



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



In the matter of: )  
)  
) ISCR Case No. 18-00050  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Michelle Tilford, Esq., Department Counsel  
For Applicant: Ronald Sykstus, Esq.

05/09/2019

**Decision**

BENSON, Pamela C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline D (Sexual Behavior), and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

On September 15, 2017, Applicant submitted a security clearance application (SCA). On March 5, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline D (Sexual Behavior), and Guideline E (Personal Conduct). The action was taken under Executive Order (EO) 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 June 8, 2017.

On March 29, 2018, Applicant responded to the SOR, and he requested a hearing before an administrative judge. On July 13, 2018, the Defense Office of Hearings and Appeals (DOHA) issued a notice of Hearing, setting the hearing for August 15, 2018. Applicant's request for a continuance was granted. On October 29, 2018, the case was assigned to me. On December 31, 2018, the Defense Office of Hearings and Appeals (DOHA) issued a notice of Hearing, setting the hearing for January 17, 2019.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 3 into evidence, which I admitted without objection. Applicant's counsel proffered Applicant Exhibit (AE) A through F, which I admitted without objection. Applicant testified, and he had four witnesses testify on his behalf during the hearing. I held the record open until February 17, 2019, in the event either party wanted to provide additional documentation. DOHA received the hearing transcript (Tr.) on January 28, 2019. No additional documents were submitted, and the record was closed on February 17, 2019.

### **Findings of Fact**

Having thoroughly considered the evidence in the record, including Applicant's admissions, I make the following findings of fact: Applicant is 38 years old. He married in January 2006, and he has one daughter, age 10. He claimed to be nine credit hours short of a bachelor's degree. Applicant was previously employed with a DOD contractor from May 2006 until December 2015, and he held a DOD security clearance during that period. He was unemployed from about December 2015 to March 2017, when he obtained his real estate license. Applicant was hired by another DOD contractor approximately one year ago. His employer is requesting Applicant obtain a DOD security clearance in order to perform specific employment duties on DOD classified projects. (Tr. 10, 17-21, 23, 35, GE 1)

The SOR ¶ 1.a alleges that Applicant was arrested in about December 2015, and charged with pornography-possession of obscene materials depicting minors, a felony. In his response to the SOR, Applicant admitted he was arrested, but denied that the arrest had any merit to support it. The judge set his bond at \$250,000. Applicant stayed in jail for approximately three weeks since he was unable to make bail, but he was later released after his father paid \$21,000. Applicant and his family had just moved to state A five weeks earlier after he accepted a new job assignment from his former DOD contractor employer. (Tr. 25, 28, 30, 41-42, 48, 50, 63-65; GE 2)

Applicant admitted to looking at pornography on his computer for about the last 25 years, including the five weeks he had lived in state A. His frequency of viewing pornography varied, but he admitted to looking at it twice weekly in 2015. He denied ever intentionally looking for images of minors, or accidentally looking at images of minors, during the entire time period he accessed pornography on the internet. It became a habit for him to view pornography, and he continued over the years because he believed that viewing pornography was not hurting anyone. (Tr. 25, 28-29, 30, 41-42, 48, 50, 63-65; GE 2)

Applicant stated at the hearing that on the day of his arrest, the police arrived early in the morning to his house with a search warrant. A police officer asked him if he knew why the police were in his home, and Applicant responded "No." The police officer told him they were there looking for illegal pornography. The police confiscated his home computer, and other items, and placed Applicant under arrest. (Tr. 25-26)

Applicant's background interview occurred in April 2016, which was subsequently adopted by him on March 13, 2018, after he made several changes to the record. In the interrogatories, Applicant listed, "When they (police) first arrived, I did not know why they were there. A couple of minutes later, they told me they were there because of the obscene material." He also wrote, "The charge related to pornography of teens under the age of 17 being on my computer, which would have been there from either downloading or viewing them on the internet. . . . When the police came to my house, I admitted I had pornography on my computer. . . ." He told the investigator that his attorney informed him that the criminal charges filed against him were for child pornography. The district attorney (DA) cancelled a meeting with his attorneys, and due to the cancellation, his attorneys were unable to review any incriminating evidence the state had against him. Instead, the DA offered to dismiss the charges through a pretrial intervention program with specific conditions. The conditions included that he attend weekly meetings for a two-year period with the state's sex offender group treatment program, and he pay approximately \$1,250 in court costs. Applicant accepted the DA's offer and the charges against him were dismissed in February 2016. Applicant said that he neither admits, nor denies, his involvement which led to the criminal charges filed against him. (GE 2)

At the hearing, Applicant specifically denied ever looking at child pornography. He was surprised about the criminal charges that were filed against him. He stated that the court dismissed his "case almost immediately." He only accepted the DA's offer because he wanted to get this ordeal over with as quickly as possible, and he did not have the financial resources to fight the charges. This incident has taught him a valuable lesson, as he has not looked at any pornography for the past three years. The arrest has been a source of embarrassment for him and his wife. (Tr. 28, 30-33, 39-40)

After further questioning, Applicant admitted that the DA was not proposing to his attorneys that they would be "dismissing the charges outright" against him due to lack of evidence. He also agreed that if he had not met the conditions of the pre-trial intervention program, the DA could have refiled the criminal charges against him. He finished his sexual offender treatment program in a year-and-a-half, about six months early. He denied receiving a diagnosis from the treatment program, or that he was required by the state to register as a sex offender. (Tr. 43-44, 66)

During the hearing, the following testimony was provided:

Department Counsel: And you in fact noted that in your response to the interrogatories that the images (of minors 17 and younger) would have had to have been there (on his computer) from either downloading, or you said you were viewing them on the internet.

Applicant: That's correct. That's why I have no idea. I have no idea specifically what it was that they (police) were looking for because they never said so. And they never told my attorneys. And the first case that they (attorneys) were going to ask them (DA) about it, they (DA) decided – they (DA) declined to even offer up anything.

Department Counsel: Well, they (DA) offered up the pretrial diversion program.

Applicant: Yeah, I'm saying they (DA) offered up no evidence of any type of wrongdoing whatsoever. From the first time I was arrested, they told my attorney absolutely nothing.

Department Counsel: Okay, as far as you know.

Applicant: Yeah, as far as what my attorney has expressed to me. (Tr. 47)

Applicant claimed the reason his previous DOD contractor employer stopped paying him in December 2015 was not related to his arrest, but due to him not working on the contract. He was told he was going to be continued as an employee while his current security clearance was placed on "hold." He acknowledged this employer terminated his employment, but he was unsure of the date. His employer filed an incident report in the Joint Personnel Adjudication System since he was arrested while in possession of a DOD security clearance. Applicant admitted receiving a letter in the mail from his employer and then applying for unemployment benefits. He was initially denied unemployment benefits due to his gross negligence, "failing to report to work" for three consecutive days. Applicant appealed that decision, and he did receive unemployment benefits for a few months. (Tr. 33-34, 52-55, 58)

SOR ¶ 2.a cross-referenced SOR ¶ 1.a under Guideline E (Personal Conduct). Applicant denied in his response to the SOR that he was involved in any conduct that questioned his judgment, candor, or willingness to comply with rules pertaining to his December 2015 arrest. He stated: "The court system found no grounds to pursue any case against me, . . ." Applicant failed to provide any court documentation to support his contention.

SOR ¶ 2.b alleges that Applicant intentionally misrepresented the criminal charge from his December 2015 arrest when he disclosed he had been charged with "Possession of Obscene Materials," rather than "Possession of Obscene Materials depicting a minor" on his September 2017 SCA. Applicant denied this allegation and stated he did not intentionally try to misrepresent this charge on his SCA. He listed the offense to put the Government on notice of his arrest, and he was not trying to conceal the nature of the criminal offense in any way.

Applicant disclosed information about his December 2015 arrest to his current DOD contractor employer. He also showed his employer the SOR and interrogatories. Despite this adverse information, his current employer continues to sponsor him for a

DOD security clearance. The founder of the company appeared at the hearing, and stated that he was aware of Applicant's security issues. He would not hesitate to place Applicant in a position of his company with full access to classified information. Three other witnesses gave favorable recommendations for Applicant as well. (Tr. 59, 70. 76-79)

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG 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 AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility 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 evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 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 as to obtaining a favorable security decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant

concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline D, Sexual Behavior**

The security concern for sexual behavior is set out in AG ¶ 12:

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. ...

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 13, and the following are potentially applicable:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted; and
  
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

In December 2015, Applicant was arrested after the police executed a search warrant at his home, and he was charged with pornography possession of obscene material depicting minors, a felony. The charges were dismissed after he accepted a pretrial intervention program with conditions. The conditions included that he attend weekly meetings for a two-year period with the state’s sex offender group treatment program, and he pay approximately \$1,250 in court costs. The charges were not dismissed for lack of evidence, which raises questions about his judgment and potential vulnerability to coercion, exploitation, and duress. If Applicant had not fulfilled the pretrial intervention program conditions, the DA could have refiled the charges and continued with prosecution of the case against him. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from sexual behavior. AG ¶ 14 provides the following possible mitigating conditions:

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

(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;

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

(d) the sexual behavior is strictly private, consensual, and discreet; and

(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.

Applicant has continued to deny that the material confiscated by the police involved child pornography, despite the fact he was arrested after the police executed a search warrant at his home. He stated multiple times that the DA cancelled a meeting with his attorney. The purpose of this meeting was to show Applicant's attorney the incriminating evidence the DA had against him. Applicant alluded that the reason the DA offered to dismiss the charges against him was due to the fact that the DA did not have any evidence of child pornography. The established facts of record in the Government's exhibits do tend, however, to bring into question Applicant's judgment and current reliability. Applicant has completed a year-and-a-half of sexual offender treatment, but he does not admit to viewing child pornography, to include an accidental image, over the span of approximately 25 years he has viewed pornography. I find his assertions unpersuasive. Since he has revealed the events to his wife and employer, ¶ 14(c) applies, but is, in itself, insufficient for a finding in his favor. I find ¶¶ 14(a), (b), (d), and (e) do not apply.

### **Guideline E: Personal Conduct**

AG ¶ 15 expresses the security concern for personal conduct:

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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility.

AG ¶ 16 describes conditions that could raise a security concern and be disqualifying. The following are potentially applicable under the established facts in this case:

(a) 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 national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(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.

Applicant's sexual behavior (SOR ¶ 1.a) was addressed under that specific guideline, and also cross-alleged (SOR ¶ 2.a) under the personal conduct guideline. I have previously addressed the issue under Guideline D. Disqualifying condition ¶ 16 (e)(1) applies in this case.

SOR ¶ 2.b alleges that Applicant intentionally misrepresented the criminal charge he listed on his 2017 SCA. There is insufficient evidence in the record to show that Applicant intentionally misrepresented or concealed the nature of his criminal charge when he disclosed his arrest on the 2017 SCA. Disqualifying condition ¶ 16(a) does not apply.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. The following mitigating conditions under AG ¶ 17 are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, 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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

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

(f) the information was unsubstantiated or from a source of questionable reliability.



Applicant has consistently denied that he viewed or possessed child pornography at any time. There is no evidence in the record to support his contention that the court system did not have any grounds to pursue criminal charges against him. He admitted during the hearing that the DA did not dismiss “outright” the charges due to lack of evidence. Applicant also acknowledged that the DA could refile the charges against him if he did not complete the conditions outlined in his pretrial intervention program. His continued claim of innocence without supporting documentation is worrisome. To his credit, Applicant completed a year-and-a-half of treatment and claimed that he has not viewed pornography for the last three years. He also told his wife and current employer about the circumstances which resulted in his arrest. Mitigating condition ¶ 17(e) does have some application, but it is not enough for a favorable finding. His personal conduct casts doubt on his reliability, trustworthiness, and overall good judgment. Mitigating conditions ¶¶ 17(c), (d), and (f) do not apply.

### **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 the 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. Applicant provided several favorable character testimonials, to include support from his current employer, friends and associates. He admitted being arrested, but denied he ever viewed child pornography. Applicant successfully completed the conditions of his pretrial intervention program, and the criminal charges against him were dismissed. Unfortunately, his favorable character evidence and his completion of a pretrial intervention program is not enough to absolve the security concerns in this case.

Applicant averred the DA did not possess any evidence of child pornography against him, which was the reason he was offered the pretrial diversion program. He has viewed pornography for approximately 25 years, but denied that he has ever viewed an

image of a minor, even by accident, over that entire period of time. I find his assertions unpersuasive and unsubstantiated. Because protection of the national interest is the principle focus of these adjudications, any unresolved doubts must be resolved against the granting of access to classified information.

### **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
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant

### **Conclusion**

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

Pamela C. Benson  
Administrative Judge