



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



In the matter of:	)	
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SSN: -----	)	ISCR Case No. 08-10124
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Richard Stevens, Esquire, Department Counsel  
For Applicant: Pro Se

January 29, 2010

**Decision**

LYNCH, Noreen, Administrative Judge:

On May 16, 2008, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) to request a security clearance for his employment with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>1</sup> that it is clearly consistent with the national interest to grant Applicant’s request. On July 27, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the Revised Adjudicative Guidelines (AG)<sup>2</sup> under Guideline M (misuse of

<sup>1</sup> Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

<sup>2</sup> Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, the Revised Adjudicative Guidelines supercede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

information technology), Guideline E (personal conduct), and Guideline D (sexual behavior).

Applicant timely responded to the SOR, and admitted allegations in ¶ 1.b and ¶ 2.b of the SOR. He denied the other allegations in the SOR because he claimed there was no “nudity” in the photo. He elected to have his case decided on the record in lieu of a hearing. Department Counsel submitted the government’s written case on October 8, 2009.<sup>3</sup> Applicant received a complete file of relevant material (FORM) on December 1, 2009, and was provided an opportunity to file objections and submit material to refute, extenuate, or mitigate the government’s case. Applicant submitted additional information in a timely manner. The case was assigned to me on January 7, 2010. Based upon a review of the case file, pleadings, and exhibits Applicant’s request for a security clearance is denied.

### **Findings of Fact**

Under Guideline M, the government alleged in SOR ¶ 1.a that Applicant emailed a nude photograph of himself to a coworker in about December 2007 from his company issued laptop computer while employed with a defense contractor. In SOR ¶ 1.b, the government alleged Applicant downloaded approximately 122 personal pictures, to include four nude photographs of himself onto his company issued laptop computer, in about December 2007, in violation of the company Code of Conduct. He submitted a resignation in lieu of termination.

Under Guideline E, the government alleged in SOR ¶ 2.a the same information alleged in SOR ¶ 1.a. The government also alleged in SOR ¶ 2.b. the same information alleged in SOR ¶ 1.b.

Under Guideline D, the government alleged in SOR ¶ 3.a the same information as alleged in SOR ¶ 1.a. After a thorough review of the pleadings, and exhibits, I make the following findings of fact.

Applicant is 54 years old. Applicant served in the U.S. Air Force from 1973 until 1994, and held a security clearance. He graduated from college in 1995 (Item 5). Since March 2008, he has worked as a senior technical writer for a defense contractor. He also held a clearance during his civilian employment until his resignation in 2008 (Item 6).

Applicant worked as a civilian employee with various contractors from approximately 1998 until 2008. In December 2007, while employed with a defense contractor, Applicant uploaded approximately 122 personal pictures to his work computer. Four of the pictures were full frontal nude pictures of Applicant. Applicant edited one of the full frontal nude photos by adding a “long black tie” that covered his genitals. He then emailed the photo to a coworker. Applicant’s coworker, who was also a friend, informed the security officer of the company about receipt of the photo. She did

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<sup>3</sup>The Government submitted seven items to support its case.

not file any complaint against Applicant. However, the security manager filed a complaint (Item 6).

An investigation conducted by Applicant's employer revealed that Applicant's work laptop computer had personal pictures of Applicant including four nude pictures. Applicant's program manager interviewed him as part of the investigation. The manager discussed a performance plan with Applicant. Applicant was put on a three month probation period. Applicant decided to resign from his employment in January 2008 (Item 7).

Applicant admitted that he downloaded the pictures, and that he emailed the photo in question to his coworker. He explained that they were friends. He argued that he had sent previous jokes to her that included items of a sexual nature. He denied that the photo was a nude one. Applicant disagrees with the characterization of the photo that he sent to his coworker. He explained that he superimposed a tie on the photo and that the tie was "intentionally exaggerated" in length and width to cover a lot more than just the genitals (Response to FORM). He asked that a review of the photo in question be made before "killing his 36-year-career." Applicant also argued that the photo was not intended as one of a sexual nature. He claimed it was meant as a cartoon-type lampoon on "casual Friday." He also elaborated that he knew he violated company policy by storing personal photos on the computer and emailing the photo to his coworker. He believed that the violation was *diminimus* given the practices of other employees in the organization (Item 4).

Applicant stated that he put the nude pictures of himself on his work computer because he wanted to have them before he started a weight loss program. His reason for putting them on the work computer rather than his home computer was because he feared his family might find them during the Christmas vacation in December 2007 (Response to Form). He stated this was a temporary measure and he fully intended to remove them from the work computer. To support this premise, he explained that he did not store the photos on a CD or zip drive (Response to Form).

Applicant proffers that his employment record is exemplary and he has maintained strict responsibility and accountability for a great deal of secret information. He claims he has never had any problems with handling classified information during almost 36 years of work (Item 4).

Applicant acknowledged that this was not a responsible thing to do and that he realized that he used poor judgment. He realized that his actions violated the Guidelines and the company code, but he argued that the company code of conduct is stretched and broken daily. He admitted that he learned a lesson from the incident and that he is sure it will not happen again (Item 4).

Applicant completed his recent SF 86 and listed the reason that he left his previous position. He explained that he left by mutual agreement after allegations of misconduct. He specifically stated that he used his work computer for personal use and he elaborated that he had stored personal pictures, including four of himself, that were nude (Item 5).

## Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).<sup>4</sup> Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines.<sup>5</sup> The presence or absence of a disqualifying or mitigating conditions is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines must be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of a clearance. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline M (misuse of information technology systems), at AG ¶ 39, Guideline E (personal conduct) at AG ¶ 15, and Guideline D (sexual behavior) at AG ¶ 12.

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>6</sup> for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, an applicant bears a heavy burden of persuasion.<sup>7</sup> A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.<sup>8</sup>

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<sup>4</sup> Directive. 6.3.

<sup>5</sup> Commonly referred to as the "whole person" concept, these factor are: (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.

<sup>6</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>7</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>8</sup> See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

## Analysis

### Misuse of Information Technology Systems.

Under Guideline M, “[n]oncompliance 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 ¶ 39). The government presented sufficient information to support the allegations in SOR ¶¶ 1.a and 1.b. Applicant admitted using his computer at work to send the photo to a coworker. He admitted that he downloaded approximately 122 photos of himself, which included four frontal nude shots. Despite the fact that Applicant put a long tie on his photo, the photo emailed to the female coworker was of a sexual nature. He further admitted that his actions violated company policy. The information requires consideration of the disqualifying conditions listed at AG ¶ 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*).

The record does not support consideration of Guideline M mitigating conditions listed in AG ¶ 41. This conduct occurred in December 2007. Applicant minimized his actions, although he acknowledged that it was against company policy. He believes his long career should overcome any security concerns. Applicant has not demonstrated how his actions do not reflect adversely on his current “reliability, trustworthiness, or good judgment.” (AG ¶ 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*)) does not apply. The other mitigating conditions are not applicable.

### Personal Conduct.

The security concern about Applicant's personal conduct, as expressed in the AG ¶ 15, is that “[c]onduct 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.”

As to SOR ¶ 2.b, available information requires consideration of the disqualifying conditions listed in AG ¶ 16(d)(3) (*a pattern of rule violations*), 16(d)(4) (*evidence of significant misuse of Government or other employer's time or resources*) and AG ¶ 16(e) (1) (*personal conduct, or concealment of information about ones' 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*). Certainly, Applicant's violation of company policy by sending the photo of himself partially covered to his female coworker on his company issued computer is

conduct a person might wish to conceal, as it adversely affects a person's professional and community standing.

The mitigating conditions outlined in AG ¶ 17(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 AG ¶ 17(e) (*the individual has taken positive steps to reduce or eliminate vulnerability, to exploitation, manipulation, or duress*) do not apply. Applicant cooperated with the investigation after the complaint was made. He did not alert his employer that he had downloaded approximately 122 personal pictures of himself, including four frontal nude ones. It was the female coworker who alerted a security manager. Applicant has minimized his actions and believes that although his actions were improper, they are on the end of the continuum where more consideration could be given, especially in light of his long career.

### **Sexual Behavior.**

The security concerns about Applicant's sexual behavior, as expressed in the AG ¶ 12, is that "sexual behavior that involves a criminal offense, indicated a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the 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 sexual orientation of the individual."

AG ¶ 13(c) (*sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*) is an applicable disqualifying condition. Applicant had full frontal nude photos of himself on work computer.

AG ¶ 13(d) (*sexual behavior of a public nature and/or that reflects lack of discretion or judgment*) is an applicable disqualifying condition. Applicant's decision to send the photo of himself to his female coworker, whether nude or partially nude, reflects lack of judgment and discretion. The coworker alerted the security manager about the photo. Thus, it can be inferred that it was of an unwelcome nature.

An applicant might be able to mitigate Guideline D security concerns. One such mitigating condition (*the behavior no longer serves as a basis for coercion, exploitation, or duress*), AG ¶ 14(c) may apply. Applicant disclosed the fact that he had left his position by mutual agreement following allegations of misconduct. He elaborated on his SF 86 that he had personal pictures on his work computer, including four of himself that were nude. The government, security officials, and previous employer are well aware of the incident. I do not believe Applicant would compromise national security to avoid public disclosure of the incident. Any sexual behavior security concerns pertaining to the incident are dealt with more thoroughly under Guideline M and Guideline E in this decision. Sexual behavior security concerns are mitigated.

## Whole Person Concept.

I have evaluated the facts presented in this record and have applied the appropriate adjudicative factors, pro and con, under Guidelines M, E, and D. I have also reviewed the record before me in the context of the whole person factors listed in ¶ AG 2(a).<sup>9</sup> Applicant is a mature adult who served in the military. He held a security clearance for many years. However, when working for a defense contractor in 2007, he downloaded approximately 122 photos of himself, including four frontal nude ones, to his work issued computer. He knew this violated company policy. His reasoning for doing so is suspect. Applicant then sent one of the photos to a female coworker. Despite the fact that Applicant believed the “long tie” did not make the nude frontal photo of himself offensive, the coworker took the photo to the security manager. Applicant’s inappropriate use of his government computer, his poor judgment, and his minimalization of his behavior when responding to the SOR, leaves me with doubts as to his judgment. His rationale that the company rules are often stretched and that this incident should be overlooked in light of his long career, causes me to question his reliability. He acknowledges his mistake and is sorry for the incident. The positive information about Applicant is insufficient to overcome the adverse information about his conduct at his previous job under Guideline M and Guideline E. This raises serious doubts about his reliability and trustworthiness. Applicant’s recent conduct does not mitigate the security concerns under these guidelines. He has mitigated the security concerns under the sexual behavior guideline, but because protection of the national interest is paramount in these determinations, my doubts must be resolved in favor of the national interest.<sup>10</sup>

## Formal Findings

Formal findings 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 M:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Paragraph 3, Guideline D:	FOR Applicant
Subparagraph 3.a:	For Applicant

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<sup>9</sup> See footnote 5, *supra*.

See footnote 8, *supra*.

## **Conclusion**

In light of all of the foregoing, it is not clearly consistent with the national interest to grant Applicant access to classified information. Clearance is denied

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NOREEN A. LYNCH  
Administrative Judge