

DATE: October 15, 2007

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In re:)	
)	
-----)	ISCR Case No. 07-05593
SSN: -----)	
)	
Applicant for Security Clearance)	
_____)	

**DECISION OF ADMINISTRATIVE JUDGE
JUAN J. RIVERA**

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

From approximately 1993 to 2003, Applicant solicited and purchased the services of prostitutes around 18 times. His behavior raised security concerns under the personal conduct, sexual behavior, and criminal conduct adjudicative guidelines. His favorable information, evidence of rehabilitation, and the passage of time are sufficient to mitigate the security concerns raised by his behavior. Clearance is granted.

STATEMENT OF THE CASE

On July 13, 2007, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts and security concerns under Guideline D (Sexual Behavior), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). The SOR informed Applicant that, based on available information, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information and submitted the case to an administrative judge for a security determination.¹ On July 27, 2007, Applicant answered the SOR and requested a hearing.

The case was assigned to me on September 4, 2007. The next day, a Notice of Hearing was issued convening a hearing on September 21, 2007. The hearing was convened as scheduled. The government presented five exhibits, marked GE 1-5, to support the SOR. Applicant testified on his own behalf, and presented five exhibits, marked AE 1-5. DOHA received the transcript (Tr.) on October 1, 2007.

PROCEDURAL ISSUES

At the hearing, the government moved to amend the SOR to correct typographical mistakes in ¶ 3.a, by deleting the numbers “2007,” and in ¶ 3.b, by deleting the numbers “138.34,” and substituting the number “134”. Applicant did not object to the amendments, and I granted the motion (Tr. 14-16).

FINDINGS OF FACT

Applicant admitted all the SOR allegations with explanations.² His admissions are incorporated herein as findings of facts. After a thorough review of the record evidence, I make the following additional findings of fact.

Applicant is a 44-year-old computer systems technologist who has worked for Department of Defense (DoD) contractors for approximately five years. In October 1982, he enlisted in the U.S. Air Force shortly after completing high school, and served 20 years on active duty. In October 2002, he retired as a Technology Sergeant (information technology specialist), pay grade E-6. The Air Force characterized his service as honorable. He was awarded the the Air Force Commendation Medal.

¹ See Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended. On August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised adjudicative guidelines (AG) to all adjudications and other determinations made under the Directive in which the SOR was issued on or after September 1, 2006.

² Concerning SOR ¶ 1.c, Applicant admitted using the services of a masseuse/prostitute only four to five times over the course of four years.

Applicant married his wife in April 1985, and they were divorced in June 1993. They have a daughter, age 20, out of this marriage. He has completed two associate degrees. In January 2001, he obtained an associates degree in information technology. In March 2002, he completed his second associates degree in computer science.

Applicant has had access to classified information at the top secret level (sensitive compartmented information (SCI)) for almost 24 years, including most of his 20 years of Air Force service, and while working for defense contractors. Applicant's employment history reflects that since his retirement in 2002 he has worked for two defense contractors. He has been working for his current employer since July 2003. There is no evidence he has ever mishandled or compromised classified information while serving in the Air Force or working for defense contractors.

In 2004, Applicant was denied access to classified information by another government agency. He was informed that he failed a polygraph examination, but he was not informed of the reasons why he failed the polygraph. He disclosed this information in his security clearance application (GE 3). In his answers to DOHA interrogatories, and during an interview with a government investigator, Applicant disclosed that he had solicited and engaged the services of prostitutes (GE 4). From approximately July 1993 to February 1994, while serving on active duty and while assigned to a U.S. military base in Japan, he solicited and engaged the services of prostitutes on approximately five to seven occasions. There is substantial evidence to establish that his behavior was illegal under the UCMJ.³

From approximately May 1996 through May 2000, while in the service and stationed to a military base in the state of Florida, Applicant solicited and engaged the services of prostitutes on approximately ten occasions. And, in May 2003, while working for a government contractor in Florida, he solicited and engaged the services of prostitutes one time. I took administrative notice of Florida statute § 796.07, which makes it a second degree misdemeanor (for a first offense) to solicit or to purchase the services of a prostitute.

Applicant engaged the services of prostitutes after he divorced his wife, and never while he was dating other women (Tr. 32). He explained that because of his hectic work schedule, it was difficult for him to establish long-term relationships with women. The women were unhappy because he was always busy and/or traveling, and they did not stay with him for long. He found it easier to satisfy his sexual needs with prostitutes (Tr. 42). He believed that such behavior was not illegal in Japan, and claimed he was not aware it was an offense under the Uniform Code of Military Justice (UCMJ) (Tr. 41). He testified that the establishment he visited in Japan was located right outside the gate of the military base and it was constantly patronized by U.S. servicemen. He never thought too much about his behavior because he was among many other servicemen who patronized the establishment, and he never heard about any problems related to soliciting and engaging the services of prostitutes (Tr. 27-28).

Applicant claimed he was not aware of the seriousness of soliciting and engaging the services of prostitutes in the state of Florida. He believed that such behavior was akin to receiving a speeding

³ Under Article 134 of the UCMJ, soliciting and/or engaging the services of prostitutes is an offense when the act is wrongful, and when under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

ticket for which you have to pay a small fine (Tr. 29). The prostitution establishments in Florida were also close to the military base, and they were frequently visited by military personnel. According to Applicant, military police officers as well as state police were always around, and he never heard of servicemen getting into trouble for engaging the services of prostitutes. He did not think his behavior was much of a concern to civil or military authorities.

The first time Applicant was questioned about his behavior with prostitutes was during his 2004 polygraph interview. He convincingly stated the last time he solicited and/or engaged the services of a prostitute was in May 2003 (Tr. 36). Applicant claimed his past behavior with prostitutes cannot be used against him for several reasons: he has been divorced since 1993, he was always discrete about his actions, and his behavior was infrequent. He believes that not one of his past or current supervisors would hold it against him if they were told of his behavior. Applicant informed his current supervisors and his friends (including those who provided him with character reference statements) of the reasons behind the government's security clearance concerns (Tr. 43-44).

Applicant expressed sincere remorse and embarrassment for his past behavior. He promised never to engage in such behavior again. He considers himself to be reliable and trustworthy, and he asserts he has good judgment. In support of his assertions, he submitted his military record, and five character reference letters from supervisors, co-workers, and friends. Applicant is characterized as a hard-working person, with exceptional on-duty performance, excellent technical knowledge, and outstanding work ethics. In general, his references attest to Applicant's honesty, trustworthiness, good judgment, and dependability. There is no evidence Applicant has ever mishandled or caused the compromise of classified information while serving on active duty or while employed by a defense contractor.

POLICIES

The Directive sets forth adjudicative guidelines (AG) which must be considered in evaluating an Applicant's eligibility for access to classified information. The administrative judge must take into account both disqualifying and mitigating conditions under each AG applicable to the facts and circumstances of the case. The guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive, and the whole person concept.⁴ Having considered the record evidence as a whole, I conclude Guideline D (Sexual Behavior), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) are the applicable relevant AGs.

⁴ AG ¶ 2(a). "... The adjudication 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 whole person concept includes the consideration of "the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the extent to which participation is voluntary; the presence or absence of rehabilitation and other permanent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; and the likelihood of continuation or recurrence. . . ."

BURDEN OF PROOF

The purpose of a security clearance decision is to determine whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.⁵ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own.

The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish by substantial evidence⁶ a *prima facie* case that it is not clearly consistent with the national interest for the applicant to have access to classified information. The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries a heavy burden of persuasion.⁷ The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.⁸

The scope of an administrative judge's decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. Executive Order 10865, § 7.

CONCLUSIONS

Under Guideline D, the government's concern is that sexual 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. AG ¶ 12.

The government established its case by showing Applicant solicited and engaged the services of prostitutes from July 1993 to February 1994, from May 1996 to May 2000, and in May 2003. His behavior is illegal in the state of Florida. Sexual behavior disqualifying conditions AG ¶ 13(a): *sexual behavior of a criminal nature, whether or not the individual has been prosecuted*; and AG ¶ 13(d): *sexual behavior . . . that reflects lack of judgment*, apply.

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁶ ISCR Case No. 98-0761 at 2 (App. Bd. Dec. 27, 1999)(Substantial evidence is more than a scintilla, but less than a preponderance of the evidence); ISCR Case No. 02-12199 at 3 (App. Bd. Apr. 3, 2006)(Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record); Directive, ¶ E3.1.32.1.

⁷ *Egan*, *supra* n.5, at 528, 531.

⁸ See *id.*; AG ¶ 2(b).

Notwithstanding, considering the evidence as a whole, I find Applicant has mitigated the sexual behavior concern. In reaching my decision I specifically considered among other factors, Applicant's credible testimony; his 20 years of honorable service to his country; the fact he has had access to classified information for approximately 24 years with no security violations; Applicant was candid and forthcoming throughout the security clearance process; that it is not likely his questionable behavior could be used as a basis for coercion or exploitation, and that he has not engaged in similar conduct for over four years. Sexual behavior mitigating conditions AG ¶ 14(b): *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(c): *the behavior no longer serves as a basis for coercion, exploitation, or duress*; and AG ¶ 14(d): *the sexual behavior is strictly private, consensual, and discreet*, apply.

Under Guideline E (Personal Conduct) the government's concern is that 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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. AG ¶ 15.

The government established its case by showing Applicant solicited and engaged the services of prostitutes from July 1993 to February 1994, from May 1996 to May 2000, and in May 2003. Applicant's behavior showed questionable judgment by exposing himself to the risk of acquiring a serious venereal disease, and the possibility of criminal prosecution. Personal Conduct disqualifying condition AG ¶ 16(e): *personal conduct . . . that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group*, applies.

For the same reasons discussed under Guideline D, I consider Applicant's behavior under Guideline E mitigated by the passage of time, and the other factors outlined in the Guideline D discussion. Additionally, Applicant disclosed his past questionable behavior to friends and supervisors, thus reducing the possibility of vulnerability to exploitation, manipulation, or duress. Personal conduct mitigating conditions AG ¶ 17(c): *the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*, and AG ¶ 17(e): *the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*, apply.

Under Guideline J (Criminal Conduct) the government's concern is that criminal activity 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.

The government established its case by showing Applicant solicited and engaged the services of prostitutes from May 1996 to May 2000, and in May 2003. Such behavior was in violation of Florida Statute § 796.7. Criminal conduct disqualifying conditions AG ¶ 31(a): *a single serious*

crime or multiple lesser offenses; and AG ¶ 31(c): allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted, apply.

There is no evidence Applicant has engaged in similar questionable behavior since May 2003, or that he has engaged in any other criminal behavior. His honorable military service, as well as his job performance while working for government contractors, indicate he has the ability and willingness to comply with laws and regulations. At his hearing, Applicant demonstrated sincere remorse. He credibly testified he now realizes the seriousness of his past behavior. He promised not to engage in the future in similar behavior. Considering the totality of the circumstances of this particular case, I find Applicant's questionable behavior is unlikely to recur and it does not cast doubt on his reliability, trustworthiness, and good judgment. Criminal conduct mitigating conditions AG ¶ 32(a): *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; and AG ¶ 32(d): 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, apply.*

I have carefully weighed all evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable AGs. I specifically considered Applicant's credible testimony; his 20 years of honorable service to his country; the fact he has held access to classified information for approximately 24 years with no security violations; that Applicant was candid and forthcoming throughout the security clearance process; his remorse and promise to stay away from similar behavior; that it is not likely his questionable behavior could be used as a basis for coercion or exploitation, and that he has not engaged in similar conduct for over four years. In light of the totality of the circumstances, I find Applicant's favorable evidence is sufficient to mitigate all the security clearance concerns.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Sexual Behavior Subparagraphs 1.a -1.d	FOR APPLICANT For Applicant
Paragraph 2, Personal Conduct Subparagraph 2.a	FOR APPLICANT For Applicant
Paragraph 3, Criminal Conduct Subparagraphs 3.a-3.b	FOR APPLICANT 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.

Juan J. Rivera
Administrative Judge