

DATE: August 9, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 05-02422

## **DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Robert E. Coacher, Esq., Department Counsel

#### **FOR APPLICANT**

Howell Roger Riggs, Esq., Timothy P. Pittman, Esq.

### **SYNOPSIS**

Applicant, a longtime security-clearance holder, engaged in an affair with Jane Doe, a married, subordinate employee. In June 2000, after investigating the matter, the company terminated or fired Applicant because: (a) Applicant engaged in disparate treatment of employees by showing undue favoritism toward Jane Doe; (b) Applicant had an extramarital affair with Jane Doe, a subordinate employee, and he lied to the company vice-president by denying the affair; and (c) Applicant misused company resources by submitting petty-cash receipts and travel receipts used to carry on the affair. Applicant failed to successfully mitigate the resulting personal conduct security concern. Clearance is denied.

### **STATEMENT OF THE CASE**

Applicant is challenging the Defense Department's preliminary decision to deny or revoke his security clearance. Acting under the relevant Executive Order and DoD Directive, [\(1\)](#) on October 21, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) detailing the basis for its decision. The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline E for personal conduct. Applicant replied to the SOR on November 8, 2005, and requested a hearing. The case was assigned to me on January 19, 2006. The next month a notice of hearing was issued scheduling the hearing for March 8, 2006. Applicant appeared with counsel and the hearing took place as scheduled. DOHA received the transcript on March 16, 2006.

### **FINDINGS OF FACT**

In his written reply to the SOR, Applicant denied all the SOR allegations. In addition, after considering the record evidence as a whole, I make the following findings of fact.

1. Applicant is a 47-year-old senior network engineer employed by a contractor to the Defense Department. He has worked for this company since February 2003. His annual salary is about \$82,000. He has held a security clearance for many years as a soldier and as a defense contractor.

2. Applicant married his first wife in March 1980 and they divorced in February 2001. He married his current wife in February 2002. He has four minor stepchildren in his household, and he is in the process of adopting the youngest stepchild.

3. Applicant served as a soldier in the U.S. Army from about April 1977 until June 1994. He took an early-out retirement allowing him to retire with less than 20 years of service. He retired at the grade of sergeant first class (paygrade E-7).

4. In about April 1995, Applicant began working as an at-will employee for a small company that provided technology or computer services to military customers. Applicant held a security clearance for this job, and he worked his way up from his initial position of software trainer to senior network engineer. In about July 1998, with the backing of the company, he opened a retail computer store. As the store manager, he hired several employees, including a woman who is now his wife. His relationship with this woman (Jane Doe) led to allegations of impropriety, which were investigated by the company vice-president in June 2000. This investigation resulted in Applicant's termination from employment on or about June 15, 2000.

5. SOR subparagraph 1.a alleges that Applicant was terminated on June 15, 2000, for violations of company policy not otherwise specified. Applicant denies this allegation, but I find the evidence is sufficient to prove it. The vice-president testified unequivocally that Applicant was terminated or fired for the following reasons: (a) Applicant engaged in disparate treatment of employees by showing undue favoritism toward Jane Doe; (b) Applicant had an extramarital affair with Jane Doe, a subordinate employee, and he lied to the company vice-president by denying the affair; and (c) Applicant misused company resources by submitting petty-cash receipts and travel receipts used to carry on the affair. (2) In making this finding, I found the vice-president's testimony was wholly credible. In the vice-president's opinion, Applicant lacks honesty, integrity, trustworthiness, and good judgment. (3)

6. SOR subparagraph 1.b alleges that Applicant downloaded "pornographic" material onto his company computer during the period April 1995 to June 2000. Applicant denies this allegation, and I find the evidence is inconclusive and insufficient to prove it. The basis for this allegation is what was found on Applicant's computer immediately after he was fired. The vice-president testified they found "several very incriminating e-mails," (4) one of which acknowledged membership at a website for pornographic cartoons. Other than the vice-president's testimony, the government did not offer any other evidence (e.g., the e-mails, material from the website, etc.) to show the pornographic nature of the materials. Accordingly, the vice-president's testimony, standing alone, is not enough to prove that the materials were pornographic as that term is used in the law. (5) Had the SOR alleged sexually-explicit material as opposed to pornographic material, my finding here may have been different.

7. SOR subparagraph 1.c alleges that Applicant used a company credit card to pay for downloading pornographic material onto his company computer during the period April 1995 to June 2000. Applicant denies this allegation, and I find the evidence is inconclusive and insufficient to prove it. According to the vice-president, shortly after Applicant was fired, the company received a credit card bill that contained a charge for the cartoon website. The registration against the credit card matched the registration on Applicant's computer. Other than this testimony, the government did not offer any other evidence (e.g., the credit card account statement, company records, etc.) to support this allegation. Given the absence of any documentary evidence tying Applicant to the credit card charges, the record evidence is not enough to prove this allegation.

8. SOR subparagraph 1.d alleges that Applicant used a company credit card in 1999 or 2000 to pay for Jane Doe to travel for out-of-town company business when she had no reason to accompany Applicant. Applicant denies this allegation, and I find the evidence is inconclusive and insufficient to prove it. Again, given the absence of any documentary evidence showing that Applicant made specific charges to a company credit card for specific travel, the record evidence is not enough to prove this allegation.

9. Applicant has continuously denied having an extramarital affair with Jane Doe while she was his subordinate employee, and he reaffirmed his denials during his testimony. His denials are not credible. In making this credibility finding, I am relying, in part, on my observations of Applicant's sincerity and demeanor while he testified, as well as

how he might be affected by the outcome of this case. In addition, I considered the following circumstances. First, Applicant was giving Jane Doe preferential treatment at work. Second, Applicant took long lunches, two hours or so, with Jane Doe. Third, Jane Doe's husband met with the vice-president during the investigation and showed him a hotel receipt found in Jane Doe's purse. It was dated April 2000, and it was signed by Applicant for a hotel room in a nearby town. Applicant listed his parents' address in another state on the receipt. Fourth, on several occasions Jane Doe's husband followed her after work and saw Jane Doe go directly from work to Applicant's apartment. Fifth, when Applicant was told his services were no longer needed, Applicant departed the computer store and was followed out the door by Jane Doe who never returned to work. Sixth, Jane Doe moved in with Applicant shortly after the termination and they lived together until they were married. Taken together, these circumstances show Applicant was having an affair with Jane Doe while she was his subordinate employee.

10. Three character witnesses provided highly favorable character evidence for Applicant. The witnesses are retired or former military officers who now work with Applicant. The witnesses vouched for Applicant's knowledge, skills, and abilities as an employee. And the witnesses vouched for Applicant's suitability to hold a security clearance.

### **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.<sup>(6)</sup> Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

### **BURDEN OF PROOF**

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(7)</sup> There is no presumption in favor of granting or continuing access to classified information.<sup>(8)</sup> The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.<sup>(9)</sup> An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>(10)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(11)</sup>

No one has a right to a security clearance.<sup>(12)</sup> And as noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(13)</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

### **CONCLUSIONS**

Personal conduct under Guideline E<sup>(14)</sup> is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Conduct or behavior 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.

Here, based on the record evidence as a whole, the government established its case under Guideline E. While working as a cleared employee of a defense contractor, Applicant had an extramarital affair with a subordinate employee. The company terminated or fired Applicant because: (a) Applicant engaged in disparate treatment of employees by showing undue favoritism toward Jane Doe; (b) Applicant had an extramarital affair with Jane Doe, a subordinate employee, and he lied to the company vice-president by denying the affair; and (c) Applicant misused company resources by submitting petty-cash receipts and travel receipts used to carry on the affair. Taken together, this unfavorable

information from a previous employer raises a security concern within the meaning of DC 1, <sup>(15)</sup> DC 4, <sup>(16)</sup> and DC 5. <sup>(17)</sup> The record evidence shows Applicant engaged in significant workplace misconduct and he was terminated or fired as a result. To sum up, his past workplace misconduct shows poor judgment, lack of candor, dishonesty, and untrustworthiness.

Turning to his case in mitigation, I reviewed the mitigating conditions under Guideline E and conclude only MC 5 <sup>(18)</sup> applies in his favor, because this incident took place approximately six years ago and it has not recurred. These circumstances are positive steps that support his case in mitigation, but are not enough to overcome the case against him.

In addition, I remain concerned about whether Applicant has provided a full, frank, and truthful accounting of his past conduct. <sup>(19)</sup> Applicant has continuously denied having an affair with Jane Doe while she was his subordinate employee, and he continued to make this denial during his testimony. As noted above in Finding No. 9, his explanations or denials were not credible. I considered his lack of credibility for certain limited purposes. First, it causes me to discount his testimony in general. And second, it indicates he has not accepted full responsibility for his actions, which militates against his evidence of rehabilitation and other pertinent behavior changes. <sup>(20)</sup> At bottom, his lack of credibility erodes his case in mitigation. Accordingly, Guideline E is decided against Applicant.

To conclude, Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I considered the record evidence as a whole--including

Applicant's exhibits and witnesses and his many years of honorable military service--the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

SOR Paragraph 1-Guideline E: Against Applicant

Subparagraph a: Against Applicant

Subparagraphs b, c, d: For 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 a security clearance for Applicant. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. R. 44-45, 49.
3. R. 50-51.
4. R. 46.
5. *Miller v. California*, 413 U.S. 15, 24-25 (1973) (Material is pornographic or obscene--and not protected by the First Amendment--if the average person, applying contemporary community standards, would find that the work taken as a whole appeals to th prurient interest, and if it depicts or describes in a patently offensive way sexual conduct, and if the

work taken as a whole lack serious literary, artistic, political, or scientific value).

6. Executive Order 10865, § 7.

7. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

8. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

9. Directive, Enclosure 3, Item E3.1.14.

10. Directive, Enclosure 3, Item E3.1.15.

11. Directive, Enclosure 3, Item E3.1.15.

12. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.") (citations omitted).

13. 484 U.S. at 531.

14. Directive, Enclosure 2, Attachment 5.

15. Item E2.A5.1.2.1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances.

16. Item 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.

17. Item E2.A5.1.2.5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement between the individual and the agency.

18. Item E2.A5.1.3.5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.

19. Under Item 6.2 of the Directive, an applicant is required to give full, frank, and truthful answers to relevant and material questions.

20. Directive, Enclosure 2, Item E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavior changes.