

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is a 44-year-old systems analyst for a federal contractor. He entered private industry in 1999 after serving on active military duty for 18 years. In 1994, Applicant was disciplined under the Uniform Code of Military Justice (UCMJ) for voyeurism. In 1998, he was discharged from the military after admitting to sexually harassing two female subordinates in violation of the UCMJ. In 2000, he resigned his position with a civilian employer as the result of two co-workers' allegations of sexual harassment. He acknowledged his past misconduct and has taken some steps to prevent similar behavior in the future. However, he failed to sufficiently mitigate the security concerns raised by his criminal history or personal conduct. Clearance is denied.

CASENO: 04-03752.h1

DATE: 01/26/2006

DATE: January 26, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03752

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esq., Department Counsel

FOR APPLICANT

Chester H. Morgan, II, Esq.

SYNOPSIS

Applicant is a 44-year-old systems analyst for a federal contractor. He entered private industry in 1999 after serving on active military duty for 18 years. In 1994, Applicant was disciplined under the Uniform Code of Military Justice (UCMJ) for voyeurism. In 1998, he was discharged from the military after admitting to sexually harassing two female subordinates in violation of the UCMJ. In 2000, he resigned his position with a civilian employer as the result of two co-workers' allegations of sexual harassment. He acknowledged his past misconduct and has taken some steps to prevent similar behavior in the future. However, he failed to sufficiently mitigate the security concerns raised by his criminal history or personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On April 5, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) in response to his application for a security clearance, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR detailed reasons why DOHA could not preliminarily determine that it is clearly consistent with the national interest to grant or continue Applicant's request for a security clearance and raised security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct).

In a sworn statement, dated May 11, 2005, Applicant responded to the SOR allegations, and requested a hearing. This case was initially assigned to another administrative judge on September 6, 2005, and reassigned to me on September 13, 2005. A Notice of Hearing was issued on September 26, 2005, scheduling the hearing for October 25, 2005. The hearing was conducted as scheduled. The parties stipulated to the introduction of Government Exhibits 1-13 into evidence. The Government also submitted Government Exhibit 14 that was admitted into the record without objection. Applicant testified and called two witnesses during his case-in-chief. Applicant submitted nine exhibits that were marked as Applicant Exhibits A-I and admitted into the record without objection. DOHA received the Transcript (Tr.)

on November 14, 2005.

FINDINGS OF FACT

In his Answer to the SOR, Applicant admitted all of the factual allegations contained in subparagraphs 1.a., 1.b., and 1.c., under Guideline J, and those contained in subparagraphs 2.a., 2.b., 2.c. (as to two co-workers), 2.d., and 2.f., under Guideline E. He denied those contained in subparagraph 2.e. These admissions are incorporated into my findings of fact. After a complete review of the evidence, I make the following additional findings of fact:

Applicant is 44 years old.⁽¹⁾ For the past three years Applicant has been employed as a systems analyst for a missile defense agency working with a federal contractor.⁽²⁾ Applicant has been married for eighteen years and has six children.⁽³⁾

Applicant graduated very high in his class from a military academy in 1986.⁽⁴⁾ He then attended helicopter school, having been amongst several cadets handpicked for the training.⁽⁵⁾ He received his pilot wings the following year and subsequently became a helicopter flight instructor. As a result of his flying abilities, he was selected for "a joint tour with the United States Army where he served for six months in Operation Desert Shield and Desert Storm being awarded an Air Medal."⁽⁶⁾ He was selected to attend officer training school and was honored for graduating in the top 10% of his class.⁽⁷⁾ He went on to complete five months of weapons school and was recognized "as a subject matter expert in technical weaponry and combat search and rescue tactics."⁽⁸⁾ He served as the Director of Operations for Operation Southern Watch in Kuwait and earned three Aerial Achievement Medals after being deployed three times.⁽⁹⁾ According to his former commander, Applicant "consistently performed above his peers and beyond the call of duty receiving an early promotion with multiple awards and achievements throughout his outstanding career."⁽¹⁰⁾ Referring to Applicant's squadron leadership skills, the commander stated, "He is the most versatile instructor in the schoolhouse, sought out for his knowledge and piloting skills."⁽¹¹⁾ Applicant earned a Master of Science in space operations and studies in 1991.⁽¹²⁾

After his combat assignments, Applicant was deployed overseas in 1992.⁽¹³⁾ While there, he was criminally charged with peering into his neighbors' windows at an off base housing complex. Three incidents occurred in March, August and December of 1993, and involved three separate neighbors.⁽¹⁴⁾ When he was initially confronted with the charges by the investigating officer, he denied them; however, he later recanted and admitted his misconduct both to the investigator and his wife.⁽¹⁵⁾ He acknowledged that his behavior was sexually motivated.⁽¹⁶⁾ As a result of this conduct, in January 1994, Applicant went to a UCMJ Article 15 Hearing (non-judicial punishment) for voyeurism. Applicant, then age 32, was reprimanded and forfeited \$600.00 of his pay. He acknowledged in the proceeding that his

"actions showed a blatant disregard for the privacy of others as well as poor judgement . . . and that [he] should take the opportunity to reflect on [his] action and take immediate steps to correct [his] behavior."⁽¹⁷⁾ In July 1994, Applicant returned to an air base in the United States.⁽¹⁸⁾

In October 1997, two female subordinates accused Applicant of sexually harassing them at work. He admitted that on several occasions during October he made inappropriate and unwelcome sexual comments to the women. In January 1998, after an investigation of the charges the military found that he sexually harassed the two women and imposed a Non-Judicial Punishment under Article 15 of the UCMJ for the offense of Conduct Unbecoming an Officer and a Gentleman. Applicant, then age 36, was reprimanded and forfeited \$1,288.00 per pay month for two months.⁽¹⁹⁾ In July 1998, he resigned his commission from the Air Force and received a General Under Honorable Conditions discharge.⁽²⁰⁾ Prior to his discharge Applicant's commander requested him to undergo a mental health examination, which he did. He never received the results of the test, a diagnosis, or a recommendation that he should seek psychological treatment.⁽²¹⁾

Following his admission of guilt to his commander and wife about the 1997 incidents, Applicant also confessed to his wife that he had engaged in extramarital affairs for five or six years. Soon after that he and his wife began marital counseling with their pastor. They continued weekly counseling for approximately six months, up to the time he left the military in July 1998.⁽²²⁾

Applicant subsequently filed an appeal to upgrade his discharge from Under Honorable Conditions to Honorable and to change the discharge code in order to enable him to re-enroll in active service in the future.⁽²³⁾ In April 1999, he wrote "I have had no problems since getting out of the Air Force, and whether or not I am allowed to re-enter the military, I will not have any more disciplinary problems; none."⁽²⁴⁾ The Review Board Office denied his request in October 2000.⁽²⁵⁾

After discharge Applicant worked for approximately nine months for a federal contractor as a senior analyst in underground nuclear testing.⁽²⁶⁾ In April 1999, he took a position with another contractor.⁽²⁷⁾ About a year later, two female co-workers complained to their supervisor that he engaged in sexual harassment by making inappropriate sexual comments and advances, some of which occurred during an off-site meeting.⁽²⁸⁾ As a consequence of their complaints and a discussion with his supervisor in August 2000, Applicant, then age 39, resigned his position rather than be terminated for cause.⁽²⁹⁾ He admitted he spoke inappropriately to the women and regretted his comments.⁽³⁰⁾ He denied that he lied to the employer during his initial interview about the underlying reason he left the Air Force.⁽³¹⁾ I find his denial credible.

In November 2000, Applicant began working for his present employer. His office mate of three years became familiar with the allegations underlying this proceeding about six months prior to this hearing.⁽³²⁾ He has observed Applicant interact with female co-workers and has found Applicant's behavior to be appropriate.⁽³³⁾ The facility security officer (FSO) at Applicant's place of employment is also familiar with Applicant's history. Applicant told him of his previous problems during the course of these proceedings. The FSO does not know any female employee that has had a problem with Applicant.⁽³⁴⁾ The FSO and five other colleagues support Applicant's request for a security clearance and find him

to be security conscious and trustworthy.⁽³⁵⁾ Applicant received an Outstanding New Employee of the Year award in March 2005.⁽³⁶⁾

Applicant stated that when he left his previous employer he needed to keep better boundaries with his colleagues and not engage in intimate conversations.⁽³⁷⁾ In order to prevent "backsliding" into misconduct, he does not share an office with women employees, avoids personal conversations at work and will not socialize with co-workers.⁽³⁸⁾ He is involved with his family and tries to set a good example to his children.⁽³⁹⁾ He and his wife have worked on their marriage. At the age of 44, he feels he has matured.⁽⁴⁰⁾ He acknowledges the gravity of his misconduct.⁽⁴¹⁾ Other than six months of marital counseling with his pastor in 1998, he has not received any form of professional psychological treatment or participated in recognized self-help groups.

Throughout the hearing Applicant stated that he takes responsibility for his past behavior and poor judgment. He said, "I'm here today because of my misconduct, because of my poor judgment. I've lied in the past. I've been deceitful. I've been a jerk in the past to some of my co-workers, and that's why I'm here today."⁽⁴²⁾ Applicant has held a security clearance for approximately 25 years without incident.⁽⁴³⁾

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth the criteria which must be evaluated when determining security clearance eligibility. Within those adjudicative guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence in order to reach a fair, impartial and common sense decision.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Section E2.2. of Enclosure 2 of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct of the applicant, an administrative judge should consider: (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.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information.⁽⁴⁴⁾ The decision to deny an individual a security clearance request to an individual is not necessarily a judgment of the applicant's loyalty.⁽⁴⁵⁾ Instead, it is a determination that the applicant has not met the strict guidelines established by the Department of Defense 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.⁽⁴⁶⁾ The Directive presumes a rational connection between past proven conduct under any disqualifying condition and an applicant's present security suitability.⁽⁴⁷⁾

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the position of the government.⁽⁴⁸⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his clearance."⁽⁴⁹⁾

Based upon the allegations contained in the SOR and a consideration of the evidence as a whole, the following adjudicative guidelines are pertinent to an evaluation of the facts of this case:

Guideline J - Criminal Conduct: A security concern arises when a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Guideline E - Personal Conduct: A security concern arises when an individual's conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with the rules and regulations could indicate that the person may not properly safeguard classified information.

The Guideline J and Guideline E disqualifying and mitigating conditions, raising either security concerns or mitigating security concerns applicable to this case, are set forth and discussed in the Conclusions section below.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of credibility and the application of the appropriate adjudicative factors and legal standards, including the "whole person" concept, I conclude the following with respect to the allegations set forth in the SOR:

Guideline E: Personal Conduct

Based on the evidence, Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.1. (*Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and others*) applies to subparagraphs 2.a. (1993 voyeurism charges), 2.b. (1998 sexual harassment charges), 2.c. (2000 sexual harassment allegations), 2.d. (2000 employment termination), and 2.f. (extramarital relationships). These allegations of inappropriate behavior are supported by documentation from the military and Applicant's admissions. In addition, PC DC E2.A5.1.2.4. (*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*) also applies. In each instance Applicant did not voluntarily disclose the nature of his misconduct (sexual) until he was confronted during an investigation.

No evidence was offered by the Government to support the allegation contained in subparagraph 2.e. of the SOR, alleging that Applicant lied to his previous employer during an initial interview about the underlying reasons he resigned from military service.

The Government having established its case on allegations 2.a., 2.b., 2.c., 2.d., and 2.f., the burden shifted to Applicant to produce evidence to rebut, explain, or mitigate the facts. Due to the nature of the allegations, the pertinent mitigating condition is Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.5. (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). Applicant presented evidence of distinguished accomplishments, many achievements and accolades awarded to him during his time in the military, as well as from his current employer. He spoke remorsefully of his past sexual indiscretions and the gravity of his conduct. He described behavioral safeguards he now uses to prevent relapse. He believes his maturity and commitment to his

family are working because five years have passed without another incident. He claims that he cannot be vulnerable to coercion or duress because he has disclosed his past to some of his family, friends and employers.

In addition to considering the above mitigating evidence, I have applied the relevant variables of the "whole person" concept in my analysis of the disqualifying and mitigating components. Applicant has shown a seven year period of exercising questionable judgment, each time being aware of the gravity of his actions, yet choosing to continue the misconduct was for his own gratification, from age 32 to 39. All three incidents were serious in nature, displayed poor judgment and resulted in disciplinary action, including the loss of a distinguished military career. His attempt at psychological rehabilitation entailed six months of marital counseling with his pastor, which predated his misconduct in 2000. While the behavioral adjustments he has made are creditable, consisting of self-policing his interactions in his social environment, I am not persuaded that such self-policing is sufficient, as it simply represents a "trying to do better" approach that has already failed in two incidents subsequent to his initial misconduct. Although Applicant claims that he has now divulged his past misconduct to his family, friends and employer, he did not do so until he knew his behavior had become an issue. His misconduct is the type that makes him especially vulnerable to coercion or exploitation because of the effect it would have on his personal, professional or community standing, which may render him susceptible to blackmail. Without objective evidence from a credentialed professional to corroborate or measure claims of internal change over the last five years, his presentation of self-diagnosis and cure has failed to convince me that he has significantly reduced or eliminated vulnerability to coercion, exploitation, or duress, and thereby, he has failed to met his substantial burden. Hence, I find PC MC E2.A5.1.3.5. does not apply in this case. Accordingly, Guideline E is decided against Applicant.

Guideline J: Criminal Conduct

Considering all the evidence in this case, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*), applies to the allegations contained in subparagraphs 1.a. (1994 voyeurism charges) and 1.b. (1998 sexual harassment charges) of the SOR. Applicant admitted he was disciplined under the UCMJ for both criminal charges. The Government did not establish the allegation contained in subparagraph 1.c., which alleged Applicant's discharge from the military constituted criminal behavior.

I considered all the mitigating conditions, in particular, Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*The criminal behavior was not recent*), and conclude it does not apply. Although the last criminal charge occurred in 1998, Applicant engaged in similar misconduct in 2000. The passage of five years without incident is insufficient to counterbalance the sporadic pattern of the allegations occurring over seven years. I also considered CC MC E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*), and conclude it does not apply for the reasons articulated in my analysis under Guideline E. Accordingly, Guideline J is decided against Applicant.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1: Guideline J (Criminal Conduct) AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: For the Applicant

Paragraph 2: Guideline E (Personal Conduct) AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Subparagraph 2.d.: Against the Applicant

Subparagraph 2.e.: For the Applicant

Subparagraph 2.f.: Against the Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with the national interest to grant a security clearance to Applicant at this time. Clearance is denied.

Shari Dam

Administrative Judge

1. Government Exhibit 14 (Security Clearance Application EPSQ, dated September 12, 2001) at 1.
2. Tr. 72.
3. Tr. 75.
4. Government Exhibit 10 (Applicant's Letter to Chairman of the Discharge Upgrade Board, dated April 7, 1999) at 3.
5. *Id.*
6. Applicant Exhibit H (Character Reference for Applicant, dated June 11, 1998).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Government Exhibit 14, *supra* note 1, at 2; Tr. 75.
13. Tr. 74.
14. Government Exhibit 8 (Department of Air Force Memorandum, dated March 20, 1998) at 8.
15. Tr. 78-79.
16. Tr. 79.
17. Government Exhibit 11 (Record of Non-Judicial Punishment Proceedings, dated March 11, 1994) at 3.
18. Tr. 74.
19. Government Exhibit 4 (Record of Non-Judicial Punishment Proceedings, dated January 1998) at 3.
20. Tr. 85.

21. Tr. 133.
22. Tr. 83-84.
23. Government Exhibit 9 (Review Boards Office Decision, dated October 20, 2000); (There are three levels of discharge: Honorable, Under Honorable Conditions (General) and Under Other Than Honorable Conditions. Applicant received the middle level discharge because the "misconduct involved lacked the aggravating factors that would justify the worst possible discharge characterization, a UOTHC." Tr. 128-129).
24. Government Exhibit 10, *supra* note 4, at 4.
25. Government Exhibit 9, *supra* note 23, at 1.
26. Government Exhibit 14, *supra* note 1, at 3.
27. *Id.*
28. Response to SOR, dated May 11, 2005, at 2.
29. Tr. 112.
30. Response to SOR, *supra* note 28, at 3.
31. Tr. 99 and 115.
32. Tr. 40.
33. Tr. 45.
34. Tr. 64.
35. Tr. 63; Applicant Exhibits A-G (Letters of Recommendation from current colleagues).
36. Applicant Exhibit I (2005 Annual Appraisal for Applicant).
37. Tr. 121-122.
38. Tr. 91.
39. Tr. 123.
40. Tr. 122.
41. Tr. 135.
42. Tr. 76.
43. Applicant's Letter to DOHA, dated May 11, 2005, at 1.
44. Directive, Enclosure 2, ¶ E2.2.2.
45. Executive Order 10865, § 7.
46. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
47. ISCR Case No. 95-0611 at 3 (App. Bd., May 2, 1996).

48. ISCR Case No. 01-20700 at 3 (App. Bd., Dec. 19, 2002); *See* Directive ¶E3.1.15.

49. *Id.*