

DATE: April 14, 2003

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-27106

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant's improper use of his company computer to access pornographic sites, specifically sexually explicit under aged girls and other prohibited materials on the Internet, in violation of company policy, resulting in employment termination has not been mitigated. Clearance is denied.

STATEMENT OF THE CASE

On December 13, 2002, 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 the 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 January 10, 2003, in which he elected to have the case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) to the Applicant on February 12, 2003. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on February 13, 2003, and he submitted no response.

The case was assigned to the undersigned for resolution on March 28, 2003.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, and the documents. The Applicant is 30 years of age, and is employed by a defense contractor. He seeks a security clearance in connection with his employment in the defense industry.

Paragraph 1 (Guideline D- Sexual Behavior). The Government alleges that the Applicant's sexual behavior indicates a personality or emotional disorder that subjects him to coercion, exploitation or duress or reflect lack of judgment or discretion.

Paragraph 2 (Guideline M - Misuse of Information Technology Systems). The Government alleges that the Applicant's noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about his trustworthiness, willingness, and ability to properly protect classified systems, networks, and information.

Paragraph 3 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has engaged in conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations.

In August 2000, the Applicant, while employed by a defense contractor, downloaded pornographic material to his hard drive on his company computer. He did this with the specific intent of being fired, knowing that it was against company policy. The Applicant stated that an internet acquaintance informed him about Asian and specifically Japanese pornography of under aged girls. The Applicant was curious about this, and downloaded a few of these images in August 2000 to his company computer as well as to his home computer. The Applicant's employer discovered that he was downloading this sexually explicit material by their use of internet scanning software. The Applicant stated that he chose these particular images because he is attracted to girls in that age group and wanted to see if those pictures were real. The Applicant admits that he not only downloaded sexually explicit materials, but during the entire period he was employed, from November 1998 to September 2000, he also downloaded music files, video files, and games onto his company computer on about ten to twenty separate occasions, in spite of the fact that he knew it was against company policy and he had been counseled for it. (Government Exhibit 6 and 8). In September 2000, the Applicant was terminated by his employer for violating the company's computer security and usage policies. (See, Government Exhibit 4).

On other occasions, the Applicant uploaded a couple of explicit images, specifically under aged girls and of a sexual nature, to the server. He also copied these images onto a compact disc to take home to show his wife. (See, Government Exhibit 6).

The Applicant admits that he has downloaded copyrighted software that was not demonstration or evaluation software and he used it to help a customer. (See, Government Exhibit 6).

The Applicant states that he cannot say that he will never download these images again, referring to explicit under aged pictures of girls. (See, Government Exhibit 6).

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on her own common sense. 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:

Sexual Behavior

Sexual behavior is a security concern if it involves a criminal offense, indicating a personality or emotional disorder that could subject the individual to undue influence or coercion, or reflects lack of judgment or discretion.

Conditions that could raise a security concern:

1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
3. Sexual behavior that causes an individual to be vulnerable to undue influence or coercion;
4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

Conditions that could mitigate security concern:

None.

Misuse of Information Technology Systems

Noncompliance with rules, procedures, 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. Information Technology Systems include all related equipment used for the communication, transmission, processing, manipulation, and storage of classified or sensitive information.

Conditions that could raise a security concern:

1. Illegal or unauthorized entry into any information technology system;
3. Introduction of hardware, software or media into any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines or regulations.

Condition that could mitigate security concerns:

None.

Personal Conduct

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

Conditions that could raise a security concern:

4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure;
5. A pattern of dishonesty or rule violations; to include violation of any written or recorded agreement made between the individual and the agency.

Condition that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at page 2-1, "In evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- 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 criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of

variables known as the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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."

The Government must make out a case under Guideline D, (Sexual Behavior), Guideline M (Misuse of Information Technology Systems), and Guideline E (Personal Conduct) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between Applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to 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 be repeated, and that the Applicant presently qualifies for a security clearance.

An individual who demonstrates a disregard for security policies and procedure, or who engages in a pattern of rule violations, may be prone to provide information or make decisions that are harmful to the interests of the United States. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations, at all times and in all places.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal standards and factors, and having assessed the Applicant's credibility, this Administrative Judge concludes that the Government has established its case as to all allegations in the SOR, and that Applicant's misuse of information technology systems and his personal conduct has a direct and negative impact on his suitability for access to classified information.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

During the period he was employed with the defense contractor, from November 1998 until September 2000, the Applicant repeatedly violated his company's policy prohibiting the improper use of his company computer to access pornographic sites and other materials. The Applicant deliberately and with reckless disregard for company policies against such access, continued to access sexually explicit images of under aged girls as well as other materials such as

music files, video files and games despite being counseled for such activities, in order to be fired from his job. As a result of his conduct, the Applicant got what he wanted, he was eventually terminated from his employment on September 2000. This behavior is recent, and shows extremely poor judgment.

This Applicant has not demonstrated that he is trustworthy, and does not meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guideline D (Sexual Behavior), Guideline M (Misuse of Information Technology Systems), and Guideline E (Personal Conduct).

Furthermore, the Applicant has not provided this Administrative Judge with sufficient evidence in mitigation that would negate the negative impact his poor judgment has had on his security worthiness. At this time, I cannot find that it is clearly consistent with the national interests to grant the Applicant a security clearance.

Considering all the evidence, the Applicant has not rebutted the Government's case regarding his sexual behavior, misuse of computer technology and personal conduct. The Applicant has not met the mitigating conditions of Guidelines D, M or E of Section F.3. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Guidelines D, M or E.

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: Against the Applicant.

Subparas. 1.a.: Against the Applicant

1.b.: Against the Applicant

1.c.: Against the Applicant

Paragraph 2: Against the Applicant.

Subparas. 2.a.: Against the Applicant

2.b.: Against the Applicant

Paragraph 3: Against the Applicant.

Subparas. 3.a.: Against the Applicant

DECISION

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

Darlene Lokey Anderson

Administrative Judge