



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
-----, ----- ) ISCR Case No. 08-01670  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Jeff A. Nagel, Esquire, Department Counsel  
For Applicant: *Pro Se*

April 14, 2009

**Decision**

WHITE, David M., Administrative Judge:

Applicant misused a government computer in 1998 to view pornography while on active duty. He was fired while a probationary government employee in 2006 for alleged computer misuse that was neither serious nor the actual reason. He fully mitigated potential security concerns arising from his conduct. Based upon a thorough review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Applicant submitted his Questionnaire for Sensitive Positions (SF-86), on August 27, 2007, and resubmitted a signed copy of this Electronic Questionnaires for Investigative Processing (e-QIP) retained copy on June 10, 2008, when the original was temporarily lost. On September 24, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E, M, and D. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised

adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense (DoD) for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on October 1, 2008. DOHA received his undated written answer to the SOR on October 20, 2008. In this answer, Applicant requested that a determination be made without a hearing. On November 17, 2008, Department Counsel requested a hearing before an administrative judge, pursuant to Directive ¶ E3.1.7. DOHA assigned the case to me on November 21, 2008.

DOHA issued a notice of hearing on December 2, 2008, and I convened the hearing as scheduled on January 8, 2009. Department Counsel offered Government Exhibits (GE) 1 through 4, which were admitted without objection. Applicant testified on his own behalf. I granted Applicant's request to leave the record open until January 22, 2009, to permit Applicant to obtain and submit some documents that he did not bring to the hearing. This evidence was submitted on January 15, 2009, and admitted as AE A without objection by Department Counsel. DOHA received the transcript of the hearing (Tr.) on January 26, 2009.

### **Findings of Fact**

Applicant is a 44-year-old employee of a federal contractor, where he has worked for two years as an information technology customer service representative. He is married, and has two children, ages 20 and 16. In his response to the SOR, he admitted the truth of all the allegations except for the year he sought counseling in SOR ¶¶ 1.d and 3.b. During the hearing, Department Counsel moved to amend the SOR to correct the year alleged in these two paragraphs from "2000" to "1998." Applicant had no objection to this amendment, and the motion was granted. Applicant's admissions are incorporated into the following findings of fact.

Applicant enlisted in the Air Force in 1983, at age 18, and retired just over 20 years later as a master sergeant (E-7). He acquired a Secret clearance after his first year of service, and a Top Secret clearance about two years after that. He worked in reconnaissance imagery processing and visual information management, and maintained this clearance successfully working with classified information throughout his time in the service. He received Good Conduct Medals covering his entire period of service, as well as numerous personal and service awards to include two Meritorious Service Medals in 2001 and 2003. (GE 4; AE A at 1; Tr. at 34-38.)

During 1998, an officer detected Applicant viewing adult pornography on his Government computer. He had done this three of four times previously, and realized that he should not have done so. He was awarded a non-punitive letter of reprimand for misusing the computer, and his performance report for that year was adversely impacted. That report, however, noted that the administrative actions taken against him had proven effective in changing his behavior. (AE A at 8-9.) His unit commander nominated him for award of the Base NCO of the Quarter for his outstanding

performance and contributions the quarter following that performance report. (AE A at 10.) His performance report for the next year contained the highest possible marks in each category, and recommended him for immediate promotion. He was then promoted to Master Sergeant effective January 1, 2001. (AE A at 11-12; GE 4; Tr. at 40-48.)

Applicant voluntarily sought counseling at the Air Force clinic because he was concerned that he might have some compulsion or addiction that caused him to violate computer-use rules by viewing pornography. After attending six or seven sessions, Applicant and his counselor agreed that he was not addicted to pornography, but simply needed to make better choices and resist temptation. He has since occasionally viewed pornography, but never on a work computer or in any illegal manner. (Answer at 4; Tr. at 41-42, 59.)

About two years after his retirement from the Air Force, Applicant was hired to fill a civil service position providing information technology and executive support on an Air Force headquarters staff. Three months into that job, the commanding general issued him a letter of appreciation for quickly returning their computer fleet to fully mission capable status after more than a third of them crashed due to corrupted software. The general selected him as Civilian Employee of the Quarter for the last quarter of 2005, his fifth through seventh months on the job, for which he also received a \$250 cash award. He also received a 24-hour time-off award on May 25, 2006. (AE A at 3-7.)

In March 2006, Applicant was in the back area of the command conference room updating a security patch on the secure computer there. While waiting for that computer to process the changes, he was looking at the MSN homepage on the unclassified computer system. Under the "most frequent searches" heading, he saw a woman's name he did not recognize, so he opened the link. The web site that appeared showed the woman, an actress, dressed in very scanty attire. Unbeknown to Applicant, the unclassified computer was projecting onto the large-screen display in the conference room, and a female co-worker who had come in saw the image of the actress. She told Applicant about the improper projected image and that he shouldn't do that. She also apparently reported this to his active duty E-8 supervisor, with whom Applicant had a personality conflict. This conflict arose because Applicant did not like or agree with his supervisor's leadership qualities, and did not conceal his opinions in that regard. (GE 3 at 3; Tr. at 31-33, 49-51.)

The supervisor seized Applicant's government computer and had it searched. In June 2006, two days before completing his one-year probationary period, the supervisor terminated Applicant's employment citing improper computer usage while employed to act as the command computer security manager. Applicant admits that he had played the pre-installed card game on the computer, had used it to check weather and surf reports, and had used it to update his official Air Force personnel system resume - all with either express or tacit permission from his supervisors. The weight of evidence indicates that this termination was due to the fact that his supervisor disliked and resented Applicant and could fire him without recourse as a probationary employee, and not because Applicant violated standard computer-use policies or practices. Applicant

further proved that his termination was not based on poor performance, since his evaluations and awards reflect that he did an excellent job. He has maintained his security clearance without incident throughout the past 25 years, and fully intends to remain well within proper computer use policies in the future. (AE A; Tr. at 29-31, 51-53, 60-64.) Applicant was forthright and credible throughout his testimony.

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used to evaluate an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides that "Any determination under this order adverse to an applicant 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."

A person applying for access to classified information seeks to enter into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information.

Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

## **Analysis**

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,
- (b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying (DCs). The Government's allegations raise potential concerns under two of these provisions:

- (c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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; and
- (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:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;
- (2) disruptive, violent, or other inappropriate behavior in the workplace;
- (3) a pattern of dishonesty or rule violations; and,
- (4) evidence of significant misuse of Government or other employer's time or resources.

Applicant admitted improperly viewing pornography on a government computer several times in 1998. After he was caught and administratively reprimanded for doing so, he never repeated this conduct. He sought counseling to determine whether he needed help to deal with some type of addiction, and ultimately determined that he had no addiction and did not need further help. In June 2006, he was fired from his civilian position with the Air Force for the stated reason that he misused his government computer for non-governmental purposes. The Government established sufficient evidence, in the form of Applicant's own statements and admissions, to raise potential security concerns under these two whole-person related disqualifying conditions. The seriousness of those concerns, and the degree to which Applicant has mitigated them, will be further analyzed under the whole-person analysis at the conclusion of this decision.

AG ¶ 17 provides conditions that could mitigate security concerns (MCs). Applicant provided evidence that supports mitigation under the following three provisions:

- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant's conduct which was clearly wrong occurred more than ten years ago, and had no effect on continuation of his Top Secret clearance or work with highly classified information. His counseling was voluntarily undertaken and successful, and he never again accessed pornography on a government or work computer. He was subsequently promoted, awarded two Meritorious Service Medals, and honorably discharged upon retirement from the Air Force.

The only subsequent incident of accessing inappropriate content on a government computer was entirely accidental, in that he did not realize the image would be either provocative or projected where it could be seen by others. His other arguably non-official uses of his government computer while an Air Force civilian employee were known to and approved by his supervisors. These incidents did not exceed typically acceptable practices, or adversely affect his excellent work performance. The evidence fully supports Applicant's contention that he was fired at the end of his probationary period due to a personality conflict with a supervisor whom he openly considered to be a poor leader, and who used computer-use issues as a pretext for this action.

#### **Guideline M, Use of Information Technology Systems**

AG ¶ 39 expresses the security concern pertaining to use of information technology systems:

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.

AG ¶ 40 describes conditions that could raise a security concern and may be disqualifying. The only DC supported by evidence in this case is, "(e) unauthorized use of a government or other information technology system." Applicant's viewing of pornography in 1998 was unauthorized, and he knew it. Viewing the web site showing a scantily clad actress in 2006 was also unauthorized, but was a one-time and accidental event. The evidence shows that the other alleged misuse of his government computer did not constitute unauthorized use, was either expressly or tacitly approved by his supervisors at the time it occurred, and was merely a pretext for terminating his employment during probationary status due to a personality conflict.

AG ¶ 41 provides conditions that could mitigate security concerns:

(a) so much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the misuse was minor and done only in the interest of organizational efficiency and effectiveness, such as letting another person use one's password or computer when no other timely alternative was readily available; and,

(c) the conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification of supervisor.

Applicant's 1998 viewing of pornography is mitigated under AG ¶ 41(a) since it was more than ten years ago, has not recurred, and no longer casts any doubt on his reliability or judgment. The conference room incident is mitigated under AG ¶ 41(c), since it was isolated and inadvertent, promptly corrected and addressed with his supervisor. The other alleged instances of unauthorized non-official use are mitigated under AG ¶ 41(b) since they fall within typically authorized unofficial use, and were known to and approved of by supervisory personnel when taking place.

#### **Guideline D, Sexual Behavior**

AG ¶ 12 expresses the security 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.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. The DC raised by the evidence in this case is, "(d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment." Applicant's use of his government computer to view pornography during 1998 reflected a lack of discretion and judgment. His subsequent counseling, however, revealed that he did not suffer from any addiction to pornography or other personality or emotional disorder.

AG ¶ 14 provides conditions that could mitigate security concerns. As discussed above under other guidelines dealing with analogous concerns, Applicant proved mitigation of security concerns stemming from that conduct under AG ¶ 14(b), "the



sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.”

### **Whole Person Concept**

Under the whole person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's conduct of potential concern involved his brief misuse of a government computer in 1998 for viewing pornography, seeking counseling for potential addiction thereto, and alleged subsequent misuse of government computers in 2006. The 1998 misuse was wrongful, but brief and ceased once he was caught and reprimanded for it. He sought counseling to help ensure such conduct would not recur, and was determined to have no addiction or other problem requiring ongoing assistance. He continued with highly classified work, and was promoted and highly decorated during the remainder of his active duty career. His 2006 computer-related conduct was not shown to be knowingly wrongful or sufficiently improper to reflect poor judgment or untrustworthiness.

Applicant is fully mature, educated, and accountable for his conduct. His performance appraisals and recognition awards reflect consistent outstanding performance in areas requiring protection of classified and other sensitive information. His entire adult life has been spent supporting and defending the interests of national security, and he demonstrated credibility and integrity during his hearing. The evidence demonstrated no vulnerability to pressure, coercion, exploitation or duress. He was fired during his probationary Government employment due to a personality conflict with his immediate supervisor, and not due to any legitimately actionable computer misuse or poor work performance.

On balance, Applicant presented sufficient evidence to meet his burden of persuasion to mitigate reliability and trustworthiness concerns arising from the undisputed conduct that was alleged in the SOR and supported by his statements. Overall, the record evidence leaves no doubt as to Applicant's present eligibility and suitability for a security clearance.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline M:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Paragraph 3, Guideline D:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

DAVID M. WHITE  
Administrative Judge