

DATE: April 8, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-10260

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Rita C. O'Brien, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant's history of harassment complaints leading to company warnings and suspensions and ensuing misuse of his position as a levee district commissioner to organize group that he promised his best efforts as a commissioner to steer business their way reflects not only pattern violations of accepted rules of behavior in the workplace, but also violations of his fiducial duties as a commissioner of a public commission. His exhibited pattern of determined harassment and abuse of his fiducial position as a commissioner reflect adversely on his judgment and reliability. On the record presented, he fails to mitigate the Government's security concerns under Guideline E of the Adjudicative Guidelines. Clearance is denied.

### **STATEMENT OF CASE**

On May 6, 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 May 19, 2004 and requested a hearing. The case was assigned to me on November 9, 2004, and was scheduled for hearing on December 7, 2004. A hearing was convened on December 7, 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 12 exhibits; Applicant relied on three witnesses (including himself) and one exhibit. The transcript (R.T.) of the proceedings was received on December 15, 2004.

### **SUMMARY OF PLEADINGS**

Under Guideline E, Applicant is alleged to (a) have received multiple notices from his employer of sexual harassment between September 2000 and November 2001, based on harassment complaints filed against him, (b) have been the subject of an Inspector General's recommendation for appropriate action after he concluded Applicant misused his authority as a Commissioner of a local levee district and (c) have been replaced as a commissioner of his levee district by the Governor of his State in September 2002.

For his response to the SOR, Applicant admitted most of the allegations. He denied two of the allegations: his termination in February 2001 for allegations of sexual harassment and his termination in March 200 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 to retain his 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.

An employee of his current defense contractor since 1993, and currently a project foreman, Applicant is college educated (with a masters degree in engineering technology) and married with two grown children (ages 30 and 23). He is familiar with the female employee who filed harassment complaints against him with his employer in September 2000, October 2000, and January 2001.

Applicant had befriended the complainant (a new employee with the company) and oft-took her to sporting events and exchanged visits to each others' homes (R.T., at 39-40). As Applicant describes the complainant, she had become frustrated about finding a better job. Applicant, in turn, volunteered to help her and followed up with a potential job lead with a DoD military group. Once he told her of the potential job opportunity, she reacted negatively, and their collegial relationship deteriorated (R.T., at 41-43). In questioning her as to why she did not follow up with the employment contact, he used an expletive word to address her and sent a vulgar e-mail to her, reportedly in response to a joke she made to him earlier, according to the employee's complaint summary of her first reported harassment complaint in September 2000 (*see ex. 2*).

Applicant acknowledges receiving official warning notices (albeit too illegible to discern) from his employer in September 2000, October 2000 and January 2001 as the result of a single harassment complaint filed against him by A (R.T., at 45-49). However, he insists (a) the first two warning notices involved the one September incident, and no more (*see exs. 2 and 3*; R.T., at 49-50) and (b) the third warning (*ex. 4*) involved a claim from the same complainant in January 2001 that Applicant said something to her one evening while passing by her desk that couldn't be substantiated (R.T., at 49-51). Each of the incidents complained of, however, is documented by warning notices to Applicant (albeit not very legibly), which Applicant is unable to credibly refute with documentation of his own. The complainant, though, did play some contributory role in the covered incidents, for which she also received warning notices concerning her part in the incidents (*see ex. 2*; R.T., at 52-53).

Following his first two warning notices, Applicant was issued work suspensions: a five-day working suspension and a final warning following the September complaint and a three-day suspension following the October complaint. While he disagreed with the harassment accounts of the complainant in each of the reported incidents, he never visibly challenged the suspensions and completed them. He appears to have avoided any further complaints from the complaining employee (who he claims also received company warnings resulting from Applicant's exchanges with her) or any other employee at his work place.

In addition to his employment duties with his defense contractor during the 2000 to 2002 time frame, Applicant served as an appointed commissioner for a local levee district empowered by the State (*see exs. 1 and 8 through 12*; R.T., at 74-76). He received his appointment from his State's governor in 1992 on the recommendation of one of the state's legislators and twice had been reappointed by a different governor (R.T., at 81-82). By its charter no individual commissioner of the levee board can commit the board to any contracts.

Nonetheless, Applicant (in September 2000) solicited engineers from his company to attend a meeting designed to interest them in creating a company that would seek public contracts from the levee district he served on. In his e-mails

to the solicited engineers, Applicant promised to use his influence as a levee district commissioner to steer business to their newly created business (*see* exs. 1 and 10). Many of the solicited engineers responded favorably to Applicant's request and voluntarily attended the first organizational meeting arranged by Applicant in September 2000. At the convened meeting, all of the six in attendance agreed to reconvene in October to select a new name to call the organization and brief each other on their findings (*see* ex. 1; R.T., at 59-61). In a follow-up September 2000 e-mail Applicant sent to the participants of the meeting, he confirmed their agreement to reunite in early October to adopt a name for their newly proposed organization and brief each other on how to incorporate (*see* ex. 1). In the same e-mail Applicant confirmed his efforts to try and use his position with the levee board to steer some work to their organization, only to see his efforts blow apart at the previous night's levee board meeting (ex. 1).

Applicant insists "he was blowing smoke" (a hoax), since he had no power as a commissioner of the levee district to individually approve any work for the organization and was working with the organizing group only in an advisory role (R.T., at 30-31, 60-74). That he had no actual power to approve outside work as an individual commissioner is supported by the current commission president of the levee district (R.T., at 85-86). In his testimony, the commission president (who was present during the Inspector General's investigation of Applicant) opined that he thought Applicant was trying to do something (*viz.*, committing the levee board to contracts) he had no power to do as an individual member (R.T., at 86). When pressed, though, the commission president acknowledged Applicant's encouraging others on several occasions to form companies as a means of generating levee board business for minority contractors. He considered Applicant's actions on their face to reflect poor judgment but not illegal or unethical behavior, absent any actual individual power to commit the board to contracts. Because the commission president has never personally discussed the e-mails with Applicant, any personal impressions of Applicant's reasons for writing the e-mails are wholly speculative and entitled to very little weight (R.T., at 93-94, 100-02).

What Applicant can't corroborate with his evidence are his claims he had no intention of persuading his fellow organization attendees he would use his influence as a levee district commissioner to try and steer business to their newly proposed organization. His advisory acknowledgments to the persons attending his 2000 meetings are detailed in his signed, sworn DSS statement of January 2003, and his ensuing e-mails show no indicia of insincerity or joking around (*see* ex. 12). He does not appear to have been successful either in persuading his own company that his solicitation efforts amounted to a joke. Based on its internal review of Applicant's e-mails and employee interviews, Applicant's employer (in November 2001) found he misused his company computer in using it to solicit co-workers to participate in a private business and issued him a warning notice (*see* ex. 7). His employer later filed adverse information reports on Applicant: first in May 2002 (*see* ex. 10), noting Applicant's solicitation of company engineers to work for a private company being created by Applicant, and later in September 2002 (*see* ex. 11), calling attention to an newspaper article stating Applicant had been fired from a levee district position by the State's Governor.

For this misuse of his computer, Applicant acknowledges his mistake in using company equipment for this private purpose (R.T., at 59). But he continues to characterize his termination as politically motivated, based on his association with the legislator who sponsored his appointment, and who Applicant believed was out of favor with the current governor who replaced him on the levee district. Politics may have played some role in Applicant's dismissal from the levee district. But without more proof of a causal connection between the State Governor's actions and the Inspector General's findings regarding Applicant's organizing activities, political considerations cannot be used to neutralize or diminish the weight and effect of the Inspector General's findings on the State Governor's decision to replace Applicant on the levee district.

According to the State Inspector General's April 2002 report, the levee district in which Applicant served on as a commissioner is responsible for drainage, flood control and water resources development in the river section of Applicant's parish, in addition to its responsibilities for constructing and maintaining levees and drainage systems within its district. In exercising its responsibilities, the levee district (according to the Inspector General) may buy, sell, or exchange property, enter into contracts and perform any acts necessary to carry out its assigned duties.

As a part of its April 2002 findings, the State's Inspector General found that Applicant did attempt to persuade co-workers to form an engineering company and advise them by e-mail he would use his position on the levee board to obtain work for the group. In an e-mail cited by the Inspector General in its report, Applicant e-mailed his organizational group in October 2001, informing the group that he "had worked out a deal with the levee district for me

to select the company to do the construction management for our 100 million dollar flood protection project . . ." (*see* exs. 6 and 9). But in fact, no deals were made by the levee board with Applicant that allowed him to select contractors for levee district work. Although, the Inspector General's report does acknowledge Applicant's questioning the levee board's engineering firm about its use of contractors (*see* ex. 9).

The State's Inspector General concluded in its April 2002 report that Applicant misused his authority as a member of the levee board when he told them in the process of trying to organize a group of co-workers to pursue a business venture with him that he could use his official power as a levee district member to steer business to them (ex. 9). The Inspector General also concluded that Applicant's unsolicited role in trying to persuade his co-workers to join in this venture, when considered in light of all of the circumstances present, created the appearance he had some type of personal interest in the venture (*see* ex. 9). That Applicant might have been exaggerating his powers, when he suggested he could use the power of his office to refer business to them, or that the State's Inspector General's findings and conclusions may have been politically motivated, is not visibly apparent to either the group participants or the drafters of the Inspector General's report.

Acting on the recommendations of the Inspector General in its April 2002 report, the State's Governor (from a different political party than the ones that appointed Applicant to his levee district position) replaced Applicant on the State's levee board (*see* ex. 11, referencing a local newspaper's coverage of Applicant's reported firing in ex. A), citing his misuse of his position to steer contracts to the firm he was trying to create. Although it is possible that the Governor replaced Applicant on the levee board to spite his mentor (a local elected official who had sued the governor), it is far more likely the Governor fired Applicant over the findings and conclusions reached in the Inspector General's report (*compare* exs. 9 and 10 with exs. 12 and A).

Applicant continues to claim he made no attempt to misuse his levee board position to try and obtain business for his organization but was only "blowing smoke." He could persuade neither the investigating State Inspector General nor his own company of his hoax claims, however, and provides too little corroborative support for such claims in his evidentiary submissions (limited to the impressions of the current levee district president and a member of the organizing group who later dropped out) to warrant acceptance. In the adverse information report filed by his employer in May 2002 shortly after being notified of the Inspector General's report through a company "hot line," his company facility clearance security officer reported that Applicant had in fact solicited engineers from a company work site to work for a private company he said he was creating, and that he would use his influence as a local levee district commissioner to steer levee district contracts to the proposed firm (*see* ex. 10).

Although neither the Inspector General's report nor his company's adverse information report attempt to determine whether in fact Applicant had tried to elicit levee board contract approvals for his new firm, each report emphasized Applicant's overt attempts to use his levee district relationship to organize his new firm with promises of exerting influence. Without more probative proof his efforts represented no more than blowing smoke, he can not avert inferences he enlisted the support of others associated with his employer to organize a new firm that would be the recipient of steered business from Applicant's levee district as the result of his personal influence as a levee district commissioner.

## **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:

### **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**

Applicant comes to these proceedings with a history of warning notices and work suspensions from his employer over a three-month period in 2000-2001 (three in all) resulting from sexual harassment complaints from a female subordinate of his in his work location. These actions raise security concerns about Applicant's judgment, reliability and judgment that are compounded by the termination actions taken against him by the Governor of his State following the receipt of an Inspector General's report concluding he misused his authority as a commissioner of a local levee district by trying to organize and steer levee district business to his organized group. Applicant's actions and continuing reluctance to acknowledge and account for his judgment lapses raise security concerns about his judgment and reliability under the guidelines covered by Guideline E (personal conduct).

Applicant's actions are covered by the personal conduct Guidelines: E2A5.1.2.1 (*Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*) and E2A5.1.2.5 (*A pattern of dishonesty or rule violations*).

Mitigation is difficult to credit Applicant with. Applicant's actions reflect a pattern of proven mistakes of judgment, which he continues to dispute and avoid accountability for. His repeated approaching of the complainant, even after he had received a suspension as the result of her initial sexual harassment complaint, reflects poor choices on Applicant's part. These poor choices reflect adversely on his judgement and reliability. Were the acts complained of by his subordinate his only judgment lapses they might be mitigated by both time and overall favorable professional behavior on and off the job. However, the harassment complaints lodged against him do not represent Applicant's only judgement mistakes. Of considerable security concern as well is his misuse of his position as a commissioner of a local levee district in organizing a group of associates to receive business steered to the group (once organized under Applicant's direction).

Applicant's claims he considered his actions a hoax and of no tangible consequence are not reflected in either the findings and conclusions of the State's Inspector General or in the warning notices and adverse information reports issued by his company. The collective effect of Applicant's cited harassment of a subordinate of his and misuse of his position as a commissioner of a local levee district is to create adverse impressions about his overall judgment, reliability and judgment, which are not mitigated by any of Applicant's firm disclaimers of any wrongdoing. Based on

the record presented, Applicant may not take advantage of any mitigating conditions under Guideline E.

Taking into account all of the circumstances surrounding Applicant's recurrent sexual harassment conduct and misuse of his official position as a levee district commissioner, Applicant fails to mitigate security concerns relative to his 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 E.

### **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 E (PERSONAL CONDUCT): AGAINST APPLICANT**

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

Sub-para. 1.d: AGAINST APPLICANT

Sub-para. 1.e: AGAINST APPLICANT

Sub-para. 1.f: 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 or continue Applicant's security clearance.

Roger C. Wesley

Administrative Judge