

DATE: December 19, 2005

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-15474

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Sabrina E. Redd, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In June 1998, while on active duty as an Army officer, Applicant was reprimanded for indecent conduct with two teenaged girls, obstruction of justice, and inappropriately touching an enlisted subordinate. In August 1999, he was reprimanded for assaulting his fiancé during an argument. In October 1999, he was arrested for driving under the influence, ordered by his commander to attend an alcohol abuse program, and left the program without completing it. In March 2000, he was reprimanded for making inappropriate personal comments to a junior enlisted soldier. Security concerns based on personal conduct and sexual behavior are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On December 4, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guideline E (Personal Conduct) and Guideline D (Sexual Behavior)

Applicant answered the SOR in writing on February 17, 2004, admitted the allegations in part and denied them in part, offered explanations, and requested a hearing. The case was assigned to me on June 27, 2005, and scheduled for hearing on September 15, 2005. Applicant did not appear on the scheduled date. On inquiry, I determined Applicant had not received the Notice of Hearing until the day on which the hearing was scheduled. Accordingly, I rescheduled the hearing for October 20, 2005, and it was conducted on that date. At the hearing, I granted Department Counsel's motion to amend SOR ¶ 1.f. to conform to the evidence. Department Counsel's motion to amend initially requested adding an additional allegation under Guideline E, but she withdrew that request at the hearing. [\(U\)](#) DOHA received the transcript on November 3, 2005.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 47-year-old senior program analyst for a defense contractor. He served on active duty in the Army from May 1980 to May 2000, retiring as a major. Shortly after retiring, he began working for his current employer, from whom he has received outstanding performance appraisals. Applicant is a project manager for his employer, supervising a 19-person team, of which two-thirds are women, and half the women are in their early 20s. [\(2\)](#)

All the incidents underlying the SOR occurred while Applicant was on active duty as an Army officer. He received a written reprimand in June 1998 for indecent acts and liberties with a child under the age of 16, indecent assault on a child, indecent assault, and obstruction of justice. [\(3\)](#) The charges of indecent assault on a child and taking indecent liberties with a child were based on two accusations. The first was based on an accusation that Applicant had bumped a 15-year-old girl several times and unexpectedly hugged her in August 1997. [\(4\)](#) The second was an accusation that Applicant had touched the inner thigh of a 13-year-old girl and told her she was sexy, after the girl accepted his offer of a ride home during a rainstorm in January 1998. [\(5\)](#) Both girls were children of Applicant's neighbors, and Applicant had previously approached them about babysitting his two children. The charge of obstruction of justice was based on evidence that in February 1998 Applicant told an enlisted soldier under his command to tell investigators she did not know anything about his personal conduct. [\(6\)](#) The charge of indecent assault was based on an accusation by an enlisted soldier under Applicant's command that he patted her buttocks and rubbed his body against her while walking past her. [\(7\)](#)

In an interview with a criminal investigator, Applicant denied touching the 13-year-old girl or telling her she looked sexy. [\(8\)](#) In his answer to the SOR, Applicant admitted he might have touched the 13-year-old inadvertently. At the hearing he admitted telling her she was attractive. [\(9\)](#) Applicant admitted to the 15-year-old girl's father that he had hugged her at the conclusion of a conversation about babysitting, and he apologized. [\(10\)](#)

Applicant denied obstructing justice. He testified at the hearing that a soldier had complained to him about aggressive questioning by the criminal investigators, and he advised the soldier she was not required to tolerate their badgering. [\(11\)](#)

Applicant admitted in part the allegation of inappropriately touching a female subordinate. He admitted he interacted with his soldiers physically and it would not have been unusual for him to slap a young female soldier on the buttocks. [\(12\)](#)

In his answer to the SOR, he responded to all the above allegations by admitting he "allowed [himself] to be placed in an environment or circumstances where inappropriate behavior could be perceived, comments or actions manipulated, or misconstrued regardless of intent." At the hearing, Applicant portrayed the above incidents as minor, not meriting criminal prosecution, and the product of working in a "zero defect" environment. [\(13\)](#)

The accusations by the teenaged girls triggered a wide-ranging criminal investigation that included interviews of numerous schoolgirls, a search of Applicant's home for child pornography, and seizure of his personal computer. [\(14\)](#) Applicant complained frequently about the excessive zealotry of the investigators, and he referred to the investigation as a "witch hunt" at the hearing and in his answer to the SOR.

In August 1999, Applicant received an oral reprimand for assaulting his fiancée during an argument. [\(15\)](#) Applicant admitted discussing the incident with his commander but denied being reprimanded. [\(16\)](#)

In October 1999, Applicant was arrested by civilian police for driving while intoxicated. A police officer approached Applicant's parked vehicle, saw Applicant in the driver's seat, and smelled alcohol. [\(17\)](#) Applicant admitted he had been drinking, and the police found an open container of an alcoholic beverage in his vehicle. Applicant declined to take a breathalyzer test. [\(18\)](#) After the incident, Applicant voluntarily entered an alcohol and drug abuse prevention program,

anticipating a "command referral," which followed shortly thereafter. After the charges were dismissed, in part because Applicant was not observed actually driving,⁽¹⁹⁾ Applicant stopped participating in the program, because in his view the grounds for the command referral were negated, and there was no longer any reason to continue with the program.⁽²⁰⁾

In March 2000, Applicant received a written reprimand for making inappropriate suggestions to a junior enlisted soldier⁽²¹⁾ implying a desire to have a personal relationship with her.⁽²²⁾ In his answer to the SOR, Applicant denied having any recollection of these events and stated he did not recall receiving a written reprimand. At the hearing, Applicant stated he had no memory of any contact with the soldier.⁽²³⁾

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 authorized the Secretary of Defense or his designee to grant applicants 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 and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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 ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[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) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline E: Personal Conduct

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness

to comply with rules and regulations could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. A disqualifying condition (DC 1) may arise under this guideline when there is "[r]eliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances." Directive ¶ E2.A5.1.2.1. The numerous sworn statements supporting the allegations in the SOR establish DC 1.

A disqualifying condition (DC 4) may arise from "[p]ersonal conduct . . . that increases an individual's vulnerability to coercion, exploitation, or duress." Directive ¶ E2.A5.1.2.4. The evidence of Applicant's inappropriate behavior with the teenaged girls and his military subordinates establishes DC 4.

Finally, a disqualifying condition (DC 5) may arise from "[a] pattern of . . . rule violations." Directive ¶ E2.A5.1.2.5. Applicant's military disciplinary record, obstruction of justice, violations of military standards in his relationships with female subordinates, and his unilateral decision to terminate participation in a command-directed alcohol abuse program establish DC 5.

Applicant's reprimands alleged in SOR ¶¶ 1.c. and 1.f. were imposed for the obstruction of justice alleged in SOR ¶ 1.g. and the sexual behavior alleged in SOR ¶¶ 2.a. through 2.d., discussed below. When the same conduct is alleged twice in the SOR, one of the duplicative allegations should be resolved in Applicant's favor. *See* ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Accordingly, I resolve SOR ¶¶ 1.c. and 1.f. in Applicant's favor.

A mitigating condition (MC 5) applies to the security concern based on personal conduct when there is evidence of "positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress." Directive ¶ E2.A5.1.3.5. While the administrative correspondence in this case informed Applicant's employer that his security clearance is under review, there is nothing in the record showing Applicant or anyone else informed his employer about the specific facts alleged in the SOR. Thus, he remains vulnerable to coercion, exploitation, or duress. I conclude MC 5 is not established.

I have also evaluated Applicant's conduct under the general adjudicative guidelines in the Directive. In considering the nature, extent, and seriousness of Applicant's conduct (Directive ¶ E2.2.1.1), I conclude Applicant's inappropriate conduct with two teenaged girls and his female military subordinates was serious. The conduct occurred when Applicant was a mature adult and a military officer nearing the end of a 20-year career. Directive ¶ E2.2.1.4. (age and maturity).

In evaluating the frequency and recency of Applicant's conduct, I conclude there were several instances of inappropriate conduct with young women, and the most recent incident was in early 2000. Directive ¶ E2.2.1.3. The concept of recency is closely related to rehabilitation (Directive ¶ E2.2.1.6.) and likelihood of recurrence (Directive ¶ E2.2.1.9). The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. The sufficiency or insufficiency of an applicant's period of conduct without recurrence of past misconduct does not turn on any bright-line rules concerning the length of time needed to demonstrate reform and rehabilitation, but rather on a reasoned analysis of all the facts and circumstances of an applicant's case. If the record evidence shows a significant period of time has passed without evidence of misconduct by an applicant, then an administrative judge must articulate a rational basis for concluding why that period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

I conclude Applicant's conduct with young women was "recent" within the meaning of the Directive, and I am not satisfied he is rehabilitated or similar misconduct will not recur. While his last reprimand was in March 2003 and he has not been accused of inappropriate conduct by female subordinates in his current job, he has worked under the pressure of keeping his security clearance since September 2000, when he filed his security clearance application, and even closer scrutiny since the SOR was issued in December 2003. Under these circumstances, the absence of further complaints is certainly relevant but not dispositive.

Applicant has never admitted his misconduct with the teenaged girls and military subordinates. When his conduct was investigated by military authorities, he asserted he was misunderstood and victimized by a witch hunt. At the hearing, he was embarrassed but not contrite. He has admitted the altercation with his then-fiancée and his arrest for driving under the influence, but he has sought to minimize his culpability on the ground that the incidents occurred shortly after he underwent a bitter divorce and custody battle.

I find Applicant's claimed lack of memory of the circumstances of his March 2000 reprimand implausible. His claimed inability to remember an embarrassing disciplinary action shortly before his retirement causes me to doubt his veracity. Based on Applicant's lack of remorse, continued efforts to minimize and justify his conduct, and implausible claims of lack of memory, I conclude insufficient time has elapsed to establish his rehabilitation.

Applicant's arrest in October 1999 is the only incident of alcohol-related misconduct. However, Applicant disregarded the directive of his commander to undergo alcohol abuse training, and he took it upon himself to determine the command was no longer binding after the criminal charges were dismissed. His disobedience of his commander's order to attend and complete the alcohol abuse program, however, was only one of several incidents reflecting disregard for authority. At the hearing, Applicant maintained his decision to withdraw from the program was justified. As with his other misconduct, he minimized his culpability, attempted to justify his behavior, and showed no contrition. There is no evidence his ability to carry out distasteful orders has been tested in his current job. I am not satisfied he will not unilaterally decide in the future to disregard a rule or directive with which he disagrees.

An applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. ⁽²⁴⁾ After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on personal conduct.

Guideline D: Sexual Behavior

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. DC 1 under this guideline applies if there is "[s]exual behavior of a criminal nature, whether or not the individual has been prosecuted." Directive ¶ E2.A4.1.2.1. Applicant's conduct with the 13-year-old girl (SOR ¶ 2.a.) was criminal, in that touching her thigh was an indecent assault. Applicant's conduct with the 15-year-old girl (SOR ¶ 2.c.) was inappropriate, but I have resolved this allegation in Applicant's favor because it does not appear to have been sexual. Slapping a female subordinate on the buttocks (SOR ¶ 2.b.) may not have been sexual; however, the inappropriate rubbing against her was sexual. Applicant's overtures to a subordinate female soldier (SOR ¶ 2.d.) appear to have been sexual. Applicant's conduct with female subordinates violated Articles 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 933 and 934. *See Manual for Courts-Martial, United States (2005 ed.), Part IV, ¶¶ 59 (conduct unbecoming an officer) and 83 (fraternization).* I conclude DC 1 is established.

DC 2 applies when there is "[c]ompulsive or addictive sexual behavior . . . or that which is symptomatic of a personality disorder." Directive ¶ E2.A4.1.2.2. There is no evidence of pedophilia or any sexually-related mental or personality disorder. I conclude DC 2 is not established.

DC 3 applies when there is "[s]exual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress." Directive ¶ E2.A4.1.2.3. Applicant's conduct with the teenaged girls and military subordinates establishes DC 3.

DC 4 applies when there is sexual behavior reflecting lack of discretion or judgment. Directive ¶ E2.A4.1.2.4. Applicant's behavior with the teenaged girls and his female subordinates establishes DC 4.

Several mitigating conditions (MC) are relevant. MC 2 applies if "[t]he behavior was not recent and there is no evidence of subsequent conduct of a similar nature." Directive ¶ E2.A4.1.3.2. For the reasons discussed under the personal conduct guideline, above, I conclude MC 2 is not established, because Applicant's behavior was "recent" within the meaning of the Directive.

MC 3 applies if "[t]here is no other evidence of questionable judgment, irresponsibility, or emotional instability." MC 3 is not established because Applicant's altercations with his fiancée, apprehension for driving under the influence, and unauthorized withdrawal from the alcohol abuse program demonstrate questionable judgment and irresponsibility.

MC 4 applies when "[t]he behavior no longer serves as a basis for coercion, exploitation, or duress." This mitigating condition is not established because there is no evidence showing Applicant's record of misconduct has been disclosed

to his current employer.

The same general adjudicative guidelines discussed under the personal conduct guideline, above, also apply to sexual behavior. After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on sexual behavior.

FORMAL FINDINGS

The following are my findings as to each allegation in the SOR:

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

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: Against Applicant

Paragraph 2. Guideline D (Sexual Behavior): AGAINST APPLICANT

Subparagraph 2.a. Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: Against 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 Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. Transcript (Tr.) 21-23.
2. Tr. 78.
3. Government Exhibit (GX 18).
4. GX 6.
5. GX 3, 4.
6. GX 9 at pp. 1-2.

7. GX 5 at pp. 1-2.

8. GX 7 at p. 3.

9. Tr. 87.

10. GX 11 at p. 1.

11. Tr. 85.

12. Tr. 88.

13. Tr. 57-59.

14. GX 14, 15, 17.

15. GX 21.

16. Answer to SOR at p. 2.

17. Tr. 80.

18. GX 20 at p. 7.

19. Tr. 81.

20. Answer to SOR at pp. 1-2; Tr. 73..

21. The SOR ¶ 1.c. alleges misconduct with a "junior enlisted officer." This is an obvious typographical error because there is no such position in the armed forces. The victim was a junior enlisted soldier.

22. GX 23 and 24.

23. Tr. 70.

24. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).