

KEYWORD: Personal Conduct

DIGEST: Applicant was terminated from a previous employment position due to poor job performance associated with unauthorized use of his company computer. He did not disclose the reason for his termination on his security clearance application (SF 86), and failed to mitigate the resulting security concerns under Guideline E, personal conduct. Clearance is denied.

CASENO: 03-22709.h1

DATE: 08/15/2005

DATE: August 15, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22709

DECISION OF ADMINISTRATIVE JUDGE

DAVID S. BRUCE

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was terminated from a previous employment position due to poor job performance associated with unauthorized use of his company computer. He did not disclose the reason for his termination on his security clearance application (SF 86), and failed to mitigate the resulting security concerns under Guideline E, personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On December 27, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to 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 Review Program*, dated January 2, 1992, as amended and modified (Directive), issued a Statement of Reasons (SOR) to Applicant in response to his application for a security clearance. The SOR detailed why DOHA could not preliminarily determine under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's request for a security clearance.

On January 19, 2005, Applicant responded to each of the SOR allegations and elected not to present his case at a hearing. Department Counsel submitted the government's File of Relevant Materials (FORM) on May 13, 2005, which contained six itemized documents in support of the allegations. Applicant received the FORM on May 23, 2005, and was given 30 days to file objections and to submit information in support of his position. On June 14, 2005, Applicant submitted a sworn, written letter to DOHA further qualifying his responses to the SOR. Department Counsel did not

object to the letter being included as a part of the file, and the case was assigned to me on June 30, 2005.

FINDINGS OF FACT

Applicant has admitted the allegations of subparagraphs 1.a. and 1.b. of the SOR. The admissions are incorporated herein by reference. After a thorough review of all the evidence in the record and the various statements submitted by Applicant in the case to support his position, I make the following additional findings of fact:

Applicant is 39 years old, married with one daughter, age 4, and has been employed by a defense contractor as a mechanical engineer since April 2002.⁽¹⁾ He was employed for five years with a different company prior to obtaining his present position. He was involuntarily terminated from that position in December 2001.⁽²⁾ Except for a brief period of unemployment between these jobs, Applicant has been gainfully employed since 1991.⁽³⁾ Applicant indicates he was granted a Defense Department secret security clearance in about 1987 while working for another federal contractor as a student summer intern.⁽⁴⁾

According to his previous employer's records, Applicant's termination was a result of poor performance on the job associated with the unauthorized use of the company computer system. Applicant accessed pornographic and other non-business websites about 5 hours per week from at least September 2001 to December 2001.⁽⁵⁾ Applicant believed all details of his termination would be kept confidential by his employer.⁽⁶⁾

Applicant submitted his SF 86 on June 12, 2002. In his answer to Question 20 concerning job history, he indicated he left his previous employment by mutual agreement based on unsatisfactory performance. In the remarks section of the answer, Applicant added his termination was also due to his company's on-going period of low product demand and reduction-in-force (RIF) and personnel reorganization mandates by the company.⁽⁷⁾ Applicant did not mention the issues related to his unauthorized computer use.

According to Applicant's prior employer, Applicant was realigned to another position through RIF procedures about two months prior to the revelation concerning his unauthorized computer use. The primary reason for his realignment was Applicant's lack of engagement with his position at the time, exemplified by Applicant's failure to spend enough time out of his office dealing directly with day to day issues.⁽⁸⁾ About two weeks later, Applicant's new supervisor emphasized to him the need to spend more time in the field after finishing up the final aspects of his prior work.⁽⁹⁾ Over the next month, Applicant participated in four general supervisory staff meetings. Shortly thereafter, Applicant's supervisor requested a review of Applicant's internet activity reports on the premise that he was still spending too much

time in his office on the computer.⁽¹⁰⁾ The reports showed Applicant spent substantial unauthorized time typing in web addresses to pornographic and other non-business sites while likely running two browsers at a time in an attempt to cover his activities.⁽¹¹⁾

Applicant admitted his unauthorized use of the company computer system at the time he was terminated. He understood it resulted in poor job performance, and he took full responsibility for his actions by apologizing to company officials for what he had done.⁽¹²⁾ Applicant did not reveal the true reason for his termination to his wife or family at the time, but indicates he has learned from this exercise of past poor judgment.⁽¹³⁾

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines For Determining Eligibility For Access To Classified Information*, sets forth the criteria which must be evaluated when determining security clearance eligibility. The adjudicative guidelines specifically distinguish between those factors that are considered in denying or revoking an employee's request for access to classified information (Disqualifying Conditions), together with those factors that are considered in granting an employee's request for access to classified information (Mitigating Conditions). By acknowledging that individual circumstances of each case are always different, the guidelines provide substantive standards to assist an administrative judge in reaching fair and impartial common sense decisions.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at well informed decisions. Section E2.2. of Enclosure 2 of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the conduct of the applicant and the circumstances in any case, the factors an administrative judge should consider pursuant to the concept are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 the 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.

Protecting national security is the paramount concern in reaching a decision in any case, and is dependent upon the primary standard that issuance of a clearance must be clearly consistent with the interests of national security. Granting an applicant's clearance for access to classified information is predicated on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of disclosure of such information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information in any aspect of his or her life. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information.⁽¹⁴⁾ The decision to deny a security clearance request to an individual is not necessarily a determination of the loyalty of the applicant.⁽¹⁵⁾ It is merely an indication the applicant has not met the strict guidelines established by the Department of Defense for

issuing a clearance.

In accordance with the Directive, the government bears the burden of proof in the adjudicative process to first establish conditions which indicate it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. ⁽¹⁶⁾ The legal standard for the burden of proof is something less than a preponderance of the evidence. ⁽¹⁷⁾ When the government meets this burden, the corresponding heavy burden of rebuttal then falls on the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the position of the government, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance. ⁽¹⁸⁾

Upon consideration of all the evidence submitted in this matter, the following adjudicative guideline is appropriate for evaluation with regard to the facts of this case:

Guideline E - Personal conduct is a security concern because conduct involving questionable judgment, trustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

The Guideline E disqualifying and mitigating conditions, either raising security concerns or mitigating security concerns applicable to this case are set forth and discussed in the Conclusions section below.

CONCLUSIONS

I have thoroughly considered all the facts in evidence in this case and the legal standards required by the Directive. The government has established a *prima facie* case for disqualification under Guideline E - Personal Conduct.

Based on all the evidence, Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.1. (*Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*) and PC DC E2.A5.1.2.2. (*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*), apply in this case.

Applicant's former employer submitted documents from its personnel records detailing the events for the two month period prior to his termination. The documents were prepared by one of Applicant's supervisors contemporaneous with the events as they occurred. The unfavorable information provided is not inconsistent with Applicant's admissions. There is no dispute that Applicant was terminated for poor job performance precipitated by his significant unauthorized use of the employer's computer system over at least the two month period. Applicant knowingly acted in violation of his former employer's policy when he accessed pornographic and other non-business internet sites while working. He was also conscious over the time period that his unauthorized computer use was having a negative impact on his job performance. At a minimum, his conduct demonstrated a pattern of dishonesty and rules violations over a significant period of time, and, as such, raises serious security concerns.

Applicant submitted his SF 86 about six months after being terminated from his prior job. In answering Question 20, Applicant thoughtfully detailed reasons related to the poor climate of his employer's business as partial justification for his termination, along with his unsatisfactory job performance. His conclusion of having left his job by mutual agreement was a calculated effort to conceal the actual reason for his involuntary departure. Applicant admitted his answer was misleading and could have misled agency investigators. Given the subject matter of the omitted information, it is reasonable to conclude that Applicant considered that disclosure of such information would be relevant and material to a security clearance investigation, and could result in an unfavorable decision. The temptation to exclude the vital facts was heightened by Applicant's belief that the fundamental reason for his termination, accessing pornographic materials while on the job, was going to be kept confidential by his employer. Applicant ostensibly concealed the essential information because he did not believe it would be disclosed.

I have considered the Personal Conduct Mitigating Conditions (PC MC) with respect to Guideline E, and the separate arguments as to each of the mitigating conditions set forth by Applicant in his answer to the SOR and separate statement he submitted in the case on June 14, 2005. Specifically, I have considered PC C E2.A5.1.3.2. (*The falsification was an isolated incident, and not recent, and the individual has subsequently provided correct information voluntarily*) and PC MC E2.A5.1.3.3. (*The individual made prompt, good faith efforts to correct the falsification before being confronted with the facts*), and conclude they do not apply.

Applicant argues the reason he was fired from his job was actually a single incident, was not recent, and that he voluntarily provided the correct information.⁽¹⁹⁾ In support of his contention, he maintains he will never repeat the conduct and it should, therefore, be considered as a one time event. Applicant submits he voluntarily provided the correct information during his initial Defense Security Service (DSS) interview in October 2002. There is no evidence in the case to substantiate Applicant's claim. His written statement given pursuant to a second DSS interview in September 2003, however, clearly shows Applicant's disclosure of the facts involving his unauthorized use of the company computer. He further argues that the events surrounding the unauthorized use of his computer from September - December 2001, and the information characterized as a falsification provided in his SF 86 application in June 2002, should be taken together and considered as a single instance of a pattern of bad behavior during one period of his life.⁽²⁰⁾ Applicant's arguments are not persuasive. He viewed pornography at work at least five hours per week for at least four months. He continued doing so knowing it was having a detrimental effect on the quality of his work and knowing it was a clear violation of company rules. He then compounded his behavior by intentionally falsifying the events on his SF 86 submitted six months after he was fired. This conduct exemplifies a continuing pattern of very questionable conduct, not just an isolated incident. He only provided the correct information after being confronted with the true facts by a DSS investigator, and given the gravity of the falsification, it is incidental whether or not his ultimate disclosure of the correct information was actually made during the first or second DSS interview.

Upon consideration of Applicant's argument regarding PC MC E2.A5.1.3.1. (*The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability*) I find it does not apply. The information provided by Applicant's previous employer was substantiated by one of Applicant's supervisors with first hand knowledge of the circumstances at the time. The conduct clearly relates to Applicant's judgment and trustworthiness. Accordingly, the information appears inherently reliable and relevant when considered in the context of Applicant's personal conduct.

Upon consideration of Applicant's argument regarding PC MC E2.A5.1.3.4. (*Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided*) I find it also does not apply. Applicant cannot rely on information provided by his previous employer that the details of his termination would not be publicly disclosed to anyone. Applicant's contention in this regard only exacerbates his position. Disclosure or non-disclosure of Applicant's personal circumstances by his previous employer, whether based on company policy or on a specific agreement with Applicant, does not negate his obligation to provide full and truthful answers on his SF 86. Applicant's obligation is further highlighted by the signature certification section of the application advising it is a serious criminal offense to submit any false statement in response to any requested information. [\(21\)](#)

Upon consideration of Applicant's argument regarding PC MC E2.A5.1.3.5. (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*) I find it does not apply. Applicant firmly states he has never been vulnerable to coercion, exploitation or duress, and he would never abuse a security clearance. I have reviewed the statements provided by his spouse and current and past supervisors with his present employer. These letters have been appropriately considered with respect to the "whole person" concept required by the Directive. This mitigating condition is simply not applicable to the specific facts of this case and has no impact on its outcome.

Upon consideration of Applicant's arguments regarding PC MC E2.A5.1.3.6. (*A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information*) and PC MC E2.A5.1.3.7. (*Association with persons involved in criminal activities has ceased*), I also find these mitigating conditions are not applicable to the facts of this case, and have no impact on its outcome.

Finally, I have reviewed all the record evidence in this case, and I have considered all information under the "whole person" concept as required by the Directive in evaluating Applicant's vulnerability in protecting our national security. I am persuaded by the totality of the evidence in this case that it is not clearly consistent with the national interest to grant Applicant a security clearance. For the reasons stated, Applicant has failed to mitigate the security concerns caused by the personal conduct issues raised in this case. Accordingly, Guideline E is decided against Applicant.

FORMAL FINDINGS

In accordance with Section E3.1.25 of Enclosure 3 of the Directive, the following are the formal findings as to each allegation in the SOR:

Paragraph 1. Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.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 or continue a security clearance for Applicant. Clearance is denied

David S. Bruce

Administrative Judge

1. Item 4 (Applicant's Security Clearance Application dated June 12, 2002), at 1-2.
2. *Id.*, at 6.
3. *Id.*, at 1-3.
4. *Id.*, at 8.
5. Item 3 (Applicant's answer to SOR dated January 19, 2005 admitting allegations of subparagraph 1.a) at 1. See also, Item 6 (Employer's Records Regarding Termination consisting of 12 pages for a more detailed review of the events leading to Applicant's job termination).
6. *Id.*, at 5.
7. Item 4, *supra* note 1, at 6.
8. Item 5 (Company Records Regarding Termination - Performance History) at 4.
9. *Id.*
10. *Id.*, at 5.
11. *Id.*
12. Item 5 (Applicant's sworn statement dated September 12, 2003 to DSS Special Agent) at 2.
13. *Id.*
14. Directive, Enclosure 2, Para. E2.2.2.
15. Executive Order 10865 § 7.
16. ISCR Case No. 96-0277 (July 11, 1007) at p. 2.
17. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
18. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Para. E3.1.15.
19. Item 3, *supra* note 5, at 3.
20. Applicant's written statement dated June 14, 2005, submitted in response to the government's FORM dated May 13, 2005, at 2.
21. Item 4, *supra* note 1, at 9.