

DATE: December 29, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 05-04317

**DECISION OF ADMINISTRATIVE JUDGE**

**JOHN GRATTAN METZ, JR**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez, Jr., Esquire, Department Counsel

Eric N. Borgstrom, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's demonstrated sexual behavior and poor judgement disqualify him for a security clearance. Clearance denied.

**STATEMENT OF THE CASE**

Applicant challenges the 4 November 2005 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of personal conduct, sexual behavior, and misuse of information technology systems. <sup>(1)</sup> Applicant answered the SOR 23 December 2005 and requested a hearing. DOHA assigned the case to me 8 May 2006, and I convened a hearing 14 September 2006. DOHA received the transcript on 25 September 2006.

**FINDINGS OF FACT**

Applicant admitted the allegations of the SOR, except for SOR 1.d., which he denied because he claims his wife is now aware of the misconduct alleged in the SOR. He is a 47-year-old senior systems administrator employed by a defense contractor. He seeks to retain the clearances he has held in the military and industry since approximately 1978.

In September 1991, Applicant was arrested for trespassing and invasion of privacy, when he was caught looking at a female acquaintance through an open window at her house (G.E. 2, 3). The charges were eventually placed on the stet docket on condition that he complete a psychiatric evaluation at the county health department (G.E. 4). Although the evaluation did not find that Applicant suffered from any psychiatric condition, Applicant disclosed that he had hoped to view the woman wearing few or no clothes (G.E. 5).

In June 2002, Applicant was fired from his job with a government contractor for viewing pornographic material on his government computer, in violation of the company's computer use policy (G.E. 6). <sup>(2)</sup> At the time of his termination,

Applicant had been viewing pornographic websites every few days until he was caught.

In November 2003, Applicant was fired from his job with a different employer for violating company computer use policy prohibiting access to pornographic material (G.E. 7, 8, 9). Applicant asserts that he accessed the site inadvertently, but acknowledges that he deleted the offending email from his computer before he could assert his innocent access (Tr. 40-50).<sup>(3)</sup>

When Applicant was interviewed by a government investigator in October 2004 (G.E. 7), Applicant disclosed that his wife was not aware of the 1991 arrest, and was not aware of the reasons for his being fired from his jobs in June 2002 and November 2003. However, he claimed that he would rather have her know about these incidents than be subject to potential coercion over them. Nevertheless, while he claims that his wife is now aware of these incidents, he did not reveal them to her until he received the SOR in November 2005 (Tr. 62).

Applicant's response to the allegations in this case is that he has held a clearance for 28 years without compromising classified information (Tr. 29), and believes that disclosing classified information is wrong (Tr. 63).

### **POLICIES AND BURDEN OF PROOF**

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guidelines are Guideline E (Personal Conduct), Guideline D (Sexual Behavior), and Guideline (Misuse of Information Technology Systems).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.<sup>(4)</sup>

### **CONCLUSIONS**

The government established a case for disqualification under Guideline E, and Applicant did not mitigate the security concerns. His "peeping tom" arrest in 1991 and his two terminations in 18 months for accessing pornographic websites on work computers demonstrate extraordinarily poor judgement inconsistent with access to classified information.<sup>(5)</sup> The fact that his wife may not know about these incidents<sup>(6)</sup> leaves him potentially subject to coercion.<sup>(7)</sup> I resolve Guideline E against Applicant.

The government established a case for disqualification under Guideline D, by demonstrating that Applicant was arrested on "peeping tom" charges in September 1991,<sup>(8)</sup> and that his wife is unaware of this arrest, as well as the true circumstances of his being fired in June 2002 and November 2003.<sup>(9)</sup> These three incidents occurred at work and other public places.<sup>(10)</sup>

Applicant failed to mitigate the security concerns raised by his sexual behavior. The misconduct is recent. <sup>(11)</sup> Applicant was not an adolescent at the time of the misconduct. <sup>(12)</sup> Applicant has not established that his wife is aware of his misconduct, or that he cannot be influenced by his past sexual behavior. <sup>(13)</sup> I resolve Guideline D against Applicant.

The government failed to establish a case for disqualification under Guideline M. First, the government's evidence does not establish that the company computers (or the government computer in SOR 1.b.) were "information technology systems" as contemplated by the Directive, i.e. equipment dealing with classified or sensitive information. Second, although Applicant's conduct violated company policy for internet use, that fact alone does not invoke any of the disqualifying conditions under the guideline. I conclude Guideline M for Applicant.

## **FORMAL FINDINGS**

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

Subparagraph d: Against Applicant

Paragraph 2. Guideline D: AGAINST APPLICANT

Subparagraph a: Against Applicant

Paragraph 3. Guideline M: FOR APPLICANT

Subparagraph a: For 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 denied.

**John G. Metz, Jr.**

**Administrative Judge**

1. Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended (Directive).
2. When he was terminated, company policy provided four levels of disciplinary action, termination being the most serious short of legal actions and prosecution by civil or criminal authorities.
3. Applicant has given various explanations for how he inadvertently viewed the pornographic material. During his interview with the investigator (G.E. 7), he stated it was contained in an email he received. At hearing, he wavered whether it was an attachment to an email, or a link embedded in the email. In any event, his supervisor observed him viewing the pornographic material, and he was terminated the next day. Under company computer use policy, termination was the most serious consequence available for violations.
4. *See, Department of the Navy v. Egan*, 484 U.S. 518 (1988).
5. E2.A5.1.2.1. Reliable, unfavorable information . . .
6. Applicant previously stated that his wife was unaware of the full circumstances of his being fired and was not aware

at all of the September 1991 "peeping tom" arrest. Although he claims he has since made his wife aware of these incidents, he has provided no corroboration of that claim.

7. E2.A5.1.2.4. 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 or render the person susceptible to blackmail;
8. E2.A4.1.2.1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
9. E2.A4.1.2.3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;
10. E2.A4.1.2.4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.
11. E2.A4.1.3.2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;
12. E2.A4.1.3.1. The behavior during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature.
13. E2.A4.1.3.4. The behavior no longer serves as a basis for coercion, exploitation, or duress.