

DATE: March 26, 1997

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR OSD Case No. 96-0547

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

Teresa Kolb, Esquire

Attorney Advisor

FOR THE APPLICANT

Eric Adam, Esquire

STATEMENT OF THE CASE

On August 28, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6 "*Defense Industrial Personnel Security Clearance Review Program*" (Directive) dated January 2, 1992, as amended by Change 3, dated February 13, 1996, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make a preliminary determination that it was clearly consistent with the national interest to grant or continue a security clearance for him.

A copy of the SOR is attached to this Decision and included herein by reference.

The Applicant responded to the SOR on September 23, 1996 and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on October 25, 1996. On December 18, 1996, a hearing was convened for the purpose of considering whether it would be clearly consistent with the national security to grant, continue, deny, or revoke Applicant's security clearance. The Government's case consisted of three witnesses and 14 exhibits; Applicant relied on 3 exhibits, on his own testimony, and on the testimony of three additional witnesses. A transcript of the proceedings was received on January 6, 1996.

FINDINGS OF FACT

Applicant has admitted that he engaged in the activities described in the factual allegations pertaining to sexual behavior set forth under subparagraphs 1.a. through 1.c of Criterion D. He denied that his activities were sexual harassment in every instance.

After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 38 year old employee of a defense contractor who has both a Bachelor's and Master's Degree in Industrial and System's Engineering. He has worked for his current employer since October 1995 and has held a secret clearance since 1981.<sup>(1)</sup> A favorable preliminary determination could not be made in his case because of evidence that he has sexually harassed several female co-workers over a period of several years.

The initial incident of sexual harassment which precipitated the current review of Applicant's security eligibility occurred on Friday morning, April 22, 1994. At that time, Applicant was working as a supervisor for Company B-- a company that had been his employer for the previous five years. A co-worker, Ms. Z, had entered his office for the purpose of discussing a work-related matter. Applicant grabbed her from behind--at what he considered an opportune time--and pulled her onto his lap. She rejected his advance immediately and left his office. Applicant made an effort to apologize to Ms. Z later that afternoon. He thought he was being sincere; she did not perceive that he was serious or that he had any appreciation of the impact that his actions had had on her. Although very upset about the incident, Ms. Z did not report it until two days later after she had had an opportunity to discuss the incident with her husband and with other important people in her life.

As a result of this incident Applicant was counseled by a management representative on the company's sexual harassment policy. In the counseling letter which he signed on April 25, 1994 Applicant specifically acknowledged that he had been "placed on notice" that further offensive behavior to fellow employees would subject him to "immediate termination." Applicant further acknowledged that he had been briefed on the company's policies pertaining to unwelcome advances and understood "the severity of the situation."

On August 26, 1995, after receiving additional complaints about Applicant's unwelcome sexual advances, the management of Company B gave Applicant an ultimatum: resign or your employment will be terminated. Applicant submitted his resignation--effective as of August 26, 1995. In October 1995, he began working--out of his home--for Company A. He continues to work for Company A under that arrangement. Since leaving the employment of Company B, Applicant's acceptance of responsibility for the sexual harassment incidents which preceded and precipitated his termination has been inconsistent.

When he was first interviewed by the Defense Investigative Service (DIS) in February 1996, Applicant admitted that he had been accused of sexually harassing co-workers, but minimized his involvement in such activity. He admitted that he acted inappropriately with respect to one co-worker--whom he identified, that he had engaged in consensual behavior (kissing, hugging) with other co-workers, and that he had been accused of sexual harassment/inappropriate behavior on several other occasions. Applicant explained that he had voluntarily resigned from Company B after being accused of sexual harassment, rather than going through an extended court proceeding. Applicant provided essentially the same account of his activities during a second interview with DIS on May 8, 1996.

Applicant finally admitted involvement in additional acts of sexual harassment during his third DIS interview on May 22. He identified different occasions when he had made unwelcome physical advances to five different female co-workers: he had placed his hand on the inside thigh of Ms. K when she was wearing a mini-skirt, he admitted that he had pulled Ms Z down on his knee (see above), he had kissed and attempted to put his tongue in the mouth of Ms. B, he had touched the breast of and held hands with Ms. T, and he had given his secretary (at a previous employer) a back rub. During the third DIS interview, Applicant described one of the women--toward whom he had made an unwelcome advance-- as a "target of opportunity."

Two women who had been victims of Applicant's unwelcome sexual advances testified at his administrative hearing. Ms. Z described in considerable detail the trauma she had experienced as a result of Applicant's actions. Ms. T, who testified on Applicant's behalf, was upset by his advances, but did not experience the mortification which Ms. Z described during her testimony. Ms. T testified that she did not report the incident to management, but did communicate to Applicant--through a third party--that she was upset by his physical contact. Neither witness experienced any unwelcome advances from Applicant after they communicated their displeasure to him.

On his own behalf, Applicant testified that he has learned his lesson. While defensive at times, Applicant admitted that his sexual advances toward female co-workers were wrong (Tr.192) Contrary to his early protestations that he had voluntarily resigned from Company B, Applicant admitted that he had to leave a company in which he had invested a "tremendous amount" of his life (Tr. 194). He testified that having to throw away that investment of time was his wake-up call. He now realizes that whether a woman welcomes his sexual advances or rejects them, such conduct is "still wrong." (Tr. 192). He realizes that he must "always be professional with males or females," and never be in a position where his actions can be misinterpreted. (Tr. 195). Since the sexual harassment incidents, Applicant has become more committed to his marriage and to his religious faith.

Applicant also submitted a very recent evaluation by Dr. D<sup>(2)</sup> (Ph.D., Diplomat in Clinical Psychology). In his evaluation, Dr. D noted a "predisposing element" in Applicant's socialization toward the behavior he had exhibited. Applicant's attitude had been shaped in a home which saw "women as being present for the convenience of men and to be submissive to men." According to the MMPI-2 which Applicant took, Applicant is "closely identified if not over identified with the male gender stereotype of the culture." Dr. D's evaluation discloses that Applicant admitted (to him) that he had been disciplined on two previous occasions for "gender improprieties" (App. Exh. A): a reprimand seven years ago, and another reprimand twelve years ago. Another relevant disclosure by Applicant to Dr. D was his statement that his wife has served notice that she will leave if he is involved in further incidents of sexual harassment. Applicant also told Dr. D that he now realizes that "he can not even give the impression of impropriety in the future" and his acceptance of "zero tolerance for confusing personal and business relationships."

Applicant is actively involved in a wide range of professional organizations and community activities to include his church and ----- . There is no evidence that he has ever made improper, unwelcome sexual advances toward the women with whom he associates and works in these activities. Applicant has been married to Ms. - since 1983; they have two children, ages seven years and four months.

By every account, Applicant is an excellent worker whose work ethic has been highly regarded by his employer and co-workers--even those who have been the victims of his unwelcome advances. He is intelligent and highly motivated. His employers have regularly rewarded his efforts with substantial salary increases (Govt. Exh. 7).

### POLICIES

The Adjudicative Guidelines of 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 with reasonable consistency that are clearly consistent with the interests of national security. In making those 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 the factors set forth in section F.3. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate that the facts proven have a nexus to an applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter.

### SEXUAL BEHAVIOR

(Criterion D)

#### **Conditions that could raise a security concern and may be disqualifying:**

- (1) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (4) Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

#### **Conditions that could mitigate security concerns:**

- (3) There is no other evidence of questionable judgment, irresponsibility, or emotional instability;

### **Burden of Proof**

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to the applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates that it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands that Court's rationale, doubts are to be resolved against an applicant.

### **CONCLUSIONS**

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes that the Government has established its case with regard to Criteria D.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section F.3, as well as those referred to in the section dealing with the Adjudicative Process, both in the Directive.

The Government has met its burden with respect to Criterion D. The testimony of Ms. Z and s. T, together with Applicant's admissions to DIS, his admissions to Dr. D, and his testimony at his administrative hearing, establish that Applicant made unwelcome physical advances to female co-workers on numerous occasions over a ten year period. His actions have been unlawful, intrusive, highly objectionable, and morally wrong.

Because Applicant's sexual harassment of female co-workers included an unlawful touching and thus involved criminal conduct, his sexual misconduct raises a security concern. This concern is not put to rest by Applicant's excellent record in handling classified information.

To counter the evidence of sexual misconduct, Applicant testified that he has learned from his mistakes and knows how to prevent a recurrence of the behavior which has gotten him into trouble. Being fired from a job to which he had devoted considerable time and energy was the wake-up call which caused him to realize the seriousness of his actions. Applicant also testified about his recommitment to his wife and family, and about his spiritual awakening through greater involvement in his church. His religious activities have caused him to take a closer look at himself and his life. He is now more concerned with how his behavior and actions are perceived by others and by God.

I have given favorable consideration to evidence that Applicant is an excellent employee who has worked hard and not exhibited poor judgment or irresponsibility in other areas of his life. Even the witnesses who testified against him on the sexual harassment incidents provided only positive information about his reputation as an employee. I have also given favorable consideration to his involvement in a wide range of community and professional activities. However, Applicant's good judgment in most circumstances is not sufficient to outweigh the egregiously poor judgment demonstrated by him through his repetitious acts of sexual harassment.

After carefully considering Applicant's testimony, I believe that he is sincere in his desire not to repeat his past behavior. Intellectually, he realizes that his unwelcome advances toward "targets of opportunity" were wrong; but emotionally, he still has not connected with his victims. His tendency to minimize his misconduct underscores the fact that he still does not understand the trauma Ms. X experienced when he grabbed her from behind and pulled her onto his lap. His testimony describing the actual mechanics of this incident suggests that--in his mind--it was less traumatic for Ms. X if he grabbed her in a manner different than the way she had described. That he chose to describe the "mechanics of the incident" after hearing Ms. X testify about how upset she was after the incident proves that he did not listen to her testimony or understand why she was upset. Nor did Applicant understand the trauma experienced by the other women

when they were the victims of his groping and grabbing. With respect to some of the incidents, Applicant has sought refuge in the notion that he had been encouraged by the victim. Applicant seems unwilling to conduct himself in accordance with the accepted societal norms that govern the relations between the sexes. In his world, every woman is a "target of opportunity" until she personally communicates to him her displeasure with his unwelcome attention.

Applicant is a 38 year-old, well-educated, married man with two children. Making unwelcome sexual advances toward women co-workers by grabbing and touching them was both morally wrong and unlawful. Applicant should have known this simple truth before receiving the first reprimand. Now after receiving three reprimands and being fired--all for making unwelcome sexual advances--Applicant demonstrates only a limited appreciation of the fact that such behavior is **always** wrong and **always** inappropriate in the workplace.

Applicant was fired from Company B because he had failed to learn the intended lesson from three previous reprimands. Because he has continued to minimize his sexual misconduct--even after being fired from Company B--his assurances that he has now learned his lesson and will not repeat his past misconduct are not persuasive. Applicant had been fired from Company B several months before the first DIS interview. He had had time to think about his misconduct and the reason he had been forced to leave the employer to whom he had given so much. Yet there is little evidence in his disclosures, during the first or second DIS interviews, that he was accepting responsibility for his actions. He did not admit that he had made improper advances toward several female co-workers in the first statement to the DIS. He acknowledged only a single incident where he had "exhibited inappropriate behavior" toward a female co-worker (Govt. Exh. 3). He was not even willing to admit that he had been involuntarily terminated because of the sexual harassment incidents. In the second statement, he indicated that he had left Company B because of an offer from another company. He had not been informed "of any allegations or charges" (of sexual harassment) until learning of that information from the DIS (Govt. Exh. 2). These statements were made by Applicant **after** he had received his wake-up call.

Applicant has not been involved in any acts of sexual misconduct since August 1995, but then he has been working out of his home--not in an environment where the opportunity presented itself. His 16 months of good behavior is not convincing, under these circumstances, without some indication from Applicant that he has come to appreciate what his victims experienced when he grabbed them in a sexually explicit manner. Given his history, Applicant's admission that he was "wrong," and his statement that he will not do it again are not convincing. There was little evidence of contrition in Applicant's attitude toward these serious incidents prior to his hearing. Without some empathy for his victims, his 16 months of good behavior is too short a time period to give me confidence there will not be a recurrence of his past misconduct. In order to conclude that continuing Applicant's clearance is clearly consistent with the national interest, I must be more confident that he will not engage in the same unlawful behavior in the future. Criterion D is concluded against Applicant.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 (Criterion D) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the 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 continue Applicant's security clearance.

**John R. Erck**

**Administrative Judge**

1. The letter sent by Applicant's former employer to DISCO on August 26, 1995, gives December 1990 as the date Applicant received his security clearance. In his answer to the SOR, Applicant states that he has had a clearance for 15 years. After reviewing his employment history on his resume (Govt. Exh. 7) I am convinced that Applicant was granted his security clearance in 1981.
2. Although Dr. D was not called as a witness and subject to cross-examination, his evaluation is found to be credible because it is objective and reaches findings consistent with other evidence.