



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-02238
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Department Counsel
For Applicant: Pro Se

May 27, 2009

Decision

LOKEY-ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on March 31, 2006. On November 26, 2008, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended), and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on January 8, 2009, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on January 30, 2009. A notice of hearing was originally issued on February 5, 2009, scheduling the hearing for February 27, 2009. Due to difficulty with the confirmation of the Government's court reporting contract, the hearing was continued. A notice of hearing was issued again on March 11, 2009, scheduling the hearing for April 10, 2009. At the hearing the Government presented three exhibits referred to as Government Exhibits 1 through 3. The Applicant presented two exhibits, referred to as Applicant's Exhibits A and B. He also testified on his own behalf. The

record remained open until close of business on April 17, 2009, to allow the Applicant the opportunity to submit additional documentation. Applicant requested a one week extension until April 24, 2009, which was granted. Applicant submitted one Post-Hearing Exhibits, referred to as Applicant's Post-Hearing Exhibit A, within the requested time period. The official transcript (Tr.) was received on April 20, 2009.

Findings of Fact

The Applicant is 51 years old and divorced. He has a high school diploma and one year of junior college. He is employed by a defense contractor as a Micro-graphic Computer Repair Technician, and is applying for a security clearance in connection with his employment.

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

Paragraph 1 (Guideline E - Personal Conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that raise questions about his ability to protect classified information.

The Applicant admits to each of the allegations set forth in the SOR under this guideline. The Applicant has worked in the defense industry since August 1980, almost twenty-nine years. Over the years he has been promoted numerous times, and has experienced a lay off and was called back. He held a secret level security clearance without interruption since 1985/86. Other than the two incidents described below, he has never committed any company violations or security violations.

From July 2003 to October 2004, the Applicant was on lay off status with his employer. He was called back to work in October 2004. He received a company credit card in late 2004, early 2005. Between April 24, 2005, and August 14, 2006, the Applicant used the company credit card that was issued to him for exclusively business purposes to make personal purchases in the amount of \$13,710.88 in violation of company policy. He testified that he made a car payment, bought tires, got cash advances and took his girlfriend on a weekend vacation to Hawaii. (Tr. pp. 43-44). During this time he was paying child support to his ex-wife, insurance and living expenses, and did not have any extra money to do other things. As a result of an investigation into his misuse of his corporate card, he was suspended from work without pay for ten work days. (Government Exhibit 3).

Applicant testified that he did not have a personal credit card at the time. (Tr. p. 24). He knew it was against company policy to use his company credit card for personal purchases, but he did it anyway. Applicant admitted his wrongdoing and within a week, before any disciplinary action was taken by the company, he paid the debt off in full. Applicant states that he will never do it again and will no longer possess a company credit card even if offered one. (Tr. p. 49). Applicant testified that he was

informed by the company that after one year, without further violations, this corrective action would be removed from his personnel record. (Tr. pp. 40-41).

In approximately December 2005, the Applicant spent approximately 69.2 hours accessing personal and pornographic web-sites during business hours. The Applicant stated that between computer repair jobs, while at work, on his company computer, he would check sport sites and at times he clicked on his e-mail sites that contained pornographic material. Each time, he tried to get out of the program, it failed to respond and he had to turn his computer off to get everything to stop. (Tr. p. 31). Applicant testified that the violation was discovered when his computer was monitored remotely from another site.

Applicant admitted the misconduct when confronted by the company investigator. He stated that he understood at the time of the wrongdoing that his conduct was against company policy. As a result, he received a one week disciplinary layoff without pay. (Government Exhibit 3). Applicant states that he now only opens up company e-mail. (Tr. p. 50). Applicant testified that he was informed by the company that after one year, without further violations, this corrective action would be removed from his personnel record. (Tr. p. 40-41).

Applicant also testified that he would never jeopardize classified information under any circumstances. When offered a hypothetical by Department Counsel, Applicant stated that even if a foreign power were trying to black mail him by eliciting classified information from him in lieu of telling his children that he was on pornographic sites at work. (Tr. p. 37).

Letters of recommendation from the Applicant's union representative, coworkers and friends all attest to the Applicant's trustworthiness and reliability. Applicant is considered to be a hardworking team player who is honest and dependable. He is recommended for a continued position of trust. (Applicant's Exhibit A). Applicant has received numerous appreciation awards and certificates of achievement and recognition for his exceptional performance and contributions to the defense industry over the past twenty-nine years. (Applicant's Exhibit B).

A letter dated April 14, 2009, from a project manager who has supervised the Applicant, on several DoD programs, stated that the Applicant "needed little oversight". He took the initiative to do the work, and each time, always achieved the best yield the program had ever seen in its history. (Applicant's Post-Hearing Exhibit A).

Policies

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guidelines. However, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on her own common sense.

Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline E (Personal Conduct)

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

Conditions that could raise a security concern:

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

16.(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Conditions that could mitigate security concerns:

17(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;

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

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, 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 behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination. The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

The Government must make out a case under Guideline E (Personal Conduct) that establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between Applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations, at all times and in all places.

CONCLUSION

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

The evidence shows that over the past twenty-nine years, the Applicant has committed two violations of company policy and procedure. In 2005-2006, he used his company credit card for personal use, and in 2005, he accessed pornographic sites on his company computer. He received company disciplinary action for both violations. He realizes the seriousness of his misconduct and is extremely remorseful. When the violation was discovered, he immediately paid off the company credit card, and to avoid any future problems, he refuses to possess one. He no longer opens any e-mail other than the company's. He states that he has learned a harsh lesson from this experience and understands that the Government will not tolerate violations of company policy while holding a security clearance.

Under Guideline E, Disqualifying Conditions 16.(d) *credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations, (4) evidence of significant misuse of Government or other employer's time or resources and 16.(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States may service as a basis for exploitation or pressure by the foreign security or intelligence service or other group apply.*

However, under the particular facts of this case, Mitigating Conditions 17(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 and, 17(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress* also applies. The Applicant's misconduct in 2005/2006 was clearly an aberration from his normal, responsible pattern of behavior.

I have also considered the "whole person concept" in evaluating the Applicant's eligibility for access to classified information. His twenty-nine years of dedicated service to the defense industry as well as his favourable references have also been considered. 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, a willingness to comply with rules and regulations, and/or

other characteristics indicating that the person may properly safeguard classified information.

Considering all of the evidence presented, Applicant has mitigated the negative effects of his company violations and the impact that they can have on his ability to 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 Paragraph 1 of the SOR.

FORMAL FINDINGS

Formal Findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For the Applicant.
Subparagraph 1.a.: For the Applicant
Subparagraph 1.b.: 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