

DATE: April 13, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-16711

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant misused Government technology equipment in 1997 and 1999 by using it to access pornography. The Applicant's conduct was intentional and not mitigated. In addition, the Applicant falsified a Security Clearance Application concerning the circumstances of his resignation from Government service. Insufficient mitigation is shown. Adverse inference is not overcome. Clearance is denied.

STATEMENT OF THE CASE

On March 6, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on April 2, 2003, and requested a hearing. The case was received by the undersigned on August 1, 2003, and a Notice of Hearing was issued on August 12, 2003.

Hearings were held on September 5, 2003, and February 13, 2004, at which the Government presented 12 documentary exhibits, and called two witnesses. Testimony was taken from the Applicant, who also submitted six exhibits. The final transcript was received on February 27, 2004.

RULINGS ON PROCEDURE

During his testimony on September 5, 2003, the Applicant revealed facts which may have been the basis for additional allegations against him. (September 5, 2003, Transcript (hereafter "Transcript One") at 62-65.) The Government asked for an adjournment in order to make an investigation. Based on that investigation, on October 21, 2003, the Government

made a Motion to Amend the Statement of Reasons in accordance with paragraphs E3.1.10 and E3.1.13 of the Directive. The Applicant filed an Objection to the Motion to Amend the Statement of Reasons on November 5, 2003. The objection was overruled and the SOR was amended as requested by the Government pursuant to paragraph E3.1.17 of the Directive. (February 13, 2004, Transcript (hereafter "Transcript Two") at 3-5.)

FINDINGS OF FACT

The Applicant is 55, married and has an Associate of Science degree. He is employed by a defense contractor as a Senior Test Engineer, and he seeks to retain a Secret-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

In May 1999, the Applicant became involved in a physical altercation with his wife. The altercation ended with the Applicant choking his wife. He was subsequently arrested and charged with Spousal Abuse. He plead guilty and was sentenced to one day in jail, fined, and placed on three years probation. As a result of this incident, the Applicant successfully attended a year long domestic violence program. (Applicant's Exhibit F.) The Applicant testified that there have been no further incidents since this time. (Transcript One at 22-25.)

Paragraph 2 (Guideline M - Misuse of information technology). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has violated rules, procedures, guidelines or regulations pertaining to the use of Government information technology systems.

The Applicant worked as a Government employee for 17 years. He resigned from Government employment in July 2000.

In 1997, the Applicant received a letter of reprimand for misuse of information technology. Three pornographic pictures depicting sexual activity, one involving minor children, were found on a Government computer that he used. The Applicant admitted that he had brought a computer file from home with the pictures on it and loaded it on his Government computer. His explanation was that the pictures were placed on his home computer without his knowledge as a result of a malicious program called a Trojan Horse program. The Applicant, according to his testimony, had downloaded a file from a news group to a floppy disc at his home. The Applicant believed the file to be benign, but it was not. Instead, the Applicant submits, the file had a "virus" which downloaded these pornographic pictures into his computer system at home and at work without his knowledge. Other than his testimony, the Applicant submitted no other information or evidence to support his version of events. (Government Exhibit 2 at 2-3, and Government Exhibit 3; Transcript One at 27-44.)

On August 11, 1999, the Applicant received an email concerning additional misuse of his Government computer system. (Government Exhibit 6.) The email specifically stated that the Applicant's computer had been used "for inappropriate purposes." However, Government Exhibit 6 does not say what websites the Applicant went to. Specifically, there is no evidence that the Applicant went to pornographic websites in August 1999, as alleged in the SOR. Accordingly, the Government has not met its burden with regards to allegations 2.b. and 3.c. Those subparagraphs are found for the Applicant.

In November 1999, the Applicant was the subject of an investigation into the use of two Government computers to access pornographic sites on the Internet. (Government Exhibits 7 and 11.) The Applicant admitted going to sites concerned with "hentai" (Japanese cartoons). The documentary evidence shows that the Applicant was on the pornographic websites for over an hour on several occasions. (Government Exhibits 9 and 12.) However, the Applicant denied specifically looking at pornographic sites. Instead, he testified that the hentai connected websites that he went to had "pop-ups" to pornographic websites appear on his computer screen without his attempting to access them. ("Pop-

ups" are windows that appear within the main window and provide access to other websites.) As the Applicant would close the pop-up windows, others would appear. (Transcript Two at 81-84, 100-114.) Once again, the Applicant submitted no other evidence to support his version of events. The Applicant testified that he did not notify anyone at his workplace of his actions because he did not want to get in trouble. (Transcript Two at 111-112.)

The Applicant's supervisor testified about his investigation of the Applicant's conduct. (Government Exhibit 11, Transcript Two at 21-52.) He specifically testified that he attempted to reproduce what the Applicant states happened on his Government computer concerning pornographic pop-ups in "hentai" sites and was unable to do so. (Transcript Two at 45-47.)

As a result of the November 1999 incident, the Applicant's access to classified information was suspended on January 12, 2000. The Applicant was subsequently suspended from his job indefinitely without pay effective April 6, 2000, because of his access being suspended. (Government Exhibit 10.) The Applicant filed a formal appeal of his job suspension. As a result, a settlement agreement was entered into whereby the Applicant agreed not to seek employment with the United States Government for three years and that he would resign effective July 31, 2000. (Government Exhibit 8.)

Paragraph 3 (Guideline E - Personal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

On November 26, 2002, the Applicant completed an official DoD questionnaire in which he stated that in the past seven years he had not either left a job by mutual agreement following allegations of misconduct, or left a job for other reasons under unfavorable circumstances. (Government Exhibit 1 at Question 20.) This statement was a false answer to a relevant question about how and why the Applicant had left Government service.

The Applicant argues that he did not leave his job because of allegations of misconduct. Rather, he states that the Government created a situation after he was suspended without pay where he could not find other employment unless he resigned. Accordingly, he did not believe the pornography allegations had anything to do with his leaving his job. (Transcript Two at 89-93.) The Applicant also submits that he admitted that his clearance had been suspended and/or that he had been debarred from government employment. (Government Exhibit 1 at question 32.)

Mitigation. The Applicant's evaluations from his Government employment shows that he met expectations and received merit increases and bonuses. (Applicant's Exhibits A through E.)

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline J (Criminal conduct)

Conditions that could raise a security concern:

- (1) Allegations or admission 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:

- (1) the criminal behavior was not recent;
- (2) the crime was an isolated incident;
- (6) there is clear evidence of successful rehabilitation.

Guideline M (Misuse of Information Technology Systems)

Conditions that could raise a security concern:

- (3) Removal (or use) of hardware, software or media from any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines or regulations;
- (4) Introduction of hardware, software or media into any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines or regulations.

Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

Guideline E (Personal conduct)

Conditions that could raise a security concern:

- (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;
- (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;
- (5) a pattern of dishonesty or rule violations, including the violation of any written or recorded agreement made between the individual and the agency.

Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct

h. The potential for pressure, coercion, exploitation or duress

i. The likelihood of continuation or recurrence."

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of spousal abuse, falsification and computer misuse that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment 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 conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue 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. 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

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has physically abused his wife (Guideline J), misused Government computer systems (Guidelines M and E), and falsified a Security Clearance Application (Guideline E).

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him, except in part. As stated above, the Government did not prove that the email warning the Applicant received in August 1999 (allegations 2.b. and 3.c.) related to pornography. Those subparagraphs are found for the Applicant.

The Applicant has also mitigated SOR Paragraph 1 relating to the spousal abuse of his wife in 1999. It is a serious criminal offense which the Applicant admitted (Disqualifying Conditions 1 and 2.) However, the criminal conduct was isolated and was not recent, being four years ago at the time of the first hearing (Mitigating Conditions 1 and 2). In addition, the Applicant testified and submitted documentary evidence showing that he had successfully attended domestic violence classes in order to learn how not to reoffend (Mitigating Condition 6.) Accordingly, this paragraph is found for the Applicant.

Applicant's misuse of his Government computer in 1997 and 1999 has not been mitigated. I have carefully considered the Applicant's extensive testimony concerning his conduct on these two occasions and do not find it sufficient. The Applicant's elaborate theories of computer sabotage in 1997 are unsupported by any credible evidence.

I have examined his explanations for what happened in 1999 and also find them wanting. Based on all of the available

evidence, including his failure to notify anyone of the alleged "problems with pop-ups," I find that he intentionally accessed pornographic sites on the Internet knowing he shouldn't. His conduct in 1999 is especially egregious because of the letter of reprimand he had received after the 1997 incident. Disqualifying Conditions 3 and 4 are applicable to these allegations. None of the Mitigating Conditions apply. Subparagraphs 2.a. and 2.c. and Paragraph 2 are found against the Applicant.

The Applicant's misuse of his Government computers is also cognizable under Guideline E. His conduct involving pornography on Government computers increased his vulnerability to coercion, exploitation or duress (Disqualifying Condition 4). In addition, his repeated use of Government computers to access pornography brings Disqualifying Condition 5 into effect, "A pattern of dishonesty or rule violations." None of the Mitigating Conditions apply. Subparagraphs 3.b. and 3.d. are found against the Applicant.

The Government relies heavily upon the integrity and honesty of clearance holders, and it is a negative factor for security clearance purposes where an Applicant has deliberately provided false information about material aspects of his or her personal background. Based on all of the available evidence, I find that the Applicant intentionally falsified question 20 on his Security Clearance Application. I am persuaded that the Applicant knew, and knows, that he resigned his position with the Government because of an adverse action being taken against him. Specifically, his clearance being suspended due to pornography. The Applicant did admit that his security clearance had been suspended and/or that he had been debarred from Government employment. (Question 32 asks both questions.) However, that was only half the truth and the Government should not have to find out the whole truth on its own. Guideline E is found against the Applicant.

On balance, it is concluded that the Applicant has failed to overcome the Government's information opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the conclusionary allegations expressed in Paragraphs 2 and 3 of the Government's Statement of Reasons. As set forth above, Paragraph 1 is found for the Applicant.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: For the Applicant.

Subparagraph 1.a.: For the Applicant.

Paragraph 2: Against the Applicant.

Subparagraph 2.a.: Against the Applicant.

Subparagraph 2.b.: For the Applicant.

Subparagraph 2.c.: Against the Applicant.

Paragraph 3: Against the Applicant.

Subparagraph 3.a.: Against the Applicant.

Subparagraph 3.b.: Against the Applicant.

Subparagraph 3.c.: For the Applicant.

Subparagraph 3.d.: 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 the Applicant.

Wilford H. Ross

Administrative Judge