

DATE: January 21, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00578

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, who engaged in prostitution solicitation on several occasions (once arrested in 1998) and multiple extramarital affairs with previously unknown foreign nationals from Mexico and Vietnam without disclosing his activities to either his spouse or employer, and who repeatedly falsified his accounts of his actions to a DSS investigator before admitting his actions after being confronted, neither extenuates nor mitigates his conduct and misstatements/omissions sufficiently to demonstrate the requisite good judgment, reliability, and trustworthiness for continued eligibility to hold a security clearance. Clearance is denied.

STATEMENT OF THE CASE

On January 8, 2003, 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, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed 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 a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on January 27, 2003, and requested a hearing. The case was assigned to me on September 29, 2003, and was scheduled for hearing on October 29, 2003. A hearing was convened on October 29, 2003, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of five exhibits; Applicant relied on one witness (himself) and four exhibits. The transcript (R.T.) was received on November 7, 2003.

PROCEDURAL ISSUES

Before the hearing was concluded, Department Counsel moved to amend sub-paragraph 1.c of the SOR to (a) insert the word **and** before the words "had identified yourself as a regular customer" in the third sentence, (b) substitute the word

women for woman at DTS in the same third sentence, and ©) insert a comma after "one woman in Mexico." There being no objection from Applicant, and good cause being shown, Department Counsel's amendment request was granted. Applicant's answer remained unchanged as the result of the amendment.

SUMMARY OF PLEADINGS

Under Guidelines E and J (by incorporation), Applicant is alleged to have (a) been arrested for solicitation of a prostitute in October 1998, to which he pleaded guilty to a lesser charge, was fined and placed on one year of probation, (b) provided false information in a DSS statement of August 2001 by falsely denying ever engaging in sexual conduct with two different foreign nationals, ever frequenting a local prostitution parlor preceding his October 1998 arrest and identifying himself as a regular customer to an undercover police officer, and ©) hired and used prostitutes in extra-marital affairs.

Under Guideline D, Applicant is alleged to have (a) hired prostitutes at the same prostitution parlor prior to his arrest, (b) solicited a prostitute as alleged under Guideline E, ©) engaged two foreign nationals for paid extramarital affairs, and (d) hired prostitutes approximately five times prior to his marriage.

For his response to the SOR, Applicant admitted each of the allegations covered by the respective guidelines. In explanation, he expressed remorse for his misbehavior. He claimed to be a devoted father to his daughter, a good employee of his defense contractor, a good neighbor, and a best man around his house.

FINDINGS OF FACT

Applicant is a 44-year old engineer specialist for a defense contractor who seeks to retain the security clearance he has held since 1998.

The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

After immigrating to the US in 1977, Applicant gained fruitful employment, saved his money, and financed his college education (*see ex. A*). Applicant completed his college education in 1982, and in 1986 joined his current defense contractor, where he has remained for the past 17 years. Before his marriage to his current spouse (W) in 1989, he engaged Vietnamese prostitutes at least five times in acts of sexual intercourse. By his current and only spouse, he has fathered one child: a daughter.

Before his October 1998 arrest on prostitution solicitation charges, Applicant had frequented the same prostitution parlor on two previous occasions. On each of these occasions, he engaged in sexual intercourse with a prostitute. Following his October 1998 arrest for soliciting a prostitute at this parlor, he pleaded guilty, was fined by the court, and was placed on one year's probation.

In June 1999 while vacationing in Mexico, Applicant engaged a Mexican woman in sexual intercourse. While vacationing in Vietnam in June 2000, he engaged a Vietnamese woman in sex on three to four occasions. In November 2000, he returned to Vietnam and engaged the same Vietnamese woman in sexual intercourse. In neither case had he known the woman previously.

Applicant cannot recall whether he was ever warned by his employer to avoid engaging foreign nationals in sexual intercourse, or to report such incidents to his FSO. He did fail to report his extramarital affairs with foreign nationals to his employer.

When first interviewed by a DSS agent in the morning of August 8, 2001, Applicant denied ever being a regular customer of the identified massage parlor, or visiting the parlor for the purpose of engaging in sex. In this initial interview, he also denied ever engaging in sexual conduct with foreign nationals. He claimed to be innocent of the prostitution charge he was arrested for in October 1998 by an undercover police officer after entering the parlor for what he claimed to believe was a legitimate massage parlor (*see ex. 2*). He claimed to have later pleaded guilty to an unrecalled lesser charge, paid a fine of \$400.00 to \$500.00, and was placed on one year of probation. In this first

interview, Applicant assured he had not engaged in any sexual misconduct and would report any attempts to blackmail him to proper authorities. He did not mention any prior engagements with foreign nationals in sexual intercourse, either before or during his marriage. All of these claims he made to the interviewing DSS agent were knowingly and wilfully false.

The same DSS agent returned to interview Applicant a second time in the afternoon of August 8, 2001. In this interview Applicant repeated his denials of ever being a regular customer of the local prostitution parlor, or any other massage parlor. He denied ever frequenting the local parlor before his October 1998 or telling the parlor's solon attendant that he understood the \$120.00 he paid was for sex with the girl of his choosing. And he denied ever engaging in any sexual conduct with foreign nationals. Each of these claims were knowingly and wilfully false.

When the same DSS agent returned to interview Applicant on August 29, 2001, he confronted Applicant with more details of his October 1998 arrest. After being confronted by the agent, Applicant admitted to returning to the same prostitution parlor for the intended purpose of receiving a massage and engaging in sexual intercourse with a female parlor employee. To the under cover investigator who greeted Applicant at the parlor, Applicant admitted to identifying himself as a "regular customer." He admitted, too, to paying \$120.00 to the undercover investigator for what he believed was for having sex with the girl of his choice. In responses to the interviewing agent, Applicant acknowledged he had made two prior visits to the same massage parlor for the purpose of engaging in acts of prostitution. On each of these occasions, he admitted to paying \$120.00 and engaging in sexual intercourse with parlor employees, each of Vietnamese descent.

Besides acknowledging his 1998 extra-marital affairs to the interviewing DSS agent in his third interview (*i.e.*, on August 29, 2001), Applicant also admitted to the DSS agent his extramarital affairs with the Mexican woman in June 1999, and with the Vietnamese woman on three to four occasions while he was vacationing in Vietnam in June 2000 (*see ex. 3*).

Applicant attributes his repeated false statements and omissions about the details of his October 1998 arrest and other sexual experiences to both embarrassment and fears of losing his security clearance. Applicant's explanations, while sincere, do not permit him to avert adverse inferences of knowing and wilful falsification. Applicant has never disclosed his arrests or any of the details of his extramarital affairs and sexual experiences with known prostitutes to either his wife and family or his employer (*see ex. 3*; R.T., at 35, 41). He and his wife have since separated.

Applicant is highly regarded by his employer and in the past has received solid performance evaluations (*see exs. B and D*). He was given a special company award in December 2001 in recognition of his observed communication skills, personal commitment, positive attitude and demonstrated teamwork (*see ex. C*).

POLICIES

Adjudicative Guidelines of the Directive (Change 4) list guidelines to be considered by judges in the decision making process covering DOHA cases. Judges are required to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Personal Conduct

Basis: 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.

Disqualifying Conditions:

DC 3 Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

DC 5 A pattern of dishonesty or rule violations.

Mitigating conditions: None.

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Disqualifying Conditions:

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

Mitigating Conditions:

MC 1 The criminal behavior was not recent.

Sexual Behavior

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.

Disqualifying Conditions:

DC 1 Sexual behavior of a criminal nature, whether or not the individual has been prosecuted.

DC 3 Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

Mitigating Conditions:

MC 2 The behavior was not recent and there is no evidence of subsequent conduct of a similar nature.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant comes to these proceedings with a meritorious professional record and no criminal history before his October 1998 arrest on prostitution solicitation charges. Further investigation of his sexual history confirmed prior sexual encounters in the same house of prostitution and extramarital affairs with foreign nationals over the course of the ensuing two years following his 1998 arrest. Because he has not disclosed his encounters with either his employer or spouse, he remains at risk to potential blackmail or compromise and raises security concerns covered under Guideline J (criminal conduct) and Guideline D (sexual behavior). Failing to provide accurate details of his arrest and sexual history to the investigating DSS agent in an initial and follow-up interview before being confronted in a third interview raises additional security concerns about Applicant's judgment, reliability and trustworthiness when faced with prioritizing the interests of national security over his own private interests.

Applicant's prostitution solicitation arrest and sexual encounters

That a highly educated and regarded engineer devoted to his wife and child could also become secretly entangled with prostitutes and foreign nationals in extramarital affairs creates both psychological and ethical dilemmas in determining Applicant's continued clearance eligibility. On one side is a dedicated engineering professional who has held a security clearance for the past five years he has spent with his current employer without the slightest hint of compromise, laxity or permitted threat of blackmail. In juxtaposition to this professionally accomplished and devoted family head is a father who frequented a known prostitution parlor on several occasions for sexual favors (including the visit for which he was arrested in October 1998) and engaged in multiple extramarital affairs with foreign nationals while vacationing in Mexico and Vietnam.

Department Counsel claims that Applicant's meritorious civilian record cannot overcome fundamental questions of doubt over Applicant's trustworthiness in the face of his repeated judgment lapses associated with his sexual encounters and implicit fidelity breaches with his spouse. Department Counsel's claims have merit. 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 reliable and trustworthy fashion. *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).

Applicant's conduct (acknowledged and proven in this case despite the absence of convictions for the specific covered conduct) raises sufficient moral and trust questions about his overall character to be security significant. The fidelity bond fixes firm responsibilities on the husband to be faithful to his spouse. That Applicant has kept his sexual transgressions secret from his wife and employer is testament of his keen awareness of the importance of his fidelity obligations. By his concealing his indiscretions from his spouse and employer he continues to place himself at risk to blackmail and compromise, security risks that cannot be easily discounted.

Applicant's covered activities invite consideration of various disqualifying conditions under both the criminal conduct and sexual behavior guidelines of the Directive. His sexual transgressions encompass, *inter alia*, knowing solicitation of prostitutes, misdemeanor offenses covered by both DC 1 (allegations or admission of criminal conduct, regardless of charges) and DC 2 (a single serious crime or multiple lesser offenses) of the criminal conduct guidelines. Both his solicitation actions and his extramarital affairs with foreign nationals are covered by DC 1 (sexual behavior of a criminal nature) and DC 3 (sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress) of the sexual behavior guidelines.

While Applicant provides few extenuating circumstances to weigh in his favor, he does bring a developing record of mitigation. His meritorious civilian record and his expressed remorse are worthy of some mitigation credit and are encouraging. However, he has shown no indications he is prepared to disclose his transgressions to either his spouse or

employer. This would have been helpful to his rehabilitation but is lacking here.

Because of the seriousness of his sexual transgressions and the still recent nature of his conduct, Applicant continues to arouse troubling doubts about his ability to avert future sexual misconduct. Absent any clinical diagnostic evaluations to reinforce his own apologies for his actions, insufficient data exists in the record to make safe predictive estimates about Applicant's ability to withstand desires to engage in recurrent sexual misbehavior.

Overall, Applicant fails to dispel all doubts about his risks of recurrent extramarital affairs with foreign nationals. Significant risks still remain about Applicant's recurrence likelihood. Weighing the seriousness of the sexual misbehavior against Applicant's imputed duties of trust (gauged both on and off the job), no fair conclusion can be reached in Applicant's favor at this time that he has sufficiently mitigated the judgment and trust lapses associated with his sexual transgressions to warrant continued entrusting him with access to classified information. More time in demonstrated avoidance of such behavior is needed by Applicant to mitigate his conduct. Therefore, the substantive allegations covered by Guidelines D and sub-paragraphs 1.d and 1.e of Guideline E are concluded unfavorable to Applicant

Applicant's misstatements and omissions about his arrest details and sexual history

Of security concern, too, are Applicant's repeated misstatements and omissions of the details of his 1998 prostitution solicitation, earlier prostitution solicitations at the same massage parlor, and his extra-marital affairs while vacationing in Mexico and Vietnam, respectively. So much trust is imposed on persons cleared to see classified information that deviation tolerances for incidents of trust betrayal are calibrated narrowly. Applicant attributes his misstatements and omissions to embarrassment and concern about how disclosure of the adverse information would impact on his security clearance: understandable certainly, but historically considered by our Appeal Board to be insufficient to avert drawn conclusions of knowing and wilful concealment.

Motivation is the key here and provides the all too critical backdrop by which Applicant's misstatement and omission explanations must be assessed. Even obvious omissions of material facts may be mitigated where circumstances indicate the declarant was under some mistaken impression or understanding when he talked to a DSS investigator. *Cf. Raybourne v. Gulf Atlantic Towing Corp.*, 276 F.2d 90, 92 (4th Cir. 1960). Disqualifying conditions (DC) 2 and 3 of the Directive's Change 4 amendments and relevant case authorities underscore the importance of motive and subjective intent considerations in gauging knowing and wilful behavior. *Cf. United States v. Chapin*, 515 F.2d 1274, 1283-84 (DC Cir. 1975); *United States v. Steinhilber*, 484 F.2d 386, 389-90 (8th Cir. 1973); *United States v. Diogo*, 320 F.2d 898, 905 (2d Cir. 1963).

Here, Applicant makes clear that he approached each of his first two DSS interviews with the intent to withhold as much adverse information about his 1998 arrest and history of sexual misconduct as he could reasonably accomplish out of embarrassment and fear of losing his security clearance. His misstatements and omissions were knowing, deliberate and material to a determination about his clearance suitability. They invite application of Disqualifying Conditions (DC) for personal conduct of the Adjudicative Guidelines: DC 3 (providing false information to an investigator) and DC 5 (pattern dishonesty or rule violations).

Mitigation is difficult to credit Applicant with since he failed to take advantage of the initial opportunities afforded him to correct his earlier DSS misstatements and omissions. Not only has the Appeal Board found the use of mitigating condition (MC) 2 of the Adjudicative Guidelines for personal conduct (isolated, corrected falsification) to be unavailable to applicants seeking mitigation by treating the omission as isolated, but it has denied applicants availability of MC 3 (prompt, good faith disclosure) as well in circumstances (as here) where the applicant has failed to take advantage of an earlier DSS interview opportunity, and has come forward only after being confronted with the adverse information (as here). *Compare* ISCR Case No. 97-0289 (January 1998) with DISCR Case No. 93-1390 (January 1995).

Applicant in the present case is on record with making and repeating his misstatements and omissions about his 1998 arrest and history of sexual transgressions until confronted with the information in a third DSS interview. Our Appeal Board has been quite clear for a number of years now that an applicant cannot be credited with a prompt, good faith correction where he has tacitly repeated his misstatements and omissions. *See* DISCR Case No. 93-1390 (January 1995).

Applicant, accordingly, may not take advantage of either MC 2 (isolated omissions) or MC 3 (prompt, good faith correction of the falsification) of the personal conduct guideline.

No question but that Applicant has maintained a praiseworthy performance record over the 17 years of his employment with his current defense contractor. But in the face of his repeated misstatements and acts of omission, his favorable work record alone is not enough to absorb Government security concerns over his failure to be truthful in his first two DSS interviews.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E.2.2 factors), unfavorable conclusions warrant with respect to sub-paras. 1.a through 1.c of Guideline E.

That none of Applicant's DSS omissions resulted in formal charges and adjudication against Applicant does not mean that the falsification issues may not be raised and considered anew in a clearance proceeding such as the present. The Appeal Board has repeatedly stated that the Government can prove applicant engagement in criminal conduct, even in the absence of a criminal conviction. *Cf.* ISCR Case No. 94-1213 (June 7, 1996). Applicant's multiple hiring of prostitutes and disclosing the correct details of his 1998 prostitution solicitation arrest and history of sexual transgressions only after being confronted in a third interview is covered as well by Guideline J. Unfavorable conclusions warrant with respect to the Guideline J allegations.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

Sub-para. 1.d: AGAINST APPLICANT

Sub-para. 1.e: AGAINST APPLICANT

GUIDELINE D (SEXUAL BEHAVIOR): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

Sub-para. 2.c: AGAINST APPLICANT

Sub-para. 2.d: AGAINST APPLICANT

Sub-para. 2.e: AGAINST APPLICANT

GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT

Sub-para. 3.a: AGAINST APPLICANT

Sub-para. 3.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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley

Administrative Judge