

KEYWORD: Personal Conduct; Misuse of Information Technology Systems; Sexual Behavior

DIGEST: Applicant knowingly violated his employer's rules, procedures and guidelines 100 times, by his estimate, by using company time and computer resources to access, view, and download pornographic materials. Applicant was placed on a five day disciplinary layoff without pay, resulting in his losing one week's salary. Thereafter, Applicant was terminated from his place of employment, after a security officer alleged that he observed Applicant masturbating in his vehicle in the company parking lot. Mitigation has not been shown. Clearance is denied.

CASENO: 03-22836.h1

DATE: 05/24/2005

DATE: May 24, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22836

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Byron J. Bahr, Esq.

SYNOPSIS

Applicant knowingly violated his employer's rules, procedures and guidelines 100 times, by his estimate, by using company time and computer resources to access, view, and download pornographic materials. Applicant was placed on a five day disciplinary layoff without pay, resulting in his losing one week's salary. Thereafter, Applicant was terminated from his place of employment,

after a security officer alleged that he observed Applicant masturbating in his vehicle in the company parking lot. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On August 3, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to 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 Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

In a signed and sworn statement, dated August 31, 2004, Applicant responded in writing to the SOR allegations. He requested a clearance decision based on a hearing record. At the Hearing, Applicant submitted an Amended Answer, signed by Applicant on May 4, 2005.

On February 21, 2005, this case was assigned to this Administrative Judge to conduct a hearing and issue a written decision. A Notice of Hearing was issued to the parties on March 15, 2005, and the hearing was scheduled to be held on April 12, 2005. Upon notice by Applicant's Counsel to continue the Hearing and upon no objection by Department Counsel, the Hearing was continued to and conducted on May 5, 2005.

At the hearing, Department Counsel offered four documentary exhibits (Government Exhibits 1 through 4), and no witnesses were called. Applicant offered no documentary exhibits, but did submit an Amended Answer and a Trial/Hearing Brief, and offered his testimony and that of his wife. The transcript (TR) was received on May 17, 2005.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline E (Personal Conduct), Guideline M (Misuse of Information Technology Systems), and Guideline D (Sexual Behavior) of the Directive. The SOR contains two allegations, 1.a. and 1.b., under Guideline E, one allegation, 2.a., under Guideline M, and one allegation, 3.a., under Guideline D.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the documents and the live testimony, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant is a 50 year old engineer, employed by a defense contractor which seeks a security clearance on his behalf. He is married and has two children.

Paragraph 1 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he exhibited conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations.

1.a. On November 9, 1998, Applicant was placed on a five day disciplinary layoff without pay, which resulted in his losing one week's salary, for using company time and computer resources to access, view, and download pornographic materials during the period from approximately July 1998 through October 1998. By doing this, Applicant knowingly violated his employer's rules, procedures and guidelines 100 times, by his estimate (Tr at 54, 56).

When confronted by his employer with this conduct, a statement was prepared by a representative of his employer, which he signed on October 13, 1998, and on which he wrote that the entire statement "is true to the best of my knowledge." (Exhibit 3). On this statement, he said, "I began accessing those sites sometime in late July and have continued the activity off and on until now." This statement directly contradicts his testimony at the Hearing wherein he testified that he had stopped this conduct approximately a month before being confronted by his employer. Applicant could not explain this very significant discrepancy as to whether he stopped viewing the pornographic material on his own, or whether he only stopped after being confronted by his employer (Tr at 36-37, 82-83). Based on the evidence and Applicant's explanation, I find that Applicant stopped viewing pornographic websites only after his employer confronted him.

In Exhibit 3, Applicant also stated, "I estimate that I spent approximately 50 hours of company time accessing inappropriate websites over a 2-1/2 month period." However, at the Hearing, Applicant denied using any company time to access these sights. His explanation was that he signed the statement, even though he knew that the information about the 50 hours was not true, because he believed he would be terminated from his employment, if he did not sign it. He conceded that no one from his employer ever threatened him with termination, if he did not sign the statement (Tr at 56-57). Applicant testified that he signed the statement, since he was only lying about himself (Tr at 94-95). I conclude that either Applicant wilfully signed a document that he knew was false to avoid what he believed would be termination, or his testimony at the Hearing misrepresented how much company time he used to access pornographic websites. Of some additional concern is Applicant's assertion, during his testimony, that his conduct of accessing pornography on a computer is no more serious than viewing Playboy magazine (Tr at 77-78).

1.b. On February 3, 1999, Applicant was terminated from his place of employment, after a security officer alleged that he observed Applicant masturbating in his vehicle in the company parking lot on January 28, 1999.

Exhibit 4 is a Security Incident Report, prepared on the date of the incident, by the security guard, who reported that he witnessed the incident. In it he states, "When I pulled up beside the vehicle on the passenger side I saw that the subject had pulled his penis out of his pants through his zipper and he was masturbating. When the subject noticed that I pulled up he stopped masturbating and just laid in his seat which was reclined back." Applicant admitted that he was in his vehicle on the day in question, but denied that he was masturbating. He contended that he was "napping" in his car during his 1/2 hour lunch break, when a security guard drove his vehicle near Applicant's, and Applicant conjectured that the guard must have believed he saw something which Applicant contended never happened. He had never spoken to this security guard either before or after the incident.

After the termination, Applicant was unemployed for a year, while looking for new employment. Yet, despite the fact that he had worked at his place of employment for 15 years, and he claimed that he was wrongly accused, Applicant

never made any attempt whatsoever to dispute his termination, either within the company or to hire an attorney and challenge the decision in court. When questioned as to why he did not, at least speak to someone within the company and say this termination was wrong, since he claimed he was terminated for something he did not do, Applicant testified, " . . . I had no use for it. I didn't see why it would make a difference."

While there is no way to know, with absolute certainty, what occurred in Applicant's vehicle on January 28, 1999, it is difficult to believe that an individual, who worked for one employer for 15 years, would make virtually no attempt to clear his record, if he believed that he was wrongly accused. When considering that, together with Applicant's lack of complete candor regarding the pornographic website allegations, as discussed above, I conclude that the incident for which Applicant was terminated, did occur.

Paragraph 2 (Guideline M - Misuse of Technology Systems)

2.a. The Government alleges in this paragraph that Applicant is ineligible for clearance because of Applicant's noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems. This is based on the allegation in paragraph 1, as discussed above, where Applicant knowingly violated his employer's rules, procedures and guidelines, by using company time and computer resources to access, view, and download pornographic materials.

Paragraph 3 (Guideline D - Sexual Behavior)

3.a. The Government alleges in this paragraph that Applicant is ineligible for clearance because Applicant's sexual behavior, as alleged in paragraph 1.a., and 1.b., reflects lack of judgment or discretion.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

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.

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).

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to Applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of Applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about Applicant's judgment, reliability, or trustworthiness, Applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless 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

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to Guidelines E, M, and D:

(Guideline E - Personal Conduct)

With respect to Guideline E, the evidence establishes that Applicant is ineligible for clearance because he exhibited conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations.

In reviewing the Disqualifying Conditions (DC) under Guideline E, I conclude that DC E2.A5.1.2.5, a pattern of dishonesty or rule violations, applies because of Applicant's knowingly and wilfully violating his employer's policy on at least 100 times by accessing pornographic websites. No Mitigating Conditions (MC) apply. I resolve Guideline E against Applicant.

(Guideline M - Misuse of Technology Systems)

As to Guideline M, the evidence establishes that Applicant is ineligible for clearance because of his noncompliance with rules procedures, guidelines or regulations pertaining to information technology systems

In reviewing the DCs under Guideline M, I conclude that DC E2.A13.1.2.1, illegal or unauthorized entry into any information technology system, and DC E2.A13.1.2.4., introduction of media into any information technology system without authorization, when specifically prohibited by rules, procedures, and guidelines, applies. While MC E2.A13.1.3.1., the misuse was not recent, and MC E2.A13.1.3.4., the misuse was an isolated event, could be argued to be appropriate to this case, the fact that a 15 year employee knowingly committed rules violations at least 100 times over the course of three months, and only stopped when he was confronted by his employer, makes the action far too serious to be considered mitigated at this time.

(Guideline D - Sexual Behavior)

With respect to Guideline D, the evidence establishes that Applicant is ineligible for clearance because Applicant's sexual behavior, as alleged in paragraph 1.a., and 1.b., reflects lack of judgment and discretion.

Under Guideline D, I find that DC E2.A4., sexual behavior of a public nature and/or that which reflects lack of discretion or judgment is applicable for both acts of Applicant. For the same reasons that I stated the misuse of technology was not mitigated under Guideline M, I find that MC E2.A4.1.3.2. does not mitigate Guideline D.

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 E: Against Applicant

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2, Guideline M: Against Applicant

Subparagraph 2.a.: Against Applicant

Paragraph 3, Guideline D: Against Applicant

Subparagraph 3.a.: 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 national interest to grant or continue a security clearance for Applicant.

Martin H. Mogul

Administrative Judge

