

DATE: November 27, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-03360

DECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 55-year-old executive for a defense contractor. Prior to 1983, he had extra-marital affairs which he divulged to his wife in 1999 while in marriage counseling. In 2002, he was convicted of driving under the influence of alcohol. In 2004, after drinking alcohol, he sexual harassed a female employee. Applicant has not mitigated security concerns for sexual behavior and alcohol consumption. Clearance is denied.

STATEMENT OF THE CASE

On July 29, 2005, the Defense Office of Hearing 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 Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). Applicant acknowledged receipt of the SOR on August 12, 2005. The SOR alleges security concerns under Guideline E (personal conduct), Guideline G (alcohol consumption), and Guideline D (sexual behavior) of the Directive.

Applicant answered the SOR in writing on August 25, 2005. He admitted all of the allegations under Guidelines E, G, and J, but provided an explanation for his actions. He elected to have the matter decided on the written record in lieu of a hearing.

Department Counsel submitted the Government's written case on July 31, 2006. Applicant received a complete file of relevant material (FORM) on September 6, 2006, and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant provided additional information on October 26, 2006. On October 31, 2006, Department Counsel noted no objection to consideration of the additional material. The case was assigned to me on November 1, 2006.

FINDINGS OF FACT

Applicant admitted the facts associated with the allegations in the SOR. After a thorough review of the pleadings and exhibits, I make the following essential findings of fact.

Applicant is a 55-year-old executive for a government contractor for the last eight months. Before that time, and when the security clearance application was submitted, Applicant worked for another defense contractor for over six years. He held a security clearance, to include sensitive compartmented information (SCI) access, for over ten years. He is a college graduate, married, with two children. Applicant signed a security clearance application on October 16, 2003. In response to question 21 asking if he had ever been charged with or convicted of a felony offense, Applicant listed a 2002 driving while intoxicated offense (DWI). In response to question 19 asking if in the last seven years he consulted a mental health professional, Applicant acknowledge seeing a mental health doctor for marital-related problems. In response to question 30 asking if in the last seven years his use of alcohol resulted in alcohol-related treatment or counseling, Applicant listed medical treatment and counseling in 2002-2003. ⁽¹⁾

In June 2002, Applicant played in a golf tournament and consumed six to eight beers. On his way home, he was stopped by police for DWI. He pled guilty to the offense, and was sentenced to probation before judgment, fined, placed on probation for 90 days, and required to attend alcohol counseling. He completed all aspects of his sentence. As part of his sentence, he attended an alcohol counseling program from June 2002 to April 2003. He was diagnosed as a "problem drinker", but not considered an "alcoholic." He states he still drinks a beer or two a week but does not drive after drinking. He was not recommended for further alcohol counseling. ⁽²⁾

In February 2004, Applicant was on an authorized business trip with female employees, A and B. Applicant consumed about five drinks with the females while at dinner and a jazz club. On return, they went to the hotel room of female A. Shortly after, female B left. Applicant laid on the bed and started sexually touching female A. Female A objected, Applicant stopped, and left the room. After returning from the trip, female A reported the incident to Applicant's supervisors. The company took immediate action. He was issued a formal reprimand, forfeited a sizable performance bonus, placed on probation within the company for six months, and directed to attend sexual behavior counseling. Applicant consulted the same counselor that counseled him on his 2002 DWI incident. ⁽³⁾

Applicant has not reported the sexual harassment incident to his wife. Prior to 1983, Applicant had numerous extra-marital affairs that he reported to his wife in 1999 during marriage counseling. His wife was anguished when she learned of these affairs. He does not want to tell her of the 2004 sexual harassment incident so she does not experience the anguish again. ⁽⁴⁾

Applicant related in his response to the SOR that since February 2004, he has been treated for sleep apnea. His doctor informed him that he probably had the condition since the early 1980s. He believes the June 2002 DWI and the February 2004 sexual behavior event were a result of his sleep apnea condition. ⁽⁵⁾ The medical literature provided by Applicant shows the results of sleep apnea are falling asleep inappropriately, morning headaches, memory problems, feelings of depression, reflux, and frequent need to urinate during the night. The condition may result in job impairment and motor vehicle accidents. ⁽⁶⁾ His medical doctor stated he has treated Applicant for sleep apnea since 2004. His disease is chronic and is associated with poor sleep quality, daytime sleepiness, decrease in daytime alertness, and poor work performance. Applicant has followed the prescribed medical routine and is one of the doctor's most successful patients. ⁽⁷⁾

Applicant states in his response to the SOR:

Although the record as documented in the SOR is shameful, I believe I am a good and honorable man who is worthy of a security clearance. I have worked hard all of my life and have accomplished much both professionally and personally of which I am proud. However, I have on occasion done terribly stupid, thoughtless, and irresponsible things. And I have spent a lot of time and energy to figure out why this paradoxical behavior has happened. ⁽⁸⁾

In his response to the FORM, Applicant notes:

I have long recognized that alcohol abuse has been a problem for me and has had a tremendous impact on my life. . . . In fact, dealing with this Case for the past two years has reinforced my understanding of the need to get control over this problem so that it never has an adverse impact on my life.

He further relates that he maintained sobriety for 14 months. He and his wife are still married and recently went on a cruise with others. He has a new position with another defense contractor. His brother was in an automobile accident and Applicant handled the stress of his brother's injuries and decision making as his medical next of kin. His son was married in May 2006. Through all of these events, he has maintained his sobriety. He has also continued with his sleep apnea procedures. ⁽⁹⁾

The Chief Executive Officer of Applicant's prior defense contractor employer until December 2005 stated he has known Applicant for over five years and believes him to be a decent, trustworthy, reliable, and honest man. The incidents in the SOR are not indicative of Applicant's general character. He believes Applicant is worthy of a security clearance. ⁽¹⁰⁾ His present employer in response to the FORM notes that Applicant is a thoughtful, focused individual with balanced thinking and consideration. He is dedicated to his family and balances work and family life. He is considered a solid professional and citizen. ⁽¹¹⁾

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." ⁽¹²⁾ Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. ⁽¹³⁾

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. ⁽¹⁴⁾ 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. ⁽¹⁵⁾

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. ⁽¹⁶⁾ 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. ⁽¹⁷⁾ Thereafter, Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts. ⁽¹⁸⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ⁽¹⁹⁾ The government is under no duty to present evidence to disprove any Adjudicative Guideline mitigating condition, and an Administrative Judge cannot assume or infer that any particular mitigating condition is applicable merely because the government does not present evidence to disprove that particular mitigating condition. ⁽²⁰⁾ "[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." [\(21\)](#) "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." [\(22\)](#)

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 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.

Guideline D - 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.

Guideline G - Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.

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 factors in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

The government raises security concerns under Guideline E (personal conduct) because of Applicant's sexual harassment of a female employee in 2004, his extra marital affairs prior to 1983, and his refusal to tell his wife of the 2004 sexual harassment incident. Applicant's admission to these actions establishes Personal Conduct Disqualifying Condition (DC) E2.A5.1.2.1 (*reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*); DC E2.A5.1.2.4 (*personal conduct or concealment of information that increases and 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 DC E2.A5.1.2.5 (*a pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between and individual and the agency*). Applicant's conduct in engaging in extra-marital affairs and his sexual harassment of a female employee is unfavorable information concerning him, and shows a pattern of dishonesty. His refusal to tell his wife about the sexual harassment because of concern for her feelings increases his vulnerability to coercion or exploitation.

Applicant raises, by his responses to the SOR and FORM, Personal Conduct Mitigating Conditions (MC) E2.A5.1.3.1 (*the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability*); and MC E2.A5.1.3.5 (*the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). Applicant admitted to the facts so the information is substantiated. Even though the extra-marital affairs happened more than 20 years ago, they are still pertinent to a determination as to his judgment, trustworthiness, or reliability. The sexual harassment happened only two years ago and shows a course of conduct similar to the extra-marital affairs. His proclivity to engage in extra marital affairs shows poor judgment, untrustworthiness, and unreliability. Even though he has not told his wife about the sexual harassment incident, his explanation that he wants to spare her the anguish is reasonable. While telling her about the incident will help him, it may be difficult for her because of her prior feelings from his previous disclosure. His failure to tell her under the circumstances does not make him vulnerable to coercion, exploitation, or duress. I find against Applicant as to the security concerns for personal conduct since the extra-marital affairs and the sexual harassment incident are similar conduct and show a continued security concern.

The government raises security concerns under Guideline D (sexual behavior) because of extra marital affairs and Applicant's sexual harassment of a female employee. Applicant's admission to the extra-marital affairs and sexual

harassment allegations raises Sexual Behavior Disqualifying Conditions (DC) E2.A4.1.2.1 (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*); DC E2.A4.1.2.3 (*sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*); and DC E2.A4.1.2.4 (*sexual behavior of a public nature and/or that which reflects lack of discretion or judgment*). Applicant's admission that he engaged in numerous extra-marital affairs prior to 1983 and to sexually harassing one of his female employees while on a business trip in 2004 establishes the disqualifying conditions. The sexual harassment incident is a criminal offense of at least assault. The extra-marital affairs and the sexual harassment of an employee are sexual behavior that reflects a lack of discretion or judgment because they both violated the marital trust. The sexual harassment of an employee causes difficult workplace problems and demonstrates a significant lack of judgment by a person in Applicant's position in a company.

Applicant's responses to the SOR and FORM raise Sexual Behavior Mitigating Conditions (MC) E2.A4.1.3.2 (*the behavior was not recent and there is no evidence of subsequent conduct of a similar nature*); MC E2.A4.1.3.3 (*there is no other evidence of questionable judgment, irresponsibility, or emotional instability*); and MC E2.A4.1.3.4 (*the behavior no longer serves as a basis of coercion, exploitation, or duress*). The extra-marital affairs happened prior to 1983 and Applicant told his wife about them in 1999. The behavior is over 20 years old and thus not recent. Since he told his wife about them, they no longer serve as a basis for coercion, exploitation, or duress. However, the sexual harassment incident occurred in 2004 and thus is recent. This puts the extra-marital affairs in a different perspective since the sexual harassment is recent conduct similar in nature to the extra-marital affairs. Applicant's sexual behavior towards the female employee could have led to extra-marital sexual activity if the female employee had consented. The act was criminal in nature, even though probably a misdemeanor, because it was offensive touching that was not consented to by the female. There is recent or subsequent sexual behavior similar to the extra-marital affairs, and his sexual harassment action is evidence of questionable judgment and irresponsibility. However as noted above, Applicant's reasons for not telling his wife are reasonable under the circumstances and no longer a basis for coercion, exploitation, or duress. I find against Applicant for sexual behavior. Applicant has failed to present sufficient information to mitigate the security concerns for sexual behavior based on the extra-marital affairs followed by a DWI and a recent act of sexual harassment caused by alcohol consumption.

The government raises security concerns for Guideline G (Alcohol Consumption) based on the 2002 DWI, and the 2004 sexual harassment incident that was precipitated by alcohol consumption. Applicant's admission to the DWI and the sexual harassment after drinking alcohol raises Alcohol Consumption Disqualifying Conditions (DC) E2.A7.1.2.1 (*alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use*); and DC E2.A7.1.2.2 (*alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job*). DWI is one of the examples used for an alcohol-related incident away from work. Applicant was drinking with other employees while on a business trip. After an evening of drinking alcohol, he sexually harassed a female employee. The sexual harassment incident can be considered an alcohol-related incident away from work because it was not at the normal workplace and an alcohol-related incident at work since it happened with a subordinate while on a business trip. The driving while intoxicated and the sexual harassment after drinking alcohol establish the disqualifying conditions under alcohol consumption.

Applicant raised by his response to the SOR and FORM Alcohol Consumption Mitigating Conditions (MC) E2.A7.1.3.1 (*the alcohol related incidents do not indicate a pattern*); MC E2.A7.1.3.2 (*the problem occurred a number of years ago and there is no indication of a recent problem*); and E2.A7.1.3.3 (*positive changes in behavior supportive of sobriety*). Even though there are a few years between the driving while intoxicated offense and the sexual harassment incident after drinking alcohol, there is a pattern. Applicant drinks alcohol and then engages in conduct that shows questionable judgment, trustworthiness, and reliability. The last alcohol-related incident was in 2004, and is recent. In response to the FORM, Applicant related a number of incidents that he handled well to indicate his sobriety. He notes in the response, he has maintained his sobriety for 14 months. However, other than his response, he presents no other information supportive of sobriety. He provides no information on any programs or steps he has taken to support his sobriety. The events do show a pattern, there are recent alcohol-related events that raise a security concern, and Applicant has not established sufficient positive changes supportive of sobriety. Applicant has not met his burden to mitigate the security concerns for alcohol consumption.

The determination of Applicant's security worthiness requires a very careful and full analysis of his conduct under the "whole person" concept. The adjudication of security worthiness is an examination of a sufficient period of a person's

life to make an affirmative determination that the person is an acceptable security risk. The whole person examination is a weighing of a number of variables. All available, reliable information about the person past and present, favorable and unfavorable, should be considered in reaching an overall common sense determination based on the careful consideration of: (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 or 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 or recurrence*. I considered Applicant's sleep apnea medical condition, but find the condition does not affect his thought process related to his alcohol consumption or engaging in inappropriate sexual behavior. I considered that Applicant's supervisors state that he is highly regarded for his work and is a benefit to his company. The allegations in the SOR taken together and in considering the "whole person," indicate a trustworthiness, reliability and judgment problem. Applicant admits alcohol abuse is a problem for him. After drinking alcohol, he drove while under the influence on one occasion and sexually harassed a female employee on another occasion. This shows unreliability, questionable judgment, and untrustworthiness. He has not mitigated the alcohol consumption concern. The extra-marital affairs and the affirmative actions to engage in sexual harassment shows Applicant is not trustworthy and has poor judgment. Even though, he knows alcohol abuse causes a problem for him, he still drinks. His past history of exercising poor judgment after drinking alcohol raises a concern that he may engage in conduct that does not safeguard classified information. Applicant's conduct indicates he is a security risk. I conclude he is not eligible for access to classified information.

FORMAL FINDINGS

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

Paragraph 1, Guideline E: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2, Guideline G: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Paragraph 3, Guideline D: AGAINST APPLICANT

Subparagraph 3.a.: 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. Item 4 (Security Clearance Application, dated Sep. 18, 2003).

2. Item 6, (Applicant's statement to security investigators, dated October 13, 2004) at 4-5.
3. *Id.*, at 6-7; Item 5 (Letter of Reprimand, dated February 19, 2004).
4. *Id.*, at 7-8.
5. Item 2 (Response to SOR, dated August 25, 2005) at 1-2.
6. *Id.*, American Sleep Association Brochure, dated August 15, 2005, at 2.
7. *Id.*, at Medical Letter, dated August 21, 2005.
8. Item 2 (Response to SOR, dated August 25, 2006) at 1.
9. Response to FORM, dated October 26, 2006.
10. Item 2 (Response to SOR, Letter, dated August 25, 2005).
11. Letter, dated October 26, 2006.
12. *Department of the Navy v. Egan*, 484 U.S. 518 (1988).
13. Directive ¶ E2.2.1.
14. *Id.*
15. Directive ¶¶ E2.2.1.1 through E2.2.1.9.
16. *See* Exec. Or. 10865 § 7.
17. Directive ¶ E3.1.14.
18. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15.
19. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).
20. ISCR Case No. 99-0597 (App. Bd. Dec 13, 2000).
21. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993))
22. *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.