



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
-----)	ISCR Case No. 07-13847
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Department Counsel
For Applicant: B. Daniel Lynch, Attorney At Law

February 19, 2009

Decision

LOKEY-ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Security Clearance Application (SF-86) on June 28, 2006 and April 17, 2008. On August 13, 2008, 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 September 2, 2008, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on October 6, 2008. A notice of hearing was issued on October 17, 2008, scheduling the hearing for November 5, 2008. At the hearing the Government presented three exhibits referred to as Government Exhibits 1 through 3. The Applicant presented seven exhibits, referred to as Applicant's Exhibits A through G. He also

testified on his own behalf. The record remained open until close of business on November 24, 2008, to allow the Applicant to submit additional documentation. He submitted one Post-Hearing Exhibit consisting of nine pages, referred to as Applicant's Post-Hearing Exhibit A, that was admitted without objection. The official transcript (Tr.) was received on December 8, 2008

Findings of Fact

The Applicant is 42 years old and has a Ph.D. in Electric Engineering. He is employed by a defense contractor as a Electrical Engineer, and is applying for a security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline D - Sexual Behavior). The Government alleges in this paragraph that the Applicant is ineligible for clearance because his sexual behavior involved a criminal offense, is indicative of a personality or emotional disorder, reflects lack of judgment or discretion, or may subject the individual to undue influence or coercion, or reflects a lack of judgment or discretion.

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that raise questions about his ability to protect classified information.

Paragraph 3 (Guideline M - Use of Information Technology Systems). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has been noncompliant with rules, procedures, guidelines or regulations pertaining to information technology systems that may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

The Applicant admits to each of the allegations set forth in the SOR under the guidelines set forth above. The Applicant has worked in the defense industry for over eighteen years. He held a secret level security clearance and SCI access during some of that period with his previous employer.

During the Applicant's Special background investigation required during his application for SCI access, he underwent a polygraph examination that took three

separate sessions to complete, February - March 2005. In May 2005, he was ultimately denied SCI access. While working for his previous employer, he admitted to accessing, viewing and downloading pornographic material on his company computer from about 1998 or 1999, to at least 2005 during work hours. (Tr. P. 48). The Applicant explained that on some occasions he simply viewed the pornographic materials in his office or in his outside private cubicle. (Tr. p. 91). He would surf the internet and look at pornography. (Tr. p. 82). On at least five or six separate occasions, he would download pornographic video clips on the company computer. On other occasions, when he was in his office and viewing pornographic material, he would shut his door and masturbate. The Applicant explained that he never downloaded "kiddy porn". He only downloaded "Dominatrix" or "Mistresses" or "S&M" and he enjoyed the images. (Tr. pp. 89-90). Although he shared the office with another person, he only masturbated when he knew the other person was not around. (Tr. p. 51). The Applicant testified that he was aware that it was against company rules and regulations to use the company computer to view pornography. (Tr. p. 59). He adds however, that the company computer was unclassified. (Tr. p. 83). Also, he did not realize the seriousness of accessing these pornographic sites. He engaged in this conduct mainly at night, however there were times he did it in the day. He would listen for someone moving to make sure no one was around before engaging in such conduct.

In 1998, during weekends and/or after work hours, when the Applicant knew that they weren't around, the Applicant would telephone female employees to hear their voices on the answering machine. He would then hang up without leaving a message. On average, he called three separate women about twenty to thirty times each. (Tr. P. 98). One of the women was so annoyed by the hang-ups that she had the call traced and found out that it was the Applicant. She admonished him for the conduct and he never did it again. He states that he learned his lesson from this situation.

Again in 1998, during the weekend, the Applicant entered the offices of female office workers, who worked in other buildings, when they were not present and look at their personal belongings. The Applicant explained that he did not go into their drawers or anything like that. He had wanted to meet these women and wanted to see if there was a picture of them on their desk. He simply looked at what was sitting on their desk. (Tr. p. 60 - 61).

In 1996 or 1997 and in 2004, the Applicant accidentally collided into other cars with his car while in parking lots and failed to notify the owners of the vehicles. The Applicant testified that in 1996, while in the company parking lot, he accidentally hit a fellow coworkers car. He noticed the damage, but did not report it. He panicked and felt bad about the situation, but that was all. In 2004, he was in a supermarket parking lot when he again hit another car on accident. He thought the damage if any was minimal and did not notify the owner of the vehicle. At the time, the Applicant was upset that the owner of the vehicle had boxed him in and thought that it was probably the other person's fault. (Tr. p. 86-87).

In June 2008, the Applicant received a lay-off notice from his employer that became effective on August 21, 2008. Applicant was hired by another defense contractor on October 13, 2008. No one at his present company knows anything about his previous misconduct and he does not want them to, as it is embarrassing.

Applicant testified that he was diagnosed with Obsessive Compulsive Disorder (OCD) in August or September 1997. He initially started seeing a psychologist who referred him to a psychiatrist that he has been seeing once every three to four months since October 1998. Applicant is currently on various medications for his condition and believes that he has a chemical imbalance in his brain. He admits that his perception of reality was at times kind of disturbing. His medical records describe this as having unwanted thoughts that cause him to become anxious. His psychiatrist has not been treating him specifically for any of the conduct that is set forth in the SOR. The Applicant and his psychiatrist believe that his condition is fairly under control, as long as he is on medication. (Tr. p. 116 and Applicant's Post-Hearing Exhibit A). Applicant explained that at his new company, the parking lot is quite large and he parks in the back to avoid any problems. Also, the women are older and not attractive.

Nine letters of recommendation from professional colleagues, previous coworkers, neighbors and friends of the Applicant attest to his hardworking, self-driven and reliable nature. He is considered conscientious and honest and very knowledgeable in his field. He was known to stay late or work on weekends to complete the necessary work assignment, and was noted as one of the few engineers that followed the rule to lock his computer when he left the office to keep its monitor out of vision of passerbys. (Applicant's Exhibit G). None of the individuals who wrote letters on behalf of the Applicant have any knowledge of his misconduct of concern in this case. (Tr. pp. 149 -150).

Applicant received various awards and certificates for outstanding achievement, technical excellence, and team contribution for his superior work product on a variety of projects during his previous employment. (Applicant's Exhibits A, B, C, D, E and F).

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 guidelines. 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:

Guideline D -Sexual Behavior

12. *The Concern.* Sexual Behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

Conditions that could raise a security concern:

13.(b) a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop to that may be symptomatic of a personality disorder;

13.(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;

13.(d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

Conditions that could mitigate security concerns:

None.

Guideline E (Personal Conduct)

15. *The Concern.* Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Conditions that could raise a security concern:

16.(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (3) a pattern of dishonesty or rule violations; and (4) evidence of significant misuse of Government or other employer's time or resources;

16.(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in

activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Conditions that could mitigate security concerns:

None.

Guideline M - Use of Information Technology

39. The Concern. Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

Conditions that could raise a security concern:

40.(a) illegal or unauthorized entry into any information technology systems or component thereof;

40.(e) unauthorized use of a government or other information technology system;

40.(f) introduction, removal or duplication of hardware, firmware, software, or media to or from any information technology system without authorization, when prohibited by rules, procedures, guidelines or regulations.

Conditions that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, 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 eligible for a security clearance. 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. 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 D (Sexual Behavior) Guideline E (Personal Conduct and Guideline M (Use of Information Technology) that 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. 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.

CONCLUSION

Having considered the evidence in light of the appropriate legal standards and factors, and having assessed the Applicant's credibility based on the record, this Administrative Judge concludes that the Government has established its case as to all allegations in the SOR, and that Applicant's questionable sexual behavior, personal conduct and use of information technology has a direct and negative impact on his suitability for access to classified information.

The Applicant has engaged in inappropriate sexual behavior that involved him accessing, viewing and downloading pornographic material on his employer's computer from 1998 or 1999 to at least 2005. At times, he masturbated while looking at the pornography. This sexual misconduct was offensive and against company rules and regulations. In 1998, he called at least three female employees at least twenty to thirty times each, to hear their voices on the message before hanging up. He also entered their offices to see their pictures on their desks. He believes that he is now in control of his behavior. However, he does not want anyone to know about his sexual perversions of the past and has kept it a secret from his current employer. Considering this evidence in totality, this demonstrates a pattern of inappropriate sexual behavior and high risk conduct that was careless, lacked discretion and good judgment and could subject him to pressure, coercion and/or blackmail, which in turn could subject the Government to a security risk.

The Applicant's high risk behavior places him in a vulnerable position to be susceptible to pressure, coercion and/or blackmail. He engaged in these activities as recently as 2005, four years ago. This demonstrates questionable judgment and lack of discretion. The Applicant states that he has been diagnosed with OCD and is on medication that helps to prevent these impulses. However, presently, the risk is great that he may fall prey to exploitation, coercion or duress. Under Guideline D, Disqualifying Conditions 13(b), "a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop to that may be symptomatic of a personality disorder;" 13(c), "sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;" and 13(d), "sexual behavior of a public nature and/or that reflects lack of discretion or judgment," apply. None of the mitigating conditions are even remotely applicable. The Applicant has not met his burden of demonstrating that his sexual behavior does not raise a security concern, and Guideline D is found against the Applicant.

In 1996 or 1997 and in 2004, the Applicant damaged vehicles in parking lots and failed to notify the owners. This behavior is not indicative of trustworthiness and reliability. In fact it is outrageous and unacceptable. With respect to the Applicant's personal conduct, Under Guideline E, Disqualifying Conditions 16.(d) "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and

regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (3) a pattern of dishonesty or rule violations, (4) evidence of significant misuse of Government or other employer's time or resources" and, 16.(e) "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, - - - may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group" apply. None of the mitigating factors are applicable.

Under Guideline M, Disqualifying Conditions 40.(a) "illegal or unauthorized entry into any information technology systems or component thereof," 40.(e) "unauthorized use of a government or other information technology system" and 40.(f) "introduction, removal or duplication of hardware, firmware, software, or media to or from any information technology system without authorization, when prohibited by rules, procedures, guidelines or regulations" apply. None of the mitigating conditions are applicable.

I have also considered the "whole person concept" in evaluating the Applicant's eligibility for access to classified information. The Applicant is an intelligent, educated professional that knew or should have known that his perverted sexual behavior violated at least company policy and was reckless and negligent as best. Instead, he acted in a way that was immature, self-destructive and ignorant of the consequences. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole person assessment of poor judgement, untrustworthiness, unreliability, an unwillingness to comply with rules and regulations, and/or other characteristics indicating that the person may not properly safeguard classified information.

Considering all of the evidence presented, it does not come close to mitigating the negative effects of his sexual misconduct, personal conduct and misuse of information technology and the impact that it can have on his ability to safeguard classified information. On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1, 2 and 3 of the SOR.

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.

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Paragraph 2: Against the Applicant.
Subparagraph 2.a.: Against the Applicant
Subparagraph 2.b.: Against the Applicant

Paragraph 3: Against the Applicant.
Subparagraph 3.a.: Against the Applicant

DECISION

In light of the circumstances presented by the record in this case, it is not clearly consistent with the national interests to grant or continue a security clearance for the Applicant.

Darlene Lokey-Anderson
Administrative Judge