

DATE: December 21, 2007

In re:

SSN: -----

Applicant for Security Clearance

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) ISCR Case No. 07-03637
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**DECISION OF ADMINISTRATIVE JUDGE
LEROY F. FOREMAN**

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esq., Department Counsel

FOR APPLICANT

Gwendolyn F. Stokes, Esq.

SYNOPSIS

Applicant admitted soliciting prostitutes on numerous occasions between 1992 and 1996. In January 1994 and July 1996, he pleaded guilty to soliciting prostitutes. In January 2006, he was cited for soliciting a known prostitute, but the charges were dismissed. His wife is unaware of his record of soliciting prostitutes. Security concerns based on criminal conduct, sexual behavior, and personal conduct are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

Applicant applied for a security clearance on October 3, 2006. On July 13, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny him a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive); and the revised adjudicative guidelines (AG) approved by the President on December 29, 2005, and implemented effective September 1, 2006. The SOR alleges security concerns under Guidelines J (Criminal Conduct), D (Sexual Behavior), and E (Personal Conduct).

Applicant answered the SOR in writing on September 7, 2007, admitted some allegations and denied some, and requested a hearing. The case was assigned to me on October 10, 2007, and heard as scheduled on November 14, 2007. DOHA received the transcript (Tr.) on November 21, 2007.

PROCEDURAL RULINGS

On October 3, 2007, Department Counsel filed a motion to amend the SOR by adding ¶¶ 2.b, 2.c, and 2.d under Guideline D, cross-alleging the criminal conduct in SOR ¶¶ 1.a, 1.b, and 1.c under Guideline J as sexual conduct under Guideline D. At the hearing, Applicant did not object to the amendments, and I granted the motion (Tr. 11). Applicant had not responded in writing to the motion to amend, but at the hearing he admitted ¶ 2.b as amended, and he denied ¶¶ 2.c and 2.d as amended.

Although the parties orally agreed in late October to the hearing date of November 14, 2007, the written hearing notice was dispatched on November 1, 2007, less than the 15 days required by the Directive ¶ E3.1.8. Applicant waived the 15-day notice requirement (Hearing Exhibit I; Tr. 13).

On motion of Department Counsel and without objection from Applicant, I took administrative notice of the provisions of the city code pertaining to prostitution in the city where the alleged conduct occurred (Hearing Exhibit II; Tr. 21-23).

Government Exhibit (GX) 2 consisted of DOHA interrogatories, Applicant's responses, and a 4-page extract from a report of investigation summarizing Applicant's oral statement to a security investigator. Applicant pointed out several minor errors in the summarization in his response to the interrogatories (GX 2 at 3) and at the hearing (Tr. 90-92). Department Counsel did not offer an authenticating witness for report of investigation attached to GX 2, as required by Directive ¶ E3.8.20. Applicant's counsel questioned whether two police reports offered by Department Counsel (GX 3 and 4) were inadmissible because they were "investigative reports," but she made no foundational objection to GX 2 (Tr. 24-29). I conclude that the lack of an authenticating witness for the attachment to GX 2 was waived by the failure of Applicant's counsel to object.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 48-year-old cable installer for a defense contractor (Tr. 37). He was hired in October 2006 and given an interim clearance. His interim clearance was revoked when DOHA made the preliminary determination to deny him a clearance (Tr. 38-41). At the time of his hearing, he was working as an auto detailer (Tr. 36). If his clearance is granted, he will return to his job as a cable installer (Tr. 117).

Applicant was married in June 1988, and his daughter was born in 1992. After the birth of his daughter, his wife became increasingly unwilling to engage in sexual activity (Tr. 71-72). He and his wife attended marriage counseling from about November 2001 to September 2002, but his wife participated "on her own terms," not participating in counseling sessions dealing with sexual intimacy (Tr. 73-74). Applicant has remained married even though the sexual intimacy issues have not been resolved, because he still loves his wife (Tr. 76-77).

In January 1994, Applicant picked up a woman who waved at him while he was driving past, and they agreed she would perform oral sex on him. The police arrested Applicant before any sex acts occurred. Applicant pleaded guilty to attempting to solicit a prostitute, paid a \$150 fine, and was placed on probation for one year (GX 2 at 8). At the hearing, he testified the charges ultimately were dismissed (Tr. 57).

In July 1996, Applicant met a woman near a motel in the same area as the January 1994 incident. They went to a motel room and Applicant asked the woman to perform oral sex on him. The woman was an undercover police officer. Applicant was cited for soliciting a prostitute. He pleaded guilty, paid a fine of \$100, and was placed on probation for one year (GX 2 at 8; GX 3). At the hearing, Applicant admitted he pleaded guilty and was convicted, and he admitted telling a security investigator he was fined "\$100 or \$150" and was placed on probation, but at the hearing he testified he was unsure of the disposition of the charge (Tr. 55, 117-18).

In January 2006, Applicant picked up a woman who waved at him as he drove past, in the same area as the two previous incidents. The woman was a known prostitute. No conversation about sex and no sexual acts occurred. After Applicant drove 2-3 blocks, he was stopped by the police and cited for soliciting a known prostitute (GX 4). Applicant testified the woman asked him for a ride for a distance of 2-3 blocks, and he was pulling over to let her out when the police confronted him. He insisted he was not looking for sexual activity, but he admitted he exercised bad judgment by picking up a stranger in that area (Tr. 103-05). The charge was dismissed for lack of evidence (Applicant's Exhibit A).

In an interview with a security investigator on December 18, 2006, Applicant admitted the incidents described above. He also admitted hiring approximately 24 prostitutes between 1990 and 1996. He explained that he sought out prostitutes because his wife is sexually anorexic and withholds sexual relations from him (GX 2 at 9). At the hearing, he testified that in retrospect he had overestimated the number of times he sought out prostitutes, and that it was more likely about 16 times instead of 24 and for a shorter period, from 1992 to 1996 (Tr. 60-61).

Applicant has not told his wife or his teenaged daughter about his activities with prostitutes. He feels guilty and remorseful about his conduct. He also believes telling his wife about his conduct would be a “low blow,” hitting her where she hurts the most (Tr. 80-81). In an effort to avoid reverting to his previous behavior, he is involved with a “men’s accountability group,” and he engages in prayer and devotionals nearly daily (Tr. 107-08).

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the Guidelines. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, the disqualifying conditions and mitigating conditions under each specific guideline, and the factors listed in AG ¶¶ 2(a)(1)-(9).

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 persons with access to classified information. However, 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 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The Guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein 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. *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 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

CONCLUSIONS

Guideline J (Criminal Conduct)

The SOR alleges Applicant was cited for prostitution in January 2006 but the charge was dismissed (§ 1.a). It also alleges he was charged with prostitution-related offenses in June 1996 and January 1994, and he pleaded guilty to the charges (§§ 1.b and 1.c).

The concern raised by criminal conduct is that it “creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.” AG § 30. Conditions that could raise a security concern and may be disqualifying include “a single serious crime or multiple lesser offenses” and an “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.” AG §§ 31(a) and (c). Applicant’s conduct in January 2006 apparently was interrupted by the police before any criminal conduct occurred. I conclude he refuted the allegation of criminal conduct in SOR § 1.a. However, his pleas of guilty to attempting to solicit a prostitute in January 1994, and soliciting a prostitute in July 1996 are sufficient to raise AG §§ 31(a) and (c).

Since the government produced substantial evidence to raise the disqualifying conditions in AG §§ 31(a) and (e), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive § E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated by evidence that “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” AG § 32(a). Applicant’s last criminal act was in July 1996, more than 10 years ago. His conduct in January 2006 exhibited bad judgment but did not reach the level of criminal conduct. The first prong (“so much time”) is established. However, the second prong (“unusual circumstances”) is not established because Applicant’s marital difficulties relating to sexual intimacy continue to exist. The third prong (“does not cast doubt on the individual’s . . . good judgment”) also is not established, because his repeated encounters with prostitutes cast doubt on his good judgment.

Security concerns under this guideline also may be mitigated if “there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.” AG § 32(d). Although more than 10 years have passed since Applicant’s last criminal conviction for involvement with prostitutes, his contact with a prostitute in January 2006, coupled with his implausible explanation for his conduct, strongly suggests he was contemplating sexual activity when he invited the woman into his car. His conduct and his implausible explanation are sufficiently troublesome to raise doubt about his successful rehabilitation. I conclude AG § 32(d) is not established.

Guideline D (Sexual Behavior)

SOR ¶ 2.a alleges Applicant solicited approximately 24 prostitutes between 1990 and 1996. SOR ¶¶ 2.b, 2.c, and 2.d allege the same conduct alleged in SOR ¶¶ 1.a, 1.b, and 1.c. The concern under this guideline is that “[s]exual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.”

Conditions that could raise a security concern and may be disqualifying include “sexual behavior of a criminal nature, whether or not the individual has been prosecuted.” AG ¶ 13(a). Applicant admitted he engaged the services of prostitutes on numerous occasions between either 1990 (as admitted to a security investigator and in his answer to the SOR) or 1992 (as admitted at the hearing) and 1996. His conduct violated the local law prohibiting soliciting or patronizing prostitutes (Hearing Exhibit II). He pleaded guilty to attempting to solicit a prostitute in January 1994 and soliciting a prostitute in July 1996. I conclude AG ¶ 13(a) is raised.

Security concerns also may be raised by “sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.” AG ¶ 13(c). Applicant concealed his conduct from his family to avoid causing them distress, and he admitted at the hearing that knowledge of his conduct would be very painful to them. I conclude this disqualifying condition is raised.

Finally, security concerns under this guideline may be raised by “sexual behavior of a public nature and/or that reflects lack of discretion or judgment.” AG ¶ 13(d). While Applicant's conduct was not “public,” it clearly reflects lack of good judgment. I conclude this disqualifying condition is raised.

Security concerns may be mitigated by showing that “the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.” AG ¶ 14(b). The first prong (“so long ago”) is established. Even though the evidence suggests Applicant may have been contemplating sexual activity when he was detained and cited in January 2006, the evidence also indicates the police intervened before any sexual activity occurred. Thus, the last incident of sexual behavior was in 1996, more than 10 years ago. The second prong (“so infrequently”) is not established in light of Applicant's admission of multiple transactions with prostitutes. The third prong (“unlikely to recur”) also is not established. Although no sexual activity occurred in January 2006, the evidence strongly suggests Applicant was contemplating it. The motivation for previous sexual activity, i.e., his wife's rejection of sexual intimacy, continues to exist. Finally, Applicant's history of sexual activity with prostitutes and his conduct in January 2006 cast doubt on his good judgment. Based on all the evidence, I conclude AG ¶ 14(b) is not established.

Security concerns arising from sexual behavior also may be mitigated by showing that “the behavior no longer serves as a basis for coercion, exploitation, or duress.” AG ¶ 14(c). Applicant's wife and teenaged daughter are unaware of his long record of soliciting prostitutes. His testimony during the hearing, and his demeanor while testifying, made it clear that disclosure of his sexual conduct to his wife and family would be painful for him. I conclude AG ¶ 14(c) is not established.

Finally, security concerns based on sexual behavior may be mitigated by showing it was “strictly private, consensual, and discreet.” AG ¶ 14(d). While Applicant’s conduct may have been strictly private and consensual, he routinely solicited total strangers, including an undercover police officer on one occasion. His conduct was indiscriminate and clearly not discreet. I conclude AG ¶ 14(d) is not established.

Guideline E (Personal Conduct)

SOR ¶¶ 3.a and 3.b allege Applicant’s wife was not aware of the conduct alleged under Guidelines J and D above. The concern under this guideline is: “Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. AG ¶ 15. A disqualifying condition may arise from “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person’s personal, professional, or community standing.” AG ¶ 15(e). This condition is raised by evidence Applicant concealed his dealings with prostitutes from his wife in order to avoid inflicting emotional pain on her.

Security concerns under this guideline may be mitigated if “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.” AG ¶ 17(d). Applicant has acknowledged his behavior, expressed remorse, attended marriage counseling, and is currently involved in a support group. However, the main stressor, i.e., his sexually dysfunctional marriage, remains unresolved. His conduct in January 2006 raises doubt whether his dealings with prostitutes are “unlikely to recur.” I conclude AG ¶ 17(d) is not established.

Security concerns under this guideline also may be mitigated if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). Applicant has taken positive steps to change his behavior, but he continues to conceal his sexual conduct from his wife. I conclude AG ¶ 17(e) is not established.

Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant’s age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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. AG ¶¶ 2(a)(1)-(9).

Applicant is a mature adult. In spite of their difficulties, he remains devoted to his wife. He has taken significant measures to break away from habit of consorting with prostitutes, but his recent

conduct raises doubt whether it will not recur. He remains vulnerable to pressure, coercion, exploitation, or duress.

After weighing the disqualifying and mitigating conditions under Guidelines J, D, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on criminal conduct, sexual conduct, and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him a security clearance.

FORMAL FINDINGS

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

Paragraph 1. Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

Paragraph 2. Guideline D (Sexual Behavior): AGAINST APPLICANT

Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant

Paragraph 3. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman
Administrative Judge