

KEYWORD: Sexual Behavior; Personal Conduct

DIGEST: Applicant was arrested, charged, and fined for soliciting prostitution in 1996. After his arrest, he threw his wallet and identification away to lay the basis for a false story that someone else committed the crime. In 2004, he lied to a security investigator by denying the arrest and charge, fearing his wife would discover what happened. The 1996 incident was relatively minor and occurred so long ago it no longer raises security concerns. However, Applicant failed to mitigate the security concerns arising from his dishonesty to the investigator. Clearance is denied.

CASENO: 03-25154.h1

DATE: 01/31/2006

DATE: January 31, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-25154

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Sabrina R. Redd, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was arrested, charged, and fined for soliciting prostitution in 1996. After his arrest, he threw his wallet and identification away to lay the basis for a false story that someone else committed the crime. In 2004, he lied to a security investigator by denying the arrest and charge, fearing his wife would discover what happened. The 1996 incident was relatively minor and occurred so long ago it no longer raises security concerns. However, Applicant failed to mitigate the security concerns arising from his dishonesty to the investigator. Clearance is denied.

STATEMENT OF THE CASE

On March 10, 2003, Applicant submitted an application for a security clearance. The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (the "Directive"). On January 6, 2005, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under the Directive, specifically Guideline D, Sexual Behavior, and Guideline E, Personal Conduct.

Applicant answered the SOR in writing on January 28, 2005. He elected to have a hearing before an administrative judge.

The case was assigned to me on August 15, 2005. With the concurrence of Applicant and Department Counsel, I convened the hearing on November 2, 2005. The government introduced Exhibits 1 and 2. Applicant offered no exhibits at the hearing, but testified on his own behalf. At Applicant's request, I kept the record open to allow him additional time to submit statements. On January 25, 2006, I received six statements from Applicant, which were admitted without objection as Exhibits A through F. DOHA received the final transcript of the hearing (Tr.) on November 17, 2005.

FINDINGS OF FACT

Applicant admitted the factual allegations in the SOR, with explanations. Applicant's Answer to SOR, dated January 28, 2005. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant is 47 years old. (Ex. 1 at 1.) He served in the U.S. Navy between 1977 and 1984, and was promoted to the rank of petty officer second class. (*Id.* at 4.) In 1984, Applicant began working as an engineering technician for a defense contractor. (*Id.* at 1.)

In January 1996, Applicant and others traveled to a distant state for four months to work on a project for his employer. (Ex. 2 at 1.) While there, Applicant bought a motorcycle. At about 9:00 at night on February 22, 1996, Applicant drove his motorcycle into the nearby city. A woman standing on the street motioned to him and he stopped to talk to her. (Ex. 2 at 1.) Applicant knew that women on the street in this section of town often propositioned passers-by. (Tr. at 10.) Their conversation included discussions of a sexual nature, and Applicant told her he had to get money from an automatic teller machine. (Tr. at 13.) As he began to leave, he was arrested for soliciting prostitution by police officers who had been concealed nearby and the woman on the street, who was an undercover policewoman. (Ex. 2 at 2.) He was handcuffed, taken to the police station, and held in jail pending bail. (*Id.*) Applicant called one of his co-workers, who posted bail and secured his release.

Later that night, Applicant decided to fake the loss of his wallet and identification. (*Id.*) He removed his credit cards, and threw his wallet with his driver's license and non-essential items in a nearby dumpster. He did it to set up an excuse; he wanted to be able to say that he lost his wallet that night, and someone using his license and identity was the person arrested for the offense. (*Id.*)

Applicant consulted an attorney at the location where he was arrested. About one month after the incident, Applicant went to court and pled "no contest" to the charge of soliciting prostitution. He was ordered to pay a \$500.00 fine; his \$500.00 bail payment was kept to pay the amount due.

Applicant did not report this matter to his security officer. (Ex. 2 at 3.) He did not tell his wife, because he was afraid she would file for divorce. (*Id.*; Tr. at 16-17.) He told some co-workers and friends. (Tr. at 14, 19-20.)

On February 25, 2003, Applicant submitted an SF 86, Security Clearance Application, to renew his security clearance.

Question 26 on the form inquired whether Applicant had been "arrested for, charged with, or convicted of any offenses" within the previous seven years that were not listed in response to other, specific questions. Applicant answered, "No." He did not report being charged with soliciting prostitution. On March 10, 2003, Applicant reviewed the SF 86 and signed it under oath.

On March 16, 2004, a security investigator interviewed Applicant about his Security Clearance Application. The investigator inquired whether Applicant had any prior arrests or convictions. (Tr. at 18-19.) Applicant denied any arrests or convictions. (Answer to SOR, *supra*, at 1.) After a couple days, Applicant called the investigator and informed her he had not been truthful about his arrest record. He did so because he believed that if he were truthful during the investigation, there was a better chance that his wife would not find out about the incident. (Ex. 2 at 3.)

Applicant prepared a sworn statement for the security investigator. (Ex.2.) He claimed he did not know the woman on the street was a prostitute when he stopped to talk to her, and only realized it after they began talking. (Ex. 2 at 1.) He admitted he told her he had to go to an automatic teller machine to get money, but claimed that was just an excuse he was using to leave. He denied agreeing to a specific amount of money, as he saw stated in a police report. (Ex. 2 at 2.)

At the hearing, Applicant asserted he never intended to solicit prostitution, and that it was a misunderstanding. (Tr. at 11.) He indicated he told his wife about the incident after admitting it to the security investigator. (Tr. at 17.) He claimed he did not report the incident on his security clearance questionnaire because he thought it was more than seven years old, and he thought the incident would drop off his record after three years. (Tr. at 17.)

POLICIES

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." (*Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988)). In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as potentially disqualifying and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline D, Sexual Behavior. 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. (Directive ¶ E2.A4.1.1.)

Guideline E, Personal Conduct. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. (Directive, ¶ E2.A5.1.1.)

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to this adjudicative guideline, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive, ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable 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. *Id.*

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. Directive, ¶ E3.1.14. Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. Directive, ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2.

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. Exec. Ord. 10865, § 7. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Guideline D, Sexual Behavior

As noted above, in February 1996, while working out of state for his employer, Applicant was arrested and charged with soliciting a prostitute. He entered a plea of "no contest" and was fined.

Under the Directive, sexual behavior may raise security concerns under some circumstances. Under ¶ E2.A4.1.2.1 of the Directive, "[s]exual behavior of a criminal nature, whether or not the individual has been prosecuted," is potentially disqualifying. Applicant admits being arrested and charged with the offense, and entering a "no contest" plea. He denies committing the offense, however, claiming it was a mistake.

As a general rule, an applicant convicted of a criminal offense is precluded from denying his guilt in subsequent civil proceedings. (DISCR Case No. 94-1213 at 3 (App. Bd. June 7, 1996)). This concept, known as collateral estoppel, is based upon the premise that an individual's right to administrative due process does not give him or her the right to litigate again matters properly adjudicated in an earlier proceeding. (*Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 46 (3rd Cir. 1981)). The Appeal Board has held that the doctrine of collateral estoppel applies in industrial security cases. (ICSR Case No. 99-0116 at 2 (App. Bd. May 1, 2000); ISCR Case No. 96-0525 at 4 (App. Bd. June 17, 1997); ISCR Case No. 94-1213 at 3 (App. Bd. June 7, 1996)). Indeed, the Appeal Board has ruled repeatedly that an administrative judge may not engage in a *de novo* review of an applicant's guilt or innocence of a criminal charge of which he was convicted in a criminal court. (ISCR Case No. 99-0116 at 2 (App. Bd. May 1, 2000); ISCR Case No. 96-0525 at 4 (App. Bd. June 17, 1997)). However, in ISCR Case No. 94-1213 at 3 (App. Bd. June 7, 1996), the Appeal Board acknowledged, in *dicta*, that the doctrine of collateral estoppel does not apply in certain circumstances. These include where the conviction based upon a *nolo contendere* plea. (DISCR Case No. 88-2116 at 4-5 (App. Bd. October 13, 1989)). I conclude Applicant is not estopped from denying the underlying offense.

I considered carefully the available evidence. Applicant admitted knowing that individuals were frequently propositioned on the street in that part of town where he pulled over to talk to a woman he did not know. He admitted the conversation involved sexual activity and that he told her he had to either go get his wallet or go to an automatic teller machine. Applicant testified that it was a misunderstanding, but his credibility is seriously undermined by his subsequent deceptive behavior. I find Applicant did engage in sexual behavior of a criminal nature, specifically, soliciting prostitution in February 1996. The evidence raises this potentially disqualifying condition.

The Directive, ¶ E2.A4.1.2.2, provides that "[s]exual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress" may be disqualifying. Applicant was so embarrassed by this incident that he did not want his

wife, his company's security officials, or others to know about it. He even threw away his wallet to prepare a false story to hide the truth. I find this potentially disqualifying condition applies.

Under ¶ E2.A4.1.2.4, "[s]exual behavior of a public nature and/or that reflects lack of discretion or judgment" may raise security concerns. Applicant's conduct occurred on a public street, and certainly reflected a lack of judgment. The evidence raises this potential concern.

Under the Directive, it is possible to mitigate security concerns arising from sexual behavior. Under ¶ E2.A4.13.2 of the Directive, it may be mitigating where "[t]he behavior was not recent and there is no evidence of subsequent conduct of a similar nature. The incident occurred in 1996, therefore it was not recent. There is no other evidence of any similar conduct. I conclude this potentially mitigating condition applies.

Paragraph E2.A4.1.3.3 indicates it may be mitigating where "[t]here is no other evidence of questionable judgment, irresponsibility or emotional instability." After the incident, applicant had several instances of conduct involving poor judgment, including staging the false story, failing to report the matter to authorities, and lying to a security investigator. This potentially mitigating condition does not apply.

Finally, under ¶ E2.A4.1.3.4, it may be mitigating where "[t]he behavior no longer serves as a basis for coercion, exploitation, or duress." Given the relatively minor nature of the offense, the passage of time, and the fact that Applicant has now informed his wife, friends and employer's representatives about the incident, I conclude it no longer is a basis for coercion.

I considered all the evidence in light of the potentially disqualifying and mitigating conditions and the "whole person" concept. Because the sexual behavior occurred almost ten years ago, it was an isolated incident, and Applicant's wife, some friends and his employer's representatives know about it, I conclude Applicant has mitigated the security concerns arising from his sexual behavior.

Guideline E, Personal Conduct

The Directive sets out various factors relevant to an applicant's personal conduct that may be potentially disqualifying. Paragraph E2.A5.1.2.1 indicates that "[r]eliable, unfavorable information provided by associates, employers, coworkers, neighbors or other associates" that shows "questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations" may raise security concerns. After his arrest for soliciting prostitution, Applicant threw his wallet in a dumpster to set up a false story claiming someone using his

identification must have committed the offense. The evidence does not indicate Applicant actually tried to use the false story in any official proceeding. I conclude this is reliable, unfavorable information demonstrating questionable judgment, lack of candor, and dishonesty.

Paragraph 2.c of the SOR repeats the previous allegations about Applicant's sexual behavior as unfavorable personal conduct. For the reasons discussed above, I find this does not raise security concerns.

Under ¶ E2.A5.1.2.3 of the Directive, "[d]eliberately providing false or misleading information concerning relevant and material matter to an investigator . . . in connection with a personnel security or trustworthiness determination" may be disqualifying. I note the original incident occurred on February 22, 1996, and the charges were resolved in about late March 1996. Applicant completed the SF 86 on February 26, 2003 and reviewed it March 10, 2003. These dates were more than seven years after the date of the arrest, but were within seven years of the existence of the criminal charges. In any event, Applicant lied to a security investigator when he denied having been arrested and charged with a criminal offense. I conclude this potentially disqualifying condition applies.

Under the Directive, an applicant may mitigate the security concerns arising from questionable personal conduct under certain circumstances. (Directive, ¶ E2.A5.1.3.) I considered carefully all the potentially mitigating conditions, and conclude none apply, except ¶ E2.A5.1.3.3 "[t]he individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."

I considered carefully all the facts and circumstances in this case in light of the "whole person" concept. As a practical matter, the system for determining who is worthy of a security clearance depends upon the honesty of each individual in responding to security investigations. Applicant's are expected to be completely honest with security investigations, to give adjudicators all the information necessary to make a competent judgment about their dependability. Here, Applicant intentionally provided false information to a security investigator. Although the underlying conduct was not disqualifying, the fact that he intentionally concealed it raises serious questions about his honesty, integrity and reliability. Considering all the evidence, I conclude Applicant has not mitigated the security concerns arising from his personal conduct.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline D: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: For Applicant

DECISION

In light of all of 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. Clearance is denied.

Michael J. Breslin

Administrative Judge