

DATE: April 26, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-16328

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Elizabeth L. Newman, Esq.

SYNOPSIS

Part of the reason Applicant was terminated in August 1997 was his downloading of a significant amount of pornography after having been advised of his employer's policy against pornography. Applicant's violation of the rules (under the personal conduct guideline) is successfully mitigated by the absence of similar conduct since August 1997. Applicant's intentional falsification of his answer to question 20 of the SF-86 in June 2000 also falls within the personal conduct guideline as representing an intentional falsification of material information from a security form used by the Government to assess security suitability. Applicant's continuing denial he falsified the security form removes the mitigating conditions from favorable consideration. An applicant has a duty to be entirely candid during the course of a security investigation. Applicant's character evidence is praiseworthy, but is insufficient to overcome Applicant's intentional falsification under disqualifying condition (DC) 2 of the personal conduct guideline. Clearance is denied.

STATEMENT OF THE CASE

On June 27, 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, amended by Change 4, April 20, 1999, issued a Statement of Reasons (SOR) to Applicant, which detailed 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 Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked. Applicant answered the SOR on August 13, 2001.

The case was transferred to the undersigned on October 10, 2001. A notice of hearing was issued on January 2, 2002, and the case was heard on February 8, 2002. The Government and Applicant submitted documentary evidence. Testimony was taken from Applicant and three witnesses. The transcript was received on February 19, 2002.

FINDINGS OF FACT

The SOR alleges unwillingness to comply with rules and regulations (1.a.), and dishonesty (1.b.), under the personal conduct guideline. In his answer, Applicant denied both allegations. Under 1.a., Applicant interpreted the termination letter dated August 11, 1997, to mean his services under a military contract were terminated. Under 1.b., Applicant justified his "no" answer to question 20 of the SF 86 with the termination letter dated August 11, 1997, and the meeting from the chief executive officer (CEO) the day before. In the meeting, the CEO presented Applicant a list of pornographic sites, then indicated he would write a letter stating Applicant's services would no longer be needed under the contract as there were funding problems.⁽¹⁾

Applicant is 49 years old and employed as a logistics analyst by a defense contractor. He was on active duty in United States (US) Navy for 20 years, and has been in defense contract support for nine years. He seeks a secret clearance.

Applicant was terminated by his employer on August 11, 1997. GE 4, dated August 3, 1998, a report prepared by the US Navy Criminal Investigative Service (NCIS) provides a chronology of actions taken and individuals interviewed during the investigation into whether Applicant collected pornography from the Internet. The chief executive officer (CEO) and four employees, Applicant, and an Agent from the Naval Investigative Service (NIS), were interviewed about the pornography.

Addressing the issue of whether Applicant downloaded pornography, I find sufficient evidence to establish Applicant's downloading of 36 disks of pornographic material from his government computer.⁽²⁾ First, GE 4, dated August 3, 1998, generated by the NCIS, contains a sworn statement by Applicant indicating he downloaded nude models, and shared the pictures with a coworker. In his sworn statement dated May 15, 2001, Applicant was not certain if the seized pornographic material belonged to him, but surmised the material was his, although it would more likely have been found in his desk on a disc rather than in his computer.

With respect to whether Applicant was terminated in part for downloading pornography (1.a.), the CEO was interviewed (in the NCIS investigation) and explained Applicant was "released" from employment because (1) Applicant could not get along with customers, and (2) a female employee had seen pornographic material on his computer. The CEO indicated Applicant was brought into his office (August 10, 1997) and provided an opportunity to resign in lieu of being fired. However, out of a sense of compassion, the CEO generated a letter laying off Applicant so he could collect unemployment benefits.

Applicant's version of the meeting which occurred the day before (August 10, 1997) he received the letter of termination, was essentially the same regarding both customer dissatisfaction and the pornography. In his May 15, 2001 sworn statement,⁽³⁾ Applicant described the customer's displeasure over an incomplete project. Then, the CEO displayed to Applicant a list of "handwritten downloads" of pornographic pictures on Applicant's computer. Next, Applicant stated, "He [CEO] told me the company policy and I was let go from [Applicant's employer]." (GE 2; Tr. 55)

Having weighed and balanced the CEO's statements to Applicant in their meeting on August 10, 1997, with the letter the CEO provided Applicant on August 11, 1997 (GE 3), and Applicant's sworn statement dated May 15, 2001 (GE 2), there is sufficient evidence to find Applicant's termination in August 1997 was due in part to misusing his government computer by downloading pornography. Applicant has not used the Internet for non-business purposes since his period of employment between March 1995 and September 1997. (Tr. 36)

With respect to 1.b. of the SOR, the August 11, 1997 termination letter is addressed to Applicant and identifies the subject matter in full case letters, "EMPLOYMENT TERMINATION," and refers to the military contract Applicant was working under. The first paragraph states:

It is with the deepest regret I inform you that [employer's name] has been officially notified that the services you are providing under reference (a military contract number) will no longer be required[.] Therefore, as of 29 August 1997, your employment will be terminated.

The second paragraph, which addresses the entitlement to unemployment benefits, indicates:

You may be entitled to unemployment benefits in accordance with existing statu[t]es[.] You can apply for these benefits

at the [State] Unemployment Office, P[.] O. Box 440, [city, state zip code]. The telephone number is [telephone number].

The letter is signed by the CEO.

The security clearance application SF-86 reflects Applicant answered "no" to question 20.⁽⁴⁾ Applicant testified that he did not think the types of termination listed in question 20 applied to him but noted at pages 71 and 72, he probably rationalized his answer because of the dissatisfied customer and Applicant's collection of downloaded pornography. The testimony is as follows:

Q "That's not what I asked you. You rationalized your answer no to question 20 knowing full well what had actually transpired when you left [employer]?"

A I had felt that money was pulled from me because I didn't satisfy my customer, number one, and number two, yes, it was combined with pornography, so that's why I figured that the customer didn't want me, so I decided that - rationalized, I don't know, that I was feeling at the time. I didn't feel that I was fired, even though it said it. My customer said that on occasion he wanted me off his program, and then [CEO] talked to him and said, well, let's try again. So, I thought the reality of the situation was that I actually was removed for that and the pornography." (Tr. 71-72)

Although not actually admitting he intentionally falsified his "no" answer to question 20 of the SF-86, Applicant's rationalization persuades me to find the Applicant viewed the termination letter as a screen to conceal the real reasons why he was terminated from his employer.

Applicants' use of certain words to describe his August 1997 employment termination provides additional reasons he understood he was being dismissed from his employer and would be without a job. In viewing GE 2, Applicant indicated he was "let go." He was " . . . given two weeks to look for another job, that I could use the computer equipment and work space to rewrite my resume. The next day I found a letter on my desk informing me of my dismissal." (GE 2) At a subsequent location of GE 2, Applicant stated, "In summary, I was let go by [his employer], I was on the street, and I was without a job." (GE 2)

In GE 2 and several locations in the transcript Applicant referenced the August 11, 1997-letter terminating his employment for funding purposes. A careful review of the letter provides no reason for Applicant's termination. The only reference the letter makes to funding is the military contract number Applicant was working on. In sum, I find Applicant falsified material facts when he furnished a "no " answer to question 20, notwithstanding the compassionate gesture of the CEO in generating a layoff letter.

A retired Naval Commander is presently the project manager where Applicant is employed. The Commander supervised Applicant at a previous job for approximately two years. Although the project manager has no knowledge of the issues involved in the case, he has never seen Applicant misuse Government equipment. According to the project manager, Applicant is professional and more responsible than most.

A second character reference has known Applicant for about four years, and has had frequent contact with him. The second reference believes Applicant's work performance is outstanding, and he works well with other individuals.

A third reference, who is a program manager Applicant works for, usually sees Applicant up to three times a week at work. The third reference furnished a general remark indicating Applicant's "no" answer on the security form was based on a letter letting him go for "funding issues." The third reference believes Applicant followed security rules and noted that if Applicant had been told by his employer in August 1997 not to view certain sites, he would not have done so. The third reference supplied a commendation to Applicant in April 2001 for successfully coordinating the efforts of different departments in the timely completion of a project.

In September 1998, Applicant received a letter of appreciation for his contribution to two projects which dealt with systems support once the system is no longer being produced, and a second system of disposing of system assets which are no longer required.

On December 6, 2001, Applicant received a written character reference from a fourth reference describing Applicant's valuable managerial help to the engineering staff.

On November 8, 2001, Applicant received a letter of appreciation for upgrading the automated system while successfully coordinating the efforts of many individuals from different commands.

Applicant's former supervisor who hired Applicant in late 1997 or early 1998, and supervised him for three years, testified Applicant never used his computer inappropriately and followed the rules all the time. (Tr. 75-79) The former supervisor has given employees termination for layoff purposes, and has been generating the same kind of letter as GE 3, especially when funding is concerned. (Tr. 81) The former supervisor recommended Applicant for a position of trust.

The information systems engineer has known Applicant for four years and has contacted him by telephone or e-mail approximately three days a week, and maintained direct contact once every six weeks. According to the systems engineer, Applicant is always punctual and follows the rules. The official policy regarding pornography in the Government office where the systems engineer currently works, went into effect in July 2000, and before the policy there was common sense. (Tr. 96)

Applicant's wife was employed as a contract administrator for the Government for 17 years. Applicant told her funding was the reason he had to seek new employment. Several weeks later, he told her his performance and behavior were reasons he was let go. (Tr. 103) Applicant's wife did not believe he had been fired. (Tr. 104) After describing the discussion they had over the phone about question 20 of the security form, Applicant told her:

He didn't feel like he had been terminated, because he was informed by [CEO] he would be eligible for unemployment benefits, and that's how the state form was being indicated. He was given the letter with the deepest regret, stating that he was no longer going to be there because the effort, the money had been pulled. (Tr. 106)

POLICIES

Enclosure 2 of the Directive sets forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

Personal Judgment

Disqualifying Conditions:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
5. A pattern of dishonesty or rules violations, including a violation of any written or recorded agreement between the individual and the agency.

Mitigating Conditions:

2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 16 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other 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.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a 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.

The Government must establish all the factual allegations under and personal conduct (Guideline E) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to the 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 repeat itself and Applicant presently qualifies for a security clearance.

CONCLUSIONS

Personal conduct is a security concern when a person demonstrates questionable judgment, a lack of candor, or unwillingness to comply with rules and regulations. Misusing a government computer by downloading pornographic material, after being advised of the policy against pornography on a computer, constitutes a rule violation under the personal conduct guideline.

Applicant was terminated in part from employment in August 1997 because of misusing his Government computer by downloading 36 diskettes of pornography. He had seen the policy earlier in his employment when he went to retrieve his pay check. The next time he saw the policy was on August 10, 1997, during the meeting the CEO showed him the policy again before telling him he was terminated.

Because there are no corresponding mitigating conditions (MC) under the personal conduct guideline for rule violations, Applicant's rule violations must be evaluated under the general factors of the whole person concept. Applicant's conduct was serious because he disregarded a rule against downloading pornography from the Internet to his computer. In 1997 Applicant was 44 years of age, having spent more than 20 years in the military before working in the defense contract industry for nine years.

The record contains impressive character evidence of rehabilitation from coworkers and supervisors. Without exception, there has been no downloading of pornography or other kinds of rule violations or security infractions since August 1997. Though Applicant has denied pornography was one cause of his termination, his testimony has persuaded me to believe he has changed his position and now has a greater recognition the pornography was the partial cause of his termination in August 1997. Considering the evidence in mitigation and rehabilitation, specifically the absence of evidence of downloading pornography after August 1997, there is a negligible likelihood Applicant will resume this kind of conduct in the future. Accordingly, I find Applicant's rule violations mitigated.

Applicant's "no" answer to question 20 of the SF-86 in June 2000 falls within the disqualifying condition DC (2) as being an intentional falsification of material information of why Applicant stopped working at his employer in August

1997. Why Applicant was terminated from his job is material information the Government has a legitimate right to investigate in order to make an informed decision regarding Applicant's security suitability.

Because the termination letter has the second paragraph instructing Applicant where he might apply for unemployment compensation, the termination letter could be viewed as a layoff letter. In addition, the words expressed by the CEO telling Applicant the day before the termination letter would be attributed to reduced funding, could provide Applicant with an additional reason to interpret the letter as a layoff letter. However, the view would be unreasonable when the letter is factored into the persuasive evidence regarding Applicant's improper downloading of pornography. Applicant knew he was being terminated for misconduct and would not be working at this employer. His explanations simply do not excuse his intentional falsification of question 20, and also do not reduce the materiality of the information withheld.

MC 2 and MC 3 are two mitigating conditions (MC) that may mitigate intentional misconduct under DC 2. MC 2 may mitigate a falsification when it was an isolated incident, was not recent, and the individual has subsequently provided the information voluntarily. Although the falsification occurred in June 2000, Applicant provided false information to his wife during their telephone conversation about what the termination letter actually said. In sum, there was no indication in the letter Applicant's termination resulted from reduced funding. The third character reference was incorrectly told Applicant's job was terminated because of funding. Finally, even though Applicant provides the correct interpretation of the termination letter in his answer to the SOR, at the hearing, he restated his view the letter indicated the job was being abolished because of funding. (Tr. 37, 47) Applicant's continuing denial he falsified the "no" answer to question 20, even though he also stated he probably rationalized the "no" answer, removes MC 2 from consideration.

MC 3 may become available when the individual makes prompt, good faith efforts to correct the falsification before being confronted with the facts. Applicant was confronted with the facts when he received the SOR. His ongoing denial of question 20 of the SF-86 and the misleading accounts of the contents of the termination letter also remove MC 3 from consideration. Considering all the evidence as a whole, Applicant's favorable evidence is insufficient to overcome the intentional falsification of material information under the personal conduct guideline.

Applicant's intentional falsification of his security form in June 2000 must be evaluated under the general factors of the whole person concept. The presence or absence of rehabilitation and other behavioral changes may change the ultimate outcome of Applicant's intentionally dishonest conduct. To obtain the full benefit of rehabilitation, one should demonstrate unequivocally he understands his dishonest conduct is wrong and will never recur. While there is credible evidence of rehabilitation in the character statements and the witness testimony, there are the misleading statements Applicant made to his wife and character references about what the termination letter indicated. Considering the evidence as a whole, Applicant's security clearance falsification in June 2000, his denial of the falsification in his answer to the SOR and also the misleading statements regarding termination letter, it is too soon to find for Applicant under the whole person concept.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 (Personal Conduct): AGAINST THE APPLICANT.

- a. For the Applicant.
- b. 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 a security clearance for Applicant.

Paul J. Mason

Administrative Judge

1. The CEO also instructed Applicant to read a policy prohibiting pornography on the computer, and asked him whether he had seen the policy before; Applicant replied he had seen the policy before. (Tr. 31; 39)
2. While working on an earlier project, Applicant became aware his computer was a "government owned piece2 of equipment." (GE 3, p. 3)
3. Applicant an h is wife prepared the statement over the weekend. (Tr. 61)
4. Question 20. **Your Employment Record** - Has any of the following happened to you within the last ten years? - Fired from job - Quit a job after being told you'd be fired - Left a job by mutual agreement following allegations of misconduct - Left a job by mutual agreement following allegations of unsatisfactory performance - Left a job for other reason under unfavorable circumstances.