

DATE: December 22, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17282

ECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is unable to successfully mitigate the security concerns stemming from his sexual behavior at the workplace (downloading pornography) and personal conduct, which includes falsification of his security-clearance application. Clearance is denied.

STATEMENT OF THE CASE

On January 20, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline D for sexual behavior, Guideline E for personal conduct, and Guideline M for misuse of information technology systems.

Applicant's response (Item 3) to the SOR is dated March 1, 2004, and he indicated he did not wish to have a hearing. Concerning the SOR's factual allegations, Applicant responded as follows: he admitted downloading pornographic material on his company computer at his current place of employment as alleged in subparagraph 1.a; he admitted being fired in May 2000 for downloading pornographic material on his company computer as alleged in subparagraph 1.b; he admitted he is addicted to pornography as alleged in subparagraph 1.c; he admitted videotaping a minor female babysitter in his home's bathroom as alleged in subparagraph 1.d, although he says it was an accident; he admitted the allegation in subparagraph 2.a, which merely refers to the allegations in paragraph 1; he admitted being fired in 1993 or 1994 from a job at a university due to cheating in a class as alleged in subparagraph 2.b; he partially admitted providing a false answer on his security-clearance application as alleged in subparagraph 2.c; and he did not respond to the misuse of information technology systems allegation in subparagraph 3.a.

On May 4, 2004, Department Counsel submitted his written case consisting of all relevant and material information that could be adduced at a hearing. This so-called File of Relevant Material (FORM) ⁽²⁾ was mailed to Applicant on or about May 7, 2004, and it was received by Applicant on May 17, 2004. Applicant did not submit any information within the

30-day period after receiving the FORM. The case was assigned to me on July 6, 2004. Issuing a decision in this case was delayed due to a heavy caseload.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the record, I make the following findings of fact:

Applicant is a 34-year-old man who is a native-born U.S. citizen. He is currently employed as a software engineer for a company engaged in federal contracting, and he has worked for this company since October 22, 2001. Applicant has worked in the computer field in various capacities since approximately September 1989.

From September 1993 to June 1996, Applicant was enrolled as a student at a state university. He apparently had a part-time job with the university, and he was fired from that job sometime in 1993 or 1994 after he was caught cheating on an exam. He was awarded a bachelor's of science degree in computer science in June 1996.

Starting in May 1997, Applicant was employed by a company as a lead technical support employee. Thereafter, he was promoted to quality management in June 1998, and then in February 1999 he was advanced to lead technical support engineer. He was working in this position when he was fired in May 2000 due to downloading pornographic material on his company computer. In his written statement (Item 5) provided during his background investigation, Applicant admitted being fired due to (1) misunderstanding and violating company policy on software licensing, and (2) deliberately violating company policy by downloading sexually explicit images on his company computer. He also admitted deliberately downloading such material about once a month, usually after working a very long shift when he would download a couple of dozen image files, look at them, and then delete them from the computer within 24 hours. Other than Applicant's admission to violating the company policy, there is no evidence in the FORM setting forth the terms and conditions, if any, of the company's policy.

Applicant started his current job in October 2001. On or about November 6, 2002, Applicant completed a security-clearance application (Item 4). The application requires an applicant to provide truthful, complete, and correct answers to multiple questions about an applicant's background. Question 20 concerned his employment record, and it asked Applicant if any of the following had happened to him *in the last ten years*: (1) fired from a job; (2) quite a job after being told he'd be fired; (3) left a job by mutual agreement following allegations of misconduct; (4) left a job by mutual agreement following allegations of unsatisfactory performance; or (5) left a job for other reasons under unfavorable circumstances. Applicant's answer was that he left the job in question for other reasons under unfavorable circumstances, and he added the remark it was due to a misunderstanding of company policies. He made no mention of being fired due to downloading pornographic material, and he made no mention of being fired from his university job in 1993 or 1994.

In January 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS) as part of the required background investigation. The interview produced a ten-page typed statement (Item 5), which covered multiple subjects, some of which are not at issue here. Concerning the alleged false answer to Question 20, Applicant explained his termination in May 2000 was not accurately reflected on his application due to a clerical error. Specially, when he filled out the pen-and-ink version of the application, he indicated he had been fired. When that information was transferred to the electronic version of the application, a clerk entered the wrong code. He did not catch this mistake when reviewing and signing the application (Item 5). He denied deliberately trying to conceal the fact he was fired.

Concerning his termination from the university in 1993 or 1994, Applicant admitted in his written statement that he used the school's computer to download and view pornography, but he was never caught. He admitted being fired after he was caught cheating in a course. He also admitted he was fired because of a sexual harassment complaint against him due to making inappropriate remarks to a female coworker. He explained he did not list this firing on his security-clearance application because the termination occurred more than seven years ago.

In his written statement Applicant admitted he is addicted to pornography, and has been since he was about 16 years old. He admitted not being aware of his addiction until about January 2001 when he reached that conclusion in group counseling. He described his addiction as overruling every other aspect of his life and it is a compulsion he cannot

control, but it is something he wants to overcome. He admitted he is constantly looking for new sources of pornography, and it is often the first thing he does when he arrives home after work. He admitted he is interested in all types of pornography, except child pornography and male homosexuality. He admitted to doing a "batch download" of sexually explicit image files from various newsgroups as often as once or twice a week. He admitted it is difficult for him to control himself at work, and that he has downloaded sexually explicit image files at his current employer once or twice.

Also in his written statement, he admitted videotaping a minor female in his home's bathroom, but he explained this event happened by accident. Specially, Applicant provided the following explanation about the videotaping incident:

As part of my addiction to pornography, my wife agreed to allow me to videotape her in our bathroom. I set up a video camera on a shelf in the bathroom that was set to start and stop recording at a certain time every day. One evening my wife and I went out, and I forgot to turn off the video camera. As a result, our under-age babysitter was accidentally videotaped in the bathroom. When I discovered what had happened I immediately destroyed the videotape. I have never intentionally videotaped anyone for sexual reasons with their permission.

In his response to the SOR, Applicant repeated his explanation that the videotaping of the babysitter was an accident. He also addressed the falsification allegations. First, he admitted providing a false answer to Question 20 of the security-clearance application by omitting downloading pornography as a reason for his termination, and only listing a misunderstanding of company policy as the reason for his termination. Second, he provided a copy of the relevant page from the pen-and-ink version of his security-clearance application. This document shows the scope the question was limited to seven years. It also correctly shows he listed his employment in May 2000 ended by firing. And it shows he listed the misunderstanding of company policy, and nothing about downloading pornography, as the reason for his firing.

Applicant went on in his response to acknowledge his addiction to pornography and the problems it has caused. He also indicated he has or will do the following to address his pornography addiction: (1) installing filtering software on his computer; (2) joining a sex addicts anonymous group to aid in his recovery; (3) seeking counseling from a mental-health professional; and (4) admitting his problem to himself and others.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. 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.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. ⁽³⁾ There is no presumption in favor of granting or continuing access to classified information. ⁽⁴⁾ The government has the burden of proving controverted facts. ⁽⁵⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence. ⁽⁶⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard. ⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence." ⁽⁸⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him. ⁽⁹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. ⁽¹⁰⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." ⁽¹¹⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access

to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. Guideline D-Sexual Behavior

Under this guideline, sexual behavior is 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. Private sexual behavior as well as sexual orientation or preference is not disqualifying conduct.

Here, based on the record evidence as a whole, the government established its case under Guideline D. Applicant admits to the following: (1) he is addicted to pornography; (2) he was fired from a job in May 2000 due to downloading pornography at work; (3) he downloaded pornography at his current place of employment; and (4) he videotaped a minor female babysitter, albeit accidentally, in his home. Whether Applicant's explanation for the videotaping incident is credible, is probably beside the point. The concern is Applicant was so immersed or absorbed in collecting pornographic images that he set up a system in his home that ended up including the babysitter without her consent or knowledge. This situation was an accident waiting to happen. Taken together, these four circumstances show compulsive or addictive sexual behavior that reflects grossly poor judgment and lack of discretion. Accordingly, both disqualifying conditions DC 2⁽¹²⁾ and DC 4⁽¹³⁾ apply against Applicant.

I have reviewed the four mitigating conditions under the guideline and conclude none apply. Applicant's problem appears to be firmly ingrained and long-standing. Moreover, he has continued his compulsive or addictive sexual behavior (downloading pornography) at his current place of employment, and this shows continuing poor judgment and lack of discretion. Applicant is credited for admitting he has a problem and taking some initial steps to address it. Given the totality of circumstances, however, Applicant has a long row to hoe before he can demonstrate that he has truly reformed and changed his ways. Accordingly, Guideline D is decided against Applicant.

2. Guideline E-Personal Conduct

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully. Omission of a past arrest or past drug use, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the arrest had been expunged from the record and did not need to be reported.

Here, based on the record evidence as a whole, the government established its case under Guideline E. In response to a question about his employment record, Applicant failed to reveal that downloading pornography was a primary reason he was fired from a job in May 2000. Given these circumstances, DC 2⁽¹⁴⁾ applies against Applicant. He did not, however, deliberately omit that he was fired from his university job in 1993 or 1994. The record evidence shows the question he answered in the pen-and-ink version of the application had a seven-year-scope, not a ten-year-scope, which makes the relevant time line November 2001 to November 1994. As the record evidence only shows he was fired from his university job sometime in 1994 or 1993, it is impossible to reach any firm conclusion on this point. Applicant's explanation is accepted, and this part of subparagraph 2.c is decided for Applicant. In addition to the falsification, a security concern is also raised by Applicant's two job terminations. The first in 1993 or 1994 was due to cheating in a college class. The second in May 2000 was due to downloading pornography at work in violation of company policy. Taken together, Applicant's two job terminations are reliable, unfavorable information from an employer⁽¹⁵⁾ that is indicative of poor judgment, unreliability, and untrustworthiness.

I have reviewed the relevant mitigating conditions under the guideline and conclude none apply. Accordingly, Guideline E is decided against Applicant.

3. Guideline M-Misuse of Information Technology Systems

Misuse of information technology systems under Guideline M is a security concern because it raises questions or doubts about a person's trustworthiness, willingness, and ability to properly protect classified systems, networks, and information. While not always illegal, misuse of information technology systems is often unethical and reflects poor judgment or lack of care in following rules and regulations. Under Guideline M, the term "information technology system" includes all related equipment used for communication, transmission, processing, manipulation, and storage of classified or sensitive information.

Here, based on the record as a whole, the government has not established its case, as none of the four disqualifying conditions of Guideline M apply. It is clear Applicant violated company policy by downloading pornography resulting in his firing in May 2000. But the record evidence does not prove he did so by using an "information technology system," which is a necessary element of each of the four disqualifying conditions. In other words, there is no record evidence establishing he downloaded pornography on a computer that was part of a system used for classified or sensitive information. Given this failure of proof, Guideline M is decided for Applicant.

To conclude, Applicant has failed to meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I have considered the record evidence as a whole, the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline D: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

SOR ¶ 2-Guideline E: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

SOR ¶ 3-Guideline M: For the Applicant

Subparagraph a: For 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.

Michael H. Leonard

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. The FORM contains several documents identified as Items 1 - 8 for consideration.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
11. *Egan*, 484 U.S. at 528, 531.
12. E2.A4.1.2.2. 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 behavior.
13. E2.A4.1.2.4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.
14. E2.A5.1.2.2. The deliberate omission, concealment, of 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.
15. E2.A5.1.2.1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances.