

DATE: June 8, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-24158

**DECISION OF ADMINISTRATIVE JUDGE**

**DARLENE LOKEY ANDERSON**

**APPEARANCES**

**FOR GOVERNMENT**

Eric H. Borgstrom, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's questionable sexual conduct, that includes downloading child pornography on his work computer and soliciting prostitutes while holding a security clearance raises a security concern and has not been mitigated. Clearance is denied.

**STATEMENT OF THE CASE**

On January 6, 2005, 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 29, 2005, 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 a date uncertain that consisted of eight documents, referred to as Items 1 through 8. The Applicant responded to the FORM on ay 25, 2005. Due to an administrative error, Department Counsel's FORM was re-sent to the Applicant on July 25, 2005. Applicant again responded on August 15, 2005. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM the second time and was contacted by Department Counsel to ensure that Applicant's response was complete. On October 12, 2006, the Applicant submitted a reply that contained duplicates of documentation he submitted earlier.

The case was assigned to the undersigned on February 10, 2006.

**FINDINGS OF FACT**

The following Findings of Fact are based on Applicant's Answer to the SOR, consisting of Items A through G, the FORM and the Applicant's Response to the FORM. The Applicant is 28 years of age and unmarried. He is employed as a Network Security Analyst for 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 in this paragraph that the Applicant is ineligible for clearance because his sexual behavior involved a criminal offense, is indicative of a personality or emotional disorder, subjects the individual to undue influence or coercion, or reflects lack of judgement or discretion.

Paragraph 2 (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.

The Applicant admits to each of the allegations set forth in the SOR under this guideline with some conditions.

Beginning in about 1994 or 1995, the Applicant downloaded pornography, some of which included child pornography, from the Internet by repeatedly visiting Internet newsgroups or message board rooms. Applicant would intentionally visit these sites for the purpose of downloading pornography. The Applicant contends that he never intentionally downloaded child pornography, only adult pornography. The Applicant explained that when he visited these sites, his computer would automatically download the pictures whether he wanted them or not, without clicking on the save button. The Applicant understood this to be the case because he would periodically delete the files from his computer to free up memory or space to allow his computer to run more efficiently. The Applicant states that any exposure to child pornography he had was inadvertent and unintentional. (*See* Government Exhibit 2).

In 1994/1995, the Applicant would visit these newsgroups or message boards about two or three times a week. He continued to view these sites until 1998, when he joined the United States Navy and was stationed upon a ship.

In the fall of 2001, until February 2002, he began visiting these newsgroups again in order to download pornography, some of which involved children. (*See* Government Exhibit 2).

From 1999 to 2000, while the Applicant was on active duty in the military, holding a Top Secret Security Clearance, and Special Compartmented Access, (SCI), he solicited prostitutes on at least three occasions while in Thailand.

The Applicant states that since he began his current employment in March 2002, as a Network Security Engineer and is involved in the monitoring of other Government employees computer access, he has taken measures to prevent his viewing and receiving unwanted Internet files. He has set up spyware blockers on his computer, installed various software programs to eliminate unwanted files from being sent to his computer and he no longer visits newsgroups or message boards of any kind.

During his military career, the Applicant's appraisals were exemplary. (*See* Applicant's Exhibits A and B). He received numerous awards and commendations. He received the Navy and Marine Corps Achievement Medal, a Good Conduct Medal, and a Joint Service Achievement Medal. (*See* Applicant's Exhibits C, D and E).

His current employment appraisals show that he either meets or exceeds all standards of performance in every category and is considered an asset to his team and his company. (*See* Applicant's Exhibit F).

## **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:

(Guideline D (Sexual Behavior))

Condition that could raise a security concern:

3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation or duress.

Condition that could mitigate security concerns:

None.

Guideline E (Personal Conduct)

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 pages 16-17, 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 eligible for a security clearance. 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. 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), and Guideline E(Personal Conduct) that 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. 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 in light of the appropriate legal standards and factors, and having assessed the Applicant's credibility based on the record, this Administrative Judge concludes that the Government has established its case as to all allegations in the SOR, and that Applicant's questionable sexual behavior have a direct and negative impact on his suitability for access to classified information.

The security concern here is the fact that from 1994 through 2002, on numerous occasions, the Applicant has been accessing and downloading pornography, including child pornography while at work, while holding some of the highest level of clearances, including a Top Secret Security Clearance and SCI access, which is not only against the law, but is against DoD policy. He has also engaged in random sexual encounters with prostitutes while on military duty stationed overseas as recently as 1999/2000. This demonstrates a pattern of inappropriate sexual behavior and high risk conduct that was careless, lacked discretion and good judgment and could subject him to pressure, coercion and/or blackmail, which in turn could subject the Government to a security risk.

This high risk behavior places him in a vulnerable position to be susceptible to pressure, coercion and/or blackmail. Furthermore, he engaged in these activities after having been granted a Security Clearance and with knowledge of the security training he was provided by the Navy. This questionable judgment and lack of discretion occurred as recently as 2002, just four years ago. The Applicant states that since March 2002, he has taken measures to prevent his viewing of pornography and from receiving unwanted Internet files by setting up blockers on his computer. However, because it is the Applicant's job to ensure that other employees do not abuse their computers, with his past history, the Applicant is not the best candidate for the job. This pattern of high risk behavior is unacceptable while holding a security clearance and entrusted with the national secrets. The risk is great that he may fall prey to exploitation, coercion or duress. Under Guideline D, Disqualifying Condition (3) *Sexual behavior that causes an individual to be vulnerable to coercion, exploitation or duress* applies. None of the mitigating conditions are applicable. Under Guideline E, Disqualifying Condition (4) *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure* applies. Again, none of the mitigating conditions are applicable. The Applicant has not met his burden of demonstrating that his questionable sexual behavior both on and off the computer does not raise a security concern, and Guidelines D and E are found against the Applicant.

Considering all the evidence, the Applicant has not met the mitigating conditions of Guidelines D and E of the adjudicative guidelines set forth in Enclosure 2 of the Directive. Accordingly, he has met his ultimate burden of persuasion under Guidelines D and 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.

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Paragraph 2: Against the Applicant.

Subparagraph 2.a.: Against the Applicant.

**DECISION**

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

Darlene Lokey Anderson

Administrative Judge