

KEYWORD: Criminal Conduct: Sexual Behavior; Personal Conduct

DIGEST: Applicant mitigated security concerns over his criminal conduct, sexual behavior, and personal conduct relating to two arrests for dated, misdemeanor arrests for patronizing prostitution in 1995 and 2001. In the first, his sentence was suspended; and in the second, he pleaded guilty to a lesser charge, peace disturbance. Further, he has had no subsequent incidents for over four years. Significantly, Applicant was evaluated by an expert psychologist who assures that Applicant has a normal personality profile with no disorders or addictive behaviors. While he denied to the Defense Security Service (DSS) that he had offered money for a sexual act, he fully disclosed that 2001 arrest and established he had no intent to falsify. He has 37 years of service to his company where his performance has been excellent. Clearance is granted.

CASENO: 03-22167.h1

DATE: 02/21/2006

DATE: February 21, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22167

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esquire, Department Counsel

FOR APPLICANT

David R. Swimmer, Esquire

SYNOPSIS

Applicant mitigated security concerns over his criminal conduct, sexual behavior, and personal conduct relating to two arrests for dated, misdemeanor arrests for patronizing prostitution in 1995 and 2001. In the first, his sentence was suspended; and in the second, he pleaded guilty to a lesser charge, peace disturbance. Further, he has had no subsequent incidents for over four years. Significantly, Applicant was evaluated by an expert psychologist who assures that Applicant has a normal personality profile with no disorders or addictive behaviors. While he denied to the Defense Security Service (DSS) that he had offered money for a sexual act, he fully disclosed that 2001 arrest and established he had no intent to falsify. He has 37 years of service to his company where his performance has been excellent. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on January 31, 2005. 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 Applicant. ⁽¹⁾ The SOR alleges specific concerns over criminal conduct (Guideline J), sexual behavior (Guideline D), and personal conduct (Guideline E). Applicant retained counsel and responded to these SOR allegations in an Answer notarized on March 22, 2005, where he admitted allegations 1.a. and 1.b, but denied allegations 2 and 3. He requested a hearing.

Department Counsel signed a Ready to Proceed notice on July 13, 2005. The matter was assigned to me on July 19, 2005. A July 21, 2005, Notice of Hearing set the matter for August 18, 2005. Department Counsel offered four documents that were admitted into evidence; Applicant's counsel objected to Exhibits 3, and 4, and filed a Motion in Limine. However, his objections was overruled as the documents remained relevant. Exhibit 3 had been attached to Applicant's Answer; Exhibit 4 was a police report obtained by the investigative agency. (TR 17-19) Applicant's counsel offered five exhibits (Exhibits A-E) which was admitted into evidence without objection and one document for official notice (AN I) to which Department Counsel objected; however, I admitted the document over her objection. Both Applicant and an expert witness testified. The transcript (TR) was received on August 29, 2005.

FINDINGS OF FACT

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

Applicant, 61 years old, has worked for Employer #1 in State #1 from March 1968 to present. In his 37 years with the company he has never been subject to any kind of discipline. He completed a SF-86 security clearance application in March 2003. He was granted a Defense Department Secret clearance in October 1977. He served in the military on inactive reserve duty from January 1969 to January 1975. (Exhibit 1; TR 54, 66)

Applicant graduated from college in State #1 in 1968 with a B.S. degree. (Exhibit 1) He was divorced in 1999. (Exhibit A) He has lived in the same geographic area his entire life. (TR 54)

Criminal Conduct, Sexual Behavior, and Personal Conduct

On his 2003 Security Clearance Application (SF 86) Applicant disclosed in answer to Question 26, his police record: he had been arrested for patronizing a prostitute in June 2001. However, in his Defense Security Service (DSS) interview in July 2004, Applicant denied that he had made an offer of money to two "ladies" walking on the street. (Exhibits 1, 2) (SOR 3.a.) The police department report included an unsworn statement by the police vice agent that Applicant had offered \$20 for a sexual act. However, Applicant disputed the accuracy of that report. He stated he was curious about ladies who were waving at people, so he parked his car and walked to the area where the women were standing and was arrested. Applicant retained counsel. Rather than go to trial, he agreed to a reduced charge to save money. He pleaded guilty to the reduced charge of Peace Disturbance, and paid a \$121 fine. In his DSS Statement he admitted starting up a conversation with one of the women. He denied asking for a date or offering money, but admitted he was arrested as he had fully disclosed on his SF 86. Applicant admitted also he had been arrested in 1995 for patronizing a prostitute, pleaded guilty, and received a suspended imposition of sentence. In that situation a lady waved at him, and he stopped to get a telephone number for another person. (Exhibits 2, 3, 4; Exhibit E; TR 55-64, 68-78) (SOR 1.a. 1.b., 2.a.)

Accepted as an expert in psychology, Dr. K , a licensed psychologist⁽²⁾

specializing in clinical psychology, testified that he had evaluated Applicant in March and April 2005 and wrote a report in July 2005. Psychological tests and Dr. K's interview reflected that Applicant has a normal personality profile with no

mood disorders, anxiety disorder, compulsive disorders or addictive behaviors. The MMPI narrative report suggests no diagnosis for mental or behavioral disorder. Based on these tests and his clinical interview, Dr. K concluded that there was no evidence Applicant has a behavioral or psychological impairment. (Exhibits A, B, C, D; TR 24-42, 44-46) (TR 41, 46)

Evaluations

Applicant's Performance Evaluation Worksheet for December 2004 rates him as exceeding expectations. The example stated that Applicant uses "his expertise, knowledge and sound judgement to create effective solutions to problems." His February 2004, March 2002, January 2001, and February 1999 evaluations reflect that on all of his performance values he either met expectations, frequently exceeded expectations or always exceeded expectations. (Exhibit C)

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, I weighed relevant Adjudication Guidelines as set forth below:

Guideline J - Criminal Conduct

E2.A10.1.1. The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Guideline D - Sexual Behavior

E2.A4.1.1. 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.⁽³⁾ 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.

Guideline E - Personal Conduct

E2.A5.1.1. The Concern: 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.

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. 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

Criminal Conduct

Applicant mitigated the Government's security concerns⁽⁴⁾ over his criminal conduct, his 1995 and in 2001 arrests for patronizing prostitution. In 1995 he pleaded guilty, but received a suspended imposition of sentence. In 2001 he pleaded guilty to the lesser charge of peace disturbance and paid a \$121 fine. While there is some conflict in the evidence on Applicant's conduct before the arrest with a police report stating that he offered \$20 to the undercover officer, the fact that he was allowed to plead guilty to a lesser charge of "Peace Disturbance" in 2001 contributes to the credibility I give his statements that he had no intent to patronize a prostitute.

In sum, Applicant established that he meets the conditions that could mitigate security concerns under: E2.A10.1.3.1., this misdemeanor criminal behavior was not recent as he has had no subsequent incidents for four years. He and his expert witness established clear evidence of successful rehabilitation under E2.A10.1.3.6. As discussed below, Applicant's conduct does not reflect that he has any behavioral or psychological impairments that would raise continuing concerns. Further, Applicant provided evidence of a consistently successful work record. Thus, Applicant has mitigated⁽⁵⁾ this misdemeanor criminal conduct. Consequently, looking at Applicant as a whole person⁽⁶⁾ and considering the circumstances surrounding his conduct and after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.a. and 1.b. incorporated under SOR Paragraph 1.

Guideline D - Sexual Behavior

Similarly, Applicant mitigated the Government's security concerns⁽⁷⁾

over Sexual Behavior, notably E2.A4.1.2.4., sexual behavior of a public nature and/or that which reflects lack of discretion or judgment. Although Applicant admitted these two arrests discussed above, he credibly established that sexual activity was not his intent. Significantly, also, he was evaluated by an expert witness, Dr K, who established that Applicant had no behavioral or psychological impairment. He also concluded that Applicant was truthful to him when he argued that he was involved in a "sting" on both occasions as he had no interest in looking for sexual contact with a woman. While Applicant presents as naive in his behavior that led to his arrests, that alone is not a condition that merits adverse action especially in light of his excellent work record over a substantial period of time. He has mitigated⁽⁸⁾ these security concerns as the behavior that led to his arrests is not recent and there is no evidence of subsequent conduct of a similar nature under E2.A4.1.3.2. Further, there is no other evidence of questionable judgment, irresponsibility, or emotional instability under E2.A4.1.3.3.

After considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant under subparagraph 2.a. incorporated under SOR Paragraph 2.

Personal Conduct

The Government established security concerns over Applicant's Personal Conduct over his assertion to the DSS in his July 2004 interview that he had not offered money for a sexual act whereas an undercover police officer reported such an act in an unsworn statement. While the record raised this concern under Disqualifying Condition (DC) (5): E2.A5.1.2.5., a pattern of dishonesty or rule violations, Applicant and his expert refuted this concern by their credible explanations which meet the mitigation⁽⁹⁾ guidelines. Significant also is that Applicant fully disclosed this arrest in his SF 86 for Patronizing Prostitution; he did not even try to minimize the seriousness of what happened by indicating his plea to a lesser charge. Looking at Applicant as a whole person⁽¹⁰⁾ and considering the circumstances surrounding his conduct (E2.2.1.2), I conclude Applicant provided sufficient evidence of a current record of rehabilitation and expert testimony of his favorable behavior. Overall, I conclude that he provided sufficient evidence to refute these personal

conduct issues. Thus, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant under SOR Paragraph 3 under subparagraph 3.a.

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 J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Paragraph 2. Guideline D: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Paragraph 3. Guideline E: FOR APPLICANT

Subparagraph 3.a.: For 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 a security clearance for the Applicant. Clearance is granted.

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. Dr. K is not an expert in security as he does not have a security clearance and only has an informal knowledge of security requirements; he did not review DoD Directive 5220.6. Dr. K also concluded that Applicant was truthful to him when he told them that he was involved in a "sting" on both occasions of his arrests as he had no interest in looking for sexual contact with a woman. (TR 43-44, 48)
3. **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.**
4. **E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:**
 - E2.A10.1.2.1 Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.; E2.A10.1.2.2. A single serious crime or multiple lesser offenses.**
5. **E2.A10.1.3. Conditions that could mitigate security concerns include: E2.A10.1.3.1. The criminal behavior was not recent; E2.A10.1.3. 2. The crime was an isolated incident; E2.A10.1.3.3. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life; E2.A10.1.3. 4. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur; E2.A10.1.3. 5. Acquittal; E2.A10.1.3.6 There is clear evidence of successful rehabilitation.**
6. **In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:**
 - E.2.21.1. The nature, extent, and seriousness of the conduct; E2.2.1.2. The circumstances surrounding the conduct, to include knowledgeable participation; E2.2.1.3. The frequency and recency of the conduct; E2.2.1.4. The individual's age and maturity at the time of the conduct; E2.2.1.5. The voluntariness of the participation;**
 - E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes; E.2.2.1.7. The motivation for the conduct; E.2.2.1.8. The potential for pressure, coercion, exploitation, or duress; and E.2.2.1.9. The likelihood of continuation or recurrence. (E.2.2. Adjudication Process)**
7. **E2.A4.1.2. Conditions that could raise a security concern and may be disqualifying include: E2.A4.1.2.1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted; E2.A4.1.2.2. Compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high-risk behavior or that which is symptomatic of a personality disorder; E2.A4.1.2.3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; E2.A4.1.2.4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.**

8. E2.A4.1.3. Conditions that could mitigate security concerns include: E2.A4.1.3.1. The behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature;

E2.A4.1.3.2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;

E2.A4.1.3.3. There is no other evidence of questionable judgment, irresponsibility, or emotional instability;

E2.A4.1.3.4. The behavior no longer serves as a basis for coercion, exploitation, or duress.

9. E2.A5.1.3. Conditions that could mitigate security concerns include: E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily; E2.A5.1.3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; E2.A5.1.3.4. 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; E2.A5.1.3.5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress; E2.A5.1.3.6. 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; E2.A5.1.3.7. Association with persons involved in criminal activities has ceased.

10. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:

E.2.21.1. The nature, extent, and seriousness of the conduct; E2.2.1.2. The circumstances surrounding the conduct, to include knowledgeable participation; E2.2.1.3. The frequency and recency of the conduct; E2.2.1.4.

The individual's age and maturity at the time of the conduct; E2.2.1.5. The voluntariness of the participation;

E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes; E2.2.1.7. The motivation for the conduct; E2.2.1.8. The potential for pressure, coercion, exploitation, or duress; and E2.2.1.9.

The likelihood of continuation or recurrence. (E.2.2. Adjudication Process)