



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 08-04795

Appearances

For Government: Jeff Nagel, Department Counsel
For Applicant: *Pro se*

August 30, 2010

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) dated July 23, 2007. (Government Exhibit 2.) On November 19, 2009, 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 on January 15, 2010, and he requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned Administrative Judge on March 11, 2010. A notice of hearing was issued on March 31, 2010, scheduling the hearing for May 24, 2010. The Government presented twelve exhibits, referred to Government Exhibits 1 to 12, which were admitted without objection. The Applicant called one witness and presented three exhibits,

referred to as Applicant's Exhibits A through C, which were admitted without objection. The Applicant also testified on his own behalf. The record remained open until the close of business on June 24, 2010, to allow the Applicant the opportunity to submit additional documentation. The Applicant submitted three Post-Hearing Exhibits, referred to as Applicant's Post-Hearing Exhibits 1 through 3, which were admitted without objection. The official transcript (Tr.) was received on June 15, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

PROCEDURAL MATTERS

Department Counsel motioned to amend the SOR to include the following language under subparagraph 2(a), that, "You were terminated and/or voluntarily separated from your employer, in about December 2003, for accessing of inappropriate web sites during work hours on your company computer." (Tr. pp. 55-56.) Applicant had no objection to said amendment, and it was so ordered. (Tr. pp. 56-57.)

FINDINGS OF FACT

The following Findings of Fact are based on the Applicant's Answer to the SOR, the testimony and the exhibits. The Applicant is 47 years old, and has a high school diploma and some college. He is employed by a defense contractor as a Flight Test Instrumental Technician and is seeking to obtain 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.) After a complete and thorough review of the evidence in the record, and upon due consideration of the same, the following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline F - Financial Considerations) The Government alleges that the Applicant is ineligible for a security clearance because he is financially overextended and at risk to engage in illegal acts to generate funds.

The Applicant has been a member of the union since he started working in the aerospace industry in 1987. In October or November 2002, he started working for his previous employer. Nine months later, his supervisor called him at home and told him to report to the human resources office for a meeting. At the meeting, the Applicant was questioned about inappropriate conduct on his company computer, to be discussed under paragraph 2.

The Applicant admits five of the six delinquent debt set forth in the SOR under this guideline. His delinquent debts totaled in excess of \$8,000.00. Credit Reports of the Applicant dated August 8, 2007; May 30, 2008; August 10, 2009; October 23, 2009;

March 4, 2010; and May 23, 2010; collectively reflect each of the delinquent debts set forth in the SOR. (Government Exhibits 3, 7, 8, 9, 10 and 12.) The Applicant stated that due to unexpected periods of unemployment, he and his wife fell behind with their financial responsibilities.

The Applicant became indebted to a creditor in the amount of \$4,812.00 for a vehicle that was repossessed in July 2004. He explained that because he was unemployed until March 2004, he fell behind on his payments. When he got a job, his wife became unemployed in June 2004. The car was repossessed. The Applicant contacted the creditor and worked out an agreement. In late August 2004, the Applicant paid the vehicle off and the vehicle was returned to him. He obtained financing through another lender and paid approximately \$5,348.82 to resolve the debt. (Applicant's Exhibit A.) In open hearing, he showed the court the vehicle's pink slip.

He is in the process of paying a delinquent credit card debt that was originally \$1,666.00. He has since reduced the debt to \$800.00. (Tr. p. 33 and Applicant's Exhibit B.) On May 28, 2010, the Applicant is scheduled to make another payment of \$403.18. He will be left owing \$400.00 that he plans to pay off by the end of June 2010.

A delinquent credit card debt in the amount of \$1,164.00 remains outstanding. The Applicant stated that at one time, he hired a consumer credit counselor to assist in paying his bills that included this creditor. The Applicant stated that he made payments to the consumer credit counselor for three months. The creditor contacted the Applicant and informed him that they had not received any payments from the consumer credit counselor and the total amount owing was due immediately. The Applicant did not have the money to resolve the debt. The Applicant plans to pay the debt when he has the money to do so. (Tr. p. 48.)

A delinquent telephone bill owed to a creditor in the amount of \$167.00 remains outstanding. The Applicant thought his wife had paid it and she thought he did. He has not had the money to pay it, but when he has the money he will do so. (Tr. p. 48.) A delinquent medical bill or telephone bill owed to a creditor in the amount of \$187.00 remains outstanding. He denies the debt to a creditor in the amount of \$228.00 because he does not know what it is. (Tr. p. 71.) He has not contacted the credit agencies or done any research to find out what it is. The Applicant testified that his present financial situation is tight. There is not a lot of discretionary money. However, he plans to resolve his remaining debts as soon as possible.

Paragraph 2 (Guideline M - Use of Information Technology Systems) The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has shown noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems, which may raise security concerns.

In October 2003, the Applicant was terminated and/or voluntarily separated from his employer for accessing of pornographic web sites, during work hours on his company computer. (Government Exhibit A.) As a result of an internal investigation, it

was determined that the Applicant, for three consecutive days, spent at least six hours every night accessing these sites. The Applicant was working alone in his office, on second shift at the time.

He testified that he tried to explain to his management, that he was living in a trailer while his home was being built. He did not have access to his personal e-mail, so he was using his company computer to access his e-mail. He admits that there were a few website e-mails that inadvertently opened, such as Hustler Magazine and several others. Once he realized what was going on, he stated that he closed the e-mails and deleted them as fast as he could. He had also been listening to internet radio during this time and believes it is very possible that whatever was found on his computer, such as pictures, may have been downloaded by the internet radio station on his computer, thus, using it as a mini-server.

The Applicant admitted that he may not have logged-off every time he left his computer, such as to get something across the room or to answer the door. He did not give his password to anyone. He tried to explain that the cipher combination on the door to his room was changed. Applicant knew this for a fact because the people who changed the lock came in when the Applicant was in the office. He was told that they were changed because access was breached by unauthorized persons. He believes that the cipher lock had been changed either on July 3 or August 3. The security officer, who was present at the meeting, denied that the combination had been compromised and that the lock had been changed. (Government Exhibits 5 and 6.)

The Applicant admitted that he understood the rules and regulations governing the use of company computers. He clearly knew that he was not authorized to access pornographic web sites. He admits that he was not authorized to access his personal e-mail. (Tr. p. 58.) Although he did not have to access internet radio to do his job, he is not aware of anything that told him that he could not listen to internet radio while at work. (Tr. p. 57.)

The Applicant believes that he was wrongly accused. He does access these types of web sites at home, but never intentionally at work. Other employees who committed the same violation were given warnings or minor penalties. He believed that his termination might have been personal. He was an outsider. People were vying for positions, there was lots of backstabbing; and although he was a member of the local workers union, he did not feel that he was being properly represented. He explained that due to competition between unions, workers who have transferred from one union to another, as he had, in order to get a job at a different facility, created serious animosity. He believes he fell in the middle of this tenuous situation.

The Applicant became physically sick as a result of this incident. He started having chest pains, became very depressed, and was seeing a counselor for a short time. He was placed on medical leave from his job for a six week period. In March 2004, he met with his company and union representative and finalized the matter. He initially wanted to file a grievance but after speaking to a few attorneys he thought his

best option would be to terminate from the company and let everything drop. (Tr. p .62.) The Applicant's settlement agreement indicates that he was able to negotiate that he "resigned" or "voluntary quit" rather than being discharged for his misconduct. He is also restricted from working with the defense contractor or any subsidiaries or affiliated businesses represented by the union. (Applicant's Post-Hearing Exhibit 2.)

Finally, the Applicant states that when he was hired by his present company, he disclosed on his employment application that he had voluntarily terminated employment for accessing pornographic web sites during work hours on a company computer.

Applicant's present supervisor testified that the Applicant has been working for him for almost four years. He observes him on a daily basis, and considers him to be an excellent team player, who is trustworthy. His supervisor was aware of the Applicant financial problems, but not aware of the allegations brought against the Applicant concerning the accessing of inappropriate web sites on the company computer during prior employment with a different company.

A letter from a past supervisor during the period from 1987 to 2001, and who car pooled with the Applicant for several years, attests to the Applicant's trustworthiness. Having worked with the Applicant, he finds it hard to believe the charges that were brought against the Applicant. He finds it troubling that they did not appear to represent him properly, if at all. (Applicant's Post-Hearing Exhibit 3.)

POLICIES

Enclosure 2 of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline F (Financial Considerations)

18. The Concern. Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

Conditions that could raise a security concern:

- 19(a) inability or unwillingness to satisfy debts;
- 19(c) a history of not meeting financial obligations.

Conditions that could mitigate security concerns:

20(b) the condition that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstance;

20(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Guideline M (Use of Information Technology Systems)

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.

Condition that could raise a security concern:

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

Condition that could mitigate security concerns:

41 (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.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct;
- 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 extent to which participation is voluntary;

- f. The presence or absence of rehabilitation and other permanent behavioral changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and
- 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 an acceptable security risk. Eligibility for access to classified information is predicated 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.”

CONCLUSIONS

In the defense industry, a security clearance is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for such access may be involved in instances of financial irresponsibility and misuse of information technology systems, which demonstrates poor judgment or unreliability.

It is the Government’s responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant’s conduct and the holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government’s case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has been financially irresponsible (Guideline F) and that he misused information technology systems (Guideline M). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

The evidence shows that the Applicant is in the process of resolving his indebtedness. He has paid off one of the debts and is making payments toward another. The three that remain outstanding are smaller debts that he plans to resolve as soon as possible. I find him to be credible in this regard.

There is sufficient evidence of financial rehabilitation at this time. Under Guideline F (Financial Considerations), Disqualifying Conditions 19(a) *inability or unwillingness to satisfy debts* and, 19(c) *a history of not meeting financial obligations* apply. However, Mitigating Conditions 20(b) *the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstance* and, 20(d) *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* also apply. The Applicant has indeed made a good faith effort to repay his overdue creditors or otherwise resolve his debts. Accordingly, I find for the Applicant under Guideline F (Financial Considerations).

The situation involving his misuse of the company computer during work hours to access pornographic material is troubling. First, the Applicant testified that he disclosed this information to his employer, when he was hired. But, his witness, a supervisor who was involved in hiring him, testified that he had no knowledge of the incident. Why the Applicant did not disclose this to him even before he testified is puzzling. Secondly, the Applicant was going to obtain documentation from his employer, namely a copy of his employment application that would have shown that he disclosed this information up front to his employer. The document was not presented.

However, the Applicant credibly testified that he did not knowingly and willingly look at the pornographic web sites and explained those circumstances. Furthermore there is evidence in the record that can be interpreted to show that at the end of all of this, he was not properly represented by his union. He wanted to grieve the action, but did not get the support he needed from his union representative. Although there is no evidence of certainty, it does appear that the Applicant, an outsider, may have been set up, was unwanted, and this was a way to get rid of him. Under the particular facts of this case, I find that the Applicant has provided sufficient documentation to bring this issue into question.

The fact remains that the Applicant clearly violated company policy by accessing pornographic sites during work hours on his company computer. He knew it was against policy. Use of Information Technology Systems, Disqualifying Condition 40 (e)

unauthorized use of a government or other information technology system applies. However, Mitigating Conditions 41 (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, also applies.

Since this incident in 2003, the Applicant has not engaged in any further misconduct. He understands his present company's policies and procedures and is complying with them to the letter. He has been severely punished for his past misconduct, and has no intentions of ever violating DoD policy or his company policy again. He plans to properly protect classified information at all times.

I have also considered the "whole-person concept" in evaluating the Applicant's eligibility for access to classified information. 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 good judgement, trustworthiness, reliability, candor, a willingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard classified information.

On balance, it is concluded that the Applicant has overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

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: For the Applicant.

- Subpara. 1.a.: For the Applicant.
- Subpara. 1.b.: For the Applicant.
- Subpara. 1.c.: For the Applicant.
- Subpara. 1.d.: For the Applicant.
- Subpara. 1.e.: For the Applicant.
- Subpara. 1.f.: For the Applicant.

Paragraph 2: For the Applicant.

- Subpara. 2.a.: For the Applicant.

DECISION

In light of the circumstances presented by the record in this case, it is clearly consistent with the national interests to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge