

DATE: March 2, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-06749

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant falsified material facts about his employment history on the security clearance application he completed and certified in August 2002. When interviewed by a special agent of the Defense Security Service, he deliberately failed to disclose disciplinary actions at work related to sexual harassment. Applicant's lack of candor and deliberate misrepresentations raise serious security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On May 19, 2004, under the applicable Executive Order [\(1\)](#) and Department of Defense Directive, [\(2\)](#) DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-security concerns raised under Guideline D (Sexual Behavior), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing May 28, 2004 and July 6, 2004. He requested his case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on October 8, 2004. The FORM contained documents identified as Items 1 through 5. By letter dated October 12, 2004, a copy of the FORM was forwarded to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant did not submit additional information or objections within that time period. On November 30, 2004, the case was assigned to me for a decision.

FINDINGS OF FACT

The SOR contains seven allegations of disqualifying conduct. Three allegations relate to conduct addressed under Guideline D, Sexual Behavior; three allegations relate to conduct addressed under Guideline E, Personal Conduct; and one allegation relates to conduct addressed under Guideline J, Criminal Conduct. In his answer to the SOR, Applicant admitted allegations 1.a. and 1.c. under Guideline D. He denied allegation 1.b. under Guideline D. He admitted allegations 2.a(1), 2.a(2), and 2.b. under Guideline E, and allegation 3.a. under Guideline J. His admissions are incorporated as findings of fact.

Applicant is a 47-year-old dispatcher employed by a defense contractor. He was married in 1990 and divorced in 1992. He married again in 2000. His security clearance application (SF-86), which he signed and certified August 21, 2002, indicates he is the father of two children.

In March 1997, Applicant's employer (Employer A) issued him a letter of reprimand for inappropriate behavior, including unsolicited and repeated flirtations, unwelcome and improper gestures, and other conduct that affected the work environment. In January 2000, Applicant received a performance review from another employer (Employer B) advising him that he needed to improve his interpersonal relationships with coworkers and noting that he had been accused of sexual harassment, which, if substantiated, would be grounds for immediate termination. He resigned his job with Employer B in January 2000. In January 2002, Applicant resigned from his job as assistant manager with Employer C, following allegations of sexual harassment.

Applicant completed and certified a security clearance application (SF-86) in August 2002. Question 20 on the SF-86 reads as follows:

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 reason under unfavorable circumstances

Applicant answered "yes" to Question 20. He stated further that he had left his job with Employer C for other reasons under unfavorable circumstances. He identified the unfavorable circumstances as "no support from management," which did not accurately describe the circumstances of his resignation from his job with Employer C. He did not list his resignation from Employer B or the circumstances which caused his resignation.

On August 21, 2002, Applicant signed and dated the following statement on his SF-86:

"CERTIFICATION BY PERSON COMPLETING FORM

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of Title 18, United States Code).

Applicant was interviewed by a special agent of the Defense Security Service on December 6, 2002. He told the agent he had been accused of sexual harassment while working for Employer C. When Employer C offered him the choice of resignation or firing, he chose resignation. When asked by the special agent if he had any other disciplinary incidents in his employment background, Applicant replied he did not. (Item 5, at 1-2.) In a second interview with the special agent in January 2003, Applicant admitted he was untruthful in his answers in the December 2002 interview about his employment background. (Item 5, at 1-2.) He admitted receiving counseling for poor work performance from Employer B. He admitted receiving a written warning from Employer A for inappropriate behavior, which included unsolicited and repeated flirtations and unwelcome and improper gestures. He denied resigning in lieu of termination from any employment other than Employer C. (Item 5, at 2.) The record shows Applicant resigned his job at Employer B one week after receiving a written performance review alleging sexual harassment. (Item 5, at 5; 17-18.)

On January 24, 2003, after participating in a second interview with the special agent, Applicant signed a written

statement memorializing the substance of the interview. The preamble to Applicant's statement reads:

I [Applicant] do hereby make the following voluntary statement to [special agent's name omitted], who has identified himself to me as a Special Agent of the Defense Security Service. I make this statement without any threats having been made against me or any promises extended to me. I certify that the following statement is true, complete and accurate to the best of my knowledge and belief and is made in good faith. I understand that a knowing and willful false statement can be punished by fine or imprisonment or both. (See U.S. Code, Title 18, Section 1001.)

In his answer to the SOR, Applicant admitted giving the investigator false information. (Item 3, at 2,3.)

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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. 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 that 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 that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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.

CONCLUSIONS

Guideline D - Sexual Behavior

In the SOR, DOHA alleged Applicant received a letter of reprimand from Employer A for inappropriate behavior of a sexual nature, including unsolicited and repeated flirtations, and unwelcome and improper gestures (¶ 1.a.); that he resigned from Employer B in lieu of termination following allegations of sexual harassment (¶ 1.b.); and that he resigned from his job with Employer C following allegations of sexual harassment (¶ 1.c.). Sexual behavior is a security concern if it involves a criminal offense (E2.A4.1.2.1.); is compulsive or addictive and indicates a personality or emotional disorder (E2.A4.1.2.2.); may subject the individual to coercion, exploitation, or duress (E2.A4.1.2.3.); or reflects lack of judgment or discretion (E2.A4.1.2.4.).

Applicant's sexual behavior on the job was contrary to law and workplace conduct norms. Despite disciplinary action from his employers for sexually harassing co-workers, Applicant persisted in the prohibited conduct, suggesting that it

may be compulsive or addictive or may reflect a personality problem. His apparent inability or unwillingness to change or modify his conduct suggests a lack of judgment, and this, in turn, could make him vulnerable to coercion, exploitation, or duress.

Security concerns arising from sexual behavior can be mitigated if the conduct occurred during or prior to adolescence and there is no evidence of subsequent similar conduct (Mitigating Condition (MC) E2.A4.1.3.1.) or if the behavior was not recent and there is no evidence of subsequent similar conduct (MC E2.A4.1.3.2.) Applicant's disqualifying conduct occurred not in adolescence but when he was 40 years of age and older. His most recent episode of disqualifying conduct occurred in 2002, making it recent. Thus, MC E2.A4.1.3.1. and MC E2.A4.1.3.2. do not apply.

Two additional mitigating conditions might apply. Applicant's disqualifying sexual conduct could be mitigated if, in his other conduct, he displayed no evidence of questionable judgment, irresponsibility or emotional instability (MC E2.A4.1.3.3) or if the behavior no longer serves as a basis for coercion, exploitation, or duress. (MC E2.A4.1.3.4.) Applicant's disqualifying conduct under Guidelines E and J, discussed below, raises issues of questionable judgment and continuing vulnerability for coercion, exploitation, or duress. Accordingly, MC E2.A4.1.3.3 and MC E2.A4.1.3.4 do not apply to the facts of Applicant's case, and the Guideline D allegations in the SOR are concluded against the Applicant.

Guideline E - Personal Conduct

In the SOR, DOHA alleged Applicant deliberately falsified his answers on his SF-86 to Question 20 (¶¶ 2.a(1) and 2.a(2) and falsified material facts in a signed, sworn statement presented to an authorized investigator for the Department of Defense (¶ 2.b). While Applicant admits the falsifications and expresses remorse, his deliberate misrepresentations cause serious security concerns. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

An applicant's responsibility to provide truthful and complete responses to questions on his SF-86 and to the questions of a lawful investigator cannot be waived, set aside, or ignored. An applicant's employment history is material to a determination of his security worthiness. With respect to the Guideline E conduct alleged in SOR subparagraphs 2.a(1), 2.a(2), and 2(b), Applicant falsified his SF-86 by omitting and concealing relevant and material information about his employment history in response to Question 20, bringing his conduct under disqualifying condition E2.A5.1.2.2. He did not make a prompt, good-faith effort to correct the falsification before being confronted with the facts, and thus MC E2.A5.1.3.3. does not apply. Moreover, he deliberately provided false or misleading information concerning relevant and material matters on two separate occasions to an authorized investigator, bringing his conduct under disqualifying condition E2.A5.1.2.3. of Guideline E. Applicant's falsifications were recent and not isolated incidents, and he did not supply the correct information voluntarily. Thus MC E2.A5.1.3.2. does not apply.

Applicant's deliberate concealment of behavior that led to disciplinary actions by his employers increased his vulnerability to coercion, exploitation, or duress, and thus disqualifying condition E2.A5.1.2.4. applies. He has not taken positive steps to reduce or eliminate his vulnerability to coercion, exploitation, or duress, and thus MC E2.A5.1.3.5. does not apply.

A person's refusal to provide relevant and material information to the Government provides a rational basis for denial or revocation of access to classified information for that person. ISCR Case No. 98-0445 at 3 (App. Bd. April 2, 1999), (quoting *Gayer v. Schlesinger*, 490 F. 2d 740, 754 (D.C. Cir. 1973); *Clifford v. Shoultz*, 413 F. 2d 868 (9th Cir. 1969), *cert. denied*, 396 U.S. 962 (1969)).

With respect to the Guideline E conduct alleged in the SOR, the Government has established its case. Accordingly, the allegations in subparagraphs 2.a(1), 2.a(2), and 2.b. of the SOR are concluded against the Applicant.

Guideline J - Criminal Conduct

In the SOR, DOHA alleged Applicant knowingly and willfully falsified his answers to Question 20 on his security clearance application in violation 18 U.S.C. § 1001 and knowingly and willfully falsified material facts on a signed, sworn statement presented to a lawful investigator, also in violation of 18 U.S.C. § 1001. DOHA further alleged these

acts constituted felonious criminal conduct. An applicant with a history or pattern of criminal behavior raises serious doubts about his judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. Applicant deliberately lied on the security clearance application he certified and signed for the purpose of obtaining a security clearance, and he lied about his employment record in two separate interviews with a special agent of the Defense Security Service. An applicant's employment history is material to a determination of his security worthiness. Applicant's answer to the SOR and his stated remorse for his conduct failed to convince me that he did not knowingly and willfully falsify his security clearance application and deliberately provide false information to a lawful investigator on his signed, sworn statement. An applicant may be disqualified if allegations of criminal conduct are raised against him. ¶ E2.A10.1.2.1. The criminal offense was not an isolated incident, and therefore mitigating condition E2.A10.1.3.2 does not apply. After weighing the disqualifying and mitigating conditions, the finding is against Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline D: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a(1): Against Applicant

Subparagraph 2.a(2): Against Applicant

Subparagraph 2.b.: Against Applicant

Paragraph 3. Guideline J: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

DECISION

In light of all of 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 Applicant. Clearance is denied.

Joan Caton Anthony

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.