

Date: June 2, 2022

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 In the matter of:)
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 Applicant for Security Clearance)
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ISCR Case No. 19-03536

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Jeffrey S. Gard, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 23, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Behavior), Guideline M (Use of Information Technology), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 25, 2022, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge failed to properly weigh the mitigating evidence; whether the Judge improperly considered a 1997 criminal charge; and whether the Judge improperly found viewing legal pornographic images to be a violation of Guideline D. Consistent with the following, we affirm.

The Judge’s Findings of Fact: The Judge’s findings of fact are summarized below, in pertinent part.

Applicant is 68 years old, married for the third time, with no children of his own. He first received a security clearance in the 1980s.

Under Guideline D, the SOR alleged: between 2001 and 2015, Applicant used his company-issued computer to upload, view, and save images of naked women and young girls, ages 11-15, in modeling poses and with scant clothing and that Applicant continues to view similar images at home; in January 1997, Applicant was arrested and charged with sexual assault and sexual assault on a child while in a position of trust; and from 2001 to 2016, Applicant attended a 12-step program for sex addicts.

Under Guideline M, the SOR alleged: Applicant signed documents that prohibited him from viewing pornography on his company-issued computer; between 2001 and 2015, Applicant used his company-issued computer to upload, view, and save images of naked women and young girls, ages 11-15, in modeling poses and with scant clothing, and Applicant continues to view similar images at home.

Under Guideline E, the SOR alleged: in February 2015, Applicant was removed from his work premises and had his work laptop and security badges confiscated for violations of company policies; in March 2015, Applicant was terminated from his employment; between 2001 and 2015, Applicant used his company-issued computer to upload, view, and save images of naked women and young girls, ages 11 – 15, in modeling poses and with scant clothing and Applicant continues to view similar images at home; and Applicant signed documents that prohibited him from viewing pornography on his company-issued computer.

In approximately 1997, Applicant was arrested for inappropriately touching his 11-year-old stepdaughter through her clothing while she was sleeping or pretending to sleep. After the child told her mother (Applicant's second wife), Applicant admitted his behavior, which occurred once a week for a month. He also admitted viewing images of adolescent girls ages 11 to 15 in sexually erotic poses during this time. Arrested on felony charges of sexual assault on a child and sexual assault on a child while in a position of trust, Applicant pleaded guilty and was given a deferred sentence, which included four years of unsupervised probation, four years of therapy, and registration as a sex offender. In 2001, Applicant successfully completed all terms of his deferred sentence, and the original charges were then dropped. He is no longer listed as a sex offender in his home state. From 2001 to 2016, Applicant voluntarily attended a 12-step recovery program for sex addicts.

From 2001 to 2015, Applicant worked for Employer 1 (E1). In his clearance interview in July 2019, Applicant admitted that he signed documents acknowledging that E1 prohibited having or viewing pornography on company-provided computers. At hearing, Applicant equivocated on this point, stating that he could not recall any specific company policy regarding the personal use of a company-issued laptop. Additionally, he testified that someone told him he could use his company-issued laptop for personal use, but he could not recall who that person was. The Judge determined that Applicant's testimony was not credible.

In February 2015, law enforcement became aware that Applicant may have had child pornography on his company-issued laptop and seized his laptop. Applicant's employer initially put him on administrative leave pending the criminal investigation and subsequently terminated his employment in March 2015. Forensic examiners ultimately concluded that the material found on the computer was not child pornography, but rather child erotica (adolescent children posed in

erotic positions with skimpy and/or revealing clothing). The criminal investigation was closed, as possession of child erotica was not illegal under state law.

In his SOR answer, Applicant admitted using his company-issued laptop to view, upload, and save images of naked women and scantily dressed young girls (ages 11-15) posed in erotic positions. He also admitted signing company documents prohibiting him from using his company-laptop for these purposes.

Applicant admitted that he continues to view child erotica on his personal electronic devices, as recently as a month before his security clearance hearing. He continues to view this material because he is sexually stimulated by viewing images of scantily dressed girls, ages 11 to 15, in modeling poses. He admitted that his actions show questionable judgment on his part.

The Judge's Analysis: The Judge's analysis is summarized and quoted in pertinent part below:

Guideline D

In approximately 1997, Applicant pleaded guilty to sexually assaulting his 11-year-old stepdaughter on multiple occasions. Between 2001 and 2015, Applicant downloaded and viewed images of adult pornography and child erotica on his company-issued laptop. He admitted that his actions demonstrated poor judgment. Adjudicative Guidelines (AG) ¶¶ 13(a)¹ and 13(d)² apply. The allegation regarding attendance at a 12-step program does not fall within any disqualifying condition under Guideline D and is found in favor of the Applicant.

Although his sexual assault and his misuse of his work computer to view pornography are in the past, Applicant admits to an ongoing sexual interest in viewing child erotica and engaged in this behavior as recently as a month before his hearing. "The common denominator of a continuing sexual fascination with pre-teenage girls and his past criminal acts and unauthorized computer use also involving pre-teenage girls casts doubt on his current reliability, trustworthiness, and judgment. AG ¶ 14(b)³ does not apply." Decision at 6.

Guideline M

From 2001 and 2015, Applicant viewed, downloaded, and saved adult pornographic images and child erotica using his company-issued laptop in violation of E1's written prohibition.

¹ AG ¶ 13(a): sexual behavior of a criminal nature, whether or not the individual has been prosecuted. Directive, Encl. 2, App. A.

² AG ¶ 13(d): sexual behavior of a public nature or that reflects lack of discretion or judgment. Directive, Encl. 2, App. A.

³ AG ¶ 14(b): the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment. Directive, Encl. 2, App. A.

Although some time has passed since Applicant engaged in his unauthorized behavior, he failed to accept full responsibility for his actions, instead claiming that an unidentified individual told him he could use his company laptop for personal use. His failure to accept responsibility for his actions calls into question Applicant’s current reliability, trustworthiness, and judgment.

The allegation of SOR ¶ 2.a.—that Applicant signed documents putting him on notice that pornography was prohibited on his company laptop—does not fall within any of Guideline M’s disqualifying conditions and is found in favor of the Applicant.

Guideline E

Applicant’s occasions of committing sexual abuse on his 11-year-old stepdaughter and his use of his company-issued laptop to view pornography and child erotica raise Guideline E security concerns under AG ¶¶ 16(e)(1)⁴ and 16(f).⁵ In light of the similarities between Applicant’s continuing sexual fixation on pre-teenage girls and his past criminal and employment-ending behavior also involving pre-teenage girls, those security concerns are not mitigated by the passage of time.

Discussion

Passage of Time

Applicant argues that the Judge failed to give appropriate weight to his evidence in mitigation, particularly “to the time passed since the allegations . . .” Appeal Brief at 2. As summarized above, the Judge specifically considered under each Guideline whether the security concerns were mitigated by the passage of time. He concluded they were not. As the Judge highlights, Applicant admits to a sexual interest in pre-teen girls and child erotica that spans from at least 1997 through the present. Moreover, Applicant admits to indulging in that sexual interest by viewing child erotica as recently as a month prior to the hearing. The evidence of record amply supports the Judge’s conclusion that Applicant demonstrates a continuing course of conduct that gives rise to continued security concerns.

1997 Criminal Charges

Applicant contends that the Judge improperly considered the 1997 child sexual assault charges. Here, he advances two separate arguments. The first is that the charges should be disregarded because they were “dismissed entirely by the District Attorney.” Appeal Brief at 2. However, it is well-established that a DOHA Judge may consider the underlying conduct in evaluating an

⁴ AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing. Directive, Encl. 2, App. A.

⁵ AG ¶ 16(f): violation of a written or recorded commitment made by the individual to the employer as a condition of employment. Directive, Encl. 2, App. A.

applicant's security clearance eligibility even if criminal charges are reduced or dropped. *See e.g.*, ISCR Case No. 17-00506 at 3–4 (App. Bd. Aug. 7, 2018). The Directive itself highlights that a security concern may arise from “sexual behavior of a criminal nature, whether or not the individual has been prosecuted.” Directive, Encl. 2, App. A ¶ 13(a).

Second, Applicant argues that the 1997 criminal charges should be disregarded because “[t]hose facts were known when [Applicant] was previously issued a security clearance and nothing has changed since that time except the allegations are now even more distant in time.” Appeal Brief at 2. Contrary to this assertion, the record confirms that the Government in earlier adjudications did not know that Applicant—for 14 years—was accessing pornography and child erotica from his work computer in violation of company policy. The Government has the right to reconsider the security significance of past conduct in light of more recent conduct having a negative security significance. *See, e.g.*, ISCR Case No. 19-02399 at 2 (App. Bd. Nov. 30, 2021).

Pornography and Guideline D

Applicant challenges the Judge's determination that an interest in child erotica raises any security concerns under Guideline D. He premises his argument on the fact that the 2015 law enforcement examination of his computer revealed “no criminal conduct” and that the images he possesses are therefore “legal images.” Appeal Brief at 2, 3. Consequently, he argues, the Judge “incorrectly found that the use of legal pornographic images constitutes a violation of Guideline D.” Appeal Brief at 2. Said differently, Applicant argues that sexual behavior raises no security concerns unless it is criminal in nature. This argument is wholly unsupported by the Directive, the record, and Appeal Board precedent.

Of Guideline D's four disqualifying conditions, only AG ¶ 13(a) references criminal behavior. The Judge determined that Applicant's behavior in viewing adult pornography and child erotica instead raised security concerns under AG ¶ 13(d), specifically sexual behavior that reflects lack of discretion or judgment. We concur. Viewing pornography and child erotica on an employer-issued laptop in the workplace over a period of 14 years inarguably reflects a lack of judgment. Indeed, Applicant admits the same. Tr. at 36; GE2 at 9.

Applicant asserts that he “freely admits his behavior, which eliminates the potential vulnerability that such information could otherwise create.” Appeal Brief at 3. The record does not support this assertion. Applicant's current wife is aware that Applicant sexually assaulted his former stepdaughter and is aware of “his viewing of images of women.” GE2 at 11. However, her son and his family live with Applicant and those individuals are “not aware of his past criminal charge or his issues as a sex addict.” *Id.* Moreover, Applicant has not told his current employer that he was criminally charged in 1997 for sexual assault of a child or that he was terminated in 2015 for viewing pornography and child erotica on his work computer. Tr. at 39. Applicant's argument that his past and ongoing sexual behavior, both criminal and non-criminal, does not make him vulnerable to coercion, exploitation, or duress is not persuasive.

In his appeal brief, Applicant cites to his “confusion” regarding personal use of his work computer at E1. He attributes that confusion to a conversation with an unidentified “superior” and a “miscommunication regarding the use of legal images.” Appeal Brief at 2, 3. The Judge

specifically found Applicant's testimony on this issue to be not credible. We defer to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Applicant has failed to rebut the presumption that the Judge considered all of the record evidence, failed to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law, and failed to establish that he should be granted any relief. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the record. "The general standard is that a clearance may be granted only when 'clearly consistent with national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also*, Directive, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of national security."

Order

The decision is **AFFIRMED**.

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board