



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



In the matter of:)
)
) ISCR Case No. 18-00659
)
Applicant for Security Clearance)

Appearances

For Government: Michelle P. Tilford, Esq., Department Counsel
For Applicant: Jacob T. Ranish, Esq.

01/04/2019

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the sexual behavior and use of information technology security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On May 1, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D (sexual behavior) and M (use of information technology). Applicant responded to the SOR on May 23, 2018, and requested a hearing before an administrative judge.

The case was assigned to another administrative judge on July 13, 2018, and reassigned to me on July 26, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 16, 2018, scheduling the hearing for August 16, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. Applicant testified, called a witness, and submitted Applicant's Exhibits (AE) A through D, which were admitted without objection. A second witness was unavailable because of an emergency. The case was continued until October 4, 2018, at which time the witness testified and AE E and F were admitted

without objection. DOHA received the transcript of the first hearing (Tr.1) on August 23, 2018, and the continued hearing (Tr.2) on October 12, 2018.

Findings of Fact

Applicant is a 39-year-old software engineer employed by a defense contractor since January 2018. He has worked in the defense industry since about 2001. He seeks to retain a security clearance, which he has held since the early 2000s. He has a bachelor's degree, which was awarded in 2001, and a master's degree, which he earned in 2006. He is married with four minor children.¹

Applicant is an admitted sex addict whose addiction is to pornography.² He started viewing pornography at a young age. His wife is an ordained minister who considers pornography and masturbation to be equivalent to infidelity. Applicant's wife discovered on several occasions that Applicant was viewing pornography at home. In order to avoid his wife finding out that he was continuing to view pornography, Applicant viewed pornography at work using his work computer. He also stored pornography on the company's computer. This was against company policy and went on at various jobs from about 2002 through September 2017. He never masturbated at his desk, but if there was nobody else in the men's room, he would sometimes masturbate there.³

Applicant received marriage and other counseling, and he has been under the care of a licensed professional counselor since 2012. He started attending Sexaholics Anonymous (SA), a 12-Step organization based on the Alcoholics Anonymous model, in about 2014.⁴

Applicant submitted a Questionnaire for National Security Positions (SF 86) in August 2016. He did not report his counseling because he considered it to be "strictly marital" counseling.⁵ He answered "No" to the use of information technology systems questions, including the following:

In the last seven (7) years have you introduced, removed, or used hardware, software, or media in connection with any information technology system without authorization, when specifically prohibited by

¹ Tr.1 at 13-14, 34, 45-46; Applicant's response to SOR; GE 1; AE A, C.

² There is a question as to whether "addiction" to pornography is a true addiction in the same sense as drug or alcohol addiction, but it is treated as such by Applicant and Sexaholics Anonymous. See Tr.2 at 9-10.

³ Tr.1 at 13-14, 21, 51-54; Applicant's response to SOR; GE 2; AE C.

⁴ Tr.1 at 21-23, 54-56; Tr.2 at 10; Applicant's response to SOR; GE 2; AE C, D.

⁵ Tr. at 58-62; GE 1.

rules, procedures, guidelines, or regulations, or attempted any of the above?⁶

Applicant was interviewed for his background investigation in September 2017. The investigator asked him if there was any aspect of his life that could be used against him for blackmail, pressure, or coercion. He told the investigator about his pornography addiction and participation in SA. He added that it could not be used to blackmail or coerce him. He stated that his pornography addiction was hurting his wife, and he was trying to stop, but he could not. He admitted that he viewed pornography at work, but he told the investigator that he had not viewed pornography in the previous 18 months. He stated the previous 18 months was the longest he went without viewing pornography since he was in the seventh grade. He credited his abstinence to SA and therapy.⁷

Applicant informed his employer about his pornography addiction about six days after his background interview. He told his employer that there was a loophole in the company's IT system that permitted him to view pornography at work.⁸

Applicant contacted the background investigator a week after his first interview. He told the investigator that he had been dishonest when he told the investigator that he had not viewed pornography in 18 months. He stated that the last time he viewed pornography was at work three days before his first interview. He stated that he informed his employer about his pornography addiction the previous day. He told the investigator that his goal was to stop viewing pornography altogether, and that he would work towards that goal through counseling and therapy.⁹

Applicant's employer terminated him because of the pornography issues. He was hired by another defense contractor in January 2018. He fully informed his current employer of his issues with pornography and why he was terminated from his previous job. The employer and Applicant put safeguards in place to deter Applicant from viewing pornography at work.¹⁰

Applicant has continued to participate in SA and therapy. He testified that he has not viewed pornography at work since before his background interview in September 2017. He admitted viewing pornography at home about two weeks before the first hearing in August 2018. He stated that he immediately informed his group, his SA sponsor, and his therapist. He testified that therapy and SA "will work to keep [him] from

⁶ GE 1.

⁷ GE 2. The SOR did not allege that Applicant intentionally provided false information to the background investigator. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be considered in assessing Applicant's credibility, in the application of mitigating conditions, and in the whole-person analysis.

⁸ Applicant's response to SOR; GE 2.

⁹ GE 2.

¹⁰ Tr.1 at 22-24, 67-70, Applicant's response to SOR.

repeating [his] behavior.” He has the complete support of his wife, who has full knowledge of his pornography issues.¹¹

Applicant received an evaluation from a forensic psychologist. The forensic psychologist diagnosed him with attention deficit hyperactivity disorder and persistent depressive disorder, which “means that he functions normally but often feels depressive symptoms and derives less enjoyment from life than most individuals.”¹² The forensic psychologist concluded:

With regard to his masturbation in rest rooms at the workplace and viewing pornography on workplace computers, [Applicant] recognizes this to be a serious problem. Although masturbation in private is considered absolutely normal, using workplace computers to look at pornography is not acceptable. Based on [Applicant’s] understanding of the gravity of this behavior, he committed himself to SA four years ago. He is diligent in his attendance at SA meetings. He reports that he has not engaged in inappropriate masturbation for the past year.

To a great degree of psychological certainty, I have concluded that [Applicant] has remediated the problem of viewing pornography and masturbating at the workplace. With that problem remediated, I found no other problems that would interfere with [Applicant’s] ability to work in a secure environment. He continues to receive ongoing mental health treatment to assist with his depression, and he receives support through his church activities.¹³

Applicant submitted documents and letters attesting to his excellent job performance. He is praised for his honesty, trustworthiness, reliability, patriotism, responsibility, moral character, work ethic, dependability, technical expertise, and integrity. He is credited with commendable actions that have greatly benefited his community and likely saved some lives. He is recommended for a security clearance.¹⁴

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

¹¹ Tr.1 at 12-43, 54-55, 71, 76-77; Tr.2 at 9-10; Applicant’s response to SOR; AE C, D.

¹² Tr.1 at 12-43, 54-55, 71; Tr.2 at 6-27; Applicant’s response to SOR; AE C-F.

¹³ AE F.

¹⁴ Tr.1 at 15-21; AE B, C.

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 to be 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, administrative judges apply the guidelines 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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

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

Applicant viewed and stored pornography on his company computer from about 2002 until September 2017. He knew that was against company policy. His behavior reflected a severe lack of judgment and made him vulnerable to coercion, exploitation, and duress. The above disqualifying conditions have been established.

Conditions that could mitigate sexual behavior security concerns are provided under AG ¶ 14. The following are potentially applicable:

- (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 good 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 used his work computer because he did not want to get caught by his wife, an ordained minister who considers pornography and masturbation to be equivalent to infidelity. He never masturbated at his desk, but if there was nobody else in the men's room, he would sometimes masturbate there. Although he disclosed his conduct during his background interview in September 2017, he also lied and told the investigator that he had not viewed pornography for 18 months. To his credit, shortly thereafter, Applicant informed his employer of his conduct, and he contacted the investigator and corrected his lie.

Applicant's employer subsequently terminated him. His current employer is fully aware of his issues with pornography and why he was terminated from his previous job. Safeguards are in place to deter Applicant from viewing pornography at work. Applicant's testimony that he has not viewed pornography at work since before his background interview in September 2017 is accepted, but with some reservation because of his previous lie. I also accept most of the forensic psychologist's opinion, whose conclusions include that "[a]lthough masturbation in private is considered absolutely normal, using workplace computers to look at pornography is not acceptable." Applicant is in his current situation not because he viewed pornography and masturbated in the privacy of his home. He is here because he would not or could not stop himself from doing it at work.

I find that Applicant's conduct continues to cast doubt on his current reliability, trustworthiness, and good judgment. While nobody ever discovered Applicant viewing pornography, it cannot be considered strictly private or discreet because it occurred on his work computer. AG ¶¶ 14(b) and 14(d) are not applicable. AG ¶¶ 14(c) and 14(e) have some applicability, but they are insufficient to mitigate Applicant's years of unacceptable conduct and rules violations.

Guideline M, Use of Information Technology

The security concern for use of information technology is set out in AG ¶ 39:

Failure to comply 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 includes any computer-based, mobile, or wireless device used to create, store, access, process, manipulate, protect, or move information. This includes any component, whether integrated into a larger system or not, such as hardware, software, or firmware, used to enable or facilitate these operations.

AG ¶ 40 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(e) unauthorized use of any information technology system.

Applicant knew he was violating company policy when he accessed pornography on his employers' computers for about 15 years. The above disqualifying condition is applicable.

Conditions that could mitigate the use of information technology systems security concerns are provided under AG ¶ 41. The following is potentially applicable:

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

The above analysis under sexual behavior also applies here. Applicant's conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 41(a) is not applicable.

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 Guidelines D and M in my whole-person analysis. I also considered Applicant's strong character evidence.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the sexual behavior and use of information technology security concerns.

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 M:	Against Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge