

DATE: April 10, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-25077

DECISION OF ADMINISTRATIVE JUDGE

CHRISTOPHER GRAHAM

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Elizabeth L. Newman, Esq.

SYNOPSIS

Applicant is a single employee of a federal contractor. He used the services of prostitutes in the United States and while employed in Europe. He successfully mitigated sexual behavior, personal conduct, and criminal conduct security concerns based on the nature and extent of the solicitations and the lack of coercion, exploitation, or duress from his admissions and common knowledge of his actions. Clearance is granted.

STATEMENT OF THE CASE

On December 9, 2004, 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 and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR alleged facts under Guidelines D (sexual behavior), E (personal conduct), and J (criminal conduct), detailing reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

In a written statement dated December 29, 2004, Applicant responded to the allegations in the SOR, and requested a hearing. The case was assigned to me on arch 25, 2005. Notice of the hearing was issued June 24, 2005, scheduling the hearing for July 19, 2005. The hearing was held as scheduled. The transcript (Tr.) was received August 1, 2005.

FINDINGS OF FACT

Applicant admitted the allegations in the SOR. After a thorough review of the record as a whole, I make the following additional findings of fact:

Applicant is a single, 47-year-old employee of a federal contractor.⁽¹⁾ He has earned a bachelor's degree in aerospace engineering, and a master's degree in mechanical engineering from a major university.⁽²⁾ His career field is aerospace engineering, specifically systems engineering of advanced concept systems.⁽³⁾ Applicant was first granted a security clearance in 1984.⁽⁴⁾ He held that clearance until he worked abroad, from 1999 to around the beginning of 2002, when his clearance was re-instated.⁽⁵⁾

Applicant admitted using the services of prostitutes in 1982-1983, while attending college; in March 1999; approximately 12 times per year while working in Europe from March 1999, until mid-summer of 2001; and in the United States from the summer of 2001 until early 2004.⁽⁶⁾ His awkwardly chivalrous attitude toward prostitution was learned from his father, who was an English immigrant, and who taught him that there were two kinds of women - those you marry and those you sleep with.⁽⁷⁾ His father believed that picking up a woman in a bar and lying to her was unethical behavior. Applicant quoted his father as saying, "Just don't do that. If you need that sort of contact, find a woman who's going to do it on a business footing and be business-like about it."⁽⁸⁾

Applicant is engaged and has told his fiancee' about his past solicitations and use of prostitutes.⁽⁹⁾ He has changed his attitude toward prostitution as a result of these proceedings. He recognizes that the general attitudes toward and laws against prostitution in the U. S. differ markedly from the attitudes in Europe. It was something he didn't think about because of his father's instructions.⁽¹⁰⁾ He was truthful about his use of prostitutes in his statement to a DSS investigator.⁽¹¹⁾

When he received the SOR he immediately told both his boss and his immediate supervisor his history of using prostitutes.⁽¹²⁾ When he offered to resign, they told him, "Don't be crazy."⁽¹³⁾ One co-worker stated,

Yes, I believe that he is a trustworthy individual, all right. In the interaction that I've had with him for the last several years, I've found him to be a very honest, very open type of person. A lot of our work involves dealing with classified material, so we have to take precautions in the design to protect that information. Applicant has always been vigilant about that sort of thing. So I feel he is a very trustworthy person. [\(14\)](#)

Another co-worker was told about Applicant's statement that he would not frequent prostitutes again. He was asked:

Q. Do you believe him if he says it's not part of his life any more?

A. I would think so, yes.

Q. Why?

A. Well, I think he's a pretty straight fellow and a pretty straight shooter, and he knows how important the security clearance is and that's what he wants more than the prostitutes.

Q. Do you believe he is trustworthy?

A. Yes.

Q. Would you recommend that he have a security clearance and have access to classified information?

A. Yes. He's a hard-working , creative engineer, with a lot of good ideas and not afraid to stand up to the crowd and say "This is a good idea and let's pursue it." [\(15\)](#)

Applicant has not been charged with any criminal offenses. [\(16\)](#)

POLICIES

"[No] one has a 'right' to a security clearance." [\(17\)](#) As Commander-in-Chief, 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." [\(18\)](#) The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential coercion, and willingness and ability to abide by regulations governing use, handling, and protection of classified information." [\(19\)](#) Eligibility for a security clearance may be adjudicated using the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative factors listed in ¶ 6.3 of the Directive: nature and seriousness of the conduct and surrounding circumstances; frequency and recency of the conduct; age of the Applicant; motivation of the applicant, and the extent to which the conduct was negligent, wilful, voluntary, or undertaken with knowledge of the consequences involved; absence or presence of rehabilitation; and probability that the circumstances or conduct will continue or recur in the future.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information.⁽²⁰⁾ The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability.⁽²¹⁾

Once the Government establishes a disqualifying condition, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.⁽²²⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."⁽²³⁾ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. The Government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or his own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the Government.⁽²⁴⁾ Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, not actual, risk of compromise of classified information.

Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism.

Having considered the evidence as a whole, I find the following guidelines most pertinent to an evaluation of the facts of this case: 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 E: Conduct 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; and Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

CONCLUSIONS

Sexual Behavior. The government made a prima facie case against Applicant by his own admissions. Sexual behavior disqualifying condition (SB DC)E2.A4.1.2.1 Sexual behavior of a criminal nature, whether or not the individual has been prosecuted, and SB DC E2.A4.1.2.3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress apply.

Applicant comes to these proceedings with a meritorious professional record and no criminal convictions. He has held a security clearance for most of the past 22 years. Applicant has never married so there is no issue of marital infidelity. He is engaged and has discussed his use of prostitutes with his fiancée. His use of prostitutes in the United States is criminal in nature since it is a crime to solicit prostitutes in the U. S. He engaged the services of prostitutes while working in Europe, but in that country prostitution was legal so it is not criminal in nature. Both the courts and our Appeal Board have historically drawn broad lines of nexus to an applicant's non-official conduct and his executing his official duties in a reliable and trustworthy manner. Cf. DISCR OSD No. 90-1803 (March 31, 1992); DISCR OSD No. 87-2107 (October 30, 1991); accord, Stanek v. Department of Transp., 805 F.2d 1572, 1577 (Fed. Cir. 1986) (employee's removal justified where employee's conduct, if tolerated, would impair the integrity of the federal government; Ryan v. Department of Justice, 950 F.2d 458, 460-61 (7th Cir. 1991) (employee's misconduct such that his retention would impair discipline, morale, or productivity of agency.) His immediate supervisors' responses to his offer to resign totally negates any inference that his conduct has impaired morale or productivity. His acknowledgment of his hiring prostitutes, especially to his fiancée, belies any efforts to coerce or blackmail Applicant.

Applicable sexual behavior mitigating conditions (SB MC) are SB MC E2.A4.1.3.3 There is no other evidence of questionable judgment, irresponsibility, or emotional instability, and SB MC E2.A4.1.3.4. The behavior no longer serves as a basis for coercion, exploitation, or duress. His employment record; expressed remorse; disclosure to fiancée, DSS investigator, and supervisors; and his word that he will refrain from this conduct in the future in the United States are indications of rehabilitation and that he cannot be coerced or exploited. This is not the type of conduct that has or will affect his ability to safeguard classified information. I find that Applicant has mitigated the security concerns about sexual behavior.

Personal Conduct. Under Guideline E, a security concern arises where it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information. Personal Conduct Disqualifying Conditions (PC DC) include PC DC 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.

The government questions Applicant's trustworthiness because he has hired prostitutes. Applicant has been forthright about his conduct, and is not a legitimate target for coercion or blackmail. Personal conduct mitigating conditions that apply include PC MC E2.A5.1.3.1 The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; and PC MC E2.A5.1.3.5 The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress. Both issues were discussed under the sexual behavior conclusions and do not need to be repeated. Accordingly, I conclude the SOR allegations under Guideline E for the Applicant.

Criminal Conduct. The security concern under Guideline J (criminal conduct) is that someone who willingly disregards the law may also disregard rules and procedures intended to safeguard classified information. Guideline J, Criminal conduct DC E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged applies. Applicant admitted his conduct. Applicant's criminal history conduct is confined to only the use of prostitutes, and his statement that he will discontinue this conduct in the future, establishes that it is not likely to happen again. His co-workers testified about his trustworthiness, his care in safeguarding classified information, his creative talents, and their recommendations that he be granted a security clearance. On balance, I conclude Guideline J for the Applicant.

I have carefully weighed all of the available evidence, and I have applied the appropriate disqualifying and mitigating

conditions. Further, I have tried to make a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. To me, this record raises no reasonable or persistent doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Because of the nature of the conduct and his efforts at mitigation, I conclude he has overcome the government's case.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline D: FOR THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. For the Applicant

Paragraph 2. Guideline E: FOR THE APPLICANT

Subparagraph 2.a. For the Applicant

Paragraph 3. Guideline J: FOR THE APPLICANT

Subparagraph 3.a. For the Applicant

Subparagraph 3.b. For the Applicant

Subparagraph 3.c. For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to

grant or continue Applicant's security clearance. Clearance is granted.

Christopher Graham

Administrative Judge

1. Government Exhibit 1 (Standard Form 86 (SF 86) Security Clearance Application, signed November 6, 1998) at 2, 5.

2. Tr. at 14.

3. Id.

4. Tr. at 17.

5. Id.

6. Applicant's Response to Statement of Reasons, dated December 29, 2004.

7. Tr. at 20.

8. Id.

9. Tr. at 38.

10. Tr. 32-38.

11. Government Exhibit 2, Applicant's Statement, dated May 11, 2004, at 3-4.

12. Tr. at 19.

13. Id.

14. Tr. at 46-47.

15. Tr. at 53-54.

16. Tr. 1-67.

17. See *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1998).

18. Id. at 527.

19. Exec. Or. 12968, *Access to Classified Information*, § 3.1(b) (Aug. 4, 1995).

20. *Egan*, supra, at 531.

21. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

22. See ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

23. Id., at 3.

24. See Egan; Directive ¶ E2.2.2.