

DATE: July 13, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-09767

ECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

APPEARANCES

FOR GOVERNMENT

Richard Stevens, Esq., Department Counsel

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a senior partner in a defense consulting firm. Applicant engaged in adulterous conduct during each of his three marriages. He has been involved in at least six extra-marital sexual encounters during his present marriage. He has not informed his wife of his conduct. Applicant deliberately informed a security investigator that he did not engage in any adulterous conduct in his present marriage. He subsequently voluntarily informed the investigator of his conduct. Applicant has not mitigated security concerns for sexual behavior and for all allegations of personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On December 8, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny a security clearance for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive). Applicant acknowledged receipt of the SOR on December 14, 2004. The SOR alleges security concerns under Guideline D (Sexual Behavior), and Guideline E (Personal Conduct) of the Directive.

Applicant answered the SOR in writing on December 15, 2004. He admitted all of the allegations under both Guideline D and Guideline E, but disagreed with some of the dates of his alleged activities. He requested a hearing before an administrative judge and the request was received by DOHA on December 21, 2004. Department Counsel was prepared to proceed with the case on May 4, 2005, and the case was assigned to me on May 5, 2005. A notice of hearing was issued on May 9, 2005, and the hearing convened on May 17, 2005. At the hearing, Applicant waived his right to the required 15 days notice for a hearing. Three government exhibits, the testimony of one government witness, and the

testimony of the Applicant were received during the hearing. The transcript was received on May 27, 2005.

FINDINGS OF FACT

Applicant is a 62-year-old senior partner in a defense consulting firm. He retired from military service with over 27 years of active service. He graduated from a military service command and staff school, and has two master's degrees, one in public administration, and one in government contracting. He received a security clearance while on active duty, and has held a security clearance for over 20 years. He served as both a facilities security officer and a special security officer while on active duty and is familiar with security clearance processes and requirements. ⁽¹⁾

Applicant has been married three times. His first marriage of 20 years ended in divorce, and his wife has since died. His second marriage of approximately four years ended in divorce. He has been married to his third and present wife for approximately 12 years. She is the managing partner of his defense consulting firm. Applicant admits to extra-marital sexual affairs in each of his marriages. He had one or two affairs in his first marriage, at least one affair in his second marriage that lasted for about two years, and about six extra-marital sexual affairs in his present marriage. Some of the affairs were one time sexual encounters, while others involved multiple sexual encounters. Applicant's extra-marital sexual partners were consenting adults he met as either students he taught in continuing education courses or business acquaintances. Applicant's last admitted extra-marital sexual encounter was in December 2003, after Applicant was interviewed by a security investigator and after he knew his extra-marital activities were a security concern. None of Applicant's wives knew or now know of his extra-marital activities. ⁽²⁾

Applicant was interviewed by a security investigator for the Defense Security Service (DSS) on September 12, 2003. The interview was held at Applicant's office, and only Applicant, his wife, and the investigator were present in the area. Applicant's wife did not participate in the interview but was working in the area. There is no indication she overheard any of the conversation between Applicant or the security investigator or that she attempted to eavesdrop on their conversation. Applicant deliberately stated to the investigator that he had not been involved in any extra-marital affairs while in his present marriage, knowing that his comments were false. Applicant stated that he did not reveal the truth concerning his extra-marital affairs to the investigator because his wife was nearby and he did not want her to overhear his conversation with the investigator and learn of his activities. Applicant made no indication to the investigator during the interview that he could not speak candidly or truthfully. ⁽³⁾

Applicant called the investigator on September 24 or 25, 2003, while on a business trip, and informed him that he wanted to clarify his statement and provide more information. The investigator told Applicant he also wanted to have a further discussion with him based on information he learned which did not directly indicate adulterous conduct in the present marriage. They agreed to meet at another of Applicant's business offices. Applicant stated he did not have an earlier opportunity to contact the agent because of the press of business. ⁽⁴⁾ At the time of the call, the investigator did not tell Applicant of any concerns he had about any untrue statements. The meeting took place on September 29, 2003. Applicant informed the investigator of his extra-marital affairs during his present marriage and that his wife did not know of the affairs. ⁽⁵⁾

Applicant expressed his willingness to tell his wife of his extra-marital affairs if required to do so to be granted a security clearance. Applicant's first and second wives did not know of his adulterous conduct. He has not informed his current wife of the affairs so she would not be upset by his conduct. Applicant has been loyal to the United States and has not had a security violation in the 44 years he held a security clearance. ⁽⁶⁾

POLICIES

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." ⁽⁷⁾ Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. ⁽⁸⁾

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the

Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions and mitigating conditions for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.⁽⁹⁾ An administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation of recurrence.⁽¹⁰⁾

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant.⁽¹¹⁾ 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 present evidence to establish controverted facts in the SOR that disqualify or may disqualify the Applicant from being eligible for access to classified information.⁽¹²⁾ Thereafter, Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts.⁽¹³⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."⁽¹⁴⁾ "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability."⁽¹⁵⁾ "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."⁽¹⁶⁾

Based upon a consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline D - Sexual Behavior: Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, or may subject the individual to coercion, exploitation, or duress or reflects lack of judgment or discretion.

Guideline E - Personal Conduct: A security concern exists for conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Any of these characteristics in a person could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guidelines are set forth and discussed in the conclusions section below.

CONCLUSIONS

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

The government has established its case under Guideline D.⁽¹⁷⁾ Applicant's adulterous conduct in all of his marriages and his failure to reveal his extra-marital conduct to his wives brings the matter under Sexual Behavior Disqualifying Conditions E2.A4.1.2.1 (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*); E2.A4.1.2.2 (*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*); E2.A4.1.2.3 (*sexual behavior that causes an individual to be vulnerable to coercions, exploitation, or duress*); and E2.A4.1.2.4 (*sexual behavior of a public nature*

and/or that which reflects lack of discretion or judgment). Applicant admitted he had multiple adulterous affairs in each of his three marriages. Applicant's adultery in his first marriage while on active military service is a violation of military law, and his adultery in his second and third marriages is a violation of Maryland law. (18) He acknowledges that none of his wives knew of his affairs and that his course of conduct reflects a lack of discretion or judgment. Applicant's repeated adulterous conduct makes him vulnerable to coercion, exploitation, and duress. Applicant's conduct has been secret from all of his wives. His failure to tell his first wife does not make him vulnerable to coercion, exploitation or duress since she is no longer alive. His failure to inform his second wife also does not make him vulnerable, since they have been divorced for over 13 years, and she is remarried. However, his failure to inform his present wife of his affairs is a basis to coerce or exploit him and place him under duress. There is also no indication Applicant's sexual behavior is compulsive or addictive. I conclude the above disqualifying conditions, with exception, have been established by Applicant's admissions. (19)

Applicant has not mitigated the security concerns for his sexual behavior. I considered Sexual Behavior Mitigating Conditions E2.A4.1.3.2 (*the behavior was not recent and there is no evidence of subsequent conduct of a similar nature*); E2.A4.1.3.3 (*there is no other evidence of questionable judgment, irresponsibility, or emotional instability*); and (*the behavior no longer serves as a basis for coercion, exploitation, or duress*). The behavior is recent since the last known adulterous act was in December 2003. Applicant's continued adulterous course of conduct after knowing his actions were a security concern, and after being questioned by a security investigator is other evidence of questionable judgment and irresponsibility. There is no indication that he will not continue to engage in adulterous conduct. The security concern exists even though Applicant stated he would inform his wife of his activities to obtain a security clearance. His promise of future action is not sufficient to mitigate the disqualifying conditions. Applicant's has not met his burden to mitigate the behavior that causes a security concern.

The government has established its case under Guideline E. Applicant deliberately provided a wrong answer to the investigator about adulterous conduct in his present marriage, and his continued adulterous behavior brings the matter under Personal Conduct Disqualifying Conditions E2.A5.1.2.3 (*deliberately providing false or misleading information concerning relevant and material matters to an investigator . . . in connection with a personnel security or trustworthiness determination*); 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 know, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*); and E2.A5.1.2.5 (*a pattern of dishonesty or rule violations, . . .*). Applicant admitted he deliberately lied to the investigator when he told him he did not have an adulterous affair while in his present marriage. Applicant's adulterous activities in his three marriages is a pattern of personal and marital dishonesty and rules violation and makes him vulnerable to coercion, exploitation, or duress. I conclude the above disqualifying conditions have been established.

Personal Conduct Mitigating Conditions E2.A5.1.3.3 (*the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*); and E2.A5.1.3.5 (*the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*) should be considered for Applicant.

Mitigating Condition 3 applies to cases where there is a correction of a falsification. (20) Applicant gave the investigator false information on September 12, 2003. He called the investigator on September 24 or 25, 2005 and told him he provided inaccurate information and asked for a meeting. He met with the investigator on September 29, 2003, and gave him the complete and accurate information. The investigator may have thought the Applicant had not told him the truth on September 12, 2005, but he did not have sufficient evidence of untruths and did not inform the Applicant of any untruthful information. Applicant took the first step to inform the investigator of the false statement, so he made a prompt good-faith effort to correct the falsification before being confronted. He has mitigated allegation 2.a. in the SOR. However, Applicant's adulterous conduct and the fact he has not informed his wife of his activities leaves him vulnerable to coercion, exploitation or duress. He has not taken any positive steps to reduce or eliminate his vulnerability. His comment that he would tell his wife of his activities if required is not a positive step. Applicant has not mitigated allegation 2.b. in the SOR.

I carefully considered all of the circumstances in light of the "whole person" concept. I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

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

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.: For Applicant

Subparagraph 2.b.: Against Applicant

DECISION

In light of all of the circumstances in 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.

Thomas M. Crean

Administrative Judge

1. Tr. 17-19.
2. Tr. 13-15.
3. Tr. 14; Tr. 25-27.
4. Tr. 27-35.
5. Tr. 55-58; Government exhibit 3 (Extract of investigator's notes).
6. Tr. 14-16.
7. *Department of the Navy v. Egan*, 484 U.S. 518 (1988).
8. Directive ¶ E2.2.1.
9. *Id.*
10. Directive ¶¶ E2.2.1.1 through E2.2.1.9.
11. *See* Exec. Or. 10865 § 7.
12. Directive ¶ E3.1.14.
13. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15.
14. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).
15. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993))

16. *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

17. In his answer to the SOR, Applicant disputes the dates of his adulterous conduct. He states that the dates in the SOR are the entire dates of his marriages and not the dates during which he engaged in adulterous conduct. The dates in the SOR are not material to a determination of his security worthiness. Applicant did not engage in adulterous conduct during the entire time of each marriages, but he did engage in adulterous conduct during the marriages. There is no need to amend the dates of the conduct as listed in the SOR.

18. Uniform Code of Military Justice, Article 134; Maryland Criminal Code Ann. § 10-501 (2004).

19. Except for E2.A4.1.2.2, and vulnerability to coercion, exploitation, or duress for the first and second wives under E2.A4.1.2.3.

20. *See*, ISCR Case No, 01-06166 (App. Bd. Oct 29, 2001) at 3; and ISCR Case No. 00-0671 (App. Bd. Aug. 15, 2001) at 3.