

DATE: July 13, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33256

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's sexual conduct and failure to admit such conduct in a signed, sworn statement raised sexual behavior, personal conduct, and criminal conduct security concerns. Applicant failed to mitigate the security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 29 August 2003, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline D (Sexual Behavior), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 9 September 2003 and, on 2 October 2003, elected not to have a hearing before an administrative judge. On 18 January 2004, Applicant requested a hearing. The case was assigned to me on 22 March 2004. On 15 April 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 23 April 2004.

FINDINGS OF FACT

Applicant is a 50-year-old administrative services manager for a defense contractor. Ex. 1 at 1-2. He served almost 24 years on active duty with the U.S. Air Force, retiring as a senior master sergeant (E-8) in 1996. *Id.* at 5. He married his first wife, a Thai national, in 1975 in Thailand, where he was stationed. He has two children by his first wife., whom he divorced in 1997. He married again in 2000. *Id.* at 2-3.

In 1975 and 1976, while on active duty stationed in Thailand, Applicant frequented massage parlors and paid prostitutes for sex "a couple of times a week." Ex. 3 at 4. He was often accompanied on these visits to massage parlors by other members of his squadron. Tr. 26-27.

In 1990, Applicant's wife held a birthday celebration for her husband. Applicant is an alcoholic and became intoxicated. He walked into a room in his house where several children were playing. He sat down on a couch with a 14-year-old girl and fondled her breast and put his hand up under her skirt. Applicant was tried by a special court-martial for committing an indecent act with another. Ex. 6 at 10. He pled not guilty, but stipulated to the child's testimony. He was found guilty and sentenced to confinement for 30 days, reduction in grade from E-8 to E-7, and ordered to forfeit \$399 of his pay per month for three months. Ex. 8 at 2; Ex. 6 at 10. After completing his term of confinement, Applicant was sent to a 28-day in-patient alcohol rehabilitation program, which he successfully completed. Two years later, the Air Force Board of Correction of Military Records, as an act of clemency on behalf of the Secretary of the Air Force, promoted Applicant back to the grade of E-8.

Applicant has not consumed alcoholic beverages since his 1990 birthday celebration. In 1996, the Department of Defense investigated Applicant and granted him a top secret clearance.

On 5 February 2001, Applicant was arrested for patronizing a prostitute. An undercover officer saw a known prostitute flag down Applicant as he drove past in his car. The officer followed them to a park. Police officers approached the vehicle to talk to Applicant and the prostitute. Applicant had to pull up his pants before he could exit the vehicle. Applicant told the police officers that he was to pay the prostitute \$25 for her to perform fellatio on him. She claimed it was only \$20. Ex. 5 at 6. The charge was eventually dismissed.

Applicant completed a signed, sworn statement to a Defense Security Service (DSS) agent on 30 January 2002. In it, Applicant admitted being arrested in April 2001 for patronizing a prostitute. But he claimed he had not solicited any prostitutes before or after the April 2001 arrest and had 'never been arrested, detained or questioned by any law enforcement authority, to include Air Force security police.' Ex. 2 at 3.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." *Id.* at 527. 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 for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal 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 process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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. *See Egan*, 484 U.S. at 531. 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. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* 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.

CONCLUSIONS

Guideline D-Sexual Behavior

In the SOR, DOHA alleged Applicant paid prostitutes for sex twice a week from 1975-76 in Thailand (¶ 1.a.), committed an indecent act with a minor, ⁽²⁾ of which he was convicted in a special court-martial in 1990 (¶ 1.b.), and was arrested for patronizing a prostitute in April 2001 (¶ 1.c.). 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.

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. Applicant denies that he was soliciting or patronizing a prostitute in 2001 when he was arrested. He claims he gave a ride to a woman he did not know was a prostitute and the police arrested him after he left his vehicle to urinate. He says he refused the offer of sex. But the police report is explicit. Applicant was stopped in his vehicle with his pants down and admitted he had agreed with the prostitute on the price of fellatio. At the hearing, I listened carefully to his testimony and observed his demeanor. I do not believe his version of the incident.

Applicant's conviction for committing an indecent act and his arrest for patronizing a prostitute is sexual behavior of a criminal nature. DC E2.A4.1.2.1. The Government failed to establish that paying for sex in Thailand in 1975-76 was "of a criminal nature." But Applicant admits that he was married in 1975. Paying for sex with prostitutes in Thailand while he was married, and patronizing the prostitute in 2001 while he was married to his second wife was sexual behavior that would cause him to be vulnerable to coercion, exploitation, or duress (DC E2.A4.1.2.3) and reflects lack of discretion or judgment (E2.A4.1.2.4.). As Applicant is divorced from the wife to whom he was married in Thailand, and there appears to be no secret that he frequented prostitutes in Thailand as a young man, that behavior no longer serves as a basis for coercion, exploitation, or duress. MC E2.A4.1.3.4. Although the sexual behavior in Thailand was certainly not recent, it is relevant to Applicant's security worthiness because it is part of a pattern of sexual behavior that reflects a lack of discretion and judgment. I find against Applicant on ¶ 1.

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant falsified material facts in a signed, sworn statement by denying he had solicited prostitutes and had never been arrested, detained, or questioned by any law enforcement authority (¶ 2.a.). 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.

The Government established by substantial evidence and Applicant's admissions that Applicant denied he had solicited prostitutes or ever been arrested, detained, or questioned by any law enforcement authority. But in order to be a disqualifying condition under Guideline E, the denial must have been deliberately false or misleading. *See* DC E2.A5.1.2.3. Applicant claims he was not trying to mislead anyone. He asserts he was only "asked about any incidents since [his] last security investigation." *See* Answer. The DSS agent testified that she placed no such limitation on her inquiry.

After listening to his testimony and that of the DSS agent and closely observing their demeanors, Applicant failed to convince me that he was concerned only with incidents since his last periodic security review. ⁽³⁾ And his denial of ever soliciting a prostitute or being arrested, detained, or questioned by any law enforcement authority to so unequivocal, it does not support his claim. I find against Applicant on ¶ 2.

Guideline J-Criminal Conduct

In the SOR, DOHA alleged Applicant committed the criminal acts alleged in ¶¶ 1.b. and 1.c. (¶ 3.a.) and violated 18 U.S.C. § 1001 by falsifying his signed, sworn statement as alleged in ¶ 2.a. (¶ 3.b.). A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. Applicant asserts he was not trying to mislead the DSS agent-he did not list the offenses because he was asked only about the offenses since the last investigation. I did not find Applicant's explanation credible.

The Government established by substantial evidence the allegations in the SOR. An applicant may be disqualified if allegations of criminal conduct are raised against him. DC E2.A10.1.2.1. None of the mitigating conditions listed under the guideline apply to Applicant. I find against applicant on ¶ 3.

FORMAL FINDINGS

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

Paragraph 1. Guideline D: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Paragraph 3. Guideline J: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against 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.

James A. Young

Administrative Judge

1. Pursuant to Exec. Or. 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 (Directive).

2. Although the victim was a minor, Applicant was actually convicted of committing an indecent act with another, not an indecent act with a minor. Indecent acts with a minor requires an accused to have acted with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both. Indecent acts with another does not require such specific intent. *Compare Manual for Courts-Martial, United States* ¶ 87b(1) with ¶ 90b (2002 ed.).

3. In reaching my conclusion, I did not consider the DSS agent's testimony that she conducted the interview with him and did not believe him. A witness's assessment of a person's credibility is not normally relevant.