

DATE: June 15, 2006

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SSN: -----

Applicant for Security Clearance

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CR Case No. 05-09976

**DECISION OF ADMINISTRATIVE JUDGE**

**DARLENE LOKEY ANDERSON**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's questionable sexual conduct that is criminal has been mitigated and no longer raises a security concern. Clearance is granted.

**STATEMENT OF THE CASE**

On November 8, 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 December 6, 2006, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on March 2, 2006. A notice of hearing was issued on March 24, 2006, scheduling the hearing for April 21, 2006. At the hearing the Government presented two exhibits. The Applicant presented one exhibit and called two witnesses. He also testified on his own behalf. The official transcript (Tr.) was received on May 5, 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 45 years of age, married with children, and has a high school diploma. He is employed as a Truck Driver 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 J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant admits to each of the allegations set forth in the SOR under this guideline. On December 16, 2004, the Applicant was arrested and charged with Disorderly Conduct; Solicitation of Prostitution. He pled Nolo Contendere and was found guilty and was sentenced to three years probation, fined \$1,170.00 and ordered to undergo HIV testing. The Applicant explained that between his work, his wife's candy business, their children, and Christmas, they were so busy and tired that neither of them had time or energy for one another. The Applicant explained very candidly that on that day and on no other day in his life, he attempted to hire a prostitute for sex and companionship. As he was in the process of offering the woman money for sex, the prostitute, unbeknownst to him was actually an undercover police officer. She gave the signal and another officer came up from behind the Applicant and arrested him. The Applicant accepts full responsibility for his actions and ensures that it will never happen again. He has no criminal record and he and his wife have made amends. The Applicant has satisfied all of the court's sentencing requirements concerning this conviction. He remains on informal probation until 2007.

### Mitigation

The Applicant's wife testified that she was the person the Applicant called to come bail him out of jail. She and the Applicant have been together since they were in the tenth grade. They deeply love each other. She believes with strong conviction and sincerity that the Applicant is a good person, a good father, a good provider, and a good husband. In her opinion, he made a bad mistake and should be forgiven for it. (Tr. pp. 25-30).

The Applicant's supervisor testified that he has known the Applicant for almost twenty five years. The Applicant is an extremely responsible and trustworthy person with high moral values. He is a self-starter and a true professional. He is considered to be one of the company's finest employees. In his supervisor's opinion, the Applicant made a stupid blunder that he is extremely remorseful for that he knows will never happen again. (Tr. p. 16-18).

A letter from the Applicant's supervisor dated November 30, 2005, corroborates his testimony. (See attachment to Applicant's Answer to SOR).

## **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.

#### Conditions that could mitigate security concerns:

2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature.
3. There is no evidence of questionable judgment, irresponsibility, or emotional instability.

## 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 questionable sexual and criminal behavior have a direct and negative impact on his suitability for access to classified information.

The security concern here is the fact that the Applicant engaged in inappropriate sexual and criminal behavior by attempting to solicit a prostitute for sexual services. This illegal conduct places him in a vulnerable position to be susceptible to pressure, coercion and/or blackmail and could subject the Government to a security risk. However, there is no pattern of misconduct here. This conduct was an isolated incident that occurred over two years ago. Since then, the Applicant has made the necessary changes in his life that will not lead him to this type of behavior. He and his wife have a good relationship, they are committed to one another and will take the time in the future to meet each others needs. Therefore, the risk is not great that he will ever engage in this behavior again or that he may fall prey to exploitation, coercion or duress because of it. Under Guideline D, Disqualifying Condition (3) *Sexual behavior that causes an individual to be vulnerable to coercion, exploitation or duress* applies. However, Mitigating Conditions (2) *The behavior was not recent and there is no evidence of subsequent conduct of a similar nature* and (3) *There is no evidence of questionable judgment, irresponsibility, or emotional instability* apply. 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 Guidelines D and J are found for the Applicant. The Applicant has met his burden of demonstrating that his questionable sexual behavior no longer raises a security concern, and Paragraphs 1 and 2 are found for the Applicant.

## **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: For the Applicant.

Subparagraph 1.a.: For the Applicant

Paragraph 2: For the Applicant.

Subparagraph 2.a.: Against the Applicant.

## **DECISION**

In light of the circumstances presented by the record in this case, it is clearly consistent with the national interests to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson

Administrative Judge