

DATE: March 31, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-01387

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 41-year-old security guard for a defense contractor, had several extra-marital affairs and took leave from her place of duty without so annotating her time card. Applicant successfully mitigated sexual behavior, personal conduct, and criminal conduct personnel security concerns. Clearance is granted.

STATEMENT OF THE CASE

Applicant, an employee of a defense contractor, applied for a security clearance. The Defense Office of Hearings and Appeals (DOHA), the federal agency tasked with determining an applicant's eligibility for access to classified information, declined to grant Applicant a clearance. In accordance with the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR) on 11 December 2002 detailing why a clearance was not granted and recommending Applicant's case be referred to an administrative judge to determine whether the clearance should be denied/revoked. In the SOR, DOHA alleged Applicant failed to meet the personal conduct (Guideline E), criminal conduct (Guideline J), and sexual behavior (Guideline D) personnel security guidelines.

Applicant answered the SOR in writing on 26 December 2002 and 27 January 2003. The case was originally assigned to me on 19 February 2003. On 13 arch 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of two exhibits. Applicant testified on her own behalf, called one witness to testify, and submitted 10 exhibits at the hearing. A transcript (Tr.) of the proceeding was received on 21 March 2003.

FINDINGS OF FACT

Applicant is a 41-year-old security guard for a defense contractor. Tr. 47. Prior to accepting the security guard position, Applicant had worked as a maintenance employee for the same defense contractor. She currently possesses a security clearance. Tr. 20.

Applicant was married to her first husband from 1976-1982. However, after about 1978, the couple had several periods of estrangement and separation. Tr. 41. In 1979, Applicant had a sexual affair with a man to whom she was not married. Answers. After their divorce in 1982, Applicant and her ex-husband re-married in 1984. Tr. 42. In 1985, they divorced again. *Id.*

Applicant married a different man in 1988, separated from him in 1991, and filed for divorce. Tr. 42-43. Applicant's husband refused to sign the paperwork and the divorce was eventually dropped. In 1998, Applicant's husband filed for divorce and alleged adultery as one of the grounds so that he would not have to distribute property equitably. Tr. 26; 43. Applicant's husband did not finalize the divorce, but she did in January 2003. During her marriage to her second husband, Applicant had sexual affairs with three men. All of these affairs occurred while Applicant was separated from her husband.

In her statements to DSS agents, Applicant never denied having sexual relationships with men other than her husbands. Exs. 1, 2. She simply refused to accept the characterization of these affairs as extra-marital. Although she was still married during these affairs, she was separated from her husbands and there was no chance of reconciliation. She understood that she could live separate and apart from her husband. Tr. 25; Ex. G at 1. Although Applicant tried to keep the affairs quiet, some of her family, friends, and professional acquaintances were aware of them. Ex. 2 at 2.

While Applicant was working as a maintenance employee, she took an hour or two leave per month without annotating it on her time card and without getting the express permission of her supervisor. Ex. 2 at 1. In a 31 July 2001 statement given to a DSS agent, Applicant stated, "At no time have I ever left the job without being excused or without having taken appropriate leave." Ex. 1 at 2. Nevertheless, Applicant's supervisor gave her authority to take small periods of time off without annotating her time card as long as her work was done well and she did not make it a habit. Tr. 52-53, 58.

POLICIES

"[N]o 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 occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other 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. Directive ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2. *See* Exec. Or. 12968 § 3.1(b).

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. May 9, 2001). Once the Government has established a prima facie case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* 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). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See Exec. Or. 12968 § 3.1(b).

CONCLUSIONS

Guideline D-Sexual Behavior

In the SOR, DOHA alleged under Guideline D that Applicant had four extra-marital affairs and had sex with her supervisor in an automobile at the work site.

Under Guideline D, 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. Directive ¶ E2.A4.1.1. The following conditions are possibly applicable and could raise a security concern in this case:

- (1) Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress. Directive ¶ E2.A4.1.2.3.
- (2) Sexual behavior of a public nature and/or which reflects lack of discretion or judgment. Directive ¶ E2.A4.1.2.4.

The following mitigating conditions may be applicable to Applicant's case.

- (1) The behavior was not recent and there is no evidence of subsequent conduct of a similar nature. Directive ¶ E2.A4.1.3.2.
- (2) There is no other evidence of questionable judgment, irresponsibility, or emotional instability. Directive ¶ E2.A4.1.3.2.
- (3) The behavior no longer serves as a basis for coercion, exploitation, or duress. Directive ¶ E2.A4.1.3.4.

The only evidence that Applicant had sex in public with her supervisor is a statement given by an unnamed individual to an agent investigating Applicant's security worthiness. That statement is hearsay, and I have no basis upon which to judge its credibility. Applicant and her former supervisor both denied having any sexual relationship or being in a car together. After closely observing their demeanor and listening to their testimony, I am convinced of their credibility.

"[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2 1996). In this case, however, the Government failed to establish the existence of any of those criteria. There is no evidence that these affairs indicated a lack of discretion or judgment or made her vulnerable to coercion, exploitation, or duress. Although she did not want these affairs to become public knowledge, neither did she hide them from her family, friends, and some of her co-workers. She was not vulnerable to coercion, exploitation, or duress.

Even if I had concluded that the Government had established a prima facie case, I would still rule for Applicant under this Guideline. Applicant has mitigated any security concerns. The affairs are not recent, were done while she was separated from her spouses, were not conducted at the same time, and she never denied them. Under the circumstances, my finding is for Applicant.

Guideline E-Personal Conduct

In the SOR, DOHA alleged under Guideline E that, while Applicant was married, she had several sexual affairs and then lied about the affairs to Defense Security Service (DSS) agents and in a signed, sworn written statement she provided them. DOHA also alleged Applicant falsified her time card by failing to record absences from work of approximately one to two hours each month.

Under Guideline E, 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. Directive ¶ E2.A5.1.1. The following conditions could raise a security concern in this case and could be disqualifying:

- (1) Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances. Directive ¶ E2.A5.1.2.1.
- (2) 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. Directive ¶ E2.A5.1.2.3..
- (3) 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. Directive ¶ E2.A5.1.2.4.
- (4) A pattern of dishonesty or rule violations. including violation of any written or recorded agreement made between the individual and the agency. Directive ¶ E2.A5.1.2.5.

The following applicable conditions could mitigate the security concerns in this case:

- (1) The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability. Directive ¶ E2.A5.1.3.1.
- (2) The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress. Directive ¶ E2.A5.1.3.5.

The Government established a prima facie case that Applicant deliberately provided false information to DSS agents investigating her security worthiness by asserting she did not have extra-marital affairs and by denying she absented herself from work without annotating her time card or getting permission from her supervisor. However, Applicant mitigated the security concerns.

There is no evidence Applicant ever denied her sexual affairs. She simply refused to accept the characterization of those affairs as extra-marital. While she was still married at the time of these affairs, she believed she was authorized to live separate and apart from her husband and that included the option of carrying on sexual affairs.

Applicant now admits that she took off one to two hours a month from her job, but did not annotate it on her time card. Yet, her supervisor at the time testified that he granted Applicant authority to take some time off as long as her duties were performed and she did not make it a habit. The supervisor also testified that Applicant kept her part of the bargain by performing her duties well. Under the circumstances, I cannot conclude that Applicant deliberately falsified the information she provided to secure a clearance. The finding is for Applicant.

Guideline J-Criminal Conduct

In the SOR, DOHA alleged under Guideline J that Applicant's denial in her signed, sworn statement of having extra-marital affairs and leaving work without permission amounted to violations of 18 U.S.C. § 1001.

Under Guideline J, a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Directive ¶ E2.A10.1.1. The following applicable conditions could raise a security concern and may be disqualifying:

- (1) Allegations or admission of criminal conduct, regardless of whether the person was formally charged. Directive ¶ E2.A10.1.2.1.
- (2) A single serious crime or multiple lesser offenses. Directive ¶ E2.A10.1.2.2.

The following conditions could apply to this case and mitigate the security concerns:

- (1) The crime was an isolated incident. Directive ¶ E2.A10.1.3.2.
- (2) There is clear evidence of successful rehabilitation. Directive ¶ E2.A10.1.3.6.

Under 18 U.S.C. § 1001, it is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation, or to make or use any false writing "in any matter within the jurisdiction of the executive branch of the Government of the United States." The granting of security clearances is a function of the executive branch of Government. *See Egan*, 484 U.S. at 527. The term "false," as used in § 1001, means "more than simply incorrect or untrue. An intent to deceive or mislead is required under the act . . ." *United States v. Lange*, 528 F.2d 1280, 1286 n.10 (5th Cir. 1976).

As discussed above, Applicant never denied that she engaged in sexual affairs with four men while she was married. She simply refused to accept the characterization of them as extra-marital, or as immoral. Under these circumstances, it is doubtful that her quibbling over the term "extra-marital" is relevant or material to a determination of her security worthiness. Regardless, I am convinced she did not intend to deceive or mislead the DSS agents about her sexual affairs during her marriages.

The evidence on Applicant's failure to annotate her time card to show periods of time she was not at work is more problematic. In her first statement, she did not offer the agents an explanation, she simply denied it outright. At the hearing, Applicant admitted leaving the job without express permission, but maintained that her supervisor had authorized her to take brief periods off without annotating her time card. The Government established a prima facie case against Applicant. However, Applicant's defense that her supervisor knew what she was doing was supported by the weight of the evidence. Thus, her absences were not unexcused. I am convinced that Applicant never intended to mislead the investigator. Furthermore, her misstatement was an isolated event and is not likely to recur. Under the circumstances, the finding is for Applicant.

FORMAL FINDINGS

Conclusions as to each of the allegations in the SOR as required by Executive Order No. 10865 § 3, ¶ 7 and the Directive ¶ E3.1.25, are as follows:

Paragraph 1. Guideline E: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2. Guideline J: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Paragraph 3. Guideline D: FOR APPLICANT

Subparagraph 3.a.: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

James A. Young

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.