

DATE: February 28, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-07075

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

Rita C. O'Brien, Department Counsel

**FOR APPLICANT**

Eric Adams, Esq.

**SYNOPSIS**

Applicant, with an otherwise meritorious work record, has a recurrent history of sexual harassment and proposition allegations in the workplace (four altogether), for which he was either transferred or terminated, and a warning issued by a local police department to avoid any further contract with a female neighbor who reported him making verbal and written proposals about having a sexual affair. Applicant mitigates security concerns associated with his behavior by demonstrating he has since shown his wife the SOR containing the allegations, receiving a favorable prognosis from a credentialed medical professional regarding his diagnosed impulsive disorder, and otherwise showing the exercise of sound judgment in the workplace and in the company of young women whose softball team he coaches. Clearance is granted.

**STATEMENT OF CASE**

On June 14, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on July 2, 2004 and requested a hearing. The case was assigned to me on September 24, 2004, and was scheduled for hearing on October 27, 2004. A hearing was convened on October 27, 2004, for the purpose of considering whether it is clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of six exhibits; Applicant relied on three witnesses (including himself) and five exhibits. The transcript (R.T.) of the proceedings was received on November 9, 2004.

**SUMMARY OF PLEADINGS**

Under Guidelines D and E, Applicant is alleged to have engaged in sexual misbehavior on several occasions between December 1982 and February 2001 that resulted in his (a) termination by employers for acts of sexual harassment and (b) of a warning by a local police department in State C not to have further contact with a female neighbor after she reported his harassing her with verbal and written proposals about having a sex affair.

For his response to the SOR, Applicant admitted two of the allegations: his termination in February 2001 for allegations of sexual harassment and his termination in March 2000 for allegations of sexual harassment of a minor female worker. But he denied the remaining allegations without explanation.

### STATEMENT OF FACTS

Applicant is a 45-year-old analyst for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant was born and raised in State A and enjoyed a strong religious upbringing. He enlisted in the AF following his high school graduation and served 15 years of active duty before being discharged from active duty in 1990. After completing his AF active duty tour, he served on a two-year mission abroad for his church. Upon his return from his mission, he lived with his parents for a short time before marrying his current spouse in 1981 (*see ex. 1; R.T., at 61-62*). In 1992, Applicant returned to college following a hiatus from formal education and obtained a degree in psychology from a university in State A in 1995 (*ex. 1; R.T., at 95-96*).

Between December 1982 and February 2001, Applicant was terminated by four different employers on the basis of claims filed employees of sexual harassment. The first such claim arose out of his employment with Company 1 in December 1982. According to a complaint filed by a female co-worker, Applicant asked her for sexual favors, in addition to making sexual innuendos. While Applicant denies the specific allegations, he does admit to participating in sexually charged banter with several employees (including the complaining employee) and later being removed from management following the employee's complaint (*R.T., at 130-32*). He was thereafter afforded an opportunity to work in the same store with employees he previously supervised (*R.T., at 131-32*), but declined the offer and transferred to another store owned by the same employer (where he was terminated a month later. Inferences warrant he made sexual innuendos while bantering with several co-workers (the complainant included) that might have been interpreted by her as a sexual request.

In August 1983, a neighbor of Applicant's filed a complaint with the local police of State A, claiming Applicant had harassed her with verbal and written proposals about having a sexual affair with him (*see ex. 6*). The complainant declined Applicant's sexual overtures and requested police protection, while declining to prosecute Applicant. No charges were brought against Applicant as the result of the neighbor's complaint. Applicant, in turn, was advised by the police to have no further contact with the neighbor (*see ex. 6; R.T., at 66-67*). By all accounts, he did not.

In December 1985, several co-workers of Applicant complained to his employer's management that he had made inappropriate sexual innuendos to them. Both Applicant and his wife (who worked at the same store) were relocated to another store together. Although he never told his wife of the complaints at the time, he has since shown her the SOR (*R.T., at 136*).

More recently (in March 2000), Applicant was terminated from a local grocery store in State B, upon allegations of sexual harassment of a minor female worker. Applicant acknowledged a sexual issue with the worker (a minor at the time), who informed her parents, who, in turn, reported her claims to the store's management (*R.T., at 99-100, 141-43*). After being confronted by store management about the worker's claims, Applicant was terminated. Once terminated, he told his wife of the verbal exchange he had with the worker that resulted in his termination.

Applicant was also terminated from a local restaurant in State B for allegations of sexual harassment of a co-worker: this in February 2001. After engaging the co-worker in a one-time conversation at the restaurant that included sexual innuendos, he was called into the office by his supervisor and confronted with the co-worker's account. Upon admitting to the incident, he was promptly terminated. Applicant later told his wife of a sexual conversation he had with the

female worker and his ensuing termination (R.T., at 139-40).

Applicant kept his wife generally informed of the various sexual harassment allegations before he received the SOR (R.T., at 53-54) and assures his wife was not surprised at the allegations contained in the SOR he has since showed her. Besides discussing the SOR with his wife, he has also told his supervisor of the allegations (R.T., at 125, 157). However, he has not told any of his coworkers of the SOR allegations, or members of his church (R.T. at 157).

Applicant has two children from his long marriage (a loving one by all accounts). Active in his church, he has regularly taught Sunday school to girls and boys (R.T., at 55-56). He coaches teams of young ladies in softball competition without any complaints of inappropriate comments or behavior on his part.

Not knowing why he bantered with co-workers in the past, he has since sought and received psychiatric counseling. In July 2004 he voluntarily enrolled in a mental health counseling center in State B (*see* exs. D and F). Following his initial intake assessment, he was assigned to outpatient individual and group sessions. Between August 2004 and November 2004, he is credited with attending four individual sessions (in addition to his group sessions) and was assigned a diagnosis of impulse control disorder nos (not otherwise specified) on the DSM-IV scale (*i.e.*, 312.30). Applicant, in turn, was given a favorable prognosis by his treating physician and licensed counselor, based on the circumstances of his current work environment, that not only requires a security clearance, but doesn't place him in close proximity to female co-workers on a routine basis (*see* ex. F).

Since his last incident of sexual comments and/or innuendos in February 2001, Applicant has had no further reports of exchanges with co-workers or any females outside his marriage. He assures he will avoid any situations with female co-workers in the future that might place him at risk to sexual harassment or innuendo allegations.

Applicant receives high praise from his colleagues who know him well at work and socially. A computer soft-ware developer with a security clearance who has known him through coaching interaction with girls' softball (ages 12 to 16) describes Applicant as compassionate and prudent with the young women players and extolled by team members for his coaching and interaction skills (R.T., at 21-25). This acquaintance never observed Applicant engage in any inappropriate conduct with the young women softball players and characterizes Applicant as consistently above reproach with the players he has coached (R.T., at 27-29). A team counterpart of Applicant's with his defense contractor describes Applicant as reliable and trustworthy in all of his dealings with him (qualified only by his lack of familiarity with the specific allegations in the SOR).

## POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Sexual Behavior**

*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.

### **Personal Conduct**

*The Concern:* 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.

## **Burden of Proof**

Under the Directive, a decision to grant or continue an Applicant's for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the SOR and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

## **CONCLUSION**

By all accounts, Applicant has a meritorious professional record and no history of involvement with law enforcement before or after his warning by State A police in 1983 to avoid any further contact with a neighbor who had claimed he harassed her in a report she filed with the police. Applicant does bring a history of employer terminations (five in all) attributable to sexual harassment reports that raise some security concerns about his judgment and reliability under the guidelines covered by Guideline D (sexual behavior) and Guideline E (personal conduct).

Before showing his wife of many years the SOR he received, Applicant had kept his wife generally informed of some of the sexual harassment and proposition allegations, but not all of them. He has since made his wife aware of the specific allegations covered in the SOR. While he has not disclosed all of the details of his employment separation circumstances with the five covered employers, his employment history provided in his SF-86 includes the employers who are covered in subparagraphs 1.a and 1.b (*see ex. 1*). Checks with these employers could be expected to yield the reasons for his respective terminations from their employment rolls. He has since been diagnosed by a credentialed medical professional and licensed counselor who assign a diagnosis of impulse control disorder nos (not otherwise specified) on the DSM-IV scale (*i.e.*, 312.30) and give a favorable prognosis, based on the circumstances of his current work environment, that not only requires a security clearance, but doesn't place him in close proximity to female co-workers on a routine basis.

Applicant's actions entitle the Government to invoke four of the disqualifying conditions (DC) under Guideline D for sexual behavior: E2A4.1.2.1 (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*), E2A4.1.2.2 (*Compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high risk behavior or that which is symptomatic of a personality disorder*), E2A4.1.2.3 (*Sexual behavior that causes the individual to be vulnerable to coercion, exploitation, or duress*), and E2A4.1.2.4 (*Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment*).

Applicant's actions raise security concerns as well over his same actions under the personal conduct Guidelines: E2A5.1.2.1 (*Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*) and E2A5.1.2.4 (*Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress*) that increases an individual's vulnerability to coercion, exploitation, or duress).

Applicant has since been diagnosed by a credentialed medical professional and licensed counselor who both assign a

diagnosis of impulse control disorder nos (not otherwise specified) on the DSM-IV scale (*i.e.*, 312.30) and give a favorable prognosis, based on the circumstances of his current work environment, that not only requires a security clearance, but doesn't place him in close proximity to female co-workers on a routine basis. This favorable prognosis combined with the favorable impressions he has made on his supervisors and coworkers and persons in a position to observe Applicants' favorable coaching relationships with young women he coaches in organized softball reveal positive overall changes in his inter-personal working relationships with young women in and out of the work place. With his spouse since notified of his sexual harassment/proposition allegations, the risks of any recurrent vulnerability are mitigated for security clearance purposes. Applicant may avail himself of the mitigating conditions covered in the Guidelines that reflect his elimination of prior sexual harassment/proposition allegations as a source of vulnerability to coercion, exploitation or duress. Applicant, in turn, may take advantage of two mitigating conditions: E2.A4.1.3.4 and E2.A5.1.3.4 (*The behavior no longer serves as a basis for coercion, exploitation, or duress*) of the Guidelines for sexual behavior and personal conduct, respectively.

Taking into account all of the circumstances surrounding Applicant's recurrent sexual harassment conduct, Applicant is credited with mitigating security concerns relative sexual behavior and judgment lapses associated with his actions. Unfavorable conclusions warrant with respect to the underlying conduct covered by subparagraphs 1.a through 1.f of Guideline D and subparagraph 2.a of Guideline E.

In reaching my decision, I have considered the evidence as a whole, including each of the factors set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

### **FORMAL FINDINGS**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

**GUIDELINE D (SEXUAL BEHAVIOR): FOR APPLICANT**

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

Sub-para. 1.d: FOR APPLICANT

Sub-para. 1.e: FOR APPLICANT

Sub-para. 1.f: FOR APPLICANT

**GUIDELINE D (SEXUAL BEHAVIOR): FOR APPLICANT**

Sub-para. 2.a: FOR APPLICANT

### **DECISION**

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

Roger C. Wesley

Administrative Judge