DATE: August 28, 2001

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 01-00010

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Department Counsel

FOR APPLICANT

Herbert M. Silverberg, Esquire

STATEMENT OF THE CASE

On February 28, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On March 26, 2001, Applicant responded to the allegations set forth in the SOR, and elected to have a hearing before a DOHA Administrative Judge. The case was assigned to me on June 14, 2001. A Notice of Hearing was issued on June 20, 2001 and the hearing was conducted on July 19, 2001. Applicant testified on his own behalf and called four witnesses. Department Counsel did not call any witnesses. Without objection by the parties, I admitted three exhibits submitted by the Government (Government Exhibits (GX) 1 - 10) and one exhibits submitted by Applicant (Applicant's Exhibit (AX) A). Applicant submitted one post-hearing exhibit that was marked and admitted as AX B. The transcript (Tr) was received at DOHA on August 1, 2001.

FINDINGS OF FACT

Applicant is a 37-year-old computer systems administrator for a DoD contractor. His employer is seeking to retain a Secret security clearance for Applicant in connection with his employment.

Based on the contents of the case file, including testimony and exhibits, I make the following findings of facts as to each SOR allegation:

1. Guideline E (Personal Conduct)

a. Applicant was fired from his employment at a defense contractor (Company A) on or about October 31, 1995,

because it was discovered that he had been downloading pornography from the Internet on his computer during work, which he knew violated company policy. When first confronted by company officials, he denied he had accessed and downloaded pornography. Later in the confrontation, he admitted he had done so. Applicant was thereupon escorted off the premises and informed he would be contacted when a final decision as to discipline was made. He was never allowed to return to work and was terminated.

2. Applicant falsified material facts on his September 28, 1999 Questionnaire for National Sensitive Positions (SF 86). In response to Question "22 YOUR EMPLOYMENT RECORD Has any of the following happened to you in the past seven years? If yes, begin with the most recent occurrence and go backward, providing the date fired, quit, or left, and other information requested.

(1) Fired from a job (2) Quit a job after being told you'd be fired (3) Left a job by mutual agreement following allegations of misconduct (4) Left a job by mutual agreement after allegations of unsatisfactory performance (5) Left a job for other reasons under unfavorable circumstances, Applicant answered that he had been fired by Firm B during February 1994, whereas he knew that he had also been fired by Company A on or about October 31, 1995, as alleged in SOR 1.a., and failed to report that incident on his SF 86. In the context of the instances that had to be reported under Question 22, I find that Applicant was (1) fired from his job at Company A; and (5) left the job under unfavorable circumstances.

2. Guideline M (Misuse of Information Technology Systems)

a. While employed as a contractor employee by Company A, Applicant downloaded pornography from the Internet to his work computer. As a result of this conduct, which was known by Applicant to be against company policy, he was fired on or about October 31, 1995.

3. Guideline J (Criminal Conduct)

a. Applicant's conduct in knowingly falsifying his September 28, 1999 SF 86, as cited in SOR 1.b, constituted a violation of 18 USC 1001;

Additional Findings of Fact;

The Department of Energy facility at which Applicant worked as a contractor employee maintains nuclear weapons. The facility had received some unfavorable publicity because some other employees had been using facility computers to run a pornography business. Everyone involved had been fired (Tr at 46). It was clearly company policy, made known to all employees, that access to pornographic material was absolutely disallowed (Tr at 36, 45). There were spot checks made of facility computers to detect and deter such use (Tr at 36, 37).

When called to an official's office after his improper use of the computer had been detected, Applicant initially denied any such use, only to later admit that he had done so (Tr at 39, 144). Mr. X asked Applicant "why did you do that? You knew they were looking," and he replied "he made a mistake and he just didn't think he'd get caught" (Tr ta 42).

There had been department meetings concerning the problem concerning pornography and Applicant knew of the company policy (Tr at 32). He had been at one or more of meetings about the policy (Tr at 37, 38). After one such meeting, Applicant was heard to say he "couldn't believe anybody could go ahead and access that stuff, knowing what could happen to them" (Trat 38). After his termination, Applicant informed Mr. X, his former project lead and direct supervisor,[(1)] that he had been terminated because his use of computers to access pornography had been detected (Tr at 38).

Applicant's wife first learned of Applicant's work problems on October 31, 1995, the day his pornography use was detected and he was sent home. He told his wife he had been caught with "pornography on his computer" (Tr at 57). His wife was aware that Applicant had viewed pornography in the past, but believed him when he said he had stopped (Tr at 57). Parents and other family members and friends also learned from Applicant why he had been terminated (Tr at 58 - 60). Applicant did not completely stop his viewing of pornography until he "found God" (Tr at 61). Even then, Applicant has had "urges" to view pornography over the past few years and has talked about it with his wife until he had

talked it out of his system (Trat 64). The two of them now attend church services frequently and Applicant is active, including developing software for the church office to use (Tr at 63).

Applicant's witness, Dr. Y, a psychiatrist, interviewed and tested Applicant for about three hours and twenty minutes on July 11 and 12, 2001 (Tr at 84 - 86). Applicant had viewed pornography since about 1989 and explained the nature and extent of his involvement with Internet pornography during working hours (Tr at 88 - 100). His misconduct occurred up to seven times a week at home and three to five times a week at work and continued for about nine months, at which time his use was detected (Tr at 117, 131). Applicant was aware of the risk of being caught, but thought he'd "be able to avoid detection, basically"(Tr at 132).

As to the reason for his termination, Applicant told Dr. Y that he had been "unofficially fired, but that the official reason was going to be that his services were no longer required. [Applicant] called the ombudsman . . . and was told this wouldn't affect him if he applied for another job, and it wouldn't be on his record" (Tr at 76). In making his evaluation and reaching his conclusions, Dr. Y relied solely on what Applicant told him, the test results, and his observations of Applicant (Tr at 112). Dr. Y's prognosis was that Applicant's ability to resolve or control his affinity for pornography was "fair to good" (Tr at 115). Dr. Y did not find any evidence of paraphilia or other disorders under the DSM IV (Tr at 79).

Mr. X was informed of Applicant's Internet pornography problem by another official, who related that Applicant had first denied and then admitted his misuse of the computer. The official also said he ordered that Applicant be "escorted out," that Applicant was informed "they would get back to him later on the results"; and that the official was going to pull back [Applicant's] badge and have [his] contract terminated as soon as he could get the paperwork done" (Tr at 38, 39).[(2)] Mr. X also spoke with Applicant several times by telephone shortly after his termination and Applicant told him about the use of his company computers to access Internet pornography. Nothing in any of Mr. X's testimony mentions that either Applicant or the official who terminated him mentioned that he had been terminated because "his services were no longer needed." In fact, nothing in the record evidence provides any oral or documentary evidence from Company A or its officials, to refute Mr. X's testimony or to corroborate Applicant's own version of how and why he was fired.

Pastor Z has been a member of the clergy for more than 25 years (Tr at 136). As pastor of Applicant's church, he has known Applicant as an active member for about three years (Tr at 138). During counseling, Applicant told him about being terminated for "calling up web sites that are pornographic"(Tr at 139). Pastor Z has "a very high level of conviction that [Applicant] has surmounted this problem [with pornography]" (Tr at 14).

Applicant's three witnesses, and the author of his post-hearing submission, AX B, all think highly of him as a person, a family man, and a dedicated engineer. Applicant appears to have resolved many of his personal problems over the past few years, particularly since his relationship began with his current wife.

POLICIES

The DoD Directive, 5220.6, at Enclosure 2, sets forth policy factors that must be considered in making security clearance determinations. However, because each security clearance determination presents a unique combination of facts and circumstances, it cannot be assumed that these factors are the only ones that apply, or that they always apply equally in all cases. Based on the Findings of Fact, as set forth above, and considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

Guideline E (Personal Conduct)

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules or regulations could indicate that the person may not properly safeguard classified information

Conditions that could raise a security concern and may be disqualifying include:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security

questionnaire . . . or similar form used to conduct investigations, . . . [or to] determine security clearance eligibility or trustworthiness . . .;

Conditions that could mitigate security concerns include:

None that are established by the record evidence.

Guideline M (Misuse of Information Technology Systems)

The Concern: Noncompliance with rules, regulations, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's trustworthiness, willingness, and ability to properly protect classified systems, networks, and information.

Conditions that could raise a security concern and may be disqualifying include:

1. Illegal or unauthorized entry into any information technology system;

Conditions that could mitigate security concerns include:

1. The misuse was not recent or significant.

Guideline J (Criminal Conduct)

The Concern: A history or pattern of criminal activity created doubts about a person's judgment, reliability, and trustworthiness.

Conditions that could raise security concerns and may be disqualifying include:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

2. The crime was an isolated incident.

I have considered the totality of the evidence under all of the Directive's general guidelines, as set forth in Section E2.2.1. of Enclosure 2. "Each adjudication is to be an overall commonsense determination based upon consideration of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency and motivation for the individual's conduct, the extent to which the conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences that have a reasonable and logical basis in the evidence of record." DOHA Administrative Judges may not draw inferences that are 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."

CONCLUSIONS

The evaluation of the evidence in this case begins with the undenied fact that Applicant downloaded pornography from the Internet to his computer at his work site (Response to the SOR).

Applicant also admits that his misconduct "triggered [his] termination from [Company A]" (Id.). When first confronted by his work superior about his misuse of his computer, on October 31, 1995, Applicant denied any wrongdoing. It was only later in the same interview that he "admitted [he] had downloaded it [pornography] and [he] was aware that downloading pornography was against policy" (GX 3). After admitting his offense, he was "escorted off [Company A] property.[(3)] He identified a company official whom he claims told him he would be able to return to work in the future

and that company records would reflect only that he left the company because his services were no longer needed (Tr at 144 - 146). Neither the official nor any supporting documentation has been provided.

Applicant's interest in pornography was not limited to the one occasion that led to his termination from Firm A. Even after his termination, Applicant's involvement with pornography stopped for a while, but after nine months to a year, he again began to seek out pornographic web sites. He recognized he was addicted to pornography (GX 3 at p. 1). In April 2000, he sought help on the Internet and located a religiously-based web site that provided information bout fighting the addiction. He soon became convinced he was no longer addicted to pornography (Id.).

When earlier contacted by DSS, Applicant did not report the "past incident at [Company A], because [he] considered it to be past history" that he would never allow anyone to use against him" (GX 3, June 20, 2000). In his March 26, 2001 Response to the SOR, Applicant, for the first time on record, claim that while the downloading of pornography "triggered [his] termination, "the official record at Company A never expressly reflected that reason" and a Company A official gave the official reason for his termination as that his services "were no longer required" (Response to SOR).

However he wishes to now construe the circumstance of his termination, he clearly knew it was caused by his misconduct in downloading pornography and not because the company no longer had need for his services [for economic reasons or ?]. I have carefully considered Applicant's evidence in explanation, mitigation and/or extenuation, and I am unable to find it credible or worthy of belief.[(4)] Applicant's most recent testimony is not binding and/or determinative in reaching a determination as to his suitability to hold a clearance. Rather, I must "consider Applicant's statements in light of the record evidence as a whole, including [my] assessment of Applicant's credibility."[(5)]

I therefore find against Applicant as to SOR 1.a. As I understand Applicant's present position, what he claims was Company A's official position as to why he was terminated relieved him of any obligation of reporting it under Question 22. Likewise, his explanation for not mentioning his pornography-related termination in response to Question 22 is not supported by the record and is not credible. When DOHA views the issue of actual and/or imputed knowledge, we use the reasonable person an standard.[(6)] The overwhelming weight of evidence establishes that Applicant knew his misuse of the company computer was the actual reason for his termination. I conclude it is simply not credible or reasonable to accept his present position, which, I find, is based more on denial and wishful thinking than demonstrated fact. His hearing testimony and what he told Dr. Y suggest his inability accept responsibility for his own conduct continues to the present.[(7)]

I note the argument by Applicant's counsel that Applicant is rehabilitated, in the sense he is no longer addicted to pornography. This argument is supported by the testimony of Dr. Y, a psychiatrist who examined Applicant several months ago. The doctor's testimony was detailed and extensive (Tr at 69 - 126). After a thorough analysis of the doctor's testimony, I conclude that the focus of the testimony was aimed at establishing the unlikelihood that Applicant would become addicted/involved with Internet pornography in the future. A major problem with the doctor's overall testimony is that the SOR does not express concerns under Guideline I (Mental. Emotional, and Personality Disorders). As I understand the SOR, its focus is on the conduct at led to Applicant's being fired in 1995; the falsification of applicant's 1999 SF 86, and the criminal nature of that falsification. Dr. Y's testimony did not directly focus on these concerns, which deal with the poor judgment, unreliability, and untrustworthiness shown by his specific conduct and statements and, to the extent it did so indirectly, that evidence is massively outweighed by the negative evidence on these points.

It is at least arguable that if the evidence against Applicant stopped with his 1995 termination, he would not be confronting the loss of his security clearance. What makes the case both more serious and current is the falsification of the September 1999 SF 86. Second only to direct violation of rules and regulations for the protection of classified information and material, the falsification of material facts in a security clearance application go most directly to the heart of the security clearance program. The recent falsification are directly related to the 1995 misconduct and termination and establish a history and pattern of misconduct and untruthfulness.

I have considered the favorable testimony of Applicant's wife and pastor. Their testimony suggests a man who has overcome what can probably best be characterized as a sex-related Internet addiction, or at least suggests he has become able to control his feelings about the material that cause him problems in the past and, apparently, still occasionally rise to the surface. However, their testimony does not mitigate or extenuate the seriousness of the 1995 conduct that caused

his termination or his 1999 decision to omit the 1995 termination from his SF 86.

The Government's evidence supports application of Guideline E Disqualifying Conditions (DC) (2), the deliberate omission , concealment, or falsification of material facts from his SF 86; and (5) a pattern of dishonesty or rule violations; the 1995 computer misuse and the 1999 falsification do establish a history, albeit a small one. None of the parallel Mitigating Conditions (MC) are established by the record evidence.

Under Guideline M (Misuse of Information Technology Systems) Disqualifying Condition (DC) (1) the illegal or unauthorized entry into any information technology system is supported by the record evidence. At the same time, Mitigating Condition (1) is found to be applicable. The single and last misuse occurred almost seven years ago. I conclude that this use was not recent and is no longer significant as an individual violation. Allegation 2.a. is therefore found in favor of Applicant. At the same time, DC (1) is relevant as part of the pattern/history of misconduct under Guideline E.

Under Guideline J (Criminal Conduct), the falsification of his answer to Question 22 on his September 28, 1999 SF 86 was knowing and intentional, and therefore violates 18 USC 1001. The evidence supports applicability of DC (1) any criminal conduct, regardless of whether the person was formally charged, and (2) a single serious crime or multiple lesser offense. Under DOHA precedent, I find a falsification on a SF 86 to be a serious crime. At the same time, I conclude that none of the possible mitigating conditions are established by the record. evidence.

In summary, while Applicant present sincerity is not questioned, his ability to recognize what is in the nation's best interests is placed in doubt by the conduct shown by the SOR and all of the record evidence. In both 1995 and 1999, when confronted with a personal challenge, his first reaction was to place what he presumably saw as his own immediate best interests over that of the Government and,.particularly, the DoD security clearance program. His hearing testimony, particularly what he claims he was told by a company official; what he expected to happen; and what did happen or did not happen, suggests a continuing state of denial.

I have carefully considered all of the evidence offered by Applicant and his witnesses and exhibits. What they had to say has certainly been helpful, but has not come close to overcoming the negative impact of Applicant's proven misconduct. What is clear from the totality of the evidence is that Applicant has not carried his heavy burden of overcoming the Government's adverse evidence by demonstrating rehabilitation, mitigation and/or extenuation. I find this to be true under both the general criteria of Section F.3 of Enclosure 2 and the specific guidance of Enclosure 3.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

GUIDELINE E (Personal Conduct) Against the Applicant

Subparagraphs 1.a. . Against the Applicant

Subparagraph 1.b. Against the Applicant

GUIDELINE M (Misuse of Information Technology) For the Applicant

Subparagraph 2.a. For the Applicant

GUIDELINE J (Criminal Conduct) Against the Applicant Subparagraph 3.a. Against the Applicant

DECISION

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

BARRY M. SAX

ADMINISTRATIVE JUDGE

1. Mr. X holds a high clearance issued by the Department of Energy (Tr at 32).

2. Counsel for Applicant objected to this testimony on the grounds it was hearsay. I explained that hearsay was admissible in DOHA cases, found the testimony to be trustworthy in context, and admitted it (Tr at 39 - 41).

3. It is in this statement by Applicant that he claims he as told his "services were no longer needed"(Id.). Even if these words were, in fact said, in context, I conclude they only corroborate that he was being terminated because of his misuse of the computer.

4. *See, e.g.*, Appeal Board Decision, ISCR Case No. 00-0291 (August 31, 2001) at p. 3

5. *See, e.g.*, Appeal Board Decisions, ISCR Case No. 00-0423 (June 8, 2001) at p. 3; and ISCR Case No. 00-0302 (April 23, 2001) at p. 3.

6. *See, e.g.*, Appeal Board Decision, ISCR Case No. 00-0291, supra, at p. 5, with citations.

7. Applicant's claims that a Company A official told him that the official reason for his termination was that his services were no longer required; that Applicant took the alleged "official position" as being a "protective measure" for Applicant's career, and that he was told by someone at Company A that he "could be employed by [the firm] next month if a job came" is not supported by any other record evidence and, under the totality of the evidence, is not credible.