DATE: October 31, 2006

In re:

SSN: ----------

Applicant for Security Clearance

CR Case No. 06-04086

DECISION OF ADMINISTRATIVE JUDGE

CHRISTOPHER GRAHAM

APPEARANCES

FOR GOVERNMENT

Michael Lyles, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a design support engineer with a federal contractor. He used the internet to assist with a model shipbuilding project and purchase personal items. He did not visit sexually explicit sites as alleged. His use of the internet comported with company policy. He successfully mitigated the security concerns about personal conduct and information technology. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1960), as amended, DOHA issued a Statement of Reasons (SOR) on March 23, 2006, detailing the basis for its decision - security concerns raised under Guideline E (personal conduct) and Guideline M (information technology) of the Directive. Applicant answered the SOR in writing which was undated but received by DOHA on April 19, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on July 24, 2006. Notice of hearing was issued August 25, 2006. With the consent of the parties, I convened a hearing on September 21, 2006, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The government offered exhibits 1 - 3. Applicant offered exhibits A - O. The government objected to Applicant's Exhibit N, which was overruled.[(1)] All other exhibits were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on September 29, 2006.

FINDINGS OF FACT

Applicant admitted SOR allegations in subparagraphs 1.a.(1). and 1.a.(3)., and denied 1.a.(2)., and 1.a.(4). Subparagraph 2.a. alleges the same conduct so the answers for subparagraphs 2.a., b., c., and d. are the same as in subparagraph 1.a. These admissions are incorporated herein. In addition, after thorough and careful review of the evidence, I make the following findings of fact.

Applicant is a 56-year-old design support engineer with a federal contractor. He is married and has one child. He has

two associates degrees in mechanical technology and art and design.[(2)]

Personal Conduct

As alleged in the SOR, Applicant was terminated by his former employer in November 2003, for (1) use of corporate assets for personal use, (2) using company emails to harass an individual, (3) excessive non-business use of internet over a two month period, and (4) accessing inappropriate, sexually focused sites on the internet.

(1) In his answer to the SOR received April 19, 2006, Applicant admitted he used corporate assets for personal use. For six years prior to his dismissal, he had been constructing a model of a World War II escort carrier, hereafter referred to as "ship."[(3)] During this six year period, Applicant used the company's internet to communicate with the National Archives in Washington, DC, and fellow modelers to ask questions about building the ship. As he progressed, more interest was generated in his project, and people would inquire if he sold, for example, 20mm or 40mm guns, and 196th or 148th scale people. On occasion, he would tell them to send him a check.[(4)] Throughout this time, his supervisor and the supervisor's supervisor knew about the model. Even the chairman of the board knew about it.[(5)] Applicant was told it was great public relations. In a newspaper article about the ship, mention was made that Applicant worked for the employer.[(6)] A state senator heard about the model and sent him a congratulatory letter.[(7)] He worked in three different departments during the six year construction period, and all the departments knew about his model building.[(8)] Applicant's friends in the company's model shop would sometimes make parts for his ship that he could not create on his milling machine at home.[(9)] The model shop supervisor gave these employees permission to assist Applicant.[(10)]

Applicant estimated he spent about 12,000 hours constructing the model.[(11)] When the ship was finished, it was put on display and donated to a museum. He made no profit on the model. The only thing of value he received was a plaque thanking him for the ship. Not until another person "pirated" his work and put it on his own website, claiming it was his work and attempting to sell it for a profit, did the ship become an issue.[(12)]

(2) On October 23, 2003, Applicant noticed a picture of his ship that another person was claiming credit for building, and offering it for sale.[(13)] Not knowing his name, he sent an email "To Whom It May Concern, please remove from your website my stuff." The reply admitted taking pictures of Applicant's ship but did not explain why he was trying to sell it. In reviewing his records, he determined he had sold this person a copy of what he used to build the ship. Applicant's reply was "Please just take it off. It's a copyrighted design. It belongs to me. You can't sell it without my permission. And I'm not granting it."[(14)] In another email, Applicant used the words: "You're misrepresenting my work as your own. This is against the law, and I will seriously look in to what I can do to legally stop you."[(15)] The individual's reply said he would remove the picture, but would forward Applicant's emails to Applicant's employer to show his use of the company's computer. Applicant gave his supervisor copies of all communications with the individual.[(16)]

(3) On November 3, 2003,[(17)] Applicant was told by his employer that he was dismissed for excessive use of the internet and visiting sexually inappropriate websites.[(18)] Applicant admitted using the internet to order parts for his ship and other personal gifts. He was not the only employee to use the company computers in this manner. The biggest usage was by employees buying and selling on eBay.[(19)] Some employees visited sexually explicit sites. In 1999, Applicant's imaging department employees were required to sign a form indicating their understanding of company computer policy.. Applicant felt it was a "sign or lose your job ultimatum."[(20)] No other department employees were required to sign such a form.[(21)] In 2002, Applicant transferred to a design department where the internet policy was wide open, there was no use of computer policy, and the employees disregarded the company's dress code, some wearing flip-flops and shorts.[(22)]

(4) Applicant has been married for 33 years. Each year on his wife's birthday, he has bought her lingerie. He did this for 22 years with the company. Applicant was embarrassed to go personally to ladies lingerie departments,[(23)] so he used the internet to shop, surfing sites such as Victoria's Secret, Satins and Lace, and the like. The past 10 years he used the

internet , and the 12 prior years he had his mother purchase the items for him.[(24)] It had never been a problem.[(25)] Applicant submitted an order over the internet on July 6, 2002, and made copies of ads containing pictures of various lingerie products.[(26)] They were similar to pictures one sees in a retail catalog such as J. C. Penney's catalog. Indeed, Applicant had purchased lingerie from a Penney's catalog.[(27)]

Misuse of Information Technology Systems

The company's computer use policy states as follows:

The company policy prohibits internet activity that would be a violation of law or lead to perceptions of sexual harassment. Examples include participating in news groups involving sexually explicit material, accessing sites that contain such material, downloading, storing, or exchanging electronic copies of such material....he company does not intend to censor or control your personal use of the internet. You are free to use your own computer, and your own account, and on your own time to access or use the internet as you see fit. However, you must comply with company policies.[(28)]

Applicant's company had a filtering system that blocked access to sexually oriented sites.[(29)] He purchased a home computer about a month before he was terminated.[(30)]

In the 22 years Applicant worked at the company, he never had a violation of proprietary information. He obtained 36 patents for the company.[(31)] In November 2003, he was called into a break room, he was advised he was being terminated, he was not allowed to speak or call an attorney, he was not allowed to return to his office, and certain of his personal files were kept by the company. He investigated legal action, but since he was an employee "at will," he was advised that under the state law he had no cause of action[(32)].Applicant has been with his current employer since May 2005.[(33)] With the company's background screens and their experience with him, the company sponsored Applicant for his security clearance.[(34)] He uses the internet appropriately.[(35)] He is a man of good character and is trustworthy.[(36)]

The person who hired Applicant stated: "I hired Applicant. Prior to that he had been a contract employee for one year. I have no regrets in hiring him. His work standards and conduct are always within company guidelines. He is a team player, takes personal pride in his work, and does everything in his power to meet his work commitments. I recommend him without reservation.[(37)]

POLICIES

"No one has a 'right' to a security clearance."[(38)] 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."[(39)] The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[(40)] Each security clearance decision "must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy."[(41)]

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."[(42)]

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive: nature and seriousness of the conduct and surrounding circumstances; frequency and recency of the conduct; age of the Applicant; motivation of the applicant, and the extent to which the conduct was negligent, wilful, voluntary, or undertaken with knowledge of the consequences involved; absence or presence of rehabilitation; and probability that the circumstances

or conduct will continue or recur in the future. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant.[(43)] It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Personal Conduct

The government failed to establish its case under guideline E (personal conduct.) Personal Conduct Disqualifying Conditions (PC DC) E2.A5.1.2.1. (*Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*) and PC DC E2.A5.1.2.5. (*A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*) do not apply. Applicant admitted using the company's internet and a certain amount of materials used in the construction of the ship. He also used the internet for other personal purchases. However, I find his use of the computer to be in compliance with company policies. I conclude Guideline E for Applicant. *See discussion under information technology, below*.

Misuse of Information Technology Systems

The government did not establish its case under guideline M (misuse of information technology systems.) Information Technology Disqualifying Condition (IT DC) 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*) is not applicable. Knowledge of Applicant's ship building project was well-known throughout the company, even the chairman of the board knew about it. If Applicant's use of the computer to aid his construction project wasn't explicitly encouraged by his employer, it was certainly condoned. Most compelling is the computer policy that Applicant signed which states:

The company policy prohibits internet activity that would be a violation of law or lead to perceptions of sexual harassment. Examples include participating in news groups involving sexually explicit material, accessing sites that contain such material, downloading, storing, or exchanging electronic copies of such material....**The company does not intend to censor or control your personal use of the internet. You are free to use your own computer, and your own account, and on your own time to access or use the internet as you see fit**. However, you must comply with company policies. [Emphasis added]

A close reading of this policy indicates that the company is expressly concerned with employees visiting sexually explicit sites or other obscene sites that might be illegal. It doesn't provide other exclusionary sites. By applying the doctrine of *inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another),[(44)] and because the company talked about sexually explicit sites in it's computer policy, an inference must be drawn that those matters which are excluded from mention in the policy were intended to be excluded. This includes personal use of the computer. The policy clearly states that **employees may use the internet for their personal use, as they may determine, as long as they don't visit prohibited sites.** [Emphasis added]

Next consideration is whether the lingerie websites are sexually explicit sites or obscene, and thus in violation of company policy. Applicant's Exhibit I contains several pages of women's lingerie that Applicant downloaded in purchasing a gift for his wife. These pictures are very similar to ads seen in the print media, on television or cable, and that are found in catalogs such as Penny's and Sears. To be obscene, the pictures must be scrutinized using the *Miller v. California* test:

"The basic guidelines for the trier of fact must be:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; and

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the

applicable state law; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[(45)]

These pictures of women, modeling lingerie, are not obscene because they do not meet the test established in *Miller, supra*. More specifically, they do not violate "contemporary community standards."

The email exchanges with the individual attempting to "pirate" Applicant's ship designs are not harassment. Applicant stated in his email that he would explore what legal avenues might be open to him to protect his own work. Harassment is defined as to "irritate persistently, to exhaust, or wear out."[(46)] Five emails exchanged over a two-day period is not harassment. The individual removed the picture of Applicant's ship because he knew he was in the wrong. His complaint about Applicant does not come with "clean hands."[(47)] Therefore, Applicant's use of the internet falls within the scope of use permitted b the company's own policy. I conclude Guideline M for Applicant.

Whole Person Analysis

In addition to the disqualifying and mitigating conditions, I also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I considered his age (56), his education and 22 years of experience with his former employer, his handling of his company's proprietary material, his motivation in using the internet, and the statements from his current employer. Applicant presents a stable person, married to the same woman for 33 years, a creative person who obtained 36 patents for his employer, and who is a dedicated craftsman building model ships. The picture of his former company runs from a tightly controlled workplace to a department where some creative employees might be deemed to be "off the wall." The company had every right to be concerned about employees surfing obscene websites. Applicant did not do this. The computer policy specifically allows employees to use the internet for personal purposes as long as they avoid prohibited sites. Lingerie sites similar to Penney's or Sears catalogs are not obscene. Applicant's using the internet to purchase gifts for his wife was understandable in wanting to avoid embarrassment to himself and to retail clerks working counters in lingerie boutiques.

Applicant's email exchanges with the person attempting to use Applicant's creations for his own pecuniary benefit would upset any normal person. Applicant's email asked him to remove the picture from the internet and that he would attempt to get legal advice as to what legal options he had to protect his ship's plans. The person removed the picture. For him to then complain that he was harassed when he was attempting to claim credit for something that belonged to Applicant raises the issue of the "clean hands" doctrine. I do not find the governments arguments to be persuasive.

Applicant's company's computer internet policy allowed employees to use the internet for their personal use as long as they did not visit prohibited sites. Applicant complied with this policy. Applicant summed up the situation best when he said:

There was never any question to my trustworthiness until the emails came into question. And I don't know how to put it except I think I was used. I gave them the opportunity to get rid of me. I was high priced talent, and I was a pain in the ass because I refused to back down when I knew I was right. And I gave them the opportunity and means to eliminate a headache. And they took it.[(48)]

I found Applicant to be sincere, and his testimony was both believable and credible. The totality of the record raises no reasonable or persistent doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. I conclude it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

FORMAL FINDINGS

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

Paragraph 1. Guideline E: FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2. Guideline M: FOR APPLICANT

Subparagraph 2.a: For Applicant

DECISION

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

Christopher Graham

Administrative Judge

1. Tr. at 36.

2. Tr. at 14-16.

3. Applicant's Exhibit A (Picture of Model Ship, undated) at 1.

4. Tr. at 17-18.

5. *Id.* at 26.

6. *Id.* at 20.

7. Applicant's Exhibit D (Letter from State Senator, dated July 15, 2001) at 1.

8. Tr. at 19-20.

9. *Id.* at 47.

10. *Id.* at 48.

11. *Id.* at 66.

12. *Id.* at 20.

13. *Id.* at 21; Applicant's Exhibit H (E-mails, dated October 23-24, 2003) at 1-5.

14. *Id.*

15. *Id.* at 53-54.

16. *Id.* at 23; Applicant's Exhibit H (Copies of various emails, dated October 23-24, 2003, at 1-5.

17. Government Exhibit 2 (Company Momorandum, dated November 3, 2003) at 1-2.

18. *Id.* at 20, 23-24.

19. *Id.* at 43.

20. *Id.* at 43-44.

21. *Id.* at 64-66.

22. *Id.* at 68.

23. *Id.* at 42-43.

24. *Id.* at 41.

25. *Id.* at 23-24..

26. Applicant's Exhibit I (Order Confirmation with attachments, dated July 6, 2002) at 1-6.

27. Tr. at 70.

28. *Id.* at 40.

29. *Id.* at 24.

30. *Id.* at 53.

31. *Id.* at 32.

32. *Id.* at 26-27.

33. Applicant's Exhibit J (Letter from Head of Security, dated September 18, 2006) at 1.

34. *Id.*

35. Applicant's Exhibit K (Letter from Applicant's Supervisor, dated September 18, 2006) at 1.

36. Applicant's Exhibit M (Letter from Program Manager, dated September 18, 2006) at 1.

37. Applicant's Exhibit L (Letter from First Supervisor, dated September 18, 2006) at 1.

38. [0] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

39. [0]*Id.* at 527.

40. [0]Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960).

41. [0]Directive ¶ 6.3.

42. [0] ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

43. [0]*See* Exec. Or. 10865 § 7.

44. This doctrine decrees that where law expressly describes a particular situation to which it shall apply, an irrefutable inference must be drawn that what is omitted or excluded was intended to be omitted or excluded. Black's Law Dictionary 687 (5th ed. 1979).

45. *Miller v. California*, 413 US 15, 25 (1973).

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47. Under the clean hands doctrine, a person who has acted wrongly, either morally or legally - i.e., who has 'unclean hands' - will not be helped by the law when complaining about the actions of someone else.

48. Tr. at 69.