

DATE: January 4, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03624

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's conduct raises security concerns over his personal conduct and sexual behavior in failing to reveal on his 1999 security application a 1996 arrest for "Solicit Prostitution" after he approached an undercover police officer for intercourse. His various claims for not revealing the arrest lack credibility: first, he thought it was expunged because the arrest was placed on the Stet docket if he was to be of good behavior for three years and later he claimed to have forgotten the arrest. Also, he had engaged in sexual behavior with prostitutes from 1977 to 1980 when he was in the military service. He failed to offer sufficient evidence to mitigate this repeated problematic and misguided conduct; thus, given his history of questionable conduct, doubt remains as to whether he is fully rehabilitated. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on July 31, 2001. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.⁽¹⁾ The SOR alleges specific concerns over personal conduct (Guideline E) and sexual behavior (Guideline D). Applicant responded to these SOR allegations in an Answer notarized on August 13, 2001, where he admitted with explanations paragraphs 1.a. and 1.a.(1) as well as paragraph 2 and subparagraphs 2.a. and 2.b. He did not want a hearing.

The case was assigned to Department Counsel who on September 14, 2001, prepared a File of Relevant Material (FORM) where the Government offered 7 items as exhibits⁽²⁾ which were forwarded to Applicant on September 17, 2001, for his review. Although he received the documents on September 19, 2001, Applicant submitted no response in the next thirty days or by October 19, 2001. Subsequently, on October 30, 2001, the case was assigned to me for a decision on the record.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 46 years old, has been an employee of Defense Contractor #1 in State #1 since July 1999. Previously he worked for Contractor #2 from 1994 to 1998, and for Contractor #3 from 1983 to 1994. Initially, he had been granted a Top Secret security clearance in 1981 when he served in the military from August 1976 to April 1983. He received a BS degree from a university in December 1986. He was married in October 1979. (Item 4)

Personal Conduct and Sexual Behavior

In August 1999 Applicant executed a Security Clearance Application (Standard Form 86) (SF 86) and failed to reveal a police record in answer to Question 26 even though he had a record of a September 1996 arrest and charge for "Solicit Prostitution" after he had approached an undercover police officer, solicited intercourse, and offered \$50. Eight months later, when Applicant was interviewed by a Defense Security Service (DSS) investigator in March 2000, he was confronted with the omission of this arrest from his security form. Applicant claimed that he thought the arrest had been expunged because the arrest had been placed on the Stet docket if he was to be of good behavior for three years. He also admitted that this incident "represented the lowest point" in his life. He acknowledged that he had engaged in earlier sexual behavior with prostitutes approximately 10-15 times from 1977 to 1980 when he was in the military service. In his Answer Applicant further explained that he was devastated by the public embarrassment and humiliation resulting from the arrest and that it adversely impacted his marriage. The arrest was so traumatic he "tried to erase it from my memory." He then offered a different reason⁽³⁾ for his security form omission in 1999: he no longer had "any recollection of the arrest." (Items 2, 4, 5, 6)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed relevant Adjudication Guidelines as set forth below :

Guideline E - Personal Conduct

Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying also include:

(2) The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(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;

Conditions that could mitigate security concerns include:

None

Guideline D - Sexual Behavior

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. (4) 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.

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

- (1) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (3) Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; (4) Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

Conditions that could mitigate security concerns include:

None

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Personal Conduct

The Government advanced security concerns (5) over personal conduct issues after Applicant omitted material information on his security form in 1999 when he failed to disclose his 1996 arrest. His conduct reflects questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations and could indicate that he may not properly safeguard classified information. Applicant demonstrated poor judgment and unreliability in his personal conduct also by his 1996 acts which led to his arrest for Solicit Prostitution. He did not reveal details of this arrest until confronted by the DSS agent in an interview eight months later. He offered a series of inconsistent reasons for the omission which undermines his credibility: he first claimed that he thought the arrest had been expunged because the arrest had been placed on the Stet docket if he was to be of good behavior for three years; he then conceded that this incident "represented the lowest point" in his life. Even if he believed the arrest had been expunged he had a duty to disclose it and then the opportunity to explain the circumstances. The question explicitly states the need to "report information regardless of whether the record. . .has been 'sealed' or otherwise stricken from the record." In his Answer to the SOR Applicant offered a different and inconsistent reason when he said that the omission was because in 1999 he no longer had "any recollection of the arrest" from 1996. This questionable personal conduct raises grave doubts as to his reliability.

To rebut and overcome the Government's case, Applicant would have to demonstrate that he has mitigated (6) this past pattern. Applicant offered no evidence in mitigation other than the explanations in his Answer to the SOR. His request for a "second chance" has to be balanced against the doubt that remains as to whether he is fully rehabilitated given this chronicle of evasive conduct. Hence, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraphs 1.a. and 1.a.(1) under SOR Paragraph 1.

Sexual Behavior

The Government also raised concerns over his past sexual behavior which becomes 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. (7) Conditions that could raise a security concern and may be disqualifying include: (1) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted; (3) Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; (4) Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment. In this case Applicant's 1996 conduct in soliciting someone for intercourse led to an arrest and charge, which is significant even if there is no evidence of a conviction as he reported that the charge was placed on the stet docket. No criminal conduct (8) was separately alleged. Even he admitted that this incident "represented the lowest point" in his life. He admitted further questionable sexual conduct with prostitutes that he had engaged in ten to fifteen times from 1977 to 1980 while he was in the military. While this conduct is quite dated, it remains relevant because of the 1996 incident.

Applicant offered no evidence to attempt to mitigate (9)

this conduct other than the explanations in his Answer to the SOR. His request for a "second chance" has to be balanced against the doubt that remains as to whether he is fully rehabilitated given this history of questionable conduct. Hence, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraphs 2.a. and 2.b. under SOR Paragraph 2.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline E AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.a.(1).: Against Applicant

Paragraph 2. Guideline D: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against 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 the Applicant.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
2. I did not admit into evidence Item 7 as there is no SOR allegation regarding this 1989 memorandum from a previous employer regarding allegations of him being in violation of sexual harassment policies of the company.
3. Applicant claimed that he did not seek to conceal anything, but given his inconsistent reasons for his failure to reveal the 1996 arrest on his security form, I find it difficult to accept that explanation as convincing. (Item 2)
4. **The adjudicator should also consider guidelines pertaining to criminal conduct (Guideline J); or emotional,**

mental, and personality disorders (Guideline I), in determining how to resolve the security concerns raised by sexual behavior.

5. Conditions that could raise a security concern and may be disqualifying also include: (2) The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; (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;

6. Conditions that could mitigate security concerns include:

1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily; 3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; 4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided; 5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress; 6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information; 7. Association with persons involved in criminal activities has ceased.

7. The adjudicator should also consider guidelines pertaining to criminal conduct (Guideline J); or emotional, mental, and personality disorders (Guideline I), in determining how to resolve the security concerns raised by sexual behavior.

8. The Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 mandated restrictions on the granting or renewal of security clearances which was implemented within the Department of Defense by a June 7, 2001, Memorandum, and within DOHA by Operating Instruction (OI) 64, issued on July 10, 2001. Provision (1) disqualifies persons with convictions in both State and Federal courts with sentences imposed of more than one year, regardless of time actually served. The policies apply to all pending cases in which a final decision had not been issued as of the June 7, 2001, date of the memorandum. In this instance I have determined that 10 U.S.C. Section 986 does not apply as there is no evidence that Applicant's 1996 sentence was for more than one year.

9. Conditions that could mitigate security concerns include:

1. The behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature; 2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature; 3. There is no other evidence of questionable judgment, irresponsibility, or emotional instability; 4. The behavior no longer serves as a basis for coercion, exploitation, or duress.