

DATE: December 9, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30620

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

Francisco J. Mendez, Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has met his ultimate burden by mitigating the record evidence of his sexual behavior with a known prostitute and related personal conduct because (1) his association with the prostitute ceased years ago, (2) his behavior was not recent and there is no evidence of subsequent conduct of a similar nature, and (3) there is no longer potential for exploitation or blackmail because he has disclosed the episode to his wife, family, pastor, friends, and co-workers. Clearance is granted.

STATEMENT OF THE CASE

On March 25, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline D for sexual behavior and Guideline E for personal conduct. The three subparagraphs under Guideline E allege the following: (1) Applicant had a sexual relationship with a prostitute from about mid-1992 to 1996; (2) the prostitute blackmailed Applicant by demanding money for her remaining silent about the relationship, and, in turn, Applicant paid her a total of about \$10,000 for the sexual encounters and blackmail; and (3) Applicant did not report the relationship or blackmail to his employer's facility security officer. The Guideline D allegation consists of a cross reference to two subparagraphs alleged under Guideline E. Applicant's response to the SOR was received by DOHA on April 23, 2004. He admitted the allegations, provided a fuller explanation for the underlying events, and requested a hearing.

Department Counsel indicated they were ready to proceed on July 8, 2004, and the case was assigned to me July 15, 2004. A notice of hearing was issued on July 19, 2004, scheduling the hearing for August 11, 2004. Applicant appeared without counsel and the hearing took place as scheduled. The government called no witnesses and presented four exhibits, which were admitted into the record evidence. Applicant called nine witnesses, testified himself, and presented six exhibits, which were admitted into the record evidence. I received the hearing transcript on August 24, 2004.

FINDINGS OF FACT

Applicant's admissions are incorporated into my findings, and after a thorough review of the record evidence, I make the following findings of fact:

Applicant, a 48-year-old college graduate in computer science, is employed as a senior software engineer for a not-for-profit research and development organization that is part of a major university. He has held a secret-level security clearance since approximately January 1981 and is seeking to obtain a top-secret security clearance for his employment. Since holding a clearance, Applicant has never been cited for a security violation or infraction (Exhibit 3).

Applicant completed a security-clearance application (Exhibit 1) in May 2002 in conjunction with seeking the top-secret security clearance. Thereafter, in August 2002, he was interviewed by a contract investigator of the Defense Security Service (DSS). Apparently, during this interview he revealed his past relationship with a known prostitute, and that matter was reduced to a written statement as follows:

In the mid 1990's I was associated with a prostitute. I meet (sic) her at [a bar]. I paid her several times for sex. Afterward I desired to end the affair, but she refused to let me end it. She called me repeatedly at home and at work. She threatened to come to my work and embarrass me. I would pay her to keep quiet. I would often not hear from her for months at a time, and she would call again, and demand money. The last time I saw her was about 8 months before I meet (sic) my present wife. It has been over 6 years since I have heard from her. My wife knows of the affair, as does my pastor, several friends and my brothers (Exhibit 2).

Applicant provided a fuller account of this episode in his answer to the SOR as follows:

In 1992, I went to a bar and meet (sic) a prostitute. This was the first time I had done this. She came home with me and I paid her for sex. After several encounters spanning several months, I desired to terminate the relationship. She would call me at home and plead for me to see her again. This would continue until I agreed to see her. When she got no answer at my home she would repeatedly call me at work, so I would again meet her. She once came to my place of work. She knew that my relationship with her embarrassed me, and she used this to get me to pay her money. Many times the encounters were non-sexual, I would give her money she said she needed for things like paying her rent. She would tell me she would pay me back, but I knew she would not. When I gave her the money she would leave me alone for a while, sometimes several months. It tapered off to where she called me less and less. The last time I saw her was in earlier spring of 1996, when I meet (sic) her and gave her money she needed to pay for rent, which she said she would repay, which I knew she would not. She called one subsequent time, almost a year later, I did not talk to her, I immediately hung up. That was the last time I heard from her. It has now been over eight years since I have seen or talked to her.

Since that time I have never repeated the behavior. It was the worst experience of my life. My life has changed greatly since then. I have been married for over 7 years to a [woman] I love deeply, and who loves me deeply. Our stepson also lives with us. When the incident was going on it was my desire to keep it secret and the threat of embarrassment that she used against me. I have since told many people. I told my brother [R] and a few close friends, and my pastor, Reverend [RH]. I told my wife about it soon after we meet (sic), while we were still dating. Recently I have told more people, my office mate at work, my boss, his secretaries, people I work closely with, my neighbors at my old house, and my new neighbors at my current home.

While this incident was going on I was single and I had a good deal of money saved, so paying her the money was not a hardship on me. At that time I also had no one who relied on me. Now I have my wife, son and daughter.

Applicant provided additional details about his relationship with the prostitute during his hearing testimony. He indicated he saw the woman regularly for approximately six months. During this period, he had sexual intercourse with her in exchange for money approximately ten times. Sometimes he paid cash, other times he bought her gifts or presents. The encounters usually took place at Applicant's home or at a hotel, but never at his place of employment. Sometime during 1993, Applicant decided no longer wanted to continue his relationship with the prostitute, but she insisted it continue, and that is when she started calling him at home and work. These calls did not result in further

sexual encounters, but did result in Applicant meeting with the prostitute and giving her money. These calls occurred approximately every two to three months or so. The last time Applicant saw the prostitute was in about March 1996, about six months before he met his wife in August 1996. Applicant did not report his sexual relationship with the prostitute to his employer's facility security officer, nor did he report the resulting blackmail. The last time Applicant spoke with the prostitute is in about March 1997 when she called his home and Applicant hung up. She called back and Applicant's wife answered the phone. She informed the prostitute that Applicant no longer wanted to speak with her.

Sometime in about 1994, Applicant told his brother R about the matter, and he also told his good friend D. Also during this time, he started attending church and he eventually was baptized and became a church member in May 1996 (Exhibit E). During this time, Applicant received pastoral counseling about his relationship with the prostitute. Applicant's pastor, who has received training in pastoral counseling, believes that pastoral counseling was sufficient for Applicant and that mental-health counseling or some other type of counseling was unnecessary. Also, the pastor is of the opinion that it is highly unlikely that Applicant's sexual behavior with the prostitute will be repeated. Applicant has been and continues to be an active member in his church serving in various capacities.

Applicant met his wife in August 1996. After about two weeks or so of dating, Applicant told her about his relationship with the prostitute. According to Applicant's wife, who testified at the hearing, Applicant told her he had a relationship with a prostitute, and he regretted the whole matter and was ashamed and embarrassed by it. Applicant and his wife married in a legal ceremony in January 1997, and then Applicant insisted they have a church wedding, which they did in May 1997, a few months after the last telephone call from the prostitute. Applicant's wife described their marriage as very strong in that they love each other dearly, and she has seen no indication Applicant has repeated his conduct. Applicant's wife, who works as an office manager at a hospital, is in charge of the family finances and knows where all the money goes, and she has seen no questionable spending by Applicant.

Besides his pastor and spouse, Applicant called seven character witnesses, two of which were his brothers, who vouched for his good character and trustworthiness. Applicant submitted many character references in written form from various people who all vouch for his good character and trustworthiness (Exhibits A and B). Applicant also submitted his performance ratings from his employer (Exhibit D) showing good to excellent performance, and he submitted copies of six awards he received from his employer for the period May 1998 to June 2003 (Exhibit C).

To sum up, considering the record evidence as a whole, I specifically make the following essential findings of fact:

1. Applicant engaged the services of a known prostitute starting in mid-1992 and ending sometime in 1993.
2. During this time, in response to requests or demands from the prostitute, he paid her money in order for her to keep quiet and go away.
3. Applicant was plainly embarrassed by the relationship, and the prostitute used that to her advantage to leverage or blackmail money from him.
4. From mid-1992 to about March 1996, he paid the prostitute about \$10,000 in total for the sexual encounters and for her silence.
5. At no time did the prostitute attempt to have Applicant provide classified information, nor is there evidence suggesting she knew Applicant had a security clearance.
6. His payment of money to the prostitute did not cause a financial hardship or an inability to meet his financial obligations.
7. Applicant did not report the blackmail to his employer's facility security officer.
8. His last contact of any kind with the prostitute was when she called his home in March 1997.
9. Other than this particular prostitute, Applicant has had no other involvement with prostitution before or since this episode.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of

the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁾ There is no presumption in favor of granting or continuing access to classified information.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁵⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.⁽⁸⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Under 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. Private sexual behavior as well as sexual orientation or preference is not disqualifying under the Directive.

Here, based on the record evidence as a whole, the government has established its case under Guideline D. Applicant's engagement of a prostitute starting in mid-1992 and ending sometime in 1993, and the continuing relationship with Applicant periodically paying the prostitute to keep quiet and go away raises a security concern for several reasons. Concerning the disqualifying conditions under the guideline, DC 1⁽¹¹⁾ applies because Applicant's sexual behavior was of a criminal nature in that he committed the criminal offense known as solicitation of prostitution. DC 3⁽¹²⁾ applies because his conduct made him vulnerable to blackmail; indeed, that is just what happened. And DC 4⁽¹³⁾ applies because the episode reflects a gross lack of discretion as well as very poor judgment. To sum up, the record evidence establishes Applicant used grossly poor judgment, which calls into question his security suitability.

I have reviewed the mitigating conditions under the guideline and conclude two apply in Applicant's favor. First, MC 2⁽¹⁴⁾ applies due to passage of time without recurrence of similar conduct. The last time Applicant paid for sex with the prostitute was sometime in 1993. The last time he saw and paid the prostitute for her silence was sometime in 1996. The last time he spoke with her was the abbreviated telephone call in 1997. Any way it is measured (1993, 1996, or 1997), his relationship with the prostitute ended years ago, and so, his sexual behavior is viewed as not recent. Moreover, he has not resumed this type of sexual behavior. The record evidence shows Applicant is now a happily-married man who benefits from a strong and loving relationship with his wife. A stepson is part of his household, and it appears Applicant now has a full and meaningful family life in stark contrast to the situation when he became involved with the prostitute in mid-1992. In short, Applicant appears to be a changed man. Second, MC 4⁽¹⁵⁾ applies because his involvement with the prostitute no longer serves as a basis for blackmail. His relationship with the prostitute effectively ended in 1996, he revealed this episode to his wife, family, pastor, friends, and co-workers, and he has had to answer for it via this proceeding. Applicant's disclosure of this episode to the people most important to him indicates it can no longer be used against him. To sum up, Applicant has successfully mitigated the security concern because his sexual behavior was not recent and

there is no evidence of subsequent conduct of a similar nature, and there is no longer potential for exploitation or blackmail. Accordingly, Guideline D is decided for Applicant.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard and handle classified information. The concern is conduct involving questionable judgment, untrustworthiness, unreliability, lack or candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Here, based on the record evidence as a whole, the government has established its case under Guideline E. I have reviewed the disqualifying conditions under the guideline and conclude two apply against Applicant. First, DC 4 (16) applies because the episode involving the prostitute is personal conduct that increased Applicant's vulnerability to coercion, exploitation, or duress. The record evidence shows he was blackmailed during 1993 to 1996 as a direct result of his sexual behavior with the prostitute. Applicant should have owned up to his actions when first confronted with the blackmail by reporting it to his facility security officer. And DC 6 (17) applies because by engaging the services of a prostitute and then continuing the relationship by paying her to keep quiet and go away, he necessarily became associated with a person involved in criminal conduct. To sum up, the episode establishes Applicant used grossly poor judgment, which calls into question his security suitability.

I have reviewed the mitigating conditions under the guideline and conclude two apply in Applicant's favor. First, MC 5 (18) applies because Applicant has reduced or eliminated his vulnerability to blackmail by terminating the relationship and the underlying sexual behavior, and by disclosing the episode to his wife, family, pastor, friends, and co-workers. The analysis here is similar to the analysis used in applying MC 4 under the sexual behavior guideline and it is adopted. Second, MC 7 (19) applies because Applicant's involvement with the prostitute ceased in 1996, and he has had no contact or communication with her since the telephone call in 1997. The analysis here is similar to the analysis used in applying MC 2 under the sexual behavior guideline and it is adopted. To sum up, Applicant has successfully mitigated the personal conduct security concern because his association with the prostitute ceased years ago, and he has significantly reduced or eliminated the potential for exploitation or blackmail. Accordingly, Guideline E is decided for Applicant.

To conclude, in all adjudications protecting national security is the paramount concern. But security-clearance decisions are not made to adjudge guilt and punish bad or inappropriate behavior. One of the objectives of the process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the whole-person concept recognizes we should take a person in the totality of their acts and omissions and their accomplishments and failures. Based on the record evidence as a whole, I conclude Applicant has met his ultimate burden by mitigating the record evidence of his sexual behavior with a known prostitute and related personal conduct because (1) his association with the prostitute ceased years ago, (2) his behavior was not recent and there is no evidence of subsequent conduct of a similar nature, and (3) there is no longer potential for exploitation or blackmail because he has disclosed the episode to his wife, family, pastor, friends, and co-workers. In reaching my decision, I have considered the record evidence as a whole, the whole-person concept, the clearly-consistent standard, and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline E: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

SOR ¶ 2-Guideline D: For the Applicant

Subparagraph a: For the Applicant

DECISION

In light of all the circumstances presented by the record, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
10. *Egan*, 484 U.S. at 528, 531.
11. E2.A4.1.2.1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted.
12. E2.A4.1.2.3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.
13. E2.A4.1.2.4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.
14. E2.A4.1.3.2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature.
15. E2.A4.1.3.4. The behavior no longer serves as a basis for coercion, exploitation, or duress.
16. 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.
17. E2.A5.1.2.6. Association with persons involved in criminal activity.
18. E2.A5.1.3.5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.
19. E2.A5.1.3.7. Association with persons involved in criminal activities has ceased.