

DATE: May 17, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-02444

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Department Counsel

FOR APPLICANT

Thomas M. Abbott, Attorney At Law

SYNOPSIS

Applicant's questionable sexual conduct raises a security concern and has not been mitigated. Clearance is denied.

STATEMENT OF THE CASE

On September 9, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended), and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on October 17, 2005, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on February 7, 2006. A notice of hearing was issued on February 7, 2006, scheduling the hearing for February 27, 2005. At the hearing the Government presented three exhibits. The Applicant presented twenty-four exhibits and testified on his own behalf. He also submitted one Post-Hearing Exhibit that consisted of Applicant's Exhibit X, and clarification of previously submitted Applicant's Exhibits G and H. The official transcript (Tr.) was received on March 10, 2006.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the exhibits and the testimony. The Applicant is 38 years of age and has a Master of Business Administration with an emphasis in Finance. He is employed as a Business Manager for a defense contractor. He seeks a security clearance in connection with his employment in the defense industry.

Paragraph 1 (Guideline D- Sexual Behavior). The Government alleges in this paragraph that the Applicant is ineligible

for clearance because his sexual behavior involved a criminal offense, is indicative of a personality or emotional disorder, subjects the individual to undue influence or coercion, or reflects lack of judgement or discretion.

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has engaged in conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations.

The Applicant admits to each of the allegations set forth in the SOR under this guideline.

Since 1990, he has worked for a defense contractor and has held a security clearance.

The Applicant is a homosexual man. He grew up in a small town in Oklahoma and was raised Southern Baptist. At some point he moved to St. Louis, Missouri. He grew up lonely, terrified of being gay, and did not know how to meet gay people. At the age of twenty-five or so, he became aware of a park where gay men cruised and he frequented it from 1993 until 1995. On at least twelve occasions, the Applicant would go to the park in the evenings and meet men to have sex with. They would meet in a secluded area, in the dark, in a car, not visible to anyone else. The Applicant claims that the sex was consensual, with other men, not boys, and he did not pay money for the sex. The sex was not intercourse, but masturbation.

The Applicant explained that during the same period, in the late 1990's, on two occasions he hired male prostitutes for sexual relations. There was no exchange of any personal information or work-related information, just sex. He states that on each occasion, it was a brief sexual encounter that lasted for about an hour. On one occasion, the sexual encounter occurred in Texas, the other sexual encounter took place in Washington D.C. The Applicant states that at the time he did not realize that the conduct was illegal.

In May 1996, the Applicant was granted a Top Secret Security Clearance by the Department of Defense. He states that since late 1997, he has been openly gay. He has lots of gay friends and dates on a regular basis.

Three years later, in May 1999, the Applicant engaged in sexual behavior with a foreign national in an adult bookstore while in Australia. The Applicant explained that the sex occurred in a locked video booth. He is not sure whether the sexual activity was illegal or not in Australia at the time. He is also not sure whether the man he had sex with in the booth was Australian, however, he did have an Australian accent. (Tr. p. 52). That same month, the Applicant engaged in sexual behavior in New Zealand with a man from Tonga.

In August 1999, he met a man in a club in Spain whom he believed was a Spanish citizen. The Applicant explained that the sex with this man occurred in a private room in a sauna located in a beach community. The Applicant went to the sauna for the specific purpose of having sex. (Tr. pp. 54-55).

In early 2000, the Applicant engaged in sexual behavior with a foreign national from Germany. The Applicant told his sex partner that he was a financial analyst but did not discuss the particulars of his job.

Also, in early 2000, the Applicant met a man from Mexico and had a romantic relationship with him for about six months. The man was not an American citizen, but was here on a work permit.

The Applicant admits that in almost every security briefing he has received, he has been informed of the concern involved when one associates with a foreign national, and that he could be subject to coercion or blackmail by engaging in a relationship with a foreign national. (Tr. pp. 41-42). In a statement to the Defense Security Service dated October 13, 2004, the Applicant stated that he knew that his sexual activities with foreign nationals could make him susceptible to pressure, blackmail or coercion. (See Government Exhibit 2, p.18). In that same statement he also indicates that he was aware that the sexual conduct he had engaged in could be a violation of the law. (See Government Exhibit 2, p. 18).

At the present time, the Applicant meets men on the internet using his home computer. He has a personal profile on the internet through various web sites in hopes of meeting that right person.

In October 1999, the Applicant was granted a Special Access Program (SAP) clearance by another Government entity.

In August 2001, this SAP clearance was revoked based upon his sexual behavior with various foreign nationals.

Paragraph 3 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant's solicitation of male prostitutes for sex is illegal pursuant to Texas Penal Code Section 43.01, 1996, and Section 22-2701.1 of the Washington D.C. statutes. (See Government Exhibit 3). However, the conduct occurred well over ten years ago and there is no evidence of any recent conduct of this sort. Accordingly, this allegation is found for the Applicant.

Mitigation.

The Applicant's performance evaluations for 1993, 1994, 1995, 2001, 2002, 2003, 2004 and 2005, all show that the Applicant has either "met", "frequently exceeded" or "always exceeded" expectations in every category. (See Applicant's Exhibits A through H).

Letters of Recognition from his employer in 2001, 2002 and 2005 and Certificates and Awards of Achievement reflect the company's appreciation for the Applicant's outstanding performance on the job. The Applicant is considered a valued employee that has made numerous contributions to the company. (See Applicant's Exhibits L, M, N, Q, P and R).

Numerous declarations submitted by managers, coworkers and friends of the Applicant collectively indicate that he is considered to be open, honest, ethical, trustworthy and professional. Among other favorable attributes, the Applicant is recognized as a person of excellent judgment and character and a person who makes well reasoned decisions. (See Applicant's Exhibits I, J, T, U, V, W and X).

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on her own common sense. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

(Guideline D (Sexual Behavior))

Condition that could raise a security concern:

3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation or duress.

Condition that could mitigate security concerns:

None.

Guideline E (Personal Conduct)

Conditions that could raise a security concern:

4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure;
5. A pattern of dishonesty or rule violations; to include violation of any written or recorded agreement made between the individual and the agency.

Condition that could mitigate security concerns:

None.

Guideline J (Criminal Conduct)Conditions that could raise a security concern:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Condition that could mitigate security concerns:

1. The criminal behavior was not recent.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "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. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination. The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

The Government must make out a case under Guideline D (Sexual Behavior), Guideline E(Personal Conduct) and Guideline J (Criminal Conduct) that establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between Applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct

evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations, at all times and in all places.

CONCLUSIONS

Having considered the evidence in light of the appropriate legal standards and factors, and having assessed the Applicant's credibility based on the record, this Administrative Judge concludes that the Government has established its case as to all allegations in the SOR, and that Applicant's foreign contacts and questionable sexual behavior have a direct and negative impact on his suitability for access to classified information.

The fact that the Applicant is a homosexual or that he has engaged in homosexual activities is not the basis for a security concern and is not held against him for any purpose. The security concern here is the fact that the Applicant has engaged in a pattern of inappropriate sexual behavior on a number of different occasions with foreign nationals over the past ten years while holding a security clearance. This sexual behavior was inappropriate because it involved foreign nationals. He was careless, almost reckless, using no discretion when dealing with these foreign nationals, who could subject him to pressure, coercion and/or blackmail, which in turn could subject the Government to a security risk.

The Applicant is a highly educated man who has engaged in numerous random sexual encounters with foreign nationals in various countries. This conduct places him in a vulnerable position to be susceptible to pressure, coercion and/or blackmail. He also solicited prostitutes for sexual services and masturbated in public places. Furthermore, he engaged in these activities after having been granted a Top Secret Security Clearance and with knowledge of the security training he has been provided by his employer. This questionable judgment and lack of discretion with a foreign national occurred as recently as 2000, just six years ago. Presently, the Applicant claims that his sexual preference is open and notorious and that his situation has changed. But, to the contrary it has not. Although his peers may know that he is gay, there is no specific reference or mention in any of their declarations that they knew or were aware that he had been engaging in sexual behavior with various foreign nationals. Moreover, the Applicant indicates that he is currently dating and not committed to any one person. He frequently has sex with individuals that he does not know very well. Therefore, the risk is great that he may fall prey to exploitation, coercion or duress. Under Guideline D, Disqualifying Condition (3) *Sexual behavior that causes an individual to be vulnerable to coercion, exploitation or duress* applies. None of the mitigating conditions are applicable. Under Guideline E, Disqualifying Condition (4) *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure* applies. Again, none of the mitigating conditions are applicable. Under Guideline J, Disqualifying Conditions (1) *Allegations or admissions of criminal conduct, regardless of whether the person was formally charged* and (2) *A single serious crime or multiple lesser offenses* apply. However, mitigating Condition (1) *the conduct was not recent* also applies. Accordingly, Guideline J is found for the Applicant. Nevertheless, the Applicant has not met his burden of demonstrating that his questionable sexual behavior does not raise a security concern, and Guidelines D and E are found against the Applicant.

Considering all the evidence, the Applicant has not met the mitigating conditions of Guidelines D and E of the adjudicative guidelines set forth in Enclosure 2 of the Directive. Accordingly, he has met his ultimate burden of persuasion under Guidelines D and E.

FORMAL FINDINGS

Formal Findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: Against the Applicant.

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: Against the Applicant

Subparagraph 1.g.: Against the Applicant

Paragraph 2: Against the Applicant.

Subparagraph 2.a.: Against the Applicant.

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Paragraph 3: For the Applicant.

Subparagraph 3.a.: For the Applicant.

DECISION

In light of the circumstances presented by the record in this case, it is not clearly consistent with the national interests to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson

Administrative Judge