

KEYWORD: Sexual Behavior; Personal Conduct; Information Technology Systems

DIGEST: Between 1998 and 2003, Applicant knowingly and repeatedly misused government computers at his former place of employment by accessing more than 4,000 pages of pornographic websites. He resigned in March 2004, rather than face an internal investigation he knew would likely result in a recommendation he be fired. In December 2004, he deliberately falsified a security clearance application by failing to disclose he had left his previous job under unfavorable circumstances. He did not mitigate the resulting security concerns about his personal conduct, sexual behavior, and misuse of information technology systems. Clearance is denied.

CASENO: 07-02511.h1

DATE: 08/31/2007

DATE: August 31, 2007

In Re:)	
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-----)	ISCR Case No. 07-02511
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
MATTHEW E. MALONE**

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Between 1998 and 2003, Applicant knowingly and repeatedly misused government computers at his former place of employment by accessing more than 4,000 pages of pornographic websites. He resigned in March 2004, rather than face an internal investigation he knew would likely result in a recommendation he be fired. In December 2004, he deliberately falsified a security clearance application by failing to disclose he had left his previous job under unfavorable circumstances. He did not mitigate the resulting security concerns about his personal conduct, sexual behavior, and misuse of information technology systems. Clearance is denied.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to give Applicant a security clearance. On May 10, 2007, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed through Guideline D (sexual behavior), Guideline E (personal conduct), and Guideline M (misuse of information technology systems).

Applicant timely responded to the SOR, admitted with explanation all of the allegations therein, and requested a hearing. The case was assigned to me on June 29, 2007, and I convened a hearing on July 16, 2007, at which the parties appeared as scheduled.² I admitted two of the three exhibits proffered by the government (Gx. 1- 3).³ Applicant testified in his own behalf, but offered no exhibits other than those included with his responsive pleading.⁴ DOHA received the transcript (Tr.) on July 25, 2007.

FINDINGS OF FACT

Applicant's admissions in response to the SOR are incorporated herein as facts. After a thorough review of the pleadings, transcript, and exhibits, I make the following additional findings of fact:

Applicant is 53 years old, and has a Ph.D. in geophysics. Since March 2004, he has worked in Maryland for a contractor supporting the National Air and Space Administration (NASA). He is on a technical staff that performs planetary science research through interpretation of data received from spacecraft. He is an accomplished member of his profession, receiving over the years numerous awards, certifications, and letters of thanks and congratulations. He also serves on several professional boards, is widely published in his field, and has a record of working with sensitive classified and unclassified information.⁵

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

² Applicant specifically waived his right to 15-days' notice before hearing as provided by Section E3.1.8 of the Directive.

³ Those documents are described at Tr., 22 - 24. I excluded Gx. 3, an excerpt from DoD Regulation 5500.7-R (the Department of Defense Joint Ethics Regulation), for reasons stated in the transcript of hearing at pp. 24 - 30. I advised the parties, based on Department Counsel's request that I take notice of whether this regulation applies to the agencies within the Department of Interior, that I would research this issue (Tr., 63 - 64). Having reviewed that document, I conclude it applies only to agencies within the Department of Defense. Therefore, it is irrelevant to the allegations of misuse of IT systems at non-DoD agencies.

⁴ Described at Tr., 9 - 11. Department Counsel did not object to including them in the record.

⁵ Tr., 35.

From September 1984 until March 2003, Applicant was a federal employee working in Arizona as a geologist for an agency within the Department of Interior. In October or November 2003, Applicant was accused of using his government-issued desktop and laptop computers to visit web sites containing sexually explicit materials. Applicant has admitted he did so and that he knew such use of government information technology (IT) assets was a violation of IT procedures where he worked. Between 1998 and 2003, he misused his access to government computers as often as daily, and at least several times each week, and he has acknowledged accessing over 4,000 web pages of such material on the internet over the five years in question.⁶ Applicant has not used government computers to access pornography on the web since 2003, but he still views it through a personal laptop he uses when traveling for work.⁷

When Applicant was confronted with his misconduct, he began looking for a new job. In November or December 2003, he interviewed with his current employer and verbally accepted a job offer. Applicant's supervisor and a personnel department representative investigating Applicant's conduct had already indicated to Applicant he probably would be fired over the matter. Applicant did not want to suffer further embarrassment and decided to leave the agency to avoid a formal investigation into his actions. At his hearing, he acknowledged that his change of employment and the allegations of misconduct were related.⁸

In December 2004, Applicant submitted a security clearance application (SF 86) to begin a periodic review of his clearance. In response to question 20, which asked if Applicant had, in the preceding seven years, been fired from or left a job under adverse conditions. He answered "no." At some point, Applicant initialed changes to the SF 86 indicating he had reviewed it for accuracy.⁹

Applicant's wife, some family members, and some of his former co-workers know about his reasons for leaving his previous job. When he was interviewed for his current job, he did not disclose the real reason for wanting to leave his job in Arizona. He has only recently told his supervisor why he may lose his clearance.¹⁰ In June 2006, a government investigator interviewed Applicant as part of his periodic reinvestigation. Applicant disclosed the circumstances surrounding his departure from his previous employer when the investigator asked him about his answer to question 20.¹¹

Applicant has been receiving counseling for his behavior since late 2003. After leaving his previous job in March 2004 and relocating to Maryland with his family, he resumed counseling in July 2004 with a new provider. Applicant attends counseling weekly or biweekly and, according to

⁶ Answer to SOR; Tr., 41 - 42.

⁷ Tr., 61.

⁸ Gx. 2; Tr., 42 - 48, 53 - 55.

⁹ Gx. 1; Tr., 56 - 57.

¹⁰ Tr., 63 - 64.

¹¹ Gx. 2; Tr., 49 - 50.

his counselor, “has shown clear and consistent progress in working on some very difficult issues.”¹² Neither Applicant nor his counselor further explained what “issues” he is working on, but Applicant has referred often to his conduct as “the problem.” He testified he continues to view sexually explicit materials as a “stress reliever.”¹³

POLICIES AND BURDEN OF PROOF

The Directive sets forth adjudicative guidelines¹⁴ to be considered in evaluating an applicant’s suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair, impartial, and common sense consideration of the factors listed in Section 6.3 of the Directive.¹⁵ The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties at hearing require that Revised Adjudicative Guidelines D (sexual behavior), E (personal conduct), and M (misuse of technology) be applied.

_____ A security clearance decision is intended to resolve whether it is clearly consistent with the national interest¹⁶ 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, the burden then shifts 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.¹⁷ A person who has access to classified information enters into a

¹² Attachment to Answer (Letter of May 31, 2007, from Margaret B. Hanagan, Psychiatric Clinical Nurse Specialist).

¹³ Answer; Tr., 61 - 62.

¹⁴ 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.

¹⁵ Commonly referred to as the “whole person” concept, these factor are as follows: 1. Nature and seriousness of the conduct and surrounding circumstances; 2. Frequency and recency of the conduct; 3. Age of the applicant; 4. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved; 5. Absence or presence of rehabilitation; and 6. Probability that the circumstances or conduct will continue or recur in the future.

¹⁶ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

¹⁷ See *Egan*, 484 U.S. at 528, 531.

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 as his or her own. 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.¹⁸

CONCLUSIONS

Personal Conduct. The government alleged Applicant should be disqualified from holding a security clearance because he exhibited poor judgment by visited sexually explicit websites using government-issued computers while he was a federal employee between 1998 and 2003 (SOR ¶ 1.a), and that he deliberately falsified his answer to SF 86 question 20 regarding adverse aspects of his employment record (SOR ¶ 1.b). The facts established raise, in turn, security concerns about Applicant’s candor, trustworthiness, judgment and conduct. Specifically, “[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. 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.”¹⁹ Further, Guideline E disqualifying condition (DC) 16(a)²⁰ must be considered, because Applicant admitted he intentionally withheld from his December 2004 SF 86 the fact he left his previous job under adverse circumstances. Applicant sought a new position when he did because he knew he would be fired for his misuse of government IT systems to view sexually explicit materials on the internet. All available information bearing on this issue shows Applicant is an intelligent, articulate person who knew at the time he submitted the SF 86 his answer was false.

Guideline E DC 16(c)²¹ and DC 16(d)(4)²² also apply to the information presented. As discussed under Guidelines D and M, below, over the course of several years, Applicant intentionally

¹⁸ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

¹⁹ Revised Adjudicative Guidelines, ¶ 15.

²⁰ “[the] deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;”

²¹ “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;”

²² “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...(4) evidence of significant misuse of Government or other employer's time or resources;”

violated procedures governing use of IT systems in a government workplace. Such conduct also shows questionable judgement, in that he was aware through periodic memoranda and his own commonsense as a well-educated scientist that such conduct was improper, yet he persisted in it on a weekly, sometimes daily basis.

His response to the government's presentation does not support consideration of any of the Guideline E mitigating conditions (MC). As to his false answer to SF 86 question 20, MC 17(a)²³ may not be applied, because Applicant made no effort to correct his answer during the 18 months that elapsed from the time he submitted his SF 86 until his subject interview with a government investigator. Nor is MC 17(b)²⁴ applicable, because Applicant offered no information showing he relied on advice from anyone else about how he should answer the question.

As to the underlying misconduct, I have considered MC 17(c) and 17(d)²⁵ together. Neither is available to Applicant, because, while nearly four years have passed since his misuse of government IT systems cost him his job, the behavior was not infrequent. Further, in spite of Applicant's acknowledgment of his misconduct and poor judgment and his ongoing counseling, Applicant still accesses sexually materials on the internet for stress relief. Although he does not do so on a government computer, the motivation for his past misconduct is still present and undermines my confidence the behavior will not recur. In light of all available information probative of this issue, I find he has not presented sufficient information to overcome the adverse information about his personal conduct, and I conclude this guideline against the Applicant.

Use of Information Technology Systems. The government further alleged as a basis for revoking Applicant's security clearance, the actual conduct that led to his dismissal; that is, that he used government computers to view sexually explicit materials on adult web sites between 1998 and 2003 (SOR ¶ 2.a). As addressed in the Revised Adjudicative Guidelines at ¶ 39, "[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." The government presented sufficient information at hearing to support the allegation, but did not cite

²³ "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;"

²⁴ "the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;"

²⁵ "(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;"

to any specific regulation, rule, or procedure Applicant may have violated.²⁶ Nonetheless, Applicant admitted the allegation, and information developed at hearing shows he was aware through periodic guidance from internal memoranda, through his own commonsense, and from his experience over several years as a federal employee that his conduct violated generally-known rules for use of government computers and IT systems.

Of the listed disqualifying conditions under this guideline, only DC 40 (e) applies.²⁷ Applicant's access to government IT systems (to surf the internet) may have been authorized, but the way he used that access was not. In response to the government's information, Applicant did not provide sufficient information to support application of any of the listed mitigating conditions under this guideline. I specifically decline to consider MC 41(a),²⁸ for the same reasons I did not consider MC 17(c) and 17(d) under Guideline E, above. Applicant's conduct in this regard continues to cast doubt on his ability or willingness to comply with rules and procedures pertaining to government IT systems, and I conclude this guideline against the Applicant.

Sexual Behavior. Lastly, the government alleged Applicant's clearance should not be renewed because of his conduct in viewing sexually explicit materials on government computers between 1998 and 2003 (SOR ¶ 3.a). Again, the information submitted by the government, and Applicant's admissions and testimony at hearing are sufficient to support this allegation. The facts established by that information raise a security concern addressed in the Revised Adjudicative Guidelines at ¶ 12; that is, "[s]exual 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 the Guideline may be raised solely on the basis of the sexual orientation of the individual."

As discussed under Guideline E, above, Applicant's conduct reflects a lack of judgment, because he violated proscriptions against using government IT systems for improper purposes, and because he deliberately tried to conceal his conduct from the government when he re-applied for a clearance. Because he decided to resign rather than face further embarrassment at work through a formal investigation of his conduct, and he did not reveal to his new employer the real reason he changed jobs, Applicant's conduct may still subject him to coercion, exploitation or duress. Finally, Applicant has responded to this allegation by characterizing his conduct as "the problem" and providing information about counseling he has been attending since late 2003. While his voluntary referral to professional help is laudable, his testimony that he still visits adult web sites as a stress reliever indicates Applicant's sexual behavior has a compulsive aspect that undermines any claim it is under control and responding to counseling.

²⁶ As previously noted, Gx. 3 was excluded because it proffered evidence of a DoD regulation, which was not controlling because the misconduct in question occurred when Applicant worked for a non-DoD agency.

²⁷ "unauthorized use of a government or other information technology system;"

²⁸ "so much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment;"

Under Guideline D, the foregoing requires consideration of DC 13(b), 13(c), and 13(d).²⁹ By contrast, for many of the same reasons discussed under Guideline E, none of the Guideline D mitigating conditions apply. Accordingly, I conclude this guideline against the Applicant.

Whole Person. I have evaluated the facts presented in this record and have applied the appropriate adjudicative factors, pro and con, under Guidelines D, E, and M. I have also reviewed the record before me in the context of the whole person factors listed in section 2(a) of the Revised Adjudicative Guidelines.³⁰ It is uncontroverted that Applicant is a well-educated professional, who is eminently qualified and accomplished in his field. It is also clear his conduct, which occurred as a mature adult, was, at least partially due to compulsion. It also was embarrassing to him, and he tried to conceal it from the government and a prospective employer. In light of the adverse effects on his career and personal life, his continued viewing of sexually explicit materials perpetuates the government's doubts about his judgment and discretion. Because such doubts must be resolved in favor of the national security, a fair and commonsense assessment of all available information before me shows that the Applicant has not yet overcome the adverse information about his ability to protect classified information and to exercise the requisite good judgment and discretion expected of one who holds a security clearance.

²⁹ “(b) a pattern of compulsive, self-destructive, or high-risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder; (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; (d) sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.”

³⁰ “ (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; (9) The likelihood of continuation or recurrence.”

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline E (Personal Conduct):	AGAINST THE APPLICANT
Subparagraph 1.a:	Against the Applicant
Subparagraph 1.b:	Against the Applicant
Paragraph 2, Guideline M (Information Technology):	AGAINST THE APPLICANT
Subparagraph 2.a:	Against the Applicant
Paragraph 3, Guideline D (Sexual Behavior):	AGAINST THE APPLICANT
Subparagraph 3.a:	Against the Applicant

DECISION

In light of all the information presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant. Clearance is denied.

Matthew E. Malone
Administrative Judge