



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 10-08838

**Appearances**

For Government: Carolyn H. Jeffreys, Esquire, Department Counsel

For Applicant: *Pro se*

October 26, 2011

**Decision**

HARVEY, Mark, Administrative Judge:

On November 28, 2008 in a public park, Applicant solicited sexual activity from an undercover police officer, and he exposed his genitals to the police officer. He received a citation for soliciting a lewd act from the police officer. He failed to disclose this citation on his May 17, 2010 security clearance application. Personal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On May 17, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF-86) (GE 1). On May 5, 2011, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline E (personal conduct). (Hearing Exhibit (HE) 2) The SOR detailed reasons why DOHA could not make the

preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked (HE 2).

On May 24, 2011, Applicant responded to the SOR and requested a hearing. (HE 3) On July 22, 2011, Department Counsel announced she was ready to proceed. On August 1, 2011, DOHA assigned Applicant's case to me. On September 7, 2011, DOHA issued a hearing notice setting the hearing for September 29, 2011. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered three exhibits (GE 1-3) (Tr. 14), and Applicant offered one exhibit. (Tr. 15; AE A) There were no objections, and I admitted GE 1-3 and AE A. (Tr. 14, 15-16) Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR as hearing exhibits. (HE 1-3) On October 12, 2011, I received the hearing transcript.

### **Findings of Fact<sup>1</sup>**

Applicant's SOR response admitted the allegation in SOR ¶ 1.a and denied the allegation in SOR ¶ 1.b. (HE 3) His admissions are accepted as factual findings.

Applicant is a 46-year-old painter working for a defense contractor. (Tr. 5) He is responsible for the contractor's paint department, and he is his company's unit environmental coordinator for hazardous materials. (Tr. 6) In 1984, he earned a graduate equivalency diploma (GED), and in 1986, he completed one year of college. (Tr. 5) He has never served in the military. (Tr. 6) He was married from March 2004 to April 2009. (Tr. 18, 26-27) He does not have any children. (Tr. 27) He has held a security clearance for about 11 years. (Tr. 6, 16-17) There is no evidence of security violations.

### **Personal Conduct**

From about 2005 to November 28, 2008, Applicant went to a local park on several occasions to meet men. (Tr. 17-18, 26) He held a security clearance during this same time period. (Tr. 18) His sexual behavior was "a very private matter," and he did not disclose his sexual behavior to friends and family. (Tr. 18-19)

On November 28, 2008, Applicant was in the public park. An undercover, male police officer walked up to Applicant and Applicant asked what the man liked. (Tr. 22) The police officer responded that he liked everything. (Tr. 22) Applicant said he liked bottoms, and then Applicant pulled his trousers down to his knees. (Tr. 23) Applicant exposed his penis to the police officer. (Tr. 23) He asked the police officer, "Can you handle this?" (Tr. 23)

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<sup>1</sup>Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

The first page and the comments section of the police report discussing the November 28, 2008 incident indicate that the police arrested Applicant. (GE 3 at 1, 4) It also states he was taken “into custody without incident.” (GE 3 at 4) Applicant waived his rights and made a statement about wanting to meet men in the park. (Tr. 24) He admitted that he knew it was illegal to expose his genitals in the park. (Tr. 24; GE 3) At his hearing, Applicant said he did not remember being advised of his rights or making a statement. (Tr. 24) He remembered being searched; however, he did not remember being handcuffed. (Tr. 24) He said the police did not take him to the police station or take his picture for a “mug shot.” (Tr. 25)

Applicant’s May 17, 2010 SF-86 in Section 22a and 22b provides:

## **Section 22: Police Record**

For this item, report information regardless of whether the record in your case has been sealed, expunged, or otherwise stricken from the court record, or the charge was dismissed. You need not report convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607. Be sure to include all incidents whether occurring in the U.S. or abroad.

For questions a and b, respond for the timeframe of the last 7 years (if an SSBI go back 10 years). Exclude any fines of less than \$300 for traffic offenses that do not involve alcohol or drugs.

- a. Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you; are you on trial or awaiting a trial on criminal charges; or are you currently awaiting sentencing for a criminal offense?
- b. Have you been arrested by any police officer, sheriff, marshal, or any other type of law enforcement officer?

Applicant answered, “No” to Sections 22a and 22b. (GE 1) He explained that he received a citation for the criminal case from the incident on November 28, 2008, with a court date on it; however, he never actually went to trial on the incident. (Tr. 19-20) He called the court, and the court staff said that the court did not have any record of the citation, “it just disappeared.”<sup>2</sup> (Tr. 19-20, 25, 31) He went to court on the day indicated on his citation, and his case did not appear on the docket. (Tr. 31) He decided the citation was a warning. (Tr. 20, 25) The case has never been resolved. (Tr. 31)

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<sup>2</sup> The police report indicates that the police officer could not find the citation when he returned to the station. (GE 3 at 4) The police report cited Applicant for solicitation of a lewd act. *Id.* A misdemeanor, non-traffic, police-issued citation for Applicant’s conduct on November 28, 2008, is included in the file. (GE 3 at 6)

On July 21, 2010, an Office of Personnel Management (OPM) investigator confronted Applicant with the information about the police report. (Tr. 20-21; GE 2 at 3) He admitted the incident on November 28, 2008, and said he had engaged in similar conduct about five times previously. (Tr. 28; GE 2 at 4) At his hearing, he said a more accurate number was two or three times. (Tr. 28) Applicant told the OPM investigator that he did not reveal the lewd conduct on his SF-86 because he misread the question. (GE 2 at 3)

Department Counsel argued that Applicant deliberately failed to disclose the incident on his SF-86 because he was embarrassed by what happened, and he did not want anyone to know about it. (Tr. 30) Applicant responded that the incident was “a very private matter to me. Yeah, it is somewhat embarrassing. And I tried to keep it to myself, yes.” (Tr. 30)

Applicant regretted the incident in the park. (Tr. 27) He promised that the incident in the park would not occur in the future. (Tr. 27)

## **Character Evidence**

Applicant’s general manager has known Applicant since January 2009.<sup>3</sup> He describes Applicant as a conscientious, punctual, reliable, and responsible employee. Applicant does an outstanding job, and he recommends reinstatement of Applicant’s security clearance.

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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<sup>3</sup> The source for the facts in this paragraph is an August 10, 2011 letter from the general manager of the government contractor employing Applicant. (AE A)

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication 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 may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein 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. 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 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

### **Analysis**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is under Guideline E (personal conduct).

#### **Personal conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can 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.

AG ¶ 16 describes five conditions that could raise a security concern in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(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;

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

(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.

All five disqualifying conditions apply. On November 28, 2008, Applicant exposed his penis to an undercover police officer after soliciting sexual conduct in a public park. He received a citation for soliciting a lewd act from the police, and the police generated a police report. When he completed his SF-86 on May 17, 2010, he falsely denied that he had a reportable citation. He deliberately failed to disclose the citation because he was embarrassed, and he did not want anyone to know about the incident in the park.

AG ¶ 17 provides seven conditions that could mitigate security concerns including:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (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;
- (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;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;
- (f) the information was unsubstantiated or from a source of questionable reliability; and
- (g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶¶ 17(a), 17(b), 17(d), 17(e), 17(f), and 17(g) do not apply to a sufficient degree to mitigate any SOR allegations. AG ¶ 17(c) applies to the information in SOR ¶ 1.a. Applicant committed a single lewd act on November 28, 2008, almost three years ago. The only victim of his exposure of his genitals was a police officer. Although he sought sexual encounters in the park on other occasions before November 28, 2008, there is no evidence he exposed his genitals in the park on those other occasions. He is truly ashamed and embarrassed about his lewd act. This offense no longer casts doubt on Applicant's trustworthiness. He sincerely stated that he would not commit such an offense in the future.

Applicant's deliberately false statement on his May 17, 2010 SF-86 about having a citation from the police for soliciting a lewd act on November 28, 2008 is recent and serious. He was not credible at his hearing about believing the citation was not

reportable on his SF-86 because it was a warning. No one misled him into thinking this information should not be reported on his SF-86. The question is clear, and his background and hearing statement show that he is an intelligent person. At his hearing, he said he could not remember whether the police handcuffed him on November 28, 2010. Being handcuffed by the police is the type of event that is memorable. He did not want to admit at his hearing that he knew he was arrested because he did not disclose the arrest on his May 17, 2010 SF-86 as required by Section 22b.<sup>4</sup> He was not being fully candid and forthright at his hearing. Personal conduct concerns are not mitigated.

## **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance 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) the 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.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Although the rationale for reinstating Applicant's clearance is insufficient to support a security clearance at this time, there are several factors tending to support approval of his access to classified information. He is a 46-year-old painter, who is

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<sup>4</sup> The SOR did not allege Applicant failed to disclose on Section 22b of his May 17, 2010 SF-86 that the police arrested him on November 28, 2008 for solicitation of a lewd act. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). I have limited my consideration of this non-SOR allegation to the five purposes listed above.



responsible for a defense contractor's paint department. He is also his company's unit environmental coordinator for hazardous materials. He has held a security clearance without security violations for 11 years. His director describes him as conscientious, punctual, reliable, and responsible. Applicant does an outstanding job, and he recommends reinstatement of Applicant's security clearance. There is every indication that he is loyal to the United States and his employer. These factors show some responsibility, rehabilitation, and mitigation.

The whole-person factors against reinstatement of Applicant's clearance are more substantial. He has not mitigated his deliberate and intentional falsification of his May 17, 2010, SF-86. He knew he should have disclosed his citation on November 28, 2008 on his SF-86, and he chose not to do so. He did not disclose the citation because he was embarrassed, and he wanted to keep the information private about exposing his genitals in the park. His explanation that he believed the citation was a warning and not reportable on his May 17, 2010 SF-86 is not credible. He was not credible at his hearing when he stated he did not remember whether the police placed handcuffs on him. His falsification of his May 17, 2010 SF-86 is recent, serious and cannot be mitigated.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude personal conduct concerns are not mitigated. Eligibility for access to classified information 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 E:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for a security clearance is denied.

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MARK HARVEY  
Administrative Judge