

DATE: November 24, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-20163

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esquire, Department Counsel

FOR APPLICANT

Bill Graham, Personal Representative

SYNOPSIS

Applicant's personal conduct and sexual behavior in Country #1 were deemed to be "unbecoming a federal supervisor," so in February 1999 his agency issued a Notice of Proposed Removal from his federal agency position. While Applicant was allowed to resign, he was permanently barred from serving in any position in Country #1 and was barred for one year from serving with the federal agency. Applicant's defenses were not credible in the light of the adverse statements taken from three women he supervised and in light of his admission that he had an improper sexual relationship with a woman he supervised. His alcohol-related conduct no longer raises security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on October 29, 2002. The SOR details reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. ⁽¹⁾ The SOR alleges specific concerns over personal conduct (Guideline E), sexual behavior (Guideline D) and Alcohol Consumption (Guideline G). Applicant responded to the SOR in a November 8, 2002 answer where he admitted allegations 1.a., 1.d., and 3.a, but denied the remainder and requested a hearing.

The case was assigned to Department Counsel who on June 3, 2003, attested it was ready to proceed. The case was assigned to another judge on July 2, 2003, and was reassigned to me on July 14, 2003. Subsequently, a mutually convenient date for hearing was agreed to. A Notice of Hearing issued on July 24, 2003, set the matter for August 27, 2003, at a location near where Applicant works and lives.

At the hearing the Government offered three exhibits which were admitted into evidence and called Applicant as an adverse witness. (Exhibits 1-3 ⁽²⁾) Applicant's personal representative called three other witnesses and offered one exhibit which was admitted into evidence. (Exhibit A) The transcript (TR) was received on September 8, 2003.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 57 years old, has been an employee of a defense contractor in State #1 since August 1999. In January 2000 he applied for a security clearance by completing a Security Clearance Application (Standard Form 86) (SF 86). He was unemployed from April to August 1999. From 1992 to 1999 he was in a federal position (WS-16) as chief of housing maintenance in an overseas assignment in Country #1. He was granted a secret clearance in January 1992. Earlier he served in the U.S. military from 1964 to 1972.

Applicant was married in November 1964 and has two children, born in 1966 and 1967.

Personal Conduct, Sexual Behavior, and Alcohol Consumption

In his Defense Security Service (DSS) June 2001 interview Applicant admitted that he consumed alcohol to excess on a daily basis when he was a civil service employee assigned to Country #1 from December 1984 to 1989. From December 1989 to 1990 he was employed in the U.S. in State #2 and did not drink to the point of intoxication. From 1990 to January 1992, he was assigned in the U.S. in State #3 where he continued to drink but not to the point of intoxication. From January 1992 to March 1999 he was assigned to Country #1 he continued to drink; he would decrease his consumption when he was on call 24 hours a day. From April 1999 to June 2001 he consumed two to three mixed drinks or beer per day after work. He is usually intoxicated once a year. He has never had an alcohol-related accident. Applicant's wife testified that she sees no evidence that he currently drinks to excess.

In his SF 86 Applicant admitted he accepted deferred retirement in April 1999 following allegations of misconduct. While he was assigned in Country #1 Applicant supervised 350 people and oversaw maintenance for over 8,000 housing units in eleven different military installations. Almost his entire work force was Country #1 nationals under a master labor contract. Applicant had influence over their promotions. He selected three positions personally: his secretary and the controllers who scheduled the daily maintenance. In his position as a supervisor he had responsibilities with respect to Equal Employment Opportunity (EEO) and received EEO training, briefings, and materials. He admits he was very much aware of the agency EEO policies and that as a supervisor it was his responsibility to enforce these EEO policies. However, his conduct as detailed below showed that he disregarded the agency's sexual harassment policies.

In February 1999 Applicant was issued a Notice of Proposed Removal from his position because of "conduct unbecoming a federal supervisor" as a result of an investigation into his sexual misconduct. During the investigation of Woman #3's complaint, the investigator learned of Applicant's sexual harassment actions towards other women Applicant supervised, Woman #1 and Woman #2. In his reply Applicant admitted we had an affair with Woman #1, but he denied the charges with respect to Woman #2 or Woman #3.

- Woman #1 was Applicant's secretary from July 1993 to August 1998; she also acted as a translator for him. Woman #1 told the agency investigator that there were several non-consensual sexual incidents while she was Applicant's secretary. During her first week on the job, Applicant asked her to lunch and asked her if she had any previous sexual experience, which she thought was too personal a question. She reported to the investigator several incidents where he touched her inappropriately as well as several incidents from 1995-96 where Applicant would call her into his office and require her to have sexual contact after normal duty hours. Woman #1 told the investigator she did not report these incidents at the time because "in local culture a woman is at a disadvantage when this type of conduct is reported." Applicant admits that Woman #1 had previous experience as a licensed practical nurse and helped him when he had medical problems in 1995. He had some paralysis in his legs and was unable to walk very well. During that period he worked out of his home for a month. Woman #1 would bring papers to his home and massage his legs. Applicant admits he engaged in a sexual relationship⁽³⁾ with Woman #1 from June 1995 to August 1995. Since he was her supervisor, Applicant admits "that it was inappropriate for a supervisor to have an affair with a subordinate." He told his wife about this affair in 1995 when he was recovering from surgery, and they were reconciled. reported Applicant touched her inappropriately once at a housing unit and once at an officer's house. He would

also touch her inappropriately on random occasions in the office from October 1997 to November 1998.

- In November 1998 Woman #3 ⁽⁵⁾ filed an official sexual harassment charge ⁽⁶⁾ concerning Applicant with an agency official who in December 1998 appointed someone to investigate this complaint. The Notice of Proposed Removal reports an incident with Woman #3 where they went to a vacant housing unit where Applicant grabbed her and asked if she was "open-minded." Even though she rejected his advances, he continued to make advances until she left the unit. Applicant was reported to have asked, "Now did I upset you?" She replied, "Yes, you did." He responded "Well, I'm just a dirty old man." She replied, "Yes, you are."

Applicant was removed from his federal position effective April 1999 and appealed his removal to the Merit Systems Protection Board (MSPB). As part of an October 1999 settlement agreement, Appellant agreed to resign instead of being terminated as he could defer his retirement. Under the settlement agreement he paid his own attorney's fees. Applicant was barred permanently from serving in any position in Country #1 and barred from any position with the agency for one year.

References

A neighbor of Applicant's testified on his behalf that he trusted him as a neighbor.

Applicant's supervisor who has known him since November 2000 testified that he was an excellent worker.

A friend who knew Applicant when he worked in Country #1 from 1993-95 stated that he had great respect for Applicant.

A former supervisor from his time working in Country #1 wrote a letter in 1999 endorsing Applicant for his technical expertise.

A friend of his in State #1 praised Applicant as a "true friend, confidant, and person of very strong character."

A neighbor who has known Applicant for five years endorsed Applicant as a hard worker and an honest and trustworthy individual.

An individual who worked for Applicant from 1986 to 1990 endorsed him as an excellent foreman.

An individual who was his supervisor from 1985-92 in Country #1 stated he selected Applicant for a promotion because of his technical expertise and demonstrated ability to supervise a large work force.

An individual who reported to Applicant in 1996 and knew him previously as a co-worker stated that Applicant had the respect of his subordinates and supervisors.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed relevant Adjudication Guidelines as set forth below :

Guideline E - Personal Conduct

Conduct involving questionable judgment, untrustworthiness, unreliability, 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:

1. Reliable, unfavorable information provided by associates, employers, co-workers, neighbors, and other acquaintances;

4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;
5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency;

Conditions that could mitigate security concerns include:

None

Guideline D - Sexual Behavior

The Concern: Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress or reflects lack of judgment or discretion. ⁽⁷⁾ Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance.

Conditions that could raise a security concern and may be disqualifying include:

4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

Conditions that could mitigate security concerns include:

None

Guideline G --Alcohol Consumption

Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.

Conditions that could raise a security concern and may be disqualifying include:

5. Habitual or binge consumption of alcohol to the point of impaired judgment;

Conditions that could mitigate security concerns include:

2. The problem occurred a number of years ago and there is no indication of a recent problem;

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance.

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Personal Conduct

The Government established security concerns over Applicant's personal conduct which falls with the following Disqualifying Conditions (DC): (1) reliable, unfavorable information provided by associates, employers, co-workers,

neighbors, and other acquaintances;

(4) personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail; and (5) a pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency. Even though he knew the EEO rules prohibited such conduct, Applicant engaged in a sexual relationship with Woman #1 from June 1995 to August 1995 while he was her supervisor. Applicant concedes "that it was inappropriate for a supervisor to have an affair with a subordinate." Further, while Applicant claimed the relationship was consensual, Woman #1 told the agency investigator that the relationship was not mutual, but she did not report the incidents because of the potential for stigma in the local culture and her fear that no action would be taken. Also in violation of EEO rules, Applicant made improper advances towards two other women he supervised. Women #3 reported his inappropriate conduct to a senior agency official who instigated an investigation. After the agency investigation was complete, the agency in February 1999 issued a Notice of Proposed Removal from his position because of his "conduct unbecoming a federal supervisor." Although in his reply he denied the charges with respect to Woman #2 or Woman #3, he was removed effective in April 1999. He appealed his removal to the Merit Systems Protection Board (MSPB). As part of an October 1999 settlement agreement, Applicant agreed to resign instead of being terminated as he was able to defer his retirement. The Settlement Agreement barred him permanently from serving in any position in Country #1 and barred from any position with the agency for one year. While he advised his wife of his affair with Woman #1, he did not advise her of his sexual advances towards Women #2 and #3. This conduct establishes Applicant's questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations and could indicate that he may not properly safeguard classified information.

While Applicant offered references who think highly of his technical and management expertise, that evidence is not sufficient to counterbalance his repeated poor judgment in engaging in conduct that was prohibited by federal agency policies and regulations on sexual harassment. Hence, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraph 1.a., 1.b., 1.c. and 1.d. under SOR Paragraph 1.

Sexual Behavior

Applicant's conduct discussed above also raises security concern under DC 4, as his sexual behavior in Country #1 reflected his lack of judgment or discretion. Applicant admits improper sexual contact with Woman #1. While he denies any improper conduct with Woman #2 and #3, the agency investigation which was admitted into evidence, documents his sexual misconduct with each of these three women that he supervised as detailed in the Findings of Fact. Applicant admits he was knowledgeable of the agency EEO policies and that as a supervisor it was his responsibility to enforce these EEO policies. However, his conduct as detailed above shows that he disregarded the agency's sexual harassment policies and engaged in conduct unbecoming a federal supervisor when he was a civil servant in Country #1.

While Applicant offered references who think highly of his technical and management expertise, that evidence is not sufficient to counterbalance his repeated poor judgment in engaging in sexual behavior with women he supervised that was prohibited by agency policies and regulations on sexual harassment. Since he continues to deny he engaged in any improper conduct with Women #2 and #3, there is insufficient evidence of mitigation or reform of his conduct. Hence, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraph 2.a., 2.b. and 2.c. under SOR Paragraph 2

Alcohol Consumption

The Government has security concerns over Applicant's past alcohol abuse where he admits he drank to excess in the 1984-89 period, but there is no indication he was ever diagnosed with an alcohol abuse problem. Thus, Applicant's conduct falls with DC 5, habitual or binge consumption of alcohol to the point of impaired judgment. On the other hand conditions that could mitigate security concerns (MD) include: MC 2, the problem occurred a number of years ago and there is no indication of a recent problem. After considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 3.a. under SOR Paragraph 3.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors

set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Paragraph 2. Guideline D: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Paragraph 3. Guideline G: FOR APPLICANT

Subparagraph 3.a.: For 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.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
2. Exhibit 3A is a U.S. Merit Systems Protection Board (MSPB) Initial Decision issued August 1999 after Applicant appealed the agency action to remove him from his supervisor position in April 1999; the October 1999 Settlement Agreement; the February 1999 Notice of Proposed Removal; the inquiry report submitted by the military investigator, including statements. Exhibit 3B is Applicant's Civilian Performance and Promotion Appraisals, job description, and Notification of Personnel Actions (SF 50). Exhibit 3C is a copy of the agency's Equal Opportunity and Treatment Policy as well as the Sexual Harassment policy of the agency as well as the implementing instruction, and educational materials distributed to employees. Exhibit 3D is additional agency educational materials distributed to employees. (TR 13-16; 23)
3. In his DSS Statement of June 2001 Applicant described the sexual relationship with Woman #1 as "mutual" and claimed they never engaged in anything of a "sexual nature" while in the workplace or during the course of their duties. He would meet her at the "Love Monkey Motel" or his home during the affair. Woman #1 told the agency investigator that the relationship was not mutual, but she did not report the incidents because of the potential for stigma in the local culture and her fear that no action would be taken.
4. Given the agency investigator's report, I do not find credible Applicant's denial in his DSS statement of June 2001 that he had no sexual contact with Woman #2 except for having hugged her "as this was customary in our workplace."

5. In his DSS Statement of June 2001 Applicant attributes Woman #3's complaint about him to her being bitter because he once counseled her to stop showing public displays of affection with another employee.

6. Given the agency investigator's report, I do not find credible Applicant's denial in his DSS statement of June 2001 that he had no sexual contact with Woman #3. He admits only that he inspected housing units and had coffee with her.

7. The adjudicator should also consider guidelines pertaining to criminal conduct (Guideline J); or emotional, mental, and personality disorders (Guideline I), in determining how to resolve the security concerns raised by sexual behavior.