

DATE: December 29, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 06-11175

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Emilio Jaksetic, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a married man, engaged in sexual relations with prostitutes four or five times during 2001-2004. The last incident in July 2004 resulted in Applicant being charged with three misdemeanor offenses, and he pleaded guilty to a solicitation offense. His sentence included a fine, court costs, and unsupervised probation for two years, which he completed in September 2006. He disclosed his misbehavior to his wife and they worked through the various marital issues. Applicant presented sufficient evidence to explain, extenuate, or mitigate the criminal conduct, sexual behavior, and personal conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

Applicant contests the Defense Department's preliminary decision to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive, [\(U\)](#) on June 21, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) detailing the basis for its action. The SOR--which is in essence the administrative complaint--alleges security concerns under Guideline J for criminal conduct, Guideline D for sexual behavior, and Guideline E for personal conduct. Applicant timely replied to the SOR and requested a hearing.

The case was assigned to me on November 3, 2006, and a notice of hearing was issued scheduling the case for December 5, 2006. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the hearing transcript on December 13, 2006.

FINDINGS OF FACT

In reply to the SOR, Applicant admitted the criminal conduct in SOR ¶ 1.a and gave an explanation. Also, he admitted the sexual behavior in SOR ¶ 2.a and gave an explanation. He did not respond to the allegation in SOR ¶ 3.a, which merely refers to the other SOR allegations. His admissions and explanations are incorporated herein as findings of fact.

In addition, I make the following findings of fact.

1. Applicant is a 46-year-old electrician for a defense contractor. He has worked for this company in a major shipyard since 1983. Given his seniority on the job, Applicant's title or position is special electrician top rate. In conjunction with his employment, he has held a Defense Department security clearance since about 1986, and he is seeking to retain that security clearance.
2. Before his employment in the shipyard, Applicant served as a sailor with the U.S. Navy during 1978-1982. He was honorably discharged in September 1982.
3. Applicant married in 1984. He and his wife have lived at the same address since 1985. They have three children, two sons and a daughter. Their 21-year-old son completed high school and is in the Navy. Their 18-year-old son is a senior in high school, and their 16-year-old daughter is a junior. Applicant's wife is employed outside the home by a state governmental department.
4. Applicant engaged in sexual relations with prostitutes four or five times during 2001-2004. The last incident in July 2004 resulted in Applicant being charged with the misdemeanor offenses of soliciting prostitution, frequenting a bawdy place, and using a vehicle for prostitution. In September 2004, he pleaded guilty to the solicitation offense and the other two offenses against him were dismissed by *nolle prosequi* (Exhibits 2, 3, and 4). His sentence included a \$1,000 fine, \$83.65 in court costs, and unsupervised probation for two years. In addition, the court sentenced Applicant to 90 days in jail, but suspended 86 days. Instead of confinement, Applicant went to "john school" and served community service. He paid the fine and court costs in February 2005, and he completed unsupervised probation without incident in September 2006. Otherwise, Applicant has no record of arrests, charges, or convictions.
5. To retain a security clearance, Applicant completed a security-clearance application in September 2004 (Exhibit 1). In response to a question about his police record, Applicant revealed his misdemeanor conviction and sentence for solicitation of prostitution.
6. During his testimony, he explained the facts and circumstances surrounding the July 2004 incident (R. 29-31). In short, Applicant picked up a prostitute on the street and was caught in the act in his car. Police questioned and processed Applicant at the scene, to include giving him three citations for the offenses. Applicant was released at the scene and went to the shipyard to work the night shift. When he arrived home that night, he woke his wife and told her that he had been arrested. In response to her questions, admitted that he had previously engaged in this activity.
7. Also during his testimony, he explained the circumstances that led him to use prostitutes (R. 32-34). In brief, Applicant was having problems at home with relations between him and his wife. The crux of the problem was that he has worked the night shift for years while his wife works a normal work day. He typically arrives home at about 1:00 a.m. to a sleeping wife. When he gets up in the morning, his wife and children are out the door going about their day, and he departs for work in the afternoon before they return.
8. Applicant's misbehavior with prostitutes was a "big shock" to his wife (R. 42). He knows he deeply disappointed his wife, because she had a lot of faith in him, and he says he is truly sorry. Since his arrest and conviction, his marriage went through substantial strain and stress. Indeed, at the hearing, Applicant appeared contrite and humbled by the whole experience. Applicant now believes his relationship with his wife has improved. Although his wife does not accept his misbehavior, she understands what happened. Applicant and his wife have discussed the situation at length without the benefit of formal counseling, as they desired to keep the matter private.
9. At his wife's request, Applicant sold the car where the incident took place. And he no longer drives the same route where he picked up prostitutes in the past. Finally, Applicant's wife, although still working days, stays up a few nights a week when Applicant arrives home so they have an opportunity for conversation and private time.
10. Applicant has worked at the shipyard for more than 20 years and he considers himself to be a model employee. He has worked his way to a position of seniority in his trade, and he desires to continue working at the shipyard. He is interested in working on the management side of the shipyard. To that end, he recently completed a human relations course and a management course (Exhibits A and B).

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.⁽²⁾ A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.⁽³⁾ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁴⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁵⁾ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁽⁶⁾ An applicant is responsible for evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁽⁷⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance.⁽⁹⁾ And as noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. The Criminal Conduct Security Concern

Under Guideline J,⁽¹¹⁾ criminal conduct is a concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling sensitive information.

Here, based on the record evidence as a whole, a criminal conduct security concern is raised under Guideline J. Applicant does not dispute that he has a history of criminal conduct based on his misbehavior with prostitutes during 2001-2004, which led to his misdemeanor conviction in September 2004. Given these circumstances, both DC 1⁽¹²⁾ and DC 2⁽¹³⁾ apply.

I reviewed the MCs under the guideline and conclude that there is evidence of reform and rehabilitation⁽¹⁴⁾ based on the following: (1) accepting responsibility for his actions by pleading guilty to the solicitation offense; (2) completing the two-year unsupervised probation without incident; (3) the passage of time since his misdemeanor conviction without further criminal activity; and (4) disclosing his misbehavior with prostitutes to his wife and working through the various marital issues with his wife. These circumstances, taken together, are substantial evidence in mitigation.

2. The Sexual Behavior Security Concern

Under Guideline D,⁽¹⁵⁾ 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.

Here, based on the record evidence as a whole, a sexual behavior security concern is raised under Guideline D. First, Applicant's misbehavior with prostitutes was criminal conduct that resulted in a misdemeanor conviction. Second, his misbehavior put him in a position where he might be vulnerable to coercion, exploitation, or duress, although there is no evidence showing that took place here. And third, his misbehavior shows a lack of good judgment. Given these circumstances, DC 1, [\(16\)](#) DC 3, [\(17\)](#) and DC 4 [\(18\)](#) apply.

I reviewed the MCs under the guideline and conclude there is substantial evidence in mitigation. First, other than his misbehavior with prostitutes, there is no other evidence of questionable judgment. Applicant has worked in the shipyard since 1983 and held a security clearance since 1986, and there is no other derogatory information in the record. Second, as noted above, Applicant revealed his arrest and his misbehavior to his wife, thereby reducing if not eliminating any potential that this information could be used as leverage against him. Given these circumstances, both C 3 [\(19\)](#) and MC 4 [\(20\)](#) apply in his favor.

3. The Personal Conduct Security Concern

Personal conduct under Guideline E [\(21\)](#) is always a security concern because it asks the central question: Does a person's past conduct justify confidence the person can be trusted to properly safeguard classified information. Conduct or behavior involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Here, based on the record evidence as a whole, a personal conduct security concern is raised under Guideline E. While working as a cleared employee of a defense contractor, Applicant engaged in sexual relations with prostitutes on four or five occasions during 2001-2004. He did so by picking up the prostitute on the street, driving to a location, and having sex in his vehicle. His misbehavior led to his arrest and conviction for a misdemeanor offense, and it caused substantial grief in his marriage. Taken together, these circumstances raise a security concern within the meaning of DC 4 [\(22\)](#) and DC 6. [\(23\)](#) His misbehavior shows questionable judgment as well as a breach of trust on a personal level.

I reviewed the MCs under the guideline and conclude there is substantial evidence in mitigation. First, Applicant's misbehavior with prostitutes is over and there is no evidence of subsequent conduct of a similar nature. Also, his wife is aware of his misbehavior. Second, not only has Applicant's misbehavior with prostitutes ceased, he has taken positive steps to prevent future misbehavior by selling the car in question and not traveling the route in question. Given these circumstances, both MC 5 [\(24\)](#) and MC 6 [\(25\)](#) apply in his favor.

4. The Whole-Person Concept

I have also considered the available information in light of the whole-person concept. [\(26\)](#) First,

he has served his country for more than two decades, first in the Navy and then working in a major shipyard, and he has held a security clearance for about 20 years without a negative security incident. Applicant deserves some credit for his service. Second, his criminal conduct is relatively minor. He was charged with misdemeanor offenses, not felonies. He pleaded guilty to a single misdemeanor offense. He received a light sentence and served no jail time. These circumstances indicate that civil authorities did not view his misbehavior as serious criminal conduct. Third, as discussed above, there is ample evidence of reform and rehabilitation. Fourth, the potential for pressure, coercion, exploitation, or duress is unlikely given that he has revealed his misbehavior to his wife. And fifth, the likelihood of continuation or recurrence of similar conduct is, as always, difficult to measure, but it appears to be low. Indeed, at the hearing, he appeared contrite and humbled by the whole experience. In my view, he has learned his lesson and his misbehavior with prostitutes will not be repeated.

The gravamen of this case is Applicant's misdemeanor-level criminal conduct, his high-risk sexual behavior, and his questionable judgment. After considering his misbehavior with prostitutes from the perspectives of three security guidelines, I conclude Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns. I

have weighed the disqualifying and mitigating information, and I conclude his case in mitigation is strong enough to overcome the negative security implications of his misbehavior. In reaching this decision, I considered all the evidence, both favorable and unfavorable, including any evidence not specifically discussed. Applicant has met his ultimate burden of persuasion to obtain a favorable clearance decision.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline J: For Applicant

Subparagraph a: For Applicant

SOR ¶ 2-Guideline D: For Applicant

Subparagraph a: For Applicant

Subparagraph b: For Applicant

SOR ¶ 3-Guideline E: For Applicant

Subparagraph a: For Applicant

DECISION

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

Michael H. Leonard

Administrative Judge

1. Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. Directive, Enclosure 2, Item E2.2.1 (setting forth nine factors to consider under the whole-person concept).
3. Executive Order 10865, § 7.
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
6. Directive, Enclosure 3, Item E3.1.14.
7. Directive, Enclosure 3, Item E3.1.15.
8. Directive, Enclosure 3, Item E3.1.15.
9. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.") (citations omitted).
10. 484 U.S. at 531.

11. Directive, Enclosure 2, Attachment 10 (setting forth the disqualifying and mitigating conditions).
12. Directive, Item E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
 13. Directive, Item E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
 14. Directive, Item E2.A10.1.3.6. There is clear evidence of successful rehabilitation.
15. Directive, Enclosure 2, Attachment 4 (setting forth the disqualifying and mitigating conditions).
16. Directive, Item E2.A4.1.2.1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted.
17. Directive, Item E2.A4.1.2.3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.
18. Directive, Item E2.A4.1.2.4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.
19. Directive, Item E2.A4.1.3.3. There is no other evidence of questionable judgment, irresponsibility, or emotional instability.
20. Directive, Item E2.A4.1.3.4. The behavior no longer serves as a basis for coercion, exploitation, or duress.
 21. Directive, Enclosure 2, Attachment 5 (setting forth the disqualifying and mitigating conditions).
22. Directive, Item E2.A5.1.2.4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail.
 23. Directive, Item E2.A5.1.2.6. Association with persons involved in criminal activity.
24. Directive, Item E2.A5.1.3.5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.
 25. Directive, Item E2.A5.1.3.6. Association with persons involved in criminal activity has ceased.
 26. Directive, Enclosure 2, Item E2.2.1.