

KEYWORD: Personal Conduct; Sexual Behavior

DIGEST: Applicant seeks a security clearance as a requirement for his position as a security officer for a defense contractor. In 1996, Applicant was terminated as a corrections officer for violating his department's sexual harassment policy and related misconduct on the job. In 2001, he resigned from his position as chief security officer from a cruise ship lines following allegations of sexual harassment. Further, at the time of the alleged misconduct on the cruise ship lines, he was married and he did not want his wife to find out what had happened. This raised personal conduct and sexual behavior concerns. Applicant has mitigated these concerns as a result of significant life style changes and also by having informed his wife of his past. Clearance is granted.

CASENO: 04-05021.h1

DATE: 05/12/2006

DATE: May 12, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-05021

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant seeks a security clearance as a requirement for his position as a security officer for a defense contractor. In 1996, Applicant was terminated as a corrections officer for violating his department's sexual harassment policy and related misconduct on the job. In 2001, he resigned from his position as chief security officer from a cruise ship lines following allegations of sexual harassment. Further, at the time of the alleged misconduct on the cruise ship lines, he was married and he did not want his wife to find out what had happened. This raised personal conduct and sexual behavior concerns. Applicant has mitigated these concerns as a result of significant life style changes and also by having informed his wife of his past. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On April 7, 2005, DOHA issued a Statement of Reasons (SOR)⁽¹⁾ detailing the basis for its decision-security concerns raised under Guideline E (Personal Conduct), and Guideline E (Sexual Behavior) of the Directive. Applicant answered the SOR in writing on April 21, 2005, and elected to have a hearing before an administrative judge.

The case was assigned to me July 7, 2005. On July 20, 2005, DOHA issued a notice of hearing scheduling the case to be heard on September 14, 2005. The hearing was conducted as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The government offered four documents, which were admitted without objection as Government Exhibits (GE) 1 through 4. The Applicant offered 13 documents, which were admitted without objection as Applicant Exhibits (AE) A through M. DOHA received the transcript on September 27, 2005.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated as findings of fact. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 40-year-old married man. Since February 2002, he has been employed as a security officer for a defense contractor. He seeks a security clearance as a condition of his employment. He graduated from high school in June 1984. From July 1992 to January 1993, Applicant was married to his first wife. That marriage ended by divorce. In December 1996, Applicant married his second and present wife. They have two young sons, ages four and two. Applicant's wife works as an electrical detection coordinator for a police department. Tr. 30.

From July 1995 to November 1996, Applicant was employed as a corrections officer for a city police department. He was terminated for engaging in sexual misconduct on the job and violation of departmental sexual harassment policies. Applicant was apparently dating at least two women at his place of employment in addition to his current wife. His relationship with the two fellow employees began to unravel. While this was going on, another female corrections officer accused Applicant of faxing inappropriate cartoons of a sexual nature to a male corrections officer, which Applicant denies. Although this account is somewhat abbreviated, ultimately Applicant was terminated by the city council. Applicant appealed his termination by the city council in superior court and the superior court reversed his termination. The city appealed, and Applicant decided not to pursue his case "because of financial issues . . . and [he] did not want to go back to work for the city." GE 2.

From January 1998 to February 2002, Applicant was employed as the chief security officer for a cruise ship line, and as such held a supervisory position in the company. In conjunction with his duties, he traveled to the Caribbean, Alaska, Greece, Italy, Turkey, and Mexico. In addition to his duties as chief security officer, he also became a trainer for the use of computer systems in the sales department. Applicant submitted his resignation to the cruise ship line following allegations of sexual harassment. Applicant conceded he had asked a fellow female supervisor out for drinks and kissed a few women passengers goodbye. Additionally, he admitted to holding hands, hugging, kissing, and fondling female passengers. He denied doing anything other than that. He stated he "was a bit lost in his marriage not thinking as a true married man." AE A.

Applicant concedes his past conduct showed poor judgment and that he made "mistakes" and "paid for them, and more importantly I have learned from them." AE A. He has discussed his past with his wife, and believes she has forgiven him. AE A. Applicant's wife acknowledged her husband had made mistakes and she confirmed she had "forgiven" him. AE C. He testified, "The cards are on the table. No one could ever come back and try to blackmail me or force me for anything I have ever done." Tr. 24. Applicant and his wife both stated that a defining moment in their life was the birth of their first son in October 2001, followed by the birth of their second son in May 2004. AE A, AE C. Applicant's wife further stated she has known her husband since 1992 and admires the focus, loyalty and compassion he has for his family. AE C. These statements are accepted.

Applicant testified convincingly that he has "learned a lot" from his experiences with the police department and more recently with the cruise ship line. Tr. 22. He acknowledged he "was thinking like an idiot." Tr. 23. He testified "being a

true married person takes so much stress out of my life. I go to work every day. I do my work. I pay attention to my work. I come home. I teach martial arts classes. I teach self-defensive classes. So I have learned to read and understand the policy, but yet if you just live a good lifestyle you don't have to be concerned with the policy." Tr. 23. Applicant's testimony is accepted.

Applicant is fully supportive of his company's sexual harassment policies, and has had no incidents of a similar nature since he left the cruise ship line. He added he is "a bit paranoid of women." Tr. 24. He has adopted a policy if "a suspicious circumstance" develops in the work place involving a member of the opposite sex, he always has a witness present. Tr. 24-25.

Applicant is a master instructor for a defensive tactic program and holds a black belt in the Butokukan martial arts. Tr. 29, AE G. More recently, Applicant was personally selected by his company from among 250 security officers for a "secret detail" guarding and protecting homes of company executives during a strike. Tr. 31. Applicant has upward mobility potential within his company on the condition he is granted a clearance. Tr. 32.

Applicant enjoys an outstanding reputation at work. His supervisors and co-workers enthusiastically and universally confirm his honesty, integrity, and ethics. His personal references are equally complimentary. Applicant's character references include male and female friends and co-workers. All those who he is personally associated with, professionally and personally, refer to him as a trustworthy individual. AE D through K.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, administrative judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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." Executive Order 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.

Initially, the government must establish, by substantial evidence, that conditions exist 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. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

Guideline E - Personal Conduct

In the SOR, DOHA alleged three allegations under personal conduct (SOR ¶¶ 1.a. through 1.c.) to include being involuntarily terminated in November 1996 for violating department sexual harassment policies; resigning from his job by mutual consent in March 2001 following allegations of sexual harassment; and information set forth in ¶ 2.1. below.

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. Directive E2.A5.1.1.

The government established its case under Guideline E by Applicant's admissions and evidence submitted for each of the allegations contained in the SOR under ¶ 1. Such conduct gives rise to Personal Conduct Disqualifying Conditions (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;* and PC DC E2.A5.1.2.5. (*A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*).

Applicant recognizes his past conduct involving sexual harassment and related inappropriate conduct was wrong and is not something that is either appropriate or tolerated in the work place. Furthermore, he convincingly testified regarding the toll losing two jobs has taken on him, his marriage, and his family. An epiphany seems to have occurred within Applicant - a significant factor being the birth of his first son in October 2001 followed by the birth of his second son in May 2004. Applicant has informed his wife of his past indiscretions. While this caused some marital strain, Applicant's wife has forgiven him. Applicant and his wife seem determined to press ahead, put the past behind them, and focus on their future as a family.

Past conduct is often a reliable indicator of future conduct. As the facts bear out, Applicant did not have the responsibility of being a father when these indiscretions occurred. Furthermore, there have been no recurrences of similar conduct since March 2001. Applicant has been nothing short of a model employee since he was hired in February 2002. He has received strong support from his supervisors, co-workers, and social friends, both men and women. While there are few guarantees in life, Applicant has demonstrated for at least the past five years his commitment and devotion to his family and work, and avoided potentially troublesome situations.

I have carefully considered the Personal Conduct Mitigating Conditions (PC MC) under E2.A5.1.3. Evidence presented by Applicant supports application of PC MC E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). In light of the fact Applicant's spouse is now aware of his past, and his positive life changes, I find for Applicant on this concern.

Guideline D - Sexual Behavior

In the SOR, DOHA alleged one allegation under sexual behavior (¶ 2.) that he engaged in sexual conduct with passengers and crew members when he worked for the cruise ship line while married, and that his wife was unaware of his conduct and he did not want her to know of this conduct.

The 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. Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance. Directive E2.A4.1.1.

The government established its case under Guideline D by Applicant's admissions and evidence submitted for the allegations contained in the SOR under ¶ 2.a.

The discussion and analysis under Personal Conduct above apply here. Such conduct gives rise to Sexual Behavior Disqualifying Condition (SB DC) E2.A4.1.2.3. (*Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*). Applicable Sexual Behavior Mitigating Conditions (SB MC) are SB MC 2: (*The behavior was not recent and there is no evidence of subsequent conduct of a similar nature*); and SB MC 3: (*There is no other evidence of questionable judgment, irresponsibility, or emotional stability*); and SB MC 4: (*The behavior no longer serves as a basis for coercion, exploitation, or duress*). In light of the time that has elapsed since the conduct in question, and the fact Applicant's spouse is aware of his past behavior and has forgiven him, these concerns are mitigated. I find for Applicant on this concern.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2: Guideline D: FOR APPLICANT

Subparagraph 2.a.: For Applicant

DECISION

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

Robert J. Tuider

Administrative Judge

1. Pursuant to Exec. Or. 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.