



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



In the matter of:)
)
-----) ISCR Case No. 08-06538
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin Howry, Esquire, Department Counsel
For Applicant: *Pro Se*

March 30, 2009

Decision

WESLEY, Roger C., Administrative Judge:

Statement of Case

On November 7, 2008, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, and Department of Defense (DoD) Regulation 5200.2-R, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on November 21, 2008 and requested a hearing. The case was assigned to me on December 23, 2008. It was scheduled for hearing on February 24, 2009. A hearing was held February 24, 2009, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, or deny, Applicant's application for a security clearance. At hearing, the Government's case consisted of four exhibits; Applicant relied on two witness (including himself) and three exhibits. The transcript (R.T.) was received on March 10, 2009.

Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Procedural Rulings

Before the close of the hearing, Applicant requested the record be kept open to permit him to supplement the record with faxed documentation of his divorce decree. For good cause shown, Applicant was granted three days to supplement the record. Department Counsel was afforded two days to respond. Within the time permitted, Applicant supplemented the record with copies of his final decree of divorce, a qualified domestic relations order, and an employer's order to withhold from earnings for child support. Applicant's exhibits were admitted as exhibits D through F.

Summary of Pleadings

Under Guideline M, Applicant is alleged to have visited pornography web-sites during work hours on his employer's computer from about 2001 to 2006, while employed as a tech supporter.

Under Guideline E, Applicant is alleged to have been fired by his employer (employed 1986 to 2006) for visiting pornographic web sites during work hours and (b) denied any pornography on his computer when first questioned about it by his employer's human resource staff in June 2006.

Under Guideline J, Applicant is alleged to have been charged with assault in about April 2006, for which he was assigned deferred adjudication and placed on six months probation.

For his response to the SOR, Applicant admitted most of the allegations. He denied concealing his pornographic activities when questioned by his Human Resources staff. He claimed he never misled his employer's staff when asked whether he had pornographic material on his web-site or ever visited pornographic web-sites. He expressed remorse for the poor judgment he exercised in viewing pornographic links. He claims he has not since viewed pornographic material and will not do so in the future. He explained that his domestic assault charge was fabricated by his ex-wife after he had her served with divorce papers that cited "irreconcilable differences."

Findings of Fact

Applicant is a 48-year-old-technical support employee for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Applicant served in the Air Force (AF) between 1982 and 1986 (see exs. 1 and C; R.T., at 98-99)). He was honorably discharged in 1986 (exs. 1 and C). For over 20

years (between May 1986 and June 2006), Applicant was employed by a defense contractor in a tech support capacity (see ex. 1). By all accounts, Applicant was a capable and conscientious performer with this employer.

Applicant married W in June 1994 (ex. 1). They have two children (an adopted daughter in college and a younger daughter who resides with W) from this marriage (R.T., at 106-07). In 2000, Applicant and W moved to another state to be with W's father who had been diagnosed with cancer (R.T., at 44). W had an affair in Summer 2005 (R.T., at 44-45). In December 2005, Applicant awoke with a sexually transmitted disease and confronted W (R.T., at 46). W told him at the time that she would move on and work on their marriage (R.T., at 46).

In February 2006, Applicant realized that W was continuing an affair with the same male individual, noting her pattern of being away on Fridays and Saturdays (R.T., at 46-48). So, Applicant filed for divorce in February 2006. The petition prepared by his divorce lawyer mistakenly cited irreconcilable differences (see ex. D; R.T., at 48-50). When W received a copy of this filing, she responded amicably to Applicant (R.T., at 51, 55).

Applicant's relations with W changed dramatically, though, when he realized the mistaken reason in the petition for seeking divorce, and instructed his lawyer to amend the petition to substitute adultery as grounds for divorce (R.T., at 52-53). When W received a copy of this amended petition (in April 2006), she was furious with Applicant over the adultery charge and sole custody claims based on her cited misuse of alcohol, prescription drugs, and marijuana (see ex. 3; R.T., at 53-56). Notwithstanding their estranged relations, Applicant continued to live in the same house with W (R.T., at 57).

In their contested divorce hearing, Applicant informed the judge he loved his daughter and did not want to move out of the house. The judge (according to Applicant) told W she would have to move out of the house on weekends to accommodate Applicant (R.T., at 58-59). Applicant then returned to the house to use the laundry facilities. Once Applicant was in the house, W confronted him about his marijuana charges and began placing his laundry in his jeep (R.T., at 60-62). Applicant pulled W out of the jeep by her arms. W then called 911 for police assistance (R.T., at 63). While Applicant was talking to the 911 operator, W opened the jeep door and pulled his duffle bag out of the vehicle. When he tried to jump out of the jeep to retrieve his duffle bag, he took his foot off the clutch. This caused the jeep to lurch forward and strike her (R.T., at 47-48). When the police arrived at the scene, they accepted W's story and arrested Applicant.

Following his arrest, Applicant was charged with assault. At the convened hearing on the charges in July 2007, the court first heard from the district attorney on a proffer for a deferred adjudication on Applicant's charges. After hearing from the district attorney, the court accepted Applicant's deferred adjudication plea based on his admission of domestic assault (see ex. 4; R.T., at 70-76). The court deferred adjudication of the assault charge against Applicant, fined him \$500.00, and ordered

him to pay \$400.00 to W in restitution and \$300.00 in court costs (see exs 2, 3 and 4; R.T., at 77-85). The court also issued a 30-day mandatory restraining order against Applicant's seeing his wife and daughter (see ex. 3). This order was rescinded after the elapse of 30 days. The court also rescinded Applicant's imposed probation after he satisfactorily completed six months of unsupervised probation (R.T., at 82-83). Since completing his probation, Applicant has not been involved in any other assault incidents (R.T., at 83).

In her appearance before the judge hearing his divorce petition, W reportedly advised the divorce court that Applicant had pictures of his daughter, including photos of her in the bathtub (see ex. 3; R.T., at 90-91). Applicant denied the accusation and has no idea what is revealed in these pictures (ex. 3). Applicant was told by the investigating officer that there were 300 or more of these pictures depicting child porn. Applicant subsequently was given police assurances that he was no longer a person of interest in their investigation of child pornography materials stored in his home computer (see ex. 3).

Applicant received a final divorce decree in October 2006 (see exs. 3 and D). The terms of the divorce decree are covered in the court-approved decree. The decree cites irreconcilable differences; Applicant dropped the adultery charges contained in his amended petition (see ex. D; R.T. at 122). Under the terms of the decree, Applicant is required to make bi-weekly child support payments to W in the amount of \$355.38 (ex. D; R.T., at 126-27). Incorporated into the decree is a qualified domestic relations order that assigns a portion of Applicant's accrued retirement benefits with his former employer to W in recognition of the latter's alternate payee's marital property rights (see ex. E). An accompanying employer's order to withhold from earnings for child support (see ex. F) obligates Applicant's employer to withhold \$770.00 a month for current child support, but no back support.

By the terms of his divorce decree, Applicant is permitted to see his daughter for two weeks in the summer and every other Christmas, and possibly one week during Spring break (see exs. 3 and D). W retains sole custody of his daughter under the terms of his divorce decree (ex. D; R.T., at 104). Both Applicant and W are prohibited from accessing any types of pronography in the presence of their daughter (see ex. 3; R.T.,at 120).

Between 2001 and 2006 (while employed by his former employer), Applicant accessed pornographic links on his company's computer. In June 2006, Applicant was confronted by a staff official of his company's human resources staff about his accessing pornographic webs sites. This staff person informed Applicant that an anonymous person called the company and accused Applicant of being involved with child pornography (see ex. 3; R.T., at 91-92)). This call prompted the staff person to retrieve his computer. Shortly thereafter, he was called into his employer's human resources office and specifically asked whether he had any pornography materials on his computer (ex. 3). He was then asked whether he had visited child porn sites in the past. Applicant answered in the negative to both questions. He acknowledged, though,

that he had visited adult pornography sites on his computer (R.T., at 92). Based on this admission, the human resources interviewer informed Applicant he would have to take his computer to have it reviewed (see ex. 3: R.T., at 92). Applicant was given a replacement lap top computer to continue with his normal duties while his company computer was out for review.

Two weeks later (still in June 2006), Applicant was called again into his company's human resources office, and this time was informed that the staff had found links to computer sites on the cache of his computer, but no child porn (ex. 3, R.T., at 92). In this interview, Applicant provided specifics on the links he received to adult pornography sites in e-mail messages from named coworkers, and from W (R.T., at 87). Although, he assures he never saved any graphic pictures on his computer (R.T., at 100). Applicant's assurances are not contradicted by any of the proofs, and are accepted.

Upon providing the requested information to his company's human resources staff, Applicant was asked to turn in his badge and lap top computer and was terminated from the company's employ (see ex. 3; R.T., at 94). Applicant assures that his wife, friends at church, and coworkers are aware of the reasons he was fired from his job. Since separating from his former employer in June 2006, Applicant has never accessed pornographic web sites at work, and has taken affirmative steps with his coworkers to ensure he is never forwarded e-mails with pornographic web sites (R.T., at 87-88).

Applicant is highly regarded by the U.S. security agency whose programs are directly supported by Applicant's employer. Records document his receipt of a letter of appreciation from this security agency (see ex. B). His site manager for his current employer lauds his expertise and contributions to their government contract (see ex. A). She describes Applicant as dedicated, persistent, and extremely hard working. His girlfriend (a program manager for a large operating systems supplier) describes Applicant as a friendly, reliable individual (R.T., at 139-40).

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Use of Information Technology Systems

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, manipulation, storage, or protection of information. See Adjudicative Guidelines (AG), ¶ 39.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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. AG, ¶ 15.

Criminal Conduct

The Concern: Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations. AG ¶ 30.

Burden of Proof

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a

security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

Analysis

Applicant is a meritorious defense contractor employee who knowingly visited adult pornography web sites transmitted from coworkers and W during work hours on his employer's computer over a five-year period spanning 2001 and 2006. Applicant was confronted by staff personnel of his employer two months later and terminated from his job. Security concerns are raised as well over Applicant's 2006 domestic assault offense and ensuing deferred adjudication plea.

Applicant's misuse of his employer's computer

Applicant's computer-based transgressions raise considerable security concerns under both the use of information technology systems and personal conduct guidelines. DC ¶ 40(a), "illegal or unauthorized entry into any information technology system or component thereof," DC ¶ 40(c), "use of any information technology system to gain unauthorized access to another system or to a compartmented area within the same system," and DC ¶ 40(e), "unauthorized use of a government or other information technology system," all apply to Applicant's unauthorized access to adult pornographic web sites on his employer's computer. DC ¶ 16(a) of Guideline E, "a pattern of dishonesty," and DC ¶ 16(e), "personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing . . .," are applicable to Applicant's situation as well.

While much of Applicant's conduct is covered by Guideline M and can be resolved under that Guideline, there are several allegations under each guideline that are not incorporated in the other. For example, subparagraph 2.a that addresses Applicant's involuntary separation in 2006 from his employer of 20 years is not incorporated in the Guideline M allegations; although, the reasons for his separation are integrally related to his accessing of pornographic web sites on his employer's computer. So, too, his reluctance to inform his human resources staff of his accessing of pornographic web sites until subsequently confronted is not literally covered by Guideline M; even though, his delayed acknowledgments of accessing adult pornographic web sites are related to his recurrent unauthorized computer access.

Judgment concerns are tied to Applicant's accessing of pornographic web sites (*i.e.*, opened e-mails from coworkers and W) on his employer's computer over a considerable period of time (2001 to 2006), and consequential separation actions later taken by his former employer. Applicant's actions are expressly covered by Guideline E, and are entitled to independent cognizance under this Guideline according to the Appeal Board. See ISCR Case No. 06-20964, at 6 (April 10, 2008). Where (as here) there is additional probative adverse information covered by Guideline E that is not covered by Guideline M, and which reflects a recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior, independent grounds do exist for considering questionable judgment and trustworthiness and exploitation and coercion risk allegations under Guideline M and Guideline E, respectively.

Authority for considering overlapping conduct under both guidelines is contained in the guidance provided in Enclosure 2, ¶ 2(d) of the Directive's August 2006 amendments. So, under Guideline E, core judgment and exploitation concerns covered by D.C. ¶ 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," is applicable in this case.

Judgment lapses and adherence to established rules and policies governing the use of employer-serviced information technology systems are core concerns in Guideline M and E cases. Our appeal Board has consistently affirmed decisions denying clearance eligibility based on probative showings of unauthorized access to pornographic material on employer-serviced computers. See ISCR Case No. 07-04193 (App. Bd. July 3, 2008); ISCR Case No. 05-13515 (App. Bd. July 19, 2007).

With close to three years elapsed since Applicant stopped accessing pornographic web sites on his employer's computer, his actions can be characterized as aged and aberrant. While his accessing of pornographic web sites cannot be considered minor or inadvertent, his actions were for the most part responsive efforts to e-mails received from co-workers and W. The proofs do not include any saved pornographic materials from these web sites or self-initiated accessing on Appellant's part. Under the circumstances, one of the mitigating conditions covered by MC ¶ 41(a) ("so much time has elapsed since the behavior happened, or it happened under unusual circumstances. . . ,") is available to Applicant. Because Applicant's friends, coworkers and wife are aware of the reasons he was fired by his former employer, MC ¶ 41(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress," is available to Applicant as well.

From a whole person perspective, Applicant has established a good relationship of trust with his current employer and U.S. agency customer. He has been credited with both his employer's government customer and his site manager with outstanding work on his employer's contract. These are qualities that serve him well in fulfilling his

fiducial responsibilities in protecting accessed classified information. Applicant credibly makes the case, too, to his committing to avoid accessing of pornographic web sites in the future.

With almost three years elapsed since he last accessed a pornographic web site, a solid record of performance with is current employer, and his consistent compliance with the child support terms of his final divorce decree, Applicant's collective efforts are enough at this time, though, to facilitate safe predictive judgments that he can avert recurrence of his covered conduct. He no longer has any of the coworker and spousal relationships who contributed to his accessing actions, and shows no inclination of likelihood of establishing any that could create recurrence risks.

Taking into account all of the circumstances surrounding Applicant's recurrent accessing of pornographic web sites on his employer's computer, Applicant is absolved of security risks associated with his accessing of pornographic web sites. Based on his acknowledged actions reflecting questionable judgment and trustworthiness concerns and his avoidance of any recurrent accessing of pornographic web sites within the past, three years, Applicant is able to mitigate the Government's security concerns. Favorable conclusions warrant with respect to the underlying conduct covered by subparagraph 1.a of Guideline M and subparagraphs 2.a through 2.c of Guideline E.

Applicant's domestic assault incident

Applicant's single domestic assault and plea-accepted deferred adjudication and fine warrants initial consideration of two disqualifying conditions of AG ¶ 30. DC ¶ 31(a), "a single serious crime or multiple lesser offenses," and DC ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged," has application. Applicant's lone domestic assault arrest resulted in accepted deferred adjudication and a fine. Applicant, in turn, completed a short probation period and satisfied all of the court's imposed restitution and court cost conditions. He has since divorced his wife, and he has no further domestic encounters with her.

Applicant may rely on MC ¶ 32(a), "so much time has elapsed since the criminal 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 mitigation of his domestic assault offense. This arrest/charge and disposition by itself is insufficient to warrant continuing security concerns about his judgment, reliability and trustworthiness.

Applicant's current site manager and government customer he has interfaced with in his work hold him in high esteem and value his team work and professionalism. His girlfriend also considers Applicant reliable. These collective impressions of Applicant speak positively to both his personal and fiducial responsibilities.

Based on a consideration of the applicable guidelines and a whole person assessment, Applicant mitigates the criminal conduct specifically associated with his

domestic assault offense. Taking into account all of the facts and circumstances developed in the record, favorable conclusions warrant with respect to the allegations covered by subparagraph 3.a of the SOR.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Enclosure 2(a) of the Adjudicative Guidelines of the Directive.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE M: (INFORMATION SYSTEMS): FOR APPLICANT

Sub-para. 1.a: For Applicant

GUIDELINE E: (PERSONAL CONDUCT): FOR APPLICANT

Sub-para. 2.a: For Applicant

Sub-para. 2.b: For Applicant

Sub-para. 2.c: For Applicant

GUIDELINE J: (CRIMINAL CONDUCT): FOR APPLICANT

Sub-para. 3.a: For Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

Roger C. Wesley
Administrative Judge

