of the February 2005 evaluation in that the actual motivation of Applicant's behavior was to antagonize his wife due to his inability to have direct and straightforward communication with his wife. The evaluation went into some detail on this point as follows:

In essence, the poor communication between [Applicant] and his wife led him to use such an indirect approach to make her aware of his anger regarding the [affair]. It appears that he also hoped that his action would upset his wife, as he felt that she had coped with her feelings of guilt more quickly than was appropriate. Although [his] behavior is certainly concerning and highly unusual, there is little evidence that he plans to engage in violent behavior in the future. There is no known history of significant violent behavior in [his] past, considerable time has passed since he became aware of his wife's infidelity, and he is actively engaged in treatment at present. In addition, there is a relatively small chance that such a significant and distressing trigger as discovering his wife's infidelity will recur in [his] life in the future. There appears to be a Moderate risk that [he] would engage in behavior indicative of poor judgment, impulsivity, or

⁶ Exhibits A-2 and A-3.

⁷ Exhibit A-3.

⁸ Exhibit A-3 at 4 of evaluation.

⁹ Exhibit A-3 at 9 of evaluation.

¹⁰ Exhibit A-2.

irresponsibility in the future. For example, if he were to experience another significant stressor, [Applicant] may engage in inappropriate or unusual behavior, but it appears unlikely that violent or illegal behavior would result. As more time passes since the digging behavior, his risk level will continue to decrease.¹¹

Applicant's current psychologist testified at the hearing and presented a written report as well. The psychologist is of the view that Applicant's lengthy therapy has helped him learn to understand and accept his anger and his needs, that he has learned and is learning better ways to express his feelings, and that he better understands the importance of sharing his feelings with his wife and encouraging her to do the same, all of which have improved Applicant's marriage.¹² The psychologist opined that Applicant has features of obsessive compulsive personality disorder, but does not qualify for a valid diagnosis.¹³ The psychologist also opined that Applicant's grave-digging activity and associated mock preparations were indicative of an adjustment disorder.¹⁴ And the psychologist opined that there is no risk that Applicant would engage in similar behavior.¹⁵

Other than the expected stress due to this case, Applicant reports that he now feels great, he believes his family (a huge priority for him) is on the right track, he has a good marriage and relationship with his wife, and his life at work is going well.¹⁶ In short, Applicant stated that his life is the best it has been since he can remember.¹⁷ He admitted having a fantasy of killing his wife's paramour and digging his grave, but he denies any intent to carry it out.¹⁸ He acknowledged that it now sounds ridiculous considering all the effort he put forth, but he felt he had to do something at the time.¹⁹ Concerning his statement about being willing to help his friend kill another man in 2003, Applicant denied any intention to engage in violence. He characterized it as a macho, nonsense statement that he made to express solidarity with and support for his friend

¹¹ Exhibit A-2 at 10 of evaluation.

¹² Exhibit A-1 at 3 of evaluation.

¹³ Tr. 121–122.

¹⁴ Tr. 122.

¹⁵ Tr. 112.

¹⁶ Tr. 92.

¹⁷ Tr. 92–93.

¹⁸ Tr. 94.

¹⁹ Tr. 94.

who was going through a similar difficult experience.²⁰ Applicant's explanation is accepted as credible, and this matter, as alleged in SOR ¶ 1.b, is resolved in his favor.

Law and Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information. The Department of Defense takes the handling and safeguarding of classified information seriously because it affects our national security, the lives of our servicemembers, and our operations abroad.

It is well-established law that no one has a right to a security clearance.²¹ As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."²² Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.²³ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²⁴

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁵ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²⁶ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁷ In addition, an applicant has the ultimate

²⁰ Tr. 68–70.

²¹ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

²² 484 U.S. at 531.

²³ Directive, ¶ 3.2.

²⁴ Directive, ¶ 3.2.

²⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²⁶ Directive, Enclosure 3, ¶ E3.1.14.

²⁷ Directive, Enclosure 3, ¶ E3.1.15.

burden of persuasion to obtain a favorable clearance decision.²⁸ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁹ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.³⁰

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant facts and circumstances, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.³¹ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

Under Guideline E for personal conduct,³² the suitability of an applicant may be questioned or put into doubt due to false statements and credible adverse information that may not be enough to support action under any other guideline. The overall concern under Guideline E is that:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.³³

In assessing the evidence, I have considered the following disqualifying conditions under the guideline:

²⁸ Directive, Enclosure 3, ¶ E3.1.15.

²⁹ *Egan*, 484 U.S. at 531.

³⁰ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

³¹ Executive Order 10865, § 7.

³² AG ¶¶ 15, 16, and 17 (setting forth the security concerns and the disqualifying and mitigating conditions).

³³ AG ¶ 15.

16(c) Credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

16(d) Credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources; and

16(e) Personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Likewise, in assessing the evidence, I have considered the following mitigating circumstances under the guideline:

17(c) The offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

17(d) The individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

17(e) The individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

My assessment of the evidence is largely consistent with an assessment by a security official from another governmental agency who reviewed Applicant's case in 2006.³⁴ That official's assessment is not binding, but it does inform my decision-making process. Applicant's grave-digging activity and associated mock preparations—while perhaps an acceptable means of coping with the emotions he felt when he learned about his wife's infidelity in 2002—went on far too long and was far too extensive to be viewed as a minor aberration. His activities were not isolated, short-term events, but were sustained and planned actions (for example, using the book as a potential cover story). His conduct, even though it took place some years ago, continues to impugn his trustworthiness and good judgment. The same may be said of his masturbation in locations where one may not expect privacy and there is a risk of exposure. Taken together, Applicant's conduct indicates a willingness to engage in high-risk activity while at the same time holding a security clearance.

To conclude, following *Egan* and the clearly-consistent standard, the evidence as a whole justifies current doubts about Applicant's judgment, reliability, and trustworthiness. In reaching this conclusion, I have considered the factors under the whole-person concept³⁵ and note that Applicant was subjected to one of life's most stressful or traumatic events as an adult (his wife's infidelity). Indeed, this case is an example of one of those times when life just whacks you, it knocks you for a loop, due to an unexpected event that affects you, a loved one, a family member, or a close friend. And it is difficult to respond to such an event with grace or aplomb. Nevertheless, Applicant's response to the situation raises serious questions about his judgment, reliability, and trustworthiness. His grave-digging activity and associated mock preparations to carry out the murder of his wife's paramour was far outside the norm, and it is still too soon to safely discount or dismiss these matters as a security concern. Based on the evidence as a whole, I have doubts or concerns about Applicant's security suitability or fitness. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

³⁴ Exhibit 2 at 120.

³⁵ AG ¶ 2(a)(1) – (9).

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline E:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard
Administrative Judge