

KEYWORD: Information Technology; Personal Conduct

DIGEST: Applicant mitigated one allegation of misuse of information technology concerning use of his defense contractor employer's computer to access sexually explicit materials on the internet in 2003. The offense resulted in his discharge after 13 years of employment. He is now employed by another defense contractor. He was under pressure caused by raising two children with a mentally ill wife from whom he divorced in 2005. Psychiatric testimony supported his defense and concluded that there was no evidence the conduct would be repeated and that he suffered from no psychiatric disability. Clearance is granted.

CASENO: 04-03412.h1

DATE: 03/16/2006

DATE: March 16, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03412

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Vincent P. DeAndrea, Jr., Esq.

SYNOPSIS

Applicant mitigated one allegation of misuse of information technology concerning use of his defense contractor employer's computer to access sexually explicit materials on the internet in 2003. The offense resulted in his discharge after 13 years of employment. He is now employed by another defense contractor. He was under pressure caused by raising two children with a mentally ill wife from whom he divorced in 2005. Psychiatric testimony supported his defense and concluded that there was no evidence the conduct would be repeated and that he suffered from no psychiatric disability. Clearance is granted.

STATEMENT OF CASE

On May 9, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, 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. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On May 26, 2005, Applicant responded to the SOR allegations, and requested a hearing. The matter was assigned to me on August 1, 2005. A notice of hearing was issued on September 27, 2005, and a hearing was held on November 18, 2005. Four government exhibits and five applicant exhibits were admitted into evidence. The Applicant and his doctor testified. The transcript was received on December 5, 2005.

FINDINGS OF FACT

Applicant denied all of the specific SOR allegations. After a complete review of the record, I make the following additional findings of fact:

Applicant is a 49-year-old engineer who has worked for a defense contractor since 2003. Before his present employment he worked for two other defense contractors for periods of ten and 13 years respectively until he was terminated from his last employment for misuse of the company computer to access sexually explicit adult internet sites in violation of a company policy (Exh. 4). He held a security clearance the entire time of the earlier employments without any incidents. He held a clearance initially with his prior employer but, since he was working on unclassified matters, it had lapsed at the time of the incidents for which he was discharged.

Applicant's misuse of his company computer began in 2002 and increased to a point in January 2003, when he used it an hour or more a day to look at the internet sites. Occasionally, other members of the staff including his supervisor would watch with him leading him to think, erroneously, that the practice was not viewed very seriously by the company. The supervisor counseled him to be careful recognizing that it was against company policy. In March 2003, Applicant was visited by a staff member from human resources who advised him that he had been "watched" in some fashion and that a report would be made about his conduct. Nearly a month later he was called to the human resources office and terminated immediately and escorted from the facility. In addition to the allegation relating to misuse of the computer he was also told that there was an allegation of sexual harassment but that was not explained or elaborated on by the government. No documentation concerning the discharge and the reasons for it was offered in evidence.

Applicant was unemployed during the summer of 2003 until his present employer made an offer and he accepted. He was advised that he would need a security clearance and an application for a security clearance (SF 86) was filed. He advised his new employer of the discharge and the reasons for it. He acknowledged the discharge in response to Question 31. He now is working on unclassified material.

Applicant's 20-year marriage was difficult because his wife suffered from a variety of mental problems including depression and bi-polar disorder aggravated by drug dependency. This was particularly severe during the period 2000-2004. She was hospitalized in several facilities for extended periods of time which placed considerable strains on the family. It was during one of these periods that Applicant began to access the internet sites in an effort to take his mind off of his problems and help satisfy the physical isolation and lack of intimacy at home as a result of his wife's illness. He did not engage in accessing the sites at home around his family. When he was discharged by his former employer he

advised his family of the reason and discussed it with them. He did not seek counseling at that point but ceased accessing the sites.

Applicant filed for divorce in April 2004, and his wife moved across the country to live with her parents. The divorce became final in August 2005. He has two children, a son from his wife's first marriage who is adopted and currently serving the Air Force, and a daughter who is 18 and lives with Applicant while attending college. He has one brother with whom he shares a close relationship.

A medical doctor specializing in neurology and psychiatry with 26 years of practice testified for Applicant and submitted a report of his evaluation (Exh. C). He met with Applicant for three hours on one day after the SOR was issued. He also conferred with him several times by telephone. The doctor also discussed Applicant with his daughter confirming some of the information regarding Applicant's wife and the difficulties her illness had caused Applicant and the children. He also discussed Applicant's medical history with his internist from whom he learned of his hypertension problems.

The four page medical report of the psychiatrist dated November 2, 2005, concluded, after detailing several tests and evaluations given Applicant, that he did not need pharmacological or psychiatric treatment and that there was no evidence that the uncharacteristic behavior in which he engaged would be repeated. He concluded that Applicant should work to increase self-awareness and would benefit from increased contact with family and friends who are supportive of him and with whom he has developed solid supportive relationships. He also recommended a short series of non-urgent psychotherapy sessions primarily focused on self-awareness to correct any adjustment disorders which Applicant has agreed to do (TR. 112).

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position that will give that person access to such information." *Id.* at 527.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (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 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. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national

interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information *See Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating it is clearly consistent with the national interest to grant or continue a security clearance. "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b).

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to all allegations set forth in the SOR:

The government has cited Guideline M (Misuse of Information Technology Systems) regarding noncompliance with rules and regulations concerning use of an information technology system.(E2.A13.1.1.) Applicant has admitted his misuse of the computer by accessing the internet sites. Mitigating conditions that might be applicable are that the misuse was not recent (E2.A13.1.3.1),was an isolated event (E2.A13.1.3.4.), or the misuse was followed by a prompt, good faith effort to correct the situation. (E2.A13.1.3.5.) The misuse occurred over an extended period of time so could not be considered an isolated event. The misuse ended with his discharge by his employer so it was not voluntary. Evidence at the hearing and the testimony of the psychiatrist establish that it has not resumed and is not likely to do so. The misuse was three years ago. I therefore conclude that it was not recent and find in his favor as he has taken significant steps to correct the situation.

Applicant has had a successful career in the defense industry and lost his position because of his misconduct. He has been candid with his family and his new employer who is apparently willing to give him another chance to resume his career. In his testimony he was candid and forthright. His divorce has changed the circumstances of his life and the pressures he was under because of her long illnesses has been lessened.

Under Guideline E (Personal Conduct) of the Directive, questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate the person may not properly safeguard classified information. (E2.A5.1.1.) The Government has established that Applicant has been involved in a pattern of rule violations (E2.A5.1.2.5.). The allegation is mitigated as the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation or duress. I find that the conduct has been mitigated by the actions of the Applicant to candidly admit his actions to his family and his employer. He has changed his habits and, as shown by his medical testimony, it is unlikely to recur thanks to his changed attitude and efforts to adhere to new behavioral patterns.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information.

The "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Applicant is a talented person who has held responsible positions with several defense contractors holding a security clearance much of the time. He has been responsible for his two children and was the essential parenting figure for them because of his wife's illness. The medical analysis offered at the hearing supports the view that the behavior that led to the discharge was an aberration and unlikely to recur.

After considering all the evidence in its totality, and as an integrated whole to focus on the whole person of Applicant, I conclude Applicant's record of conduct justifies a finding that it is clearly consistent with the national interest to grant a security clearance to him.

FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline M: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or renew a security clearance for Applicant. Clearance is granted.

Charles D. Ablard

Administrative Judge