

KEYWORD: Information Technology; Personal Conduct; Sexual Behavior

DIGEST: Applicant is 45 years old and has worked as a computer engineer for a government contractor since 2000. Applicant was terminated from a television station job for stealing, and he retaliated against his employer by knocking out a microwave signal, thereby causing the station to go off the air. He stole from two other employers, one in 1985 and the other in 1996. Applicant kept a piece of computer equipment from another employer, but the government failed to present a prima facie case for disqualifying conduct under Guideline M, misuse of information technology system. He had a friendship with a woman, not his wife, and the government failed to present a prima facie case for disqualifying conduct under Guideline D, sexual behavior. Applicant failed to mitigate the security concerns under Guideline E, personal conduct. Clearance is denied.

CASENO: 03-25148.h1

DATE: 02/23/2006

DATE: February 23, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-25148

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Melvin Howry, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant is 45 years old and has worked as a computer engineer for a government contractor since 2000. Applicant was terminated from a television station job for stealing, and he retaliated against his employer by knocking out a microwave signal, thereby causing the station to go off the air. He stole from two other employers, one in 1985 and the other in 1996. Applicant kept a piece of computer equipment from another employer, but the government failed to present a prima facie case for disqualifying conduct under Guideline M, misuse of information technology system. He had a friendship with a woman, not his wife, and the government failed to present a prima facie case for disqualifying conduct under Guideline D, sexual behavior. Applicant failed to mitigate the security concerns under Guideline E, personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On December 30, 2004, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) stating it was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. [\(U\)](#) The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline E (personal conduct), Guideline M (misuse of information technology systems), and Guideline D, (sexual behavior).

In a sworn statement, dated February 28, 2005, Applicant responded to the SOR allegations and requested a hearing. In his SOR response, Applicant admitted the allegations in ¶¶ 1.a, 1.c, and 1.d . He denied the allegations in SOR ¶¶ 1.b, 1.e, 2.a, and 3 a. The case was assigned to me on November 22, 2005. A notice of hearing was issued on December 23, 2005, scheduling the hearing for January 18, 2006. The hearing was conducted as scheduled. The government submitted six exhibits that were marked as Government Exhibits (GE) 1-6. The exhibits were admitted into the record without objection. Applicant testified on his own behalf, and submitted two exhibits that were marked as Applicant's Exhibits A-B. The exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on January 26, 2006.

PROCEDURAL ISSUES

Department Counsel moved to amend SOR ¶ 1.b, by deleting all the information after the first sentence so the allegation reads: "You were fired from your position with . . . Television, . . . on November 7, 1984, for repairing equipment without permission." The deleted portion reads: "After you were fired, you climbed up on the roof of the station's broadcast building and knocked out a microwave dish which prevented audio/video/ wireless link signals from being transmitted from the studio. You were interviewed by the Federal Bureau of Investigation but did not disclose your involvement in this incident." Department Counsel subsequently moved that the deleted portion of SOR ¶ 1.b, be added to the end of SOR ¶ 1.a. to accurately reflect the evidence. Applicant concurred that this modification accurately reflects the facts. The motion was granted and the amended made.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR, are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 45 years old and has worked as a senior software engineer for a government contractor since 2000. He is married and has two children. Applicant currently holds a top secret clearance.

Applicant was employed in about 1983 by Television Station A. He was caught stealing gasoline from the station and using it for his personal vehicle. He was subsequently fired from the job. After being terminated he reentered the station's building, after hours, with the intent to unhook various video switch cables and create havoc for the station. Applicant claims he changed his mind and did not do any damage to the station at that time. However, several weeks later, he and another disgruntled employee, who had also been terminated, climbed the roof of the station's broadcast building and intentionally knocked out a microwave dish which prevented audio/video wireless link signals from being transmitted from the studio. He minimized his actions by stating the station was only off the air for a short time, because of a back-up system. A subsequent investigation by the Federal Bureau of Investigation (FBI) ensued. The focus was directed at whether the vandalism was a sabotage attempt on the local Emergency Broadcast System radio station located in the same building as the television station. The radio station was not a target of Applicant and his cohort and it was not effected. Applicant did not disclose his involvement to the FBI regarding the incident.

In 1984, Applicant was fired from his position with Television Station B for repairing equipment without his supervisor's permission.

In 1985, while working a part-time position with a university, Applicant stole a printer, oscilloscope, video card and several floppy disks. He was entrusted with a key and access to the property room where equipment was stored. He admits he stole the equipment, but attempted to minimize the event, by stating it was unused equipment and it was not missed. (2) He further stated that approximately a year later he returned the equipment, but provided no evidence to support his position or any specific details as to what exactly he returned.

In 1996, Applicant stole approximately four uninterrupted power supplies, six hard drives, a microscope with video camera capabilities, various computer cards, network cards, motherboards, memory chips and power cords. The retail value was approximately \$6,000. Applicant minimized the theft by claiming it was unused equipment and he believed the equipment was out of date or defective. (3) He claimed he believed it was trash, and took it prior to it being thrown away. He did not ask anyone in authority if he could take the equipment. He was the person responsible for determining if the equipment should be taken out of service and replaced with new equipment. After he made the determination the equipment should be replaced, he took it home with him. Applicant rationalized and explained that the equipment was in need of repair, was outdated, but still functional and he reused the equipment to build a computer lab in his home.

Applicant worked for Company X in 1999 and they contracted with Company Y for services. He was the engineer who worked on the contract with Company Y. Company Y gave Applicant an assignment and he was to complete the assignment on a computer using a separate hard-drive and not using one provided by Company X. There is no evidence the data on the hard-drive was classified. However, Applicant admitted the material on the hard-drive was sensitive to Company Y, but it is unclear whether the hard-drive had material considered sensitive to the government for national security purposes. When the assignment was completed, Applicant claims he asked Company Y if they wanted the hard-drive back and they declined because they had no use for it. Applicant kept the hard-drive anticipating Company X would continue to have a contract with Company Y. Applicant left the employment of Company X and kept the hard-drive because Company Y did not want Company X to have it. He continued to do work for Company Y, but did not reuse the hard-drive for subsequent projects. Applicant kept the hard-drive and brought it home. An investigation ensued about the hard-drive after Applicant brought up the issue when providing a statement for a higher security clearance. He subsequently surrendered the hard-drive. No evidence was submitted by the government to show that the hard-drive had classified or sensitive information on it.

Applicant met an Australian woman of Chinese decent at a professional conference in August 1999. They exchanged emails that were work-related. They would see each other at various conferences. Their professional relationship developed into a friendship and had the potential to develop into a more intimate relationship. Their intimacy extended to one kiss and no other physical activity. They continued to see each other occasionally at conferences, and although not co-located continued to work on the same project until it was completed in spring 2000. He sent her balloons on her birthday one time. Applicant's wife knows that he had a friendship with this person, but does not know that he kissed her. Applicant does not intend on telling her because it would only start a fight or argument.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline E, pertaining to personal conduct, Guideline M, pertaining to misuse of information technology systems, and Guideline D, pertaining to sexual behavior, with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The burden of proof is something less than a preponderance of evidence.⁽⁶⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽¹¹⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽¹²⁾ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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

Guideline E-Personal Conduct is a security concern when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

Guideline M-Misuse of information technology systems and noncompliance with rules, procedures, guidelines or regulations pertaining to these systems may raise security concerns about an individual's trustworthiness, willingness, and ability to properly protect classified systems, networks, and information. Information technology systems include all related equipment used for the communication, transmission, processing, manipulation, and storage of classified or sensitive information.

Guideline D-Sexual Behavior becomes a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress or reflects lack of judgment or discretion.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline E and has failed to establish a *prima facie* case under Guidelines M and D.

Based on all the evidence, under Guideline M I have considered each of the disqualifying conditions: Misuse of Information Technology Systems Disqualifying Condition (MI DC) E2.A13.1.2.1 (*Illegal or unauthorized entry into any information technology system*), MI DC E2.A13.1.2.2 (*Illegal or unauthorized modification, destruction, manipulation, or denial of access to information residing on an information technology system*), MI DC E2.A13.1.2.3 (*Removal (or use) of hardware, software or media into any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines, or regulations*), and MI DC E2.A13.1.2.4 (*Introduction of hardware, software or medial into any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines, or regulations*) and conclude the government has not established a *prima facie* case. The minimal evidence presented did not establish that the hard-drive Applicant had retained was part of an "information technology system," defined as "all related equipment used for the communication, transmission, processing, manipulation, and storage of classified or sensitive information,"⁽¹³⁾ which is a necessary element of each of the four disqualifying conditions. No evidence was provided to establish that the "sensitive" information that may have been on the hard-drive was either classified or sensitive to national security. No evidence was presented regarding the specific rules, procedures, guidelines or regulations that were violated regarding the information technology system or any specific prohibitions. Without evidence to establish a violation and specific information to show the information was of a sensitive nature as contemplated by this guideline, the government has failed to meet to the legal standards and Guideline M is decided for Applicant.

Based on all the evidence, I have considered all the Sexual Behavior Disqualifying Conditions (SB DC) E2.A4.1.2.1 (*Sexual behavior of a criminal nature, whether or not the individual has been prosecuted*), SB DC E2.A4.1.2 (*Compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high-risk behavior or that which is symptomatic of a personality disorder*), SB DC E2.A4.1.2.3 (*Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*), and SB DC E2.A4.1.2.4 (*Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment*), and conclude none apply in this case. Applicant became friendly with a colleague and they obviously were attracted to each other; however, that attraction went no further than one kiss, one time. I find this is not the type of behavior that causes an individual to be vulnerable to exploitation. I find there is insufficient evidence to establish a prima facie case; therefore, Guideline D is decided in favor of Applicant.

Considering all of the evidence, Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.4 (*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*) and PC DC E2.A5.1.2.5 (*A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*) apply in this case. Applicant has a history and pattern of dishonest and questionable personal conduct. He stole gas from an employer in 1983. After being terminated from employment and waiting several weeks, he went back to his former place of employment and intentionally knocked out the microwave that caused the system to go off the air. His actions were premeditated. He attempted to minimize his actions by stating the system was only out for a short time. He again stole from employers in 1985 and 1996. He attempted to minimize his actions by claiming they were unused items and trash. Finally, he took home with him a hard-drive that he claimed the company told him it no longer wanted.

I have considered all the mitigating conditions and specifically considered Personal Conduct Mitigating Condition (PE MC) E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*) and conclude it does not apply.

Applicant's actions and history of stealing are very disturbing and of great concern. Although his act of retaliation against his former employer occurred a long time ago, the concern is not only the premeditated nature of his conduct and the attempt to minimize the damage he caused, but the fact he was fired for stealing. He continues to rationalize and minimize his dishonest and questionable conduct. After stealing from an employer in 1983, he did so again in 1985, but claims the items he stole were unused and not missed. He was entrusted with a key to the storeroom. He violated that trust and took what he wanted.

Eleven years later in 1996, Applicant again stole from an employer, and again minimized his conduct by claiming the items were unused. It is very suspect that he was the person that was required to make the determination about what items to take out of service, and after he made that determination, he would take those items home. Apparently he did not view this as a conflict of interest. He did not seek authorization to take the items. Again, he violated the trust of his employer. There is a question as to the nature of what was on the hard-drive that Applicant had in his possession, and I have already found in favor of Applicant as it applies to Guideline M and the sensitivity of the information. However, based on Applicant's history of stealing from his employers and rationalizing his actions, I find he has failed to mitigate the concern that he was not authorized to keep the hard-drive for his own use. He has shown a consistent pattern of

taking items from his employers, and is persistent in rationalizing and minimizing his poor judgement and misconduct. Although Applicant admitted many of his improper actions, which is commendable, he does not appreciate the gravity of his misconduct. Despite having years to mature and contemplate his misdeeds of stealing, he continued to do it repeatedly. This conduct raises questions as to his judgment, trustworthiness, dishonesty and unwillingness to comply with rules. Applicant has not met his burden to show he has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation or duress and has failed to mitigate Guideline E, personal conduct.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of his acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered the whole person, and I find Applicant failed to mitigate the security concerns regarding Guideline E, personal conduct. I find the government failed to establish a prima facie case with regard to Guideline M, misuse of information technology systems, and Guideline D, sexual behavior. Therefore, 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. Accordingly, Guideline E is decided against Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline E: AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Paragraph 2. Guideline M: FOR THE APPLICANT

Subparagraph 2.a: For the Applicant

Paragraph 3. Guideline D: FOR THE APPLICANT

Subparagraph 3.a: For the Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Carol G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Tr. 26.
3. Tr. 27.
4. ISCR Case No. 96-0277 at p. 2 (App. Bd. Jul 11, 1997).
5. ISCR Case No. 97-0016 at p. 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.

6. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
7. ISCR Case No. 94-1075 at pp. 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
8. ISCR Case No. 93-1390 at pp. 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
9. *Egan*, 484 U.S. at 531.
10. *Id.*
11. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
12. Executive Order 10865 § 7.
13. Directive E2.A13.1.1.