



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



In the matter of:)	
)	
)	ISCR Case No. 18-01987
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

06/13/2019

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline J, criminal conduct and Guideline D, sexual behavior. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On August 15, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, criminal conduct and Guideline D, sexual behavior. The DOD acted 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) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on November 2, 2018, and requested an administrative determination. Pursuant to ¶ E3.1.7 of enclosure 3 of the Directive,

Department Counsel converted this case to a hearing case. (Hearing exhibit (HE I)) As such, the case was assigned to me on February 27, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 15, 2019, and the hearing was held as scheduled on May 21, 2019. The Government offered exhibits (GE) 1 through 8, which were admitted into evidence without objection. The Government's discovery letter to Applicant was marked as HE II and the Government's exhibit list was marked as HE III. Applicant testified and offered exhibits (AE) A through E, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on June 5, 2019.

Findings of Fact

In Applicant's Answer, he admitted both allegations in the SOR, with explanations. The admissions are adopted as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 51 years old. He married in 1989 and divorced in 1998. He has two adult children and a stepchild from this marriage. He remarried in 2000 and divorced in 2013. He has a 16-year-old daughter from this marriage. He is seeking an information technology (IT) position with the defense contractor for whom he worked before his felony conviction. He is a high school graduate who has taken some college courses. (Tr. 4-5, 26, 29; GE 1, 6)

The SOR alleged Applicant was convicted of possession of child pornography, a felony, in August 2012. He was sentenced to 5-10 years of confinement (suspended) and placed on supervised probation for 10 years. He is required to register as a sex offender (SOR ¶ 1.a). This conduct, including electronically searching, downloading, and viewing numerous still pictures and at least one video containing child pornography between 2010 and April 2011, was cross-alleged as sexual behavior under Guideline D in the SOR. (SOR ¶ 2.a). His admissions in his investigative interview, his Answer, and at his hearing, along with court documents, establish the allegations by substantial evidence. (Tr. 26-27; GE 2-5)

In March 2011, the state's Internet Crimes Against Children task force (ACAC) executed a search warrant on Applicant's home based upon information that he possessed child pornography. Applicant's computers and hard drives were seized. Based upon the evidence derived from the search, Applicant was charged with possession of child pornography. In December 2012, he pleaded guilty to felony possession of child pornography. His sentence included: 5-10 years confinement (suspended); 10 years of supervised probation; requirement to register as a sex offender; and completion of a sex offender class. His probation is scheduled to end in 2022. (GE 2, 6)

Applicant admitted to a defense investigator and a forensic psychologist (who examined him at times from June 2011 to September 2011, before his guilty plea at the

request of Applicant's attorney) that he has had an addiction to pornography (adult) since he was a teenager. He acknowledged that he knowingly downloaded the specific child pornography to which he pleaded guilty, but he claims that he just "grabbed large chunks of files" on the Internet. He claimed to the psychologist that his only sexual interest is in fully adult females. He also admitted to the psychologist that he was familiar with some child specific search terms. The psychologist noted that based upon his evaluation, Applicant's risk of using child pornography in the future is low, however, he further indicated that Applicant's lack of a good marital relationship along with his continued use of "regular" pornography creates the most high-risk circumstance for him to reoffend. (GE 2, 6)

As stated above, Applicant is currently on probation and will remain so until 2022. Under the terms of his probation, he is prohibited from possessing or viewing any sort of pornography, from any type of media, including computers. A violation of his probation could subject him to revocation of its terms and imposition of his original sentence to confinement. During his testimony, when asked if he was in compliance with his probation terms he responded, "I have kept the requirements of my probation." This was a false statement because he later admitted under questioning by Department Counsel and myself that he has been viewing pornography as frequently as monthly, almost the entire time he has been on probation—seven years. He has not disclosed his pornography viewing to his probation officer. He claims he is receiving counseling from his church for this problem, but presented no documentation to support that claim. He documented completing court-ordered counseling in December 2015, with a letter from his counselor. It acknowledged that he attended all sessions and was an active participant. (Tr. 30-35, 37-38; GE 5)

Applicant presented five reference letters from a colleague, his ex-wife, a friend, his current supervisor, and his former facilities security officer (FSO). Applicant is described as accurate, professional, a good father, dedicated, loyal, knowledgeable with computers, honest, having great integrity, a great asset to his employer, and trustworthy in the work place. A friend and his former FSO recommend him for a security clearance. (AE A-E)

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 AG ¶ 2(a), the entire process is a careful weighing 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under 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 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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 J, Criminal Conduct

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and

(c) individual is currently on parole or probation;

Applicant was convicted of possession of child pornography, a felony, and was sentenced, *inter alia*, to 10 years' probation, which runs until 2022. I find that both disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

(a) so much time has elapsed since the criminal 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; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant's possession of child pornography conviction occurred in 2012. Although he is several years removed from that conviction he remains on probation until 2022. In that regard, he has consistently violated the terms of his probation by continuing to view pornography (adult). His actions cast doubt on his reliability, trustworthiness, and good judgment. His rehabilitative efforts have not been successful given his continuing probation violations. AG ¶¶ 32(a) and 32(d) do not apply.

Guideline D, Sexual Behavior

¶ 12: The security concern relating to the guideline for sexual behavior is set out in AG

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 in this case. The following is potentially applicable:

(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted.

Applicant was convicted of possession of child pornography, a felony. The above disqualifying condition applies.

I have also considered all of the mitigating conditions for sexual behavior under AG ¶ 14 and considered the following potentially relevant:

(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; 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.

AG ¶ 14(b) does not fully apply as explained above under the criminal conduct guideline. Applicant was seen by a psychologist before his guilty plea and he completed court-mandated counseling. Despite these strides, he has not overcome his compulsion to view adult pornography, which puts him at greater risk to reoffend with child pornography. AG ¶ 14(e) does not fully 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 considered Applicant's letters of recommendation, his psychological evaluation, his counseling, and his personal circumstances. I weighed these factors against his conviction for possessing child pornography and his continuing probation violations.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns under Guidelines J and D.

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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge