DATE: March 10, 2004

In Re:

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

Applicant for Security Clearance

ISCR Case No. 02-16613

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Rita O'Brien, Esq., Department Counsel

FOR APPLICANT

Charles W. Mahan, Esq.

SYNOPSIS

Applicant was terminated from his employment in June 1995 for personality differences, not poor performance as he claims. His employer's official reason for releasing Applicant from employment was a pretext for the personality differences between Applicant and supervision. On July 21, 1998, Applicant received a written warning (after having received several oral warnings) from his employer for accessing pornographic websites on company computers. On August 16, 1999, Applicant was terminated for accessing pornographic websites in violation of company policy. Applicant repeatedly exercised poor judgment between July 1996 and August 1999 by accessing pornography at least twice a workday on average. This pattern of rule violations is explained but not sufficiently extenuated or mitigated by: (1) the job monotony and having too much free time at the previous job, and (2) the absence of security violations or other policy violations with his present employer since September 2000. Clearance is denied.

STATEMENT OF THE CASE

On May 23, 2003, the Defense Office of hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5200.6, dated January 2, 1992, as reissued through Change 4 thereto, dated April 20, 1999, issued an SOR to the Applicant detailing 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. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. On June 13, 2003, Applicant responded to the SOR and requested hearing before an Administrative Judge.

The case was assigned to me on September 16, 2003. On October 31, 2003, this case was set for hearing on November 19, 2003. The Government submitted five exhibits and Applicant submitted two exhibits. Testimony was taken from Applicant and four witnesses. The transcript was received on December 1, 2003.

RULINGS ON PROCEDURE

All of Applicant's proposed changes to the transcript are hereby accepted except the change proposed at page 58, which is denied. Adding the word "not" would change the meaning of the full sentence located at lines 21, 22, and 23. The point Applicant was trying to make begins on the same page at line 25 and extends to page 59, lines 1 and 2.

The proposed change at page 71 is accepted because it is consistent with GE 2 as representing Applicant's first encounter with operation of the internet during his viewing of pornography programs. (Tr. 71)

FINDINGS OF FACT

Personal Conduct. The SOR alleges rules violations under the personal conduct guideline. Within Applicant's denials to all allegations and his testimony, Applicant made material admissions to all three allegations. The following findings of fact are:

Applicant is a 38-year-old employee of a defense contractor where he has worked as a computer scientist since July 2000. He is single and has a master's degree in physics. He seeks a secret clearance.

Applicant's denial to subparagraph 1.c. of the SOR is refuted by (1) the information he furnished in his security questionnaire (SCA, GE 1) in July 2000, (2) his sworn statement (GE 2) in April 2002, and (3) the independent evidence contained in AE B in August 1995. In the SCA (GE 1), Applicant referred to his new supervisor's dislike for him and his goal to drive Applicant away from the job. Applicant also referred to the supervisor reprimanding Applicant for twice being four minutes late in a two-month period. In his sworn statement (GE 2), Applicant stated he sensed the new supervisor did not like him and filed written documentation against Applicant for minor work-related infractions. Finally, the state employment services division found that Applicant's termination for inability to perform job to employer's satisfaction was not justifiable. (AE B) Weighing and balancing Applicant's statements in his SCA and sworn statement with the finding of the state agency, I find Applicant was terminated in June 1995 for personality conflicts.

Following his termination from the employer reference in subparagraph 1.c., Applicant began working in July 1995 for an employer referenced in subparagraphs 1.b. and 1.a. Approximately a year later in July 1996, Applicant received his first exposure to the internet when his coworker accessed pornography on the employer's computer. (Tr. 50)[(1)] Although the record is not absolutely clear, Applicant accessed pornography at least a couple of times a day (mostly on the common lab computer) between July 1996 and July 21, 1998 (1.b.), when he received a notice of violation for accessing websites on company computers.

Though Applicant claims the passage of five years caused him to forget the personal warning (GE 4, July 21, 1998) that was addressed to him, he conceded the workforce had been warned that accessing pornography on company computers was against company policy. (Tr. 25) Significantly, in his sworn statement dated February 2002, he stated, "after accessing many of these sites myself, I was personally informed of the company policy of not allowing the downloads of such material." (GE 2)

The notification of violation (GE 4) is unequivocal in its content. First, the notification is dated July 21, 1998. Second, the notification is addressed to Applicant and is specific, with references to the internet policy on pornography (and other kinds of unauthorized computer use) that was sent out previously on June 23, 1998,and that had been discussed in Monday meetings. Then the notification states that despite the warnings, Applicant committed violations on July 20, 1998, one day before the official written warning was issued. Next, the letter explains the practical problems of the misuse of the internet. The letter explains in straightforward terms that by signing the letter, Applicant understood the internet policy and further infractions would be grounds for dismissal. Finally, Applicant's signature appears at the bottom. Considering the detailed content of the notification and internet policy in GE 4, and even though Applicant acknowledged the truthfulness and accuracy of GE 4, it strains credibility to understand why Applicant did not remember the personal warning of July 1998 when he readily recalled an earlier incident in 1998 (cited in his answer) where an image had been left on the desktop folder of one of the communal laptop computers (Tr. 59) that could have caused his employer embarrassment. Also, Applicant was almost 32 years old, with a graduate degree, when he received the warning. In sum, subparagraph 1.b. is found against Applicant.

Rather than complying with his employer's policy and warnings not to access pornography on the internet, Applicant exercised poor judgment and continued to access pornography at a frequency of about twice a day until he was discharged for cause on August 16, 1999. (subparagraph 1.a.) As gleaned from his answer, Applicant still tried to minimize his serious misconduct by claiming he had never received a warning about his workplace behavior. In addition, he claimed his discharge in August 1999 was due to a lack of work for his group. Even after acknowledging the truthfulness of GE 3, GE 4, and GE 5, lingering doubt remains as to whether Applicant truly understands the purpose for the pornography prohibition and his resolve not to engage in similar conduct in the future. (Tr. 69-73)

Character evidence. The president of Applicant's present employer interviewed Applicant before he was employed in July 2000. During pre-employment discussions, Applicant apparently had no trouble telling the president why he was discharged and the forewarning he received before his discharge. (Tr. 76) The president indicated the company has a no tolerance policy when it comes to accessing pornography, and a violation of the policy could mean dismissal. The president sees Applicant two or three times a year and is aware Applicant asks more questions about procedure and policy than any other employee. (Tr. 77) The president is not aware of any rule violation by Applicant since he began working at his current position.

Until about three weeks before the hearing, the research scientist was employed at Applicant's employer as a research scientist and group leader for the research group. Applicant was hired in July 2000 to help the research scientist in the lab. Until his departure a few weeks ago, the research scientist saw Applicant about 15 times a day and never saw him access pornography on the internet or have anything inappropriate on his computer.

The technical adviser, who works in the strategic planning department and has known Applicant for 3½ years, currently sees Applicant once a week. The technical adviser explained the operations division (information services) put equipment in place to monitor the internet. In the technical advisor's estimation, Applicant has never violated rules and has exhibited candor and reliability.

The contract administrator sees Applicant three or four times a day and has never received information of Applicant violating the company's pornography policy or committing any other adverse action.

POLICIES

Enclosure 2 of the Directive sets forth policy factors that must be given 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 Conduct

Disqualifying Conditions (DC):

1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;

5. A pattern of dishonesty or rules violations, including violation of any written agreement made between the individual and the agency.

Mitigating Conditions (MC):

None.

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 pages 16-17 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 a *prima facie* case under the personal conduct (Guideline E) that establishes doubt about a person's judgment, reliability and trustworthiness. 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 is security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

Behavior involving questionable judgment or dishonesty, or an unwillingness to comply with rules and regulations demonstrates a troubling level of poor judgment that suggests the person may not be a suitable candidate for access to classified information.

Based on GE 1, GE 2, and Applicant's testimony, I find he was discharged in June 1995 for personality differences, not poor performance. To induce Applicant to quit his job, the new supervisor cited Applicant for minor attendance infractions and assigned Applicant projects he could not resolve or finish. The employer's discharge based on poor performance was a pretext for Applicant's discharge based on personality differences. By stressing personality differences in his SCA and his sworn statement, then denying personality differences in his June 2003 answer to the SOR, Applicant has failed to provide a credible explanation that substantiates his changed viewpoint concerning his discharge in June 1995. Applicant's refusal to accept the clear reasons for his discharge in June 1995 engenders poor judgment not within any of the disqualifying conditions of the personal conduct guideline. His continuing belief the discharge was based on poor performance removes any of the mitigating conditions from consideration.

After inappropriately accessing pornography for about two years from July 1996 to July 1998, Applicant received a documented warning in July 1998 that he signed, and that he remembered in April 2002 when he provided his sworn statement. His conduct falls within DC 1 of the personal conduct guideline. Applicant continued to exercise poor judgment by accessing the pornography at least twice a day until he was discharged on August 16, 1999. The discharge was based on surveillance by individuals who observed Applicant violating the internet policy. (DC 1)

Because there are no corresponding mitigating conditions that correspond to DC 1 and 5 of the personal conduct guideline, the potential mitigation that applies to these facts and circumstances must come from the general factors of the whole person concept. First, the underlying conduct was clearly serious in nature and extent as Applicant accessed pornography about twice a day for two years before he received his first documented written warning in July 1998. Significantly, several oral warnings had come ahead of the written warning. Applicant's knowledgeable and voluntary participation in the pornography viewing is compounded by the fact that after receiving the warning Applicant chose to continue to view the pornography, only under the more furtive circumstances of his own office.

Applicant was one day shy of 32 years old, with a graduate degree, when he received the written warning in July 1998.

Given his age and his training, it is reasonable to assume he should easily have been able to understand the full meaning of the warning and the disciplinary consequences of continuing to access pornography. Instead, he chose to continue the prohibited conduct until he was discharged in August 1999.

Given Applicant's three year violation of the pornography prohibition, the whole person concept obliges Applicant to furnish evidence of rehabilitation and other pertinent behavioral changes. Since his hire with his current employer in September 2000, favorable evidence from the president, contract administrator, and the research scientist reflects Applicant has committed no violations of security rules or policy. However, Applicant's answer in June 2003 contains additional evidence of Applicant's misrepresentations regarding the reasons for his termination in June 1995. Unlike his SCA and sworn statement, he claimed in his testimony that poor performance and not personality conflict was the reason he was discharged. Further, in his answer to the SOR, Applicant continued to minimize and rationalize the warning in July 1998 by denying he had been personally warned. Given (1) the inconsistent versions for why he was fired in June 1995 that are found in his sworn statement and his testimony, and (2) the egregious conduct that lasted from June 1996 to August 1999, Applicant's evidence in rehabilitation is insufficient to confidently conclude the past conduct will not recur in the future. Accordingly, Applicant's evidence in mitigation falls short of establishing his ultimate burden of persuasion under the personal conduct guideline.

FORMAL FINDINGS

Having weighed and balanced the general policy factors of the whole-person concept, Formal Findings required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 (personal conduct, Guideline E): AGAINST THE APPLICANT.

a. Against the Applicant.

b. Against the Applicant.

c. 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.

Paul J. Mason

Administrative Judge

1. Applicant's sworn statement (GE 2)suggests he may have begun accessing pornography on the internet in 1995.