

KEYWORD: Sexual Behavior, Personal Conduct, Criminal Conduct

DIGEST: In 1969 and 1970, the police arrested Applicant for disorderly conduct and possession of stolen property, misdemeanor charges. His next arrest occurred 33 years later when the police arrested him in 2003 for soliciting prostitution, a misdemeanor charge. He reported his arrest to his security officer. During the government's investigation, he, however, did not provide truthful and honest information about all the facts surrounding his arrest. Applicant has mitigated the government's security concerns under Guideline D, but has not mitigated the government's case as to Guidelines E and J. Clearance is denied. CASE NO: 04-00225.h1

DATE: 02/28/2006

DATE: February 28, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-00225

**DECISION OF ADMINISTRATIVE JUDGE**

**MARY E. HENRY**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

## **FOR APPLICANT**

Jeffrey A. Marks, Esq.

### **SYNOPSIS**

In 1969 and 1970, the police arrested Applicant for disorderly conduct and possession of stolen property, misdemeanor charges. His next arrest occurred 33 years later when the police arrested him in 2003 for soliciting prostitution, a misdemeanor charge. He reported his arrest to his security officer. During the government's investigation, he, however, did not provide truthful and honest information about all the facts surrounding his arrest. Applicant has mitigated the government's security concerns under Guideline D, but has not mitigated the government's case as to Guidelines E and J. Clearance is denied.

### **STATEMENT OF THE CASE**

On January 24, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, 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. Specifically, the SOR set forth security concerns arising under Guideline D, Sexual Behavior, Guideline J, Criminal Conduct, and Guideline E, Personal Conduct, of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. On February 24, 2005, Applicant submitted a notarized response to the allegations and requested a hearing.

This matter was assigned to another administrative judge on September 6, 2005, but reassigned to me on September 13, 2005, because of caseload considerations. A notice of hearing was issued on September 28, 2005, scheduling a hearing for October 13, 2005. Applicant's counsel timely filed a Motion for Continuance, which was granted by Order dated October 4, 2005. A second notice of hearing was issued on November 22, 2005, and a hearing was held on December 13, 2005. Eight government exhibits and seven Applicant exhibits were admitted into evidence. Applicant and an expert witness testified. The hearing transcript was received by DOHA on January 9, 2006.

## FINDINGS OF FACT

Applicant admitted, with explanation, the allegations in subparagraphs 1.a., 2.a., 2.b., and 2.c. of the SOR.<sup>(1)</sup> Those admissions are incorporated here as findings of fact. He denied the remaining allegations. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 56-year-old senior program manager for a defense contractor.<sup>(2)</sup> He has worked for this contractor, and its predecessor companies, for 32 years.<sup>(3)</sup> He completed a security clearance application (SF 86) in August 2002.<sup>(4)</sup> He has held a security clearance for nearly 30 years without any problems or infractions.<sup>(5)</sup>

Applicant started his work career as a tool and die maker.<sup>(6)</sup> He later attended the local college and university part-time, eventually graduating with a bachelor's degree in mechanical engineering.<sup>(7)</sup> He has been married for 28 years, and has three children, ages 23, 21, and 11.<sup>(8)</sup> He plays league basketball several evenings a week.<sup>(9)</sup> He has also taught at the local college.<sup>(10)</sup> His finances are good.

In March 1969, at the age of 19, the police arrested Applicant as an accomplice in a fire cracker incident, and charged him with disorderly conduct, a misdemeanor.<sup>(11)</sup> When he appeared in court, the presiding judge lectured him, but did not impose a sentence or fine.<sup>(12)</sup> A year later, in April 1970, in a raid at the house where he lived, the police arrested him and the owner of the house, charging them with possession of stolen goods, a misdemeanor.<sup>(13)</sup> On the recommendation of the prosecuting attorney, he pled guilty, despite the statement of his friend that he was not involved in the theft.<sup>(14)</sup> He disclosed both these arrests when he initially applied for work at a predecessor company.<sup>(15)</sup>

On September 18, 2003, after playing a basketball game, Applicant stopped at a convenience store for a gatorade.<sup>(16)</sup> Unknown to him, undercover police officers were watching the activities of a twenty-six-year-old female near or in the store.<sup>(17)</sup> She was dressed in a halter top and jean skirt, and acting in a manner which raised the officers' concerns about prostitution.<sup>(18)</sup> As he was leaving the store, this female asked for a ride home.<sup>(19)</sup> After initially declining to give her a ride, he decided to provide her with a ride to her home.<sup>(20)</sup> On the way, she offered to provide him with oral sex for \$20.<sup>(21)</sup> He accepted her offer, paid her the money requested, drove to an unlit industrial site, and parked his SUV, which had tinted windows.<sup>(22)</sup> Within minutes, the undercover plain clothes police officers approached his car.<sup>(23)</sup> The police arrested and charged him and the female occupant with prostitution and loitering for purposes of prostitution.<sup>(24)</sup> He spent a few hours in jail before the police released him to his wife.<sup>(25)</sup> He told his wife the reason for his arrest.<sup>(26)</sup> He pled guilty to the charge of attempted prostitution.<sup>(27)</sup> Under the applicable city code, the court sentenced him to 30

days house arrest and one year probation.<sup>(28)</sup> He has completed his sentence.<sup>(29)</sup> This was his first arrest for prostitution.<sup>(30)</sup> He denies that he has previously solicited a prostitute.<sup>(31)</sup> Although he has not told his children about his arrest, he would tell them before he would reveal classified information.<sup>(32)</sup>

Applicant reported the incident to his security officer on September 19, 2003.<sup>(33)</sup> On November 14 and 15, 2003, he met with a government investigator to discuss his arrest.<sup>(34)</sup> On the advice of counsel, he provided only an oral statement to the government investigator.<sup>(35)</sup> At this time, he denied consummation of oral sex act, saying that after thinking about his decision to engage in sexual conduct with the female in his car, he changed his mind and decided not to proceed with his bargain.<sup>(36)</sup> In his written statement dated July 8, 2004, he again denied engaging in oral sex with the female in his car.<sup>(37)</sup> He admitted to accepting her offer of oral sex and paying her \$20, and to pleading guilty to attempted prostitution.<sup>(38)</sup>

The police report contains several statements of this incident.<sup>(39)</sup> The female told police that she and Applicant "... had agreed to her giving him a 'blow job' for twenty dollars."<sup>(40)</sup> The lead plain clothes police officer's statement indicates that from the driver's window he observed the female's head in Applicant's lap, her head come up and her mouth come off his erect penis.<sup>(41)</sup> He also stated the Applicant initially said that they were just sitting there, but changed his story to he was receiving a "head" for \$20.00 after being told the officer had walked up on the two of them.<sup>(42)</sup> The second plain clothes police officer wrote that as he approached the SUV, he observed the female's head in Applicant's lap.<sup>(43)</sup> A third police officer (uniform) interviewed Applicant at the scene.<sup>(44)</sup> This officer also reported that Applicant had acknowledged that he and the female had agreed to oral sex for \$20 and that he had given the female \$20.<sup>(45)</sup>

Applicant denies that he and the female in his car consummated the oral sex act.<sup>(46)</sup> He states that when the undercover police officers made their presence known by shining their lights from an approximate distance of 25 feet, the female was leaning between the front bucket seats of his SUV to retrieve a towel from the back seat to wipe up chocolate milk she had spilled.<sup>(47)</sup> When the light shown at the car, she popped her head up next to him.<sup>(48)</sup> The police then walked one at a time to his car and asked both to get out.<sup>(49)</sup> He continually acknowledges the offer of oral sex, his payment of \$20, and his guilty plea to attempted prostitution.<sup>(50)</sup>

The police charged Applicant and the female with prostitution under Article I, Sec. 11-28(1)(c) of the city code.<sup>(51)</sup> This section of the city code makes it a criminal misdemeanor if a person "Aids, offers or agrees to commit or conspires or commits any act of prostitution."<sup>(52)</sup> Article I, Sec. 11-28.1(a) provides for a minimum sentence for a first time offender, which cannot be suspended.<sup>(53)</sup>

Applicant met with a psychologist in October 2005.<sup>(54)</sup> The psychologist testified as an expert at the hearing.<sup>(55)</sup> The

psychologist administered the Minnesota Multiphasic Personality Inventory (MMPI) and the Millon Clinical Multiaxial Inventory (MCMI), third version, tests. (56) Applicant's test scores are in the normal range and do not reflect any personality defect, psychotic disorder, or alcohol and substance abuse problem. (57) He is a cautious and honest person, who is not a security risk. (58)

## POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the

Directive. Specifically, these are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. (59) The government has the burden of proving controverted facts. (60) The burden of proof is something less than a preponderance of the evidence. (61) Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. (62) Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. (63)

No one has a right to a security clearance (64) and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." (65) Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. (66) Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the

national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant. (67) 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

**Sexual Behavior - 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.**

**Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.**

**Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulation could indicate that the person may not properly safeguard classified information.**

## CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

The government established its case under Guideline D, allegation 1.a. Sexual Behavior Disqualifying Condition (SB DC) E2.A4.1.2.1. (*Sexual behavior of a criminal nature, whether or not the individual has been prosecuted*), and SB DC E2.A4.1.2.3. (*Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*) apply. Applicant agreed to oral sex with an unknown female and paid her to perform it. As the police arrested him for soliciting prostitution and he pled guilty to attempted prostitution, his conduct is a sexual behavior of a criminal nature. Given the seriousness of his actions, he could be vulnerable to coercion, exploitation, or duress.

I considered the Sexual Behavior Mitigating Conditions (SB MC). I conclude that SB MC E2.A4.1.3.2. (*The behavior is not recent and there is no evidence of subsequent conduct of a similar nature*) applies. Almost two and one-half years ago, Applicant paid a female for oral sex. Before this time, he had never been arrested for soliciting prostitution nor has he been arrested subsequently. Based his expert witness's testimony, he does not suffer from any sexual dysfunction or behavioral disorder which would cause him to repeat this conduct.

Applicant lacks financial problems. He has been married for 28 years. In the last 35 years, he has not shown any other questionable judgment which would impact his worthiness for a security clearance. He has held a security clearance for nearly 30 years without incident. He is an emotionally stable person and a responsible family man. His wife knows about the reason for his arrest as does his employer. Although he has not told his children about his arrest and he need not do so, he credibly testified that he would tell them before he could be coerced into revealing classified information. Thus, his arrest for prostitution cannot serve as a basis for coercion, exploitation or duress. SB MC E2.A4.1.3.3. (*There is no other evidence of questionable judgment, irresponsibility, or emotional instability*) and SB MC E2.A4.1.3.4. (*The behavior no longer serves as a basis for coercion, exploitation, or duress.*) apply. He has mitigated the government's concern under Guideline D

The government has established its case under Guideline J as to allegations 1.a. through 1.d. Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*) applies. In 1969 at the age of 19, the police arrested and charged Applicant with disorderly conduct. In 1970 at the age of 20, the police again arrested and charged him with possession of stolen goods. In 2003, the police arrested and charged him with solicitation of prostitution. Each arrest was a misdemeanor criminal charge.

I considered Criminal Conduct Mitigating conditions (CC MC). As to allegations 2.a. and 2.b., I conclude that CC MC E2.A10.1.3.1. (*The criminal behavior was not recent*) applies. Applicant's arrests in 1969 and 1970 occurred more than 30 years ago. He has not been arrested for any conduct of a similar nature. For more than 33 years, he was a law-abiding citizen. He stayed clear of situations that could cause further criminal arrests.

CC MC E2.A10.1.3.2 (*The crime was an isolated incident*) and CC MC 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*) apply to allegation 2.c. Applicant's arrest for prostitution in 2003 was his first. The city code required the judge to sentence him for a first offense and prohibited the judge from suspending the sentence. Thus, even though a first-time offender, he had to serve time, which in his case was house arrest. He has not seen the female involved in this incident since his arrest and has no plans to have any contact with her or any other prostitute. He has not been arrested for anything since this incident. Although the government argues that prior conduct of this nature most likely occurred, it has not presented any evidence of previous encounters with a prostitute, nor has such conduct been alleged in the SOR.

I have also considered his three arrests together to determine if there is a course of criminal conduct which would effect his security worthiness. Between his arrests in 1969 and 1970, 33 years elapsed before Applicant was arrested for

solicitation of prostitution. With this extensive lapse of time between his early criminal arrests and his more recent arrest, I do not find that his most recent arrest indicates a course of criminal conduct that would impact his security worthiness. Applicant has mitigated the government's concerns as to Guideline, J, allegations 2.a. through 2.c. under the previously discussed mitigating conditions. However, he has not mitigated the government's concerns as to allegation 2.d., Guideline J.

To establish its case under Guideline E, the government must show that Applicant's omission, concealment or falsification in regards to the details of his 2003 arrest was a relevant and material fact and was deliberate. Applicant's explanation for why he agreed to give a 26-year-old unknown female a ride home is implausible. While accepting his statement that he stopped for a gatorade as true, common sense indicates that a 53-year-old married man would not agree to give a strange female, nearly thirty years younger than he, a ride home. More importantly, I do not find his statement that when presented with her offer of oral sex, he suddenly thought he should try it, credible. Likewise, his denial that he did not consummate the sex act is not credible. The lead police officer unbiased statement reporting what he observed when he reached Applicant's car is entitled to greater weight. The government has established its case for allegation 1.b. under Guideline E. Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2. (*The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire...*)

I have considered the Personal Conduct Mitigating Conditions (PC MC) and find that none apply. Applicant's lack of truthfulness about all the circumstances leading to his arrest raise questions about his integrity and honesty. His statements about this event reflect questionable judgment and lack of candor on his part. He has breached the trust given to him by the government. He has not mitigated the government's concerns under Guideline E, allegation 1.b.

Concerning the government's allegation he lied to the investigator during the November 2003 interview, the government did not call the investigator as a witness at the hearing to establish the statement given by the Applicant at this time. I find that the government has not established the omission and falsification alleged in subparagraph 3.a.

Finally, I have considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. When he was young and naive, he casually associated with individuals whose conduct involved him with the criminal court system. He learned from these experiences. For 33 years, he conducted himself as a law-abiding citizen. He has been steadily employed over these years. He completed his college education and has been promoted to the position of program director. He has never been cited for a security clearance violation in the 30 years he has held a clearance. While he acted responsibly in reporting his arrest to his employer and in pleading guilty to his admitted conduct, his failure to be truthful about all the circumstances surrounding his arrest outweighs his positive conduct. His untruthfulness raises serious questions about his trustworthiness in handling matters related to national security. Accordingly, for the reasons stated, I find that it is not clearly consistent with the national interest to grant a security clearance to Applicant.

## **FORMAL FINDINGS**



Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline D (Sexual Behavior): FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2, Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: Against Applicant

Paragraph 3, Guideline E (Personal Conduct): Against APPLICANT

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

Mary E. Henry

Administrative Judge

1. Applicant's Response to SOR, dated February 24, 2005, at 3-8.
2. Government Exhibit 1 (Applicant's security clearance application, dated August 28, 2002) at 2; Tr. at 18-19.
3. *Id.*
4. Government Exhibit 1, *supra* note 2, at 1.
5. *Id.* at 6; Tr. at 19, 21-22, 104.
6. Tr. at 19-20.
7. *Id.*
8. *Id.*
9. *Id.* at 21-22.
10. *Id.* at 21.
11. *Id.* at 22-23; Applicant's response, *supra* note 1, at 4-5.
12. *Id.*
13. Applicant's response, *supra* note 1, at 5; Tr. at 24-25.
14. *Id.*
15. Tr. at 27.
16. *Id.* at 35.
17. Government Exhibit 4 (Police report, dated September 19, 2003) at 2, 5.
18. *Id.* at 1.
19. *Id.* at 36-37.
20. *Id.*
21. *Id.* at 37.
22. *Id.* at 37-39; Applicant Exhibits C-E.

23. Tr. at 42; Government Exhibit 4, *supra* note 17, at 2.

24. Government Exhibit 4, *supra* note 17, at 1.

25. Tr. at 46-47.

26. *Id.*

27. *Id.* at 56; Government Exhibit 7 (Court documents, dated January 14, 2004) at 9; Article I, Sec. 11-28. Indecency, lewdness-Acts prohibited. City Code; Article I, Sec. 11-28(1)(c).

28. Article I, Sec. 11-28.1. Same--Minimum penalty: subsequent convictions. City Code.

29. Tr. at 57.

30. *Id.*; *supra* note 26.

31. Tr. at 29.

32. *Id.* at 103-104.

33. *Id.* at 47-48; Government Exhibit 6 (Internal security report of Applicant's arrest, received by the government on September 26, 2003) at 1.

34. Tr. at 51-52.

35. *Id.*

36. Government Exhibit 8 (Applicant's signed statement, dated July 8, 2004) at 4.

37. *Id.* at 2-3.

38. *Id.* at 1-3.

39. Government Exhibit 4, *supra* note 17, at 2, 3, 5-9.

40. *Id.* at 7.

41. *Id.* at 2.

42. *Id.* at 3.

43. *Id.* at 9.

44. *Id.* at 5-6.

45. *Id.* at 6.

46. Applicant's response, *supra* note 1, at 3-8; Government Exhibit 8, *supra* note 36, at 1-4; Tr. at 42.

47. Tr. at 43, 70; Government Exhibit 8, *supra* note 36, at 2; Applicant's response, *supra* note 1, at 3; Applicant Exhibit B.

48. *Id.*

49. Tr. at 44.

50. *Id.* at 55-56; Applicant's response, *supra* note 1, at 6-7.

51. Article I, Sec. 11-28. Indecency, lewdness--Acts prohibited. City Code.

52. Article I, Sec. 11-28(1)(c).

53. Article I, Sec. 11-28.1. Same--minimum penalty: subsequent convictions. City Code.

54. Tr. at 81; Applicant Exhibit F (Report of expert psychologist, dated October 18, 2005) at 1.

55. Tr. at 101; Applicant Exhibit G (Qualifications of psychologist).

56. Applicant Exhibit F, *supra* note 54, at 1, 3-4; Tr. at 83.

57. Applicant Exhibit F, *supra* note 54, at 5; Tr. at 86.

58. Applicant Exhibit F, *supra* note 54, at 1, 3-4; Tr. at 86, 91, 93.

59. ISCR Case No. 96-0277 (July 11, 1997) at 2.

60. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.

61. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

62. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.

63. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.

64. *Egan*, 484 U.S. at 531.

65. *Id.*

66. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

67. Executive Order No. 10865 § 7.