

DATE: January 8, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-32254

**DECISION OF ADMINISTRATIVE JUDGE**

**RICHARD A. CEFOLA**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

On the night of December 31, 2000, through January 1, 2001, the Applicant spent more than four hours on pornographic/sexually explicit computer sites on his employer's computer. As a result, his employment was terminated for theft of time and computer abuse. The Applicant is reluctant to admit to the vast majority of his family the reason for his termination. This hiding of his sexual behavior makes the Applicant "vulnerable to coercion, exploitation, or duress," and "susceptible to blackmail." Guidelines D and E are found against the Applicant. Clearance is denied.

**STATEMENT OF THE CASE**

On August 26, 2003, 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 the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

Applicant filed an Answer to the SOR on or about September 3, 2003.

Applicant elected to have this case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) on October 27, 2003. Applicant was instructed to submit objections or information in rebuttal, extenuation or mitigation within 30 days of receipt of the FORM. Applicant received his copy on October 31, 2003, and Applicant's response (Response) was received on or about November 11, 2003. The case was received by the undersigned for resolution on December 11, 2003. The issues raised here are whether the Applicant's admitted sexual behavior, and related personal conduct militates against the granting of a security clearance. [The Applicant admits the underlying factual basis of all of the allegations.]

**FINDINGS OF FACT**

The following Findings of Fact are based on Applicant's Answer to the SOR, the File of Relevant Material and Applicant's Response. The Applicant is 25 years of age, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact.

#### Guideline D - Sexual Behavior & Guideline E - Personal Conduct

1.a. and 1.b. and 2.a. On the night of December 31, 2000, through January 1, 2001, the Applicant spent more than four hours on pornographic/sexually explicit computer sites on his employer's computer (Government Exhibit (GX) 3 at page 1, and GX 5 at pages 1~2). As a result, his employment was terminated for theft of time and computer abuse (GX 3 at page 1, and GX 5 at page 3). The Applicant is reluctant to admit to the vast majority of his family the reason for his termination (GX 3 at page 2, and GX 5 at page 3). Only one of the Applicant's brothers and that brother's wife know the reason for his termination (*id*). His parents and four other siblings are unaware of the rationale for the termination (*see* GX 4 at page 5).

#### Mitigation

The Applicant's past employer, who employed the Applicant soon after his termination, thinks highly of the Applicant, but is apparently also unaware of the reason for his termination (Response at page 2).

### **POLICIES**

Enclosure 2 and Section E2.2 of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. The conditions 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 his own common sense. Because each security clearance case presents its own unique facts and circumstances, it should not be assumed that these conditions exhaust the realm of human experience, or apply equally in every case. Conditions most pertinent to evaluation of this case are:

#### Sexual Behavior

##### Condition that could raise a security concern:

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

##### Conditions that could mitigate security concerns:

None

#### Personal Conduct

##### Condition that could raise a security concern:

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;

##### Condition that could mitigate security concerns:

None

As set forth in the Directive, each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature, extent, and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age and maturity of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future."

The Administrative Judge, however, can only draw those inferences or conclusions that have a 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.

The Government must make out a case under Guideline D (Sexual behavior), and Guideline E (Personal conduct); which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an 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.

Personal conduct is conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations; and sexual behavior reflects a lack of judgment and discretion. 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**

The Applicant engaged in improper sexual behavior by using his employer's computer to surf pornographic/sexually explicit computer sites. His employment was terminated as a result of this transgression. In September of 2002, when the Applicant executed a signed sworn statement he was made aware of the Government's concern as to his possible coercion, exploitation or blackmail. At that time he had only told one of his brothers, who in turn told his wife, the underlying reason for the Applicant's termination. A year later, in September of 2003, when the Applicant answered the SOR, he had yet to tell the other members of his family of his sexual behavior. Even now the Applicant has failed to demonstrate that he is no longer subject to "coercion, exploitation, or duress" and/or "blackmail," as noted in disqualifying condition three under Sexual Behavior and disqualifying condition four under Personal Conduct. Guidelines D and E are therefore found against the Applicant.

The Applicant has thus not met the mitigating conditions of Guidelines D and E, and of Section E.2.2 of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Guidelines D and E.

### **FORMAL FINDINGS**

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: AGAINST THE APPLICANT

- a. Against the Applicant.
- b. Against the Applicant

Paragraph 2: AGAINST THE APPLICANT

a. Against the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

**DECISION**

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

Richard A. Cefola

Administrative Judge