

DATE: April 14, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-15745

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1995, this 42-year-old employee of a defense contractor was given a citation for solicitation of prostitution and possession of an open container of alcohol. He failed to appear in court at the time stated on the citation and a warrant was issued, which is still outstanding. He intends not to return to the distant state where the warrant was issued and has not confirmed that a \$269.00 payment he had submitted to the court had satisfied the \$500.00 bail. It did not and Applicant will not return to the court to resolve the matter. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On October 8, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

Applicant submitted a response to the allegations set forth in the SOR, dated November 25, 2002, and elected to have a decision made by a DOHA Administrative Judge on the written record, i.e., without a hearing. Department Counsel issued a File of Relevant Material (FORM) on January 23, 2003. The Form instructed Applicant that any response to the FORM had to be submitted within 30 days of its receipt by Applicant. Applicant's response to the FORM was due by March 1, 2003, but he did submit any additional information. The matter was assigned to me for resolution on March 6, 2003.

FINDINGS OF FACT

Applicant is a 42-year-old employee of a defense contractor. The SOR contains one allegation, 1.a., under Guideline J (Criminal Conduct), and one allegation, 2.a., under Guideline E (Personal Conduct), relating to the cited criminal conduct.

After considering the totality of the evidence derived from the FORM and its attachments, I make the following FINDINGS OF FACT as to each SOR allegation:

Guideline J (Criminal Conduct)

SOR 1.a. - Applicant was arrested on July 11, 1997, in State A, and charged with (1) "Loitering with intent to promote"; and (2) "open container of alcohol in a motor vehicle." On August 20, 1997, a warrant was issued for Appellant's failure to appear and bail was set at \$500.00, as to Count 1. He was assessed a fine of \$10.00 on each count, which he claims he has paid the court, but he has not documented that the claim.

Guideline E (Personal Conduct)

SOR 2.a. - Applicant had no intention of resolving the matter cited in subparagraph 1.a., above. As of the closing of the record in this case, March 1, 2003, Applicant has not established that the above matter has been resolved

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (4) the individual'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 or recurrence (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because Applicant chose to have this matter decided without a hearing and without submitting any additional information in response to the FORM, all credibility determinations and findings of fact are necessarily based entirely on the contents of the FORM.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

GUIDELINE J (Criminal Conduct)

Condition that could raise a security concern and may be disqualifying:

1. Reliable, unfavorable information provided by associates, *employers*, neighbors, and other acquaintances.
6. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement between the individual and the agency.

Conditions that could mitigate security concerns include:

None that are applicable under the facts of this case.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence

of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

CONCLUSIONS

The essence of this case is not complicated. Applicant was arrested in July 1997 for loitering with intent to promote and possession of an open container of alcohol in his vehicle. Police record show that the alleged intent was to solicit prostitution from an undercover police woman (Government Exhibit (GX) 5 and 6. Applicant challenges the "arrest" aspect of SOR allegation 1.a., and I note that Applicant appears to have been given a citation and notice to appear rather than being transported to a police station and booked. I conclude, how this fact does not affect the existence of a criminal violation by Applicant, nor his failure to appear as directed on the Citation. In his sworn statement to an agent of the Defense Security Service (DSS), Appellant admits inviting the woman into his car but denies that it was for the purpose of soliciting prostitution or that he said anything of that nature before nearby police the came over to his car, at which time they saw the open container (GX 5). Applicant "assumed there is a warrant out for my arrest because of this" and "I do not intend to return to [State A] to resolve this" (Id.). The reason I do not plan to resolve this is i don't plan on going back to [State A} N a WARRANT WRRnt [was

8888The origins of Applicant's problems at Company A are discussed in a memorandum by Company A officials, dated September 6, 1999. It cites Applicant's being rated "marginal" for time management in his 1997 and 1998 evaluations. The basis for the criticism appears to be his lack of focus on the work he has been assigned, in favor of activities that seen preferable to him. As to the specific incident cited in the memorandum, Applicant "under[stood] it was not the right decision." Applicant was placed on a "formal warning period" of 90 days. At a follow up meeting on September 16, 1999, his supervisor cited Applicant's "excessive socializing, standing around, and taking long breaks as the key points" of concern. On December 9, 1999, his supervisor ended the formal warning period, restored Applicant to full duty and advised him of current workload requirements. Applicant indicated his understanding (GX 5).

On August 19, 1999, Applicant sent a message (e-mail) to his company's message board. Referring to the Company CEO, Applicant wrote "getting rid of" the CEO "is the only thing that will help this suffering company." The message discusses possible strikes and meetings and concludes with the following: "I think a better solution to this company's problems is to get some guns and fora a march on [State A] and the hope the [the CEO] hasn't bullet proofed his limousine yet" (GX 6).

On his security clearance application, at Question 20. YOUR EMPLOYMENT RECORD

[PROBLEMS AT WORK], Applicant answered "Yes," and stated that he was fired by Company A on April 4, 2001 for "Disregard of Company Policy. Took too many long lunches" (GX 4)

The only explanation for Applicant's behavior appears in an attachment to his response to the SOR (GX 3). As to SOR 1.a. - Applicant admits placing the e-mail in question on his company's message board and cab "now see how it can be interpreted in a threatening manner," but he "did not mean it a threat." It was "in fact a poor attempt at sarcasm" and he "did not intend to cause any harm or undue stress to any employee of [Company A]. Even seen in its best light, Applicant's e-mail showed extremely poor judgment and, I conclude, could reasonably be construed a threat.

As to SOR 1.b. and 1.c. - Applicant agrees that he had been warned about his "time management" shortcomings, but states that "Disregard for Company Policy" was the official reason his employment was terminated. As he views it, he was terminated because of the e-mail message cited in SOR 1.a. The timing of each incident shows that the e-mail incident occurred on August 19, 1999, although it is not clear when management became aware of it. The time management problems cover the period from August 24, 1999 (first warning) to November 1999 (when he was taken off the warning period). He was terminated on April 4, 2001, a year and a half or more after both incidents occurred. It is a distinction without a difference. SOR 1.c. states that Applicant was terminated "due to [his] disregard of Company Policy and the threat he made to [his] company's CEO." In any case, context, Applicant's explanation does not have any impact on the final decision.

Applicant's security clearance application (GX 4) indicates that Applicant began his present employment on April 4, 2001, the same date given for his termination from Company A. In addition to Applicant's admissions, the record evidence independently supports the accuracy of all three SOR allegations. The proven allegations, in turn, create a nexus, or connection, with Applicant's suitability to hold a security clearance. The sole remaining issue is whether Applicant has provided adequate evidence of mitigation or extenuation. I conclude that Applicant has not done so. His misconduct at Company occurred over a period of several; years. He was given warnings several times over the two years and was finally terminated less than two years ago, presumable because his unacceptable behavior had not ended or improved. In mitigation, Applicant provides only uncorroborated explanations that, in any case, do not mitigate the totality of the negative evidence

Disqualifying Condition 1 (reliable unfavorable evidence from employers) applies. Applicant has not demonstrated the applicability of any of the possible mitigating Conditions cited under Guideline E. Under these circumstances, the record evidence establishes that Applicant currently lacks the judgment, reliability, and trustworthiness required of anyone seeking access to the nation's secrets.

FORMAL FINDINGS

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

Guideline E (Personal Conduct) 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 grant or continue a security clearance for Applicant.

BARRY M. SAX

ADMINISTRATIVE JUDGE