



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 04-06152  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Stephanie C. Hess, Esquire  
For Applicant: David F. Chalela, Esquire

June 9, 2008

**Decision**

CURRY, Marc E., Administrative Judge:

On September 27, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its denial of Applicant's request for a security clearance. Specifically, it alleged facts which raise concerns under Guidelines E, Personal Conduct, and D, Sexual Behavior. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), 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 answered the SOR on October 21, 2005, initially requested a hearing, and the case was assigned to another administrative judge. While the hearing was pending, Applicant suffered a light stroke, and his doctor recommended that he not attend the hearing. Subsequently, Applicant requested an administrative determination. On March 13, 2008, the government prepared a File of Relevant Materials (FORM).

Applicant, through counsel, replied on April 30, 2008, and the case was assigned to me on May 16, 2008. Based upon a review of the FORM, eligibility for access to classified information is denied.

### **Ruling of Evidence**

Item 9 of the FORM is a U.S. Merit Systems Protection Board (MSPB) case file. It includes an investigative report prepared by Applicant's then-employer containing, among other things, several adverse witness statements regarding the issue of whether Applicant, between 1996 and 1997, violated his then-employer's sexual harassment policy. In Applicant's SOR Answer, he admits being accused of sexual harassment in 1997, but "denied the conduct that was the basis of the agency's action."

With the exception of two rare circumstances, neither of which apply here, controverted, adverse witness statements are inadmissible (Directive ¶ E.3.1.22). Department Counsel argues that the doctrine of collateral estoppel compels both the admissibility of the entire MSPB file, and a finding that the underlying conduct occurred. However, Applicant's appeal of the sexual harassment case before the MSPB settled before a final judgment was entered. Absent a final judgment in the MSPB case, the doctrine of collateral estoppel is not applicable (*Coffey v. Dean Witter Reynolds, Inc.*, 961 F. 2d 922 (C.A. 10 (Colo.), 1992).

The DOHA process is designed to encourage judges to initially admit contested evidence into the record, then consider the party's objections when deciding what, if any, weight to give that evidence (ISCR Case No. 04-12449 (App. Bd., May 14, 2007)). Moreover, Applicant's counsel, in his Reply, did not object to the witness statements' admissibility. Consequently, I have admitted the entire MSPB file, but have given the encapsulated witness statements minimal weight in reaching my decision.

### **Findings of Fact**

Applicant is a 64-year-old man who has worked as a senior acquisitions analyst for various defense contractors for the past nine years. Before working in the private sector, he had worked in the federal government for the previous 19 years. He has worked on programs involving, among other things, aircraft acquisitions and intelligence. Typically, his work has focused on budgetary, legal, and technical issues. His educational background is unknown from the record. A current coworker describes him as "trustworthy, honest, and reliable" (Reference Letter dated April 16, 2008, as included in Reply).

Applicant is highly active in his community, often organizing neighborhood garage sales and community fairs (Reference letter from neighbor, undated, as listed in Reply at 7). Many neighbors often seek his advice on personal matters (*Id.*).

Applicant has been married for 20 years. Between March and May of 1992, Applicant touched a woman who worked in his building "in a manner that was

unwarranted and unwelcome, and . . . made comments of a sexual nature to the same employee that were unwarranted and unwelcome” (Item 6 at 6). The woman filed a complaint, and Applicant was subsequently administratively charged with conduct unbecoming a federal employee (Item 6 at 4). He was then suspended for three days, ordered to attend weekly therapy, and to provide progress reports of his treatment to his employing agency’s deciding official (*Id.*). He completed the treatment, as ordered (Item 9 at 147).

Three months before this incident, Applicant had attended a general training on sexual harassment prevention (Item 6 at 4).

In March 1997, a female coworker accused Applicant of a pattern of unwanted physical contact and sexual advances including, among other things, visiting her apartment to demand sexual intercourse (Item 9 at 49). This prompted the agency to appoint an investigative officer to conduct an informal investigation (Item 9 at 46, 70). In March 1997, the investigator interviewed both Applicant and his accuser, who gave their testimonies under oath (Item 9 at 72 - 150). A court reporter provided a certified transcription of both interviews (Item 9 at 151). Applicant’s attorney was present at his interview. Also, the investigator interviewed 16 other witnesses and coworkers over a two-month period. Each provided signed, sworn statements.

During Applicant’s interview, he stated that he never had physical contact with the coworker that he initiated (Item 9 at 123). Also, he acknowledged visiting her at her apartment, but asserted that he did so only to help her repair a toilet (Item 9 at 120). Later during the interview, he stated he had never been in contact with the coworker anywhere other than the office (Item 9 at 148 -149).

After the investigation was completed, a senior agency official reviewed it, and on June 10, 2007, concluded that the accuser’s allegations were substantiated, and recommended that Applicant’s employment be terminated (Item 9 at 197). Subsequently, Applicant was fired.

On November 18, 1997, Applicant appealed the decision to the U.S. Merit Systems Protection Board (MSPB). On January 28, 1998, while the appeal was pending, the parties reached an agreement to settle the case (See Item 9 at 234-238). Under the agreement, the agency agreed to reinstate Applicant’s position through March 17, 2000. Also, the agency agreed to characterize the period between Applicant’s release following the investigation and the settlement as a suspension rather than a termination. In exchange, Applicant “voluntarily and irrevocably agre[ed] to apply for and accept a discontinued service retirement on March 17, 2000 . . .” (Item 9 at 235). Also, the agreement prohibited Applicant from contacting any federal employees unless instructed, and it restricted him to working from home. He was not entitled to any “within-grade step increases” during the reinstatement period, and he was not to be paid if no work-at-home assignments were available. Once Applicant retired, he was not to seek any employment that would require personal contact with federal government employees within the agency where he had worked.

On April 4, 2003, Applicant completed a security clearance application. He answered "No" in response to Question 20 (*Your Employment Record - Has any of the following happened to you in the past 7 years? - Fired from job - Quit a job after being told you'd be fired - Left a job by mutual agreement following allegations of misconduct - Left a job by mutual agreement following allegations of unsatisfactory performance - Left a job for other reasons under unfavorable circumstances*). He contends the circumstances of his departure were not adverse because he worked for two years after the settlement agreement, and did not retire until the agency abolished the position (Answer at 2).

During the security clearance investigative process, a Defense Security Services (DSS) investigator interviewed him about the 1997 sexual harassment allegations. He denied sexually harassing the coworker, but acknowledged visiting her twice at her apartment and having consensual sexual intercourse with her on each occasion (Item 10 at 2).

In his Answer, Applicant states that he learned from the 1993 experience, and has not engaged in any inappropriate workplace behavior since then. He does not consider the 1996 affair to constitute such behavior "because it did not occur in the workplace" (Item 3 at 3).

Applicant also revealed to the DSS investigator another incident involving a former coworker that prompted a sexual harassment complaint. It occurred while on business travel when Applicant, while in the coworker's hotel room retrieving notes from a meeting earlier that day, pushed her to the bed "in a playful fashion" (Item 10 at 3). Although it occurred before the March 1997 allegation, the exact date is unclear from the record.

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

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 overarching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a 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 classified 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 security decision.

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

## **Analysis**

### **Guideline E, Personal Conduct**

Under this guideline, “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” (AG ¶15). Here, Applicant engaged in extramarital sexual intercourse with a coworker who later accused him of a pattern of sexual harassment. This occurred four years after the same employer had disciplined him for sexually harassing another employee, and required him to attend six weeks of counseling. AG ¶ 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 . . .,” applies.

When Applicant completed his security clearance application, he omitted the relationship between the 1997 sexual harassment allegations and the 2000 job departure from his security clearance application in response to Question 20. This raises the issue of whether AG ¶16(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,” applies. Applicant contends that he did not leave the job under adverse circumstances because he was reinstated after negotiating a settlement agreement, and worked for another two years before retiring. After reviewing the settlement agreement and the multiple contradictory explanations he provided throughout both the sexual harassment investigatory process and the security clearance investigatory process about his relationship with the coworker who filed the 1997 complaint, I conclude that his security clearance application omission constitutes an intentional falsification. AG ¶¶16(a) and 16(e) apply without mitigation. Applicant has failed to mitigate the personal conduct security concern.

### **Guideline D, Sexual Behavior**

Applicant went to a general sexual harassment training three months before sexually harassing a coworker in 1993. After being disciplined for the 1993 incident, he attended six weeks of counseling. Approximately four years later, he had an extramarital affair with a coworker who later accused him of sexual harassment. The recurrent nature of this sexual misconduct also generates security concerns under the sexual behavior guideline, as defined in its introductory paragraph as follows:

*The Concern:* 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 (AG ¶12).

Specifically, the disqualifying conditions under AG ¶¶13(c), “sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress,” and 13(d), “sexual behavior . . . that reflects lack of discretion or judgment,” apply.

I have considered the mitigating conditions and conclude none apply. Applicant’s most recent episode of sexual misconduct with coworkers occurred more than 10 years ago, and there is no record evidence of any such behavior since then. He has somewhat minimized the vulnerability to coercion by disclosing the 1997 extramarital affair to his wife. However, the sexual misconduct was repetitive, and at least one recurrence occurred after attending six weeks of counseling. I was particularly troubled by his belief set forth in his Answer that the 1997 extramarital affair with a coworker did not constitute inappropriate workplace behavior because it occurred at her apartment rather than on the job. The remoteness of the sexual misconduct is outweighed by the absence of rehabilitation. Applicant has failed to mitigate the sexual behavior security concern.

### **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) 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 security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I have addressed the whole person factors in the Personal Conduct and Sexual Behavior sections of the Decision. Applicant's lack of credibility and his repeated lapses in judgment render him an unacceptable security risk. Clearance 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
Subparagraphs 1.a - c:	Against Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraphs 2.a - 2.b:	Against Applicant

### **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 security clearance. Eligibility for access to classified information is denied.

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MARC E. CURRY  
Administrative Judge