

DATE: June 20, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-10533

DECISION OF ADMINISTRATIVE JUDGE

JOSEPH TESTAN

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

Kenneth M. Roberts, Esq.

SYNOPSIS

Applicant intentionally provided false, material information to the Government on a Security Clearance Application (SCA). Clearance is denied.

STATEMENT OF THE CASE

On August 4, 2005, 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 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 and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on August 31, 2005. The case was assigned to the undersigned on November 28, 2005. Notices of Hearing were issued on January 25 and May 2, 2006, and the hearing was held on May 18, 2006. The transcript was received on June 1, 2006.

RULINGS ON PROCEDURE

At the hearing, the SOR was amended in two ways. First, the language in Paragraph 1.a. was changed. As amended, Paragraph 1.a. is as follows:

a. In approximately 2003, you violated the ----- General Policies and Procedures with the unauthorized personal use of company equipment, while employed by ----- . As a result of this violation, you took early retirement in lieu of possible termination.

Second, Paragraph 2.c. was added to the SOR. This new allegation incorporates Paragraph 1.a. by reference.

FINDINGS OF FACT

Applicant is a 58 year old employee of a defense contractor. He has worked in the defense industry, and has held a security clearance, since the 1960s.

Applicant began working for ----- (hereinafter Employer 1) in the 1970s. He worked for Employer 1 in ----- (hereinafter State A) from the 1970s through most of 2002. In late 2002, Employer 1 transferred him to ----- (hereinafter State B). In January 2003, shortly after the transfer, applicant found himself alone in his apartment during a snow storm. While cooped up in his apartment, he used his employer's laptop computer to access adult web sites and download adult pictures, including "some pornographic images" (Exhibit A). Because he used his own internet service provider to access the internet, and downloaded the images onto his own personal external hard drive, applicant thought he "was in compliance with all known company policies at the time," ⁽¹⁾ or at most, was committing a minor infraction which would have resulted in a reprimand. ⁽²⁾ As he soon found out, Employer 1 considered the matter very serious.

Shortly after applicant's activity was discovered, he was contacted by a Human Resources (HR) representative and told to report to the company. When he arrived at the company, he was taken by the HR representative to a conference room where he was met by two investigators from Employer 1's security department. After he answered their questions about the personal use of the company laptop, the HR representative told him the investigation would continue, and it might result in him being fired. She then suggested to applicant that he may want to consider retiring, in which case there would be no record of the investigation (TR at 56-57). Applicant decided on the spot to retire.

Although applicant's testimony that he does not recall seeing the policies and procedures proscribing the conduct in question (Exhibits 3 and 4) before the January 2003 incident was credible and worthy of belief, the fact remains his conduct violated Employer 1's Policies and Procedures.

Applicant returned to State A and was hired by Employer 2. In June 2003, he completed and executed an SCA (Exhibit 1). He provided false, material information when he responded "no" to Question 20, which appeared on the SCA as follows:

20. Your Employment Record

Has any of the following happened to you in the past 7 years?

- Fired from a job
- Quit a job after being told you'd be fired
- Left a job by mutual agreement following allegations of misconduct
- Left a job by mutual agreement following allegations of unsatisfactory performance
- Left a job for other reason under unfavorable circumstances

Applicant clearly left his job with Employer 1 "by mutual agreement following allegations of misconduct." Applicant offered a lot of testimony regarding his "no" response to this question. In essence, according to applicant, he answered "no" to this question, after thinking about it for about a week, for two reasons: First, he was told by Employer 1's HR representative that there would be no record of what transpired in State B. Second, he did not want Employer 2's security department to see his response, which in applicant's mind might have jeopardized his employment with Employer 2. At the time he answered the question, he thought he was dealing with a "gray" area. He now concedes his answer was "evasive" (TR at 116).

The Government alleges that during an interview with a DoD investigator on September 1, 2003, applicant "failed to disclose material facts in that [he] stated that [he] retired from [Employer 1]; whereas in truth, [he] deliberately failed to disclose [his] retirement was a result of a violation of company policy and that [he was] forced into early retirement in lieu of termination from [Employer 1] . . ." The only evidence offered by the Government to prove this allegation was applicant's testimony. I have considered applicant's testimony on this point, and I am unable to conclude from it exactly what occurred during this interview, and what, if anything, gave rise to

applicant's alleged duty to disclose the circumstances surrounding his retirement. Accordingly, this allegation is found for applicant.

The testimony of applicant's brother, and letters from current and former coworkers, establish that applicant is considered reliable and trustworthy by these individuals.

CONCLUSIONS

With respect to Guideline M, the evidence establishes that in January 2003, applicant used his company issued laptop for personal reasons; namely to access and download sexually explicit materials, in violation of Employer 1's Policies and Procedures. This fact requires application of Disqualifying Condition E2.A13.1.2.3 (*removal (or use) of hardware, software, or media from any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines or regulations*).

In mitigation, this was a relatively minor act of misconduct that occurred over three years ago. These facts require application of Mitigating Condition E2.A13.1.3.1 (*the misuse was not recent or significant*). In addition, this was an isolated incident of misconduct that occurred during an otherwise incident free thirty plus year career in the defense industry (TR at 64-65). This fact requires application of Mitigating Condition E2.A13.1.3.4 (*the misuse was an isolated event*). Lastly, by using his own internet access provider and his own external hard drive, applicant truly believed that he was taking affirmative steps to avoid any serious impropriety (TR at 61-62). He believed, based on his experience working for Employer 1 in State A, that he was at most committing a minor infraction by using the laptop for personal reasons, an infraction that had been overlooked while he was working for Employer 1 in State A (TR at 54-56). Based on the evidence in the record, I conclude that applicant can now be relied upon to follow the rules and regulations relating to information technology systems. Guideline M is found for applicant.

With respect to Guideline E, the evidence establishes that applicant intentionally provided false information to the Government when he responded "no" to Question 20 on the SCA. When he answered the question, applicant knew that he had retired from Employer 1 "by mutual agreement following allegations of misconduct." The fact he thought about how to respond to this question for about a week before deciding on "no" leaves little doubt that his falsification was intentional. This conduct is extremely troubling. The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts on a security clearance application, he has demonstrated a willingness to place his self-interest over his responsibility to be frank and candid with the Government, and has made it extremely difficult to conclude that he possesses the good judgment, reliability and trustworthiness required of clearance holders. Because I cannot conclude that applicant will be truthful with the Government in the future if faced with a similar situation, Guideline E is found against him.

Disqualifying Condition E2.A5.1.2.2 (*the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . .*) is applicable. Applicant does not qualify for any formal mitigating factors. ⁽³⁾

FORMAL FINDINGS

GUIDELINE M: FOR THE APPLICANT

GUIDELINE E: AGAINST 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.

Joseph Testan

Administrative Judge

1. Exhibit A, page 4.
2. SOR Response, page 2.
3. Although his falsification was not recent and was an isolated incident, he does not qualify for Mitigating Condition E2.A5.1.3.2 because the evidence does not establish that he subsequently provided the correct information *voluntarily*.