

KEYWORD: Personal Conduct

DIGEST: The Applicant's improper use of his company computer to access pornography sites on the internet in 1999, in violation of his company policy resulting in his termination, and his attempt to intentionally conceal this information on his security clearance application in 2003 has not been mitigated. Clearance is denied.

CASENO: 04-05414.h1

DATE: 07/26/2005

DATE: July 26, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-05414

**DECISION OF ADMINISTRATIVE JUDGE**

**DARLENE LOKEY ANDERSON**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry , Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

The Applicant's improper use of his company computer to access pornographic sites on the internet in 1999, in violation of company policy resulting in his employment termination, and his attempt to intentionally conceal this information on his security clearance application in 2003, has not been mitigated. Clearance is denied.

### **STATEMENT OF THE CASE**

On January 28, 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 February 21, 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 April 11, 2005, consisting of six Government Exhibits, referred to as Government Exhibits 1 through 6. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on April 25, 2005, and he submitted a response dated May 16, 2005.

The case was assigned to the undersigned for resolution on July 7, 2005.

### **FINDINGS OF FACT**

The following Findings of Fact are based on Applicant's Answer to the SOR, and the documents. The Applicant is 51 years of age, and is employed by a defense contractor. He seeks a security clearance in connection with his employment in the defense industry.

Paragraph 1 (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.

While employed for a defense contractor, on February 11, 1999, the Applicant accessed 66 pornographic sites on the internet from his company computer. He spent a total of four and a half hours that day engaged in this conduct. On February 12, 1999, he accessed 75 pornographic sites on the internet from his company computer. This time he spent about one hour and ten minutes accessing these sites. The Applicant explained that he became aware of the growing problem with young people accessing inappropriate sites (pornography) on the internet. As a parent with two teenagers the Applicant explained that he was concerned about the ease at which his children could access pornography on the internet. He decided to see for himself what he could randomly find. (*See* Government Exhibits 3 and 6). The Applicant further explained that he did not download or print any material and had no idea how much actual time he had spent on the company computer. The Applicant did not have a computer at home so he used the one he had at work. The Applicant was subsequently terminated for violation of company policy. (*See* Government Exhibit 4).

On January 6, 2003, the Applicant completed a security clearance application. In response to question 20, concerning his employment record, he was asked if in the last ten years he was ever fired from job, etc. The Applicant answered, "YES", and indicated that he was terminated from his employment in March 1999, for misuse of office equipment by accessing the internet on the company computer to obtain driving directions to airports, hotels and subcontractors locations. (*See* Government Exhibit 5). This was not the truth. The Applicant was actually terminated by his employer in March 1999 for using his company computer during business hours to access pornographic sites on the internet.

In response to this same question on the same application, the Applicant also listed that he was terminated from another employer in 2000, a year later, for misuse of office equipment, "incorrectly and wrongly". (*See* Government Exhibit 5). The Applicant did not elaborate further as to what he specifically did to cause this termination.

In his response to the FORM, the Applicant states that he regrets his actions in the past that led to his termination in 1999, and that he has paid a huge price for his mistake. He has been working his way back into his career to show that he is a trustworthy individual and employee.

## 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:

### Personal Conduct

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

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

2. The deliberate omission, concealment, or 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;

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 page 2-1, "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 an acceptable security risk. 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. All 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 E (Personal Conduct) which 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.

An individual who demonstrates a disregard for security policies and procedure, or who engages in a pattern of rule violations, may be prone to provide information or make decisions that are harmful to the interests of the United States. 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 of record in light of the appropriate legal standards and factors, and having assessed the Applicant's credibility, this Administrative Judge concludes that the Government has established its case as to all allegations in the SOR, and that Applicant's misuse of information technology systems and his personal conduct has a

direct and negative impact on his suitability for access to classified information.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

The Applicant was terminated in 1999 for violating his company's policy prohibiting the improper use of his company computer to access pornographic sites on the internet. The Applicant acted deliberately and with reckless disregard of his company's policies. Following that termination, a year later, in 2000, the Applicant was terminated again by another one of his employers. There is no evidence in the record to explain what specifically brought on this second termination. However, there is evidence that he was terminated for violating company policy. Although both employment terminations occurred five years ago, it was only two years ago, in 2003, that he filled out the security clearance application for his present employment and intentionally failed to disclose the truth in response the question 20 concerning the reasons for his termination in 1999. Therefore, I consider this behavior recent. I cannot find that the Applicant has matured, rehabilitated himself or changed his behavior. This behavior shows extremely poor judgment.

Under Personal Conduct, Disqualifying Conditions (2) *The deliberate omission, concealment, or 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, (4) Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure and (5) A pattern of dishonesty or rule violations; to include violation of any written or recorded agreement made between the individual and the agency* apply. None of the mitigating conditions apply.

This Applicant has not demonstrated that he is trustworthy, and does not meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guideline E (Personal Conduct).

Furthermore, the Applicant has not provided this Administrative Judge with sufficient evidence in mitigation that would negate the negative impact his poor judgment has had on his security worthiness. At this time, I cannot find that it is clearly consistent with the national interests to grant the Applicant a security clearance.

Considering all the evidence, the Applicant has not rebutted the Government's case regarding his personal conduct. The Applicant has not met the mitigating conditions of Guideline E of Section F.3. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Guideline 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.

Subparas. 1.a.: Against the Applicant

1.b.: Against the Applicant

## **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.

Darlene Lokey Anderson

Administrative Judge