

KEYWORD: Financial; Personal Conduct

DIGEST: Applicant resigned from his state government job for downloading pornography over a six month period onto his government computer. Applicant subsequently was convicted of a misdemeanor offense of unauthorized access to a computer. Applicant filed a Chapter 7 bankruptcy, and then a Chapter 13 joint bankruptcy with his wife, to dispose of debts, including credit card debts incurred when he undertook an antique coin business that was unsuccessful. Applicant mitigated the financial consideration security concerns. Applicant mitigated one of the three personal conduct security concerns, but not the remaining two personal conduct security concerns. Clearance is denied.

CASENO: 02-22245.h1

DATE: 07/30/2004

DATE: July 30, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22245

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant resigned from his state government job for downloading pornography over a six month period onto his government computer. Applicant subsequently was convicted of a misdemeanor offense of unauthorized access to a computer. Applicant filed a Chapter 7 bankruptcy, and then a Chapter 13 joint bankruptcy with his wife, to dispose of debts, including credit card debts incurred when he undertook an antique coin business that was unsuccessful. Applicant mitigated the financial consideration security concerns. Applicant mitigated one of the three personal conduct security concerns, but not the remaining two personal conduct security concerns. Clearance is denied.

STATEMENT OF THE CASE

On October 7, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) 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.

In a signed and sworn statement, dated November 7, 2003, Applicant responded to the SOR allegations. He requested a hearing. This case was assigned to me on February 3, 2004.

A Notice of Hearing was issued on February 23, 2004, setting the hearing for March 9, 2004. On that date, I convened the hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government presented nine exhibits which were admitted into evidence. Applicant appeared and testified, and offered four exhibits, all of which were admitted into evidence. I received the transcript (Tr.) of the hearing on arch 17, 2004.

FINDINGS OF FACT

Applicant admitted all the SOR allegations except subparagraphs 2.b. and 2.c., which he denied. Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following additional findings of fact:

Applicant is a 58-year-old computer programmer and consultant on emergency preparedness and homeland security issues for various government contractors. He is married, and has one adult son. Applicant is currently unemployed, awaiting further assignment from a government contractor. Applicant is also a retired colonel in the Army Reserves. (Exhibits 1 and 9, Exhibit C; Tr. 31, 40, 46, 58, 62-64)

Applicant worked for a state government for 25 years, and the last 15 years in the personnel department. In that employment he took care of the computer systems for the office. In mid-1996 he was connecting the office computers to the internet. He would work nights and weekends establishing the connections. During that time he downloaded pornographic pictures onto his government computer's hard drive for his personal viewing. In October 1996 his activities were discovered and his department supervisor was going to send Applicant's case to a departmental disciplinary proceeding. Applicant took the position that there were no policies or procedures in place in his department concerning the type of sites a person could access from the government computer because this access was a new feature. Applicant had sought permission to receive Army reserve emails on his government computer, though, before this incident occurred. Applicant chose to resign instead, in what he believed was a good standing status. Applicant knew there was publicity on the television and in newspapers about his case, and wanted to avoid further publicity. Applicant did not receive a personnel action form from his former state department concerning his resignation and its status. Applicant then went into business for himself as a computer consultant. (Tr. 17-28, 63,64, 66, 71, 72, 90, 91; Exhibit 2, Exhibit 3)

Applicant's private business did not go well after 1999, and he had to file bankruptcy under Chapter 7 in 2001 as an individual. The credit card debt shown on that bankruptcy is about \$73,000. Applicant declared an income of \$433 on this bankruptcy filing. Applicant was discharged in bankruptcy on December 3, 2001. (Exhibit 6; Tr. 78, 79)

Applicant filed a Chapter 13 bankruptcy with his spouse in April 2002. This bankruptcy included about \$21,900 in taxes owed to the Federal and state government for year 2000 taxes, as shown in the amended payment plan of May 17, 2002, that required a monthly payment of \$848.73 be made by Applicant. The Chapter 13 plan also shows Applicant withdrew about \$118,700 from his IRA account over a period of time. Applicant owed the tax money because of those IRA withdrawals, and he could not pay them because he did not have the money. Applicant's bankruptcy was confirmed and Applicant is required to make payments. (Exhibit 7 at 10, 15, 30 and 33; Tr. 31, 32, 78, 79)

Applicant tried to buy and sell antique coins as a way to increase his income after he resigned from his state job. Applicant spent about \$35,000 purchasing coins, but the market collapsed and he could sell coins for about \$300 a piece after paying anywhere from \$1,500 to \$2,000 a piece for them. The remaining \$40,000 balance on Applicant's credit cards when he filed bankruptcy in 2001 was for various purchases, including furniture and computers, with some travel included. Applicant's IRA account withdrawals were intended to pay the credit card debts when his consulting business did not generate the income Applicant hoped it would. (Tr. 32-35, 83-85)

Applicant used the pornography that he downloaded as an outlet for his depression. Applicant became hooked on pornography and sought counseling from the Veterans Administration (VA) counselors just before and continuing after Applicant resigned from his state employment. Applicant attributes his decisions on the downloading of the pornography for six months as bad judgment. (Tr. 42, 69, 83, 84; Exhibit 2)

Applicant was sent a summons in February 1997 by the local prosecutor on the basis of a misdemeanor information charge sheet for the offense of unauthorized access to a computer. Applicant pled "no contest" to the charge on the advice of an attorney and paid a \$100 fine. This charge resulted from Applicant's actions with his state employment in downloading pornography on to his governmental computer. Applicant did not disclose on his security clearance application (SCA) that he was charged with and pled no contest to this charge, as requested by Question 26 (other criminal offenses). Applicant also did not reveal on his SCA in response to Question 20 that he had resigned from his state employment before his case was submitted to a disciplinary proceeding under state rules. Applicant's reasons for non-disclosure were that he was under stress, had health issues at that time, and forgot. (Tr. 69-76, 91-93; Exhibit 3)

Applicant's employee evaluation for nine months in 2002 shows he is well-rated. Applicant submitted a letter of recommendation from a professional associate. (Exhibits A and B)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* At 527. The president has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgement, as well as freedom from

conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;
- (3) how recent and frequent the behavior was;
- (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 pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. See *Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his

security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See Exec . Or. 12968 Section 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Guideline F - Financial Considerations:

An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive, ¶ E2.A6.1.1.

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

- (1) A history of not meeting financial obligations. Directive, ¶ E2.A6.1. 2.1.
- (3) Inability or unwillingness to satisfy debts. Directive, ¶ E2.A6.1.2.3.

Applicable conditions that could mitigate security concerns include: E2.A6.1.3.

- (6) The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts. E2.A6.1.3.6.

Guideline E - Personal Conduct:

(A) The Concern: 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. Directive, ¶ E2.A5.1.1.

(B) Conditions that could raise a security concern and may be disqualifying also include:

(2) The deliberate omission, concealment, falsification or misrepresentation 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; Directive, ¶ E2.A5.1.2.2.

(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. E2.A5.1.2.4.

(C) Conditions that could mitigate security concerns include:

(5) The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress. E2.A5.1.3.5

CONCLUSIONS

I conclude that under Guideline F (Financial Considerations) the Government proved its case. Therefore, the Disqualifying Conditions (DC) 1 (*a history of not meeting financial obligations*) and DC 2 (*an inability or unwillingness to satisfy debts*) apply. After he resigned his state government job, Applicant incurred large credit card debts in a futile attempt to make money by buying and selling antique coins. He had no experience in that area. At the same time he spent about \$40,000 on computer equipment, travel, and other purchases, all while he had no regular income. Then, he added to his debt problem by draining his IRA account and not paying his state and federal taxes on those withdrawals for the year 2000.

The only Mitigating Condition (MC) applicable here is MC 6 (*a good-faith effort to repay the debts*) because Applicant has filed two bankruptcy actions to absolve himself of debt under Chapter 7, and then pay some of the debt through a Chapter 13 installment payment plan in a joint filing with his wife. Applicant resigned his job, and that loss of regular income caused his financial problems. But that resignation was not beyond his control in the sense contemplated by C 3, so I do not apply that MC to this case. While Applicant made bad decisions about how to earn income selling coins, and compounded that mistake by using credit cards to buy his inventory, and then draining his IRA accounts to pay his credit card bills while not paying the taxes due on those IRA withdrawals, he finally realized he was in over his head in debt and bankruptcy is the only way out for him, because he has no regular income. The bankruptcy is the good-faith effort because it is reasonable under the circumstances, prudent, and the Chapter 13 is an attempt to repay part of the debt, at least. Therefore, I find for Applicant on this guideline.

Regarding Guideline E (Personal Conduct), I conclude the Government proved its case. The SOR alleges Applicant falsified material facts on the SCA, Questions 20 and 26 regarding his job termination and the failure to disclose a misdemeanor conviction related to the reasons why Applicant lost his state government employment, as specified in subparagraphs 2.b. and 2.c. of the SOR. DC 2 (*the deliberate, concealment, or falsification of relevant and material facts from any personal security questionnaire or similar form used to determine security clearance eligibility or trustworthiness*) applies to this case. The SOR also alleges Applicant repeatedly over a six month period accessed pornographic internet sites using a state government computer, and was charged by the local prosecutor with unauthorized access. Applicant paid a fine after pleading no contest in court. DC 5 (*personal conduct which increases an individual's vulnerability to coercion or duress*) applies to the pornographic download activity and subsequent misdemeanor charge.

I conclude MC 5 applies to the downloading activity. The misdemeanor was seven years ago, and Applicant has sought and obtained counseling from the VA over those seven years for his attraction to pornography. There were no further incidents in the ensuing years. I conclude for Applicant on subparagraph 2.a. of the SOR.

Regarding the falsification, however, I do not find any MC which apply to these facts. Applicant was 50 years old when his downloading was uncovered. He held the rank of colonel in the Army Reserves, so he was supposed to be a mature officer and leader. His defense that he did not know he was not supposed to download pornography onto a government computer is not credible or persuasive. As an adult he knew that activity was wrong, the military service in which Applicant served has had that injunction in place for years and as a senior officer Applicant should have known it. If he had any doubt he could have asked as he did when he sought permission to receive Army Reserve emails on his state government computer, and it was just common sense which should have told him he was doing wrong. This activity led to his resignation from his government job and considerable adverse publicity. Since then he has had financial problems, and non-steady employment. This event was a defining moment in his life, and one that has affected his future and finances for seven years, and will continue to do so for years to come. He remembered leaving the job under unfavorable circumstances and the subsequent misdemeanor conviction. He just did not want to disclose them. His protestations of illness clouding his mind, along with moving to a different city to take a job, is not credible. Applicant did not introduce any medical records or other documents to bolster his statement at the hearing that he had medical condition that would cause him to be unable to remember this incident. I do not find his explanations of why he failed to disclose his termination and conviction believable or persuasive. Therefore, I find against Applicant on subparagraphs 2.b. and 2.c. under this guideline.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline F: For Applicant

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Paragraph 2 Guideline E: Against Applicant

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

DECISION

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

Philip S. Howe
Administrative Judge