

DATE: December 17, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17539

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Williams Fields, Department Counsel

FOR APPLICANT

George H. Edwards, Esquire

SYNOPSIS

In 1994, the Applicant was a military officer and relieved of command for sexually harassing a soldier under his command. He received a 1995 Letter of Reprimand (LOR) for conduct unbecoming an officer and indecent assault. The Applicant did not give a false answer on his security clearance applicant. The Applicant made a 2001 false statement indicating he had been falsely accused of sexual harassment. Because of the misconduct and his 2001 false statement, clearance is denied.

STATEMENT OF THE CASE

On April 1, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On May 1, 2002, the Applicant answered the SOR and requested a hearing. The case was assigned to me on June 27, 2002. A Notice of Hearing was issued on August 14, 2002, scheduling the hearing which was held on September 11, 2002.

The Government's case consisted of three exhibits (Gov Ex). The Applicant relied on his own testimony and three exhibits (App Ex). The transcript (tr.) of the hearing was received on September 18, 2002.

Department Counsel moved to amend Subparagraph 1.a of the SOR to changed the date of the SF 86 from July 14, 2000 to December 21, 1999. (tr. 12) There being no objection to the motion, the motion was granted.

FINDINGS OF FACT

The SOR alleges personal conduct (Guideline E). The Applicant admits receiving the LOR and admits answering "no" to question 20 on his Questionnaire for National Security Positions, Standard Form (SF) 86. He denied making a false statement to a Special Agent of the Defense Security Service (DSS).

The Applicant is 49-years-old, has worked for a defense contractor since December 1999, and is seeking to maintain a security clearance.

In 1994, an AR 15-6⁽²⁾ investigation was conducted concerning allegations that on October 28, 1994, the Applicant made sexual advances toward a female enlisted member in his command in her dormitory/barracks room. Following the AR 15-6 investigation a Criminal Investigation Command (CID) investigation was made. (Gov Ex 2) Initially, the Applicant told the CID special agent (SA) he had never touched the woman, and he was being framed by members of the battalion. The Applicant changed his story and said before leaving her room the woman approached him and he put his hand on her shoulder. He then changed his story and said just before leaving the room, he gave the woman a kiss on the cheek. He then admitted he had actually kissed her on the lips and stuck his tongue into her mouth during the kiss. The Applicant admitted he asked the woman to meet him at the Officers Club thinking he might be able to have sex with her.

The Applicant told the CID SA he had lied during the AR 15-6 investigation, because he was embarrassed. He also told the CID SA he was going to tell the AR 15-6 Investigating Officer (IO) everything. In a written statement given to the CID SA, the Applicant admitted hugging and kissing the woman and asking her to meet him at the Officer's Club with the intention of a sexual liaison. (Gov Ex 2) The CID investigation determined the Applicant had indecently assaulted the woman.

In January 2001, when the Applicant described the 1994 events to a Defense Security Service (DSS) special agent, his explanation was completely different than what he had previously told the CID SA. In January 2001, the Applicant made a signed, sworn statement (Gov Ex 3) in which he states:

I resigned from the Army after being falsely accused of sexual harassment. I entered a female dormitory during a 15 day inspection. I asked for a general courts martial, and was refused. I was not allowed to prove my innocence, so I resigned my commission.

In December 1994, as a direct result of his misconduct in sexually harassing a female soldier under his command and lying under oath at a 15-6 investigation into this matter, the Applicant was relieved of command. (App Ex A) His intermediate rater did not recommend the Applicant for promotion or for any additional schooling. The senior rater approved the Applicant's relief for cause based on the serious misconduct and, therefore, could not recommend the Applicant for promotion or schooling.

In December 1994, the Applicant was reassigned to be a division chief. In February 1995, the Applicant received a LOR for conduct unbecoming an officer and indecent assault. He was not reduced in rank, fined or had money withheld from him. His request for a court-martial was denied. He did not resign in lieu of court-martial. When the Applicant was relieved of command and moved to a new job, he knew he was no longer competitive for further promotion. (tr. 47) Although he could have stayed in the service at his current rank, he chose to leave (tr. 47) knowing he had gone as far as he would go. He was not fired from his job, he was not told to resign, he was not forced out, nor was it demanded he leave the service. He left because he knew there was no additional advancement.

The Applicant Officer Evaluation (App Ex C) which covered the period from December 3, 1994 through August 11, 1995⁽³⁾ indicated the Applicant was a top performer who had excelled in executing his duties as a division chief. His rater stated the Applicant "could most certainly serve successfully at the grade of Colonel." (App Ex C) His senior rater indicated the Applicant performance had been outstanding. In September 1995, the Applicant retired from the service having completed 20 years of honorable service. Except for this incident, the Applicant would have stayed in the service.

In December 1999, the Applicant completed an SF 86 (Gov Ex 1) and answered "no" to Question 20., which asked if during the previous 10 years he had: been fired from a job; quit a job after being told he would be fired; left a job by mutual agreement following allegations of misconduct; left a job by mutual agreement following allegations of unsatisfactory performance; or left a job for other reasons under unfavorable circumstances.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition

for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Personal Conduct (Guideline E) The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying also include: E2.A5.1.2.

1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances. (E2.A5.1.2.1.)
2. The deliberate omission, concealment, or falsification of relevant and material 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. (E2.A5.1.2.2.)
3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination. (E2.A5.1.2.3.)

Conditions that could mitigate security concerns include:

None Apply

BURDEN OF PROOF

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness.

In December 1994, the Applicant was relieved of command as a direct result of his misconduct in sexually harassing a female soldier under his command and for lying under oath at a 15-6 investigation into this matter. In February 1995, the Applicant received an LOR for conduct unbecoming an officer and indecent assault. His conduct was a violation under the UCMJ. Disqualifying Conditions (DC) 1 ⁽⁴⁾ and 5 ⁽⁵⁾ apply to this conduct.

In 1994, the Applicant initially told the CID SA he was being framed by members of his battalion. He later changed his story to admit he had actually kissed the woman, stuck his tongue into her mouth during the kiss, admitted he asked the woman to meet him at the Officers Club thinking he might be able to have sex with her, and admitted he had lied during the AR 15-6 investigation because he was embarrassed. The CID investigation determined the Applicant had indecently assaulted the woman. In January 2001, the Applicant gave a signed, sworn statement in which he materially altered his version of what had occurred. Instead of making the same admissions he made to the CID SA in 1994, a time much closer to when the events occurred, he chose to say he had been falsely accused of sexual harassment. I believe his 1994 statements to be true and his 2001 statement to be false. His more recent statement is a falsification of material facts. DC 3 ⁽⁶⁾ apply.

None of the Mitigating Conditions (MC) apply. MC 2 ⁽⁷⁾ does not apply because the falsifications were not an isolated

incident since the Applicant lied to the AR 15-6 IO in 1994 and lied in his sworn statement in 2001. MC 3-(8) does not apply because the Applicant has not corrected the falsification and, contrary to what he told the CID SA in 1994, now insists he was falsely accused on sexual harassment. MC 4-(9) does not apply because there is no indication the Applicant actions were caused by improper advice. MC 5-(10) does not apply because vulnerability to coercion, exploitation, or duress is not an issue. MC 6-(11) does not apply because refusal to cooperation is not an issue. Because disqualifying conditions apply and none of the mitigating conditions apply, I find against the Applicant as to SOR subparagraphs 1.a and 1.c.

When the Applicant completed his SF 86, he answered "no" to question 20 concerning his employment record. The Applicant's final evaluation indicates his duty performance was outstanding and he "could certainly serve successfully" in the next higher grade. Following the 1994 incident the Applicant knew he would not be promoted again and left the service knowing he had gone as far as he would go. However, he was not fired from his job, he was not told to resign, he was not forced out, it was not demanded he leave. He left because he knew there would be no additional advancement. It has not been established his answer to question 20 was false. I find for the Applicant as to SOR subparagraph 1.b.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Personal Conduct (Guideline E): AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: Against the Applicant

DECISION

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

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. Army Regulation 15-6 is a regulation allowing commanders to appoint an inquiry officer (IO) to investigate specific matters and tasks the IO to make specific findings and recommendations.
3. This was the Applicant's final Officer Evaluation before leaving the service.
4. DC 1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances. (E2.A5.1.2.1.)
5. DC 5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the

agency. (E2.A5.1.2.5.)

6. MC 3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination. (E2.A5.1.2.3.)

7. MC 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. (E2.A5.1.3.2.)

8. MC 3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts. (E2.A5.1.3.3.)

9. MC 4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided. (E2.A5.1.3.4.)

10. MC 5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress. (E2.A5.1.3.5.)

11. MC 6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information. (E2.A5.1.3.6.)