



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



In the matter of:)
)
-----) ISCR Case No. 17-01680
)
Applicant for Security Clearance)

Appearances

For Government: Andre Gregorian, Esquire, Department Counsel
For Applicant: Alan V. Edmunds, Esquire

03/29/2019

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Statement of the Case

On July 17, 2017, the Department of Defense (DOD) Consolidated Adjudication Facility (CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline D (Sexual Behavior) and Guideline E Personal Conduct).¹ In a September 6, 2017, response, Applicant answered the allegations and requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. I was assigned the case on June 12, 2018.

A June 20, 2018, notice was issued which set the hearing for August 22, 2018. The hearing was convened as scheduled. The Government offered five documents, accepted into the record without objection as exhibits (Exs.) 1-5. Applicant offered testimony and 16 exhibits, accepted without objection as Exs. A-P. The record was held open through August 31, 2018, in the event either party wished to submit additional materials. The transcript (Tr.) of the proceeding was received on August 30, 2018. On August 31, 2018, Applicant offered what was marked as Ex. P. With no objection

¹ The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on or after June 8, 2017.

forthcoming, the item was accepted on September 1, 2018, and the record was closed. Based on the testimony, materials, and record as a whole, I find Applicant failed to mitigate sexual behavior and personal conduct security concerns.

Findings of Fact

Applicant is a 54-year-old reliability engineer who has worked for the same entity for nearly six years. He has earned a bachelor of science degree, three master's degrees, and a doctorate degree. In the interim, he accepted a commission in the U.S. Army, where he began with his Army Reserves unit in 1987. He was transferred to the retired Army Reserves as a lieutenant colonel after 26 years. Most recently, he completed seminary school and became a chaplain at the rank of major.

In 2007, Defense Criminal Investigative Services (DCIS) and Immigration and Customs Enforcement (ICE) conducted a national investigation that identified over 5,000 U.S. individuals, some with DOD affiliations, who subscribed to known child pornography websites. In 2007, Applicant returned from a deployment with a compact disc (CD) of some military orders and sermons. (Tr. 24, 37) He did not realize the orders were sensitive or otherwise protected. (Tr. 41) Applicant also returned suffering from Post-Traumatic Stress Disorder (PTSD).

Applicant's home was searched as part of the DCIS and CID national investigation. He admitted viewing adult content of a titillating nature on the Internet. Apparently, no images of underage individuals, however, were found and archived that were noted as pornographic. (Tr. 34-36) The past military orders, however, were found. Applicant claimed that someone had given him permission to have the orders, but he was unable to provide a name or documentation reflecting permission was given. A written warning for mishandling classified information was issued.

When Applicant came back from his next deployment in 2011, his estranged wife told him that two deployments was too much for their marriage, and that she wanted a divorce. (Tr. 22) Their five year marriage would end in divorce in 2013. (Tr. 17-18) After she moved away, he had difficulty sleeping. As a result, he would spend the nights on the computer viewing pornography. (Tr. 19)

In late 2010, DCIS and CID determined that its previous investigational checks had left several leads insufficiently examined or deficiently investigated. (Ex. 3 at 2) In June 2011, Applicant was again investigated by DCIS/CID for possession of child pornography. This entailed reopening the 2007 investigation, during which time the lab, which had lost its evidence from 2007, inspected new material. (Tr. 36). Also, a mix-up of some sort led to a hard drive that did not belong to Applicant being made part of the investigation.

During the interview, Applicant was asked if he had any unauthorized charges to his credit card. He answered a charge had been made for a hotel. When specifically asked about a particular website he had visited, he chose to end the interview and

consult an attorney. (EX. 3 at 2) His clearance and access were suspended in August 2012. (Ex. 2) Later, four to six images were discovered on Applicant's media, two images were identified as containing known child victims identified by the National Center for Missing and Exploited Children (NCMEC).² (Ex. 3 at 3)

In 2012, Applicant returned from another deployment. At the conclusion of the investigation, the Assistant U.S. Attorney's office declined to prosecute due to evidentiary deficiencies and statute of limits issues. (Ex. 3) Local prosecutors similarly declined to prosecute the matter.³ However, a Memorandum of Reprimand (MOR) was issued to Applicant on January 26, 2013. He was given 15 days from receipt of the MOR to respond in rebuttal, extenuation, or mitigation. (Ex. 2) A general officer's letter of reprimand dated January 26, 2013, was issued, determining that child pornography and unsecured classified material was found at Applicant's home. (Ex. 2) This fact was found to be particularly "reprehensible" and "disturbing" because Applicant is an Army chaplain. (Ex. 3 at 4) The reprimand became final in April 2013. Applicant was transferred to retired reserve status on May 1, 2013, with the recommendation his security clearance be revoked. (Ex. 2)

Applicant disagrees with the assessment of the military that the images at issue were child pornography. Applicant has viewed the photos, noting that some were nude, while others included scanty clothing. He testified that he had never seen the photos before. Throughout the hearing, Applicant stressed the models were not engaged in sexual activity and, therefore, could not be deemed child pornography, *per se*. Applicant repeatedly acknowledged that his reputation would be harmed if the issues regarding sexual behavior became public knowledge.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to the AG, the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept," each of which must be fully considered in making a decision.

² In December 2012, four of the children were determined to be underage by professionals according to body habitus and other criteria. (Ex. 3 at 4)

³ It is noted that the lack of criminal charges does not preclude a finding that an applicant engaged in the conduct underlying the cited offenses nor does it indicate such offenses are entitled to little weight. See, e.g., ISCR Case No. 12-11795.

The protection of the national security is the paramount consideration. Any doubt concerning personnel being considered for national security eligibility and will be resolved in favor of the national security. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the record evidence. Under the Directive, the Government must present evidence to establish controverted facts alleged in the SOR. Under the Directive, an applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision.

A person seeking access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. This relationship transcends normal duty hours. Decisions include consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Decisions are in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant.

Analysis

Guideline D, Sexual Behavior

AG ¶ 12 sets forth the security concern as follows:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

Applicant began viewing Internet-derived pornography for entertainment at some point in his life prior to 2007. He was identified by DSIC and CID as an individual whose credit card had been linked to known child pornography websites. His premises and media were inspected in 2007, but the inspection was deemed inadequate in 2010. In 2011, he was again subject to investigation. He quit complying with investigators when asked about a specific website known to offer child pornography. What was deemed to be child pornography was found, but the Assistant U.S. Attorney and local authorities declined to prosecute due to issues involving the material and the statute of limitations.

The military, however, found the investigative findings and Applicant's conduct to be particularly "reprehensible" and "disturbing" because Applicant is an Army chaplain. A formal reprimand was issued and became final in April 2013. As a result, Applicant was transferred to retired reserve status on May 1, 2013, with the recommendation his

security clearance be revoked. His sexual behavior has thus become a concern because he is now susceptible to coercion, exploitation, or duress and it could adversely affect his reputation, esteem in the community, judgment, and his ability to find or keep a job.

AG ¶ 13 provides conditions that could raise a disqualifying condition:

AG ¶ 13 (a): sexual behavior of a criminal nature . . . ;

AG ¶ 13 (b): pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;

AG ¶ 13 (c): sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

AG ¶ 13 (d): sexual behavior of a public nature or that reflects lack of discretion or judgment.

Under these circumstances, AG ¶ 13 (a) and AG ¶ 13 (c) apply.

AG ¶ 14 provides the following possible mitigating conditions:

AG ¶ 14 (a): the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of similar nature;

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;

AG ¶ 14 (c): the behavior no longer serves as a basis for coercion, exploitation, or duress;

AG ¶ 14 (d): the sexual behavior is strictly private, consensual, and discreet; and

AG ¶ 14 (e): the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

The behavior at issue occurred in Applicant's middle years. Applicant's continued protestation that the material at issue was not child pornography, despite the fact this is not the forum to appeal previous findings by DCIS and the military, makes it difficult to judge whether such behavior could recur. The established facts of record in the

Government's exhibits do tend, however, to bring into question Applicant's judgment and current reliability. Two of the children were identified as having been previously identified as missing or exploited children, obviating application of AG ¶ 14 (d). Applicant is not currently in treatment or a recent graduate of an appropriate program. Therefore, I find none of the mitigating conditions apply.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

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 or sensitive information.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, 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. . . .

Here, Applicant was the subject of the aforementioned investigation regarding child pornography in 2007 and in 2010. While federal and local prosecutors declined to prosecute, the military issued a formal reprimand seriously condemning the behavior exhibited, and the disgrace wrought by one of its own chaplains under these circumstances. Applicant admits public knowledge of the facts involved would harm his reputation. Also, Applicant was found with sensitive or protected information on his personal media during the 2007 investigation. Therefore, AG ¶ 16(e) applies.

I have considered these facts in light of the AG ¶ 17 mitigating conditions. I find the following potentially applicable:

AG ¶ 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

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

Here, the offenses at issue are particularly worrisome, as issues both reflecting poor judgment and a lack of trustworthiness. Applicant attempted to absolve himself of responsibility for the sensitive or protected material by stating he was told he could

possess the material, but he failed to provide a name or documentary evidence supporting this claim. On one hand, Applicant continues to deny having downloaded child pornography, on the other hand, he failed to show how the Government's documentary evidence is incorrect. Further, in neither situation of misconduct has he raised any mitigating facts that would tend to show some form of similar conduct, be it intentional or accidental, will not occur in the future. AG ¶ 17(c) does not apply. Moreover, by fearfully keeping the matter private, he failed to give rise to AG ¶ 17(e).

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline D and Guideline E in my whole-person analysis. I also considered Applicant's testimony, materials, and references.

Overall, the record evidence leaves me with notable questions or doubts about Applicant's eligibility and suitability for a security clearance. I conclude sexual behavior and personal conduct security concerns remain unmitigated.

Formal Findings

Formal findings for or against Applicant 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 D:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraphs 2.a-2.b:

Against Applicant

Conclusion

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

Arthur E. Marshall, Jr.
Administrative Judge