



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



In the matter of:)
)
) ISCR Case No. 20-02454
)
Applicant for Security Clearance)

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: *Pro se*

07/14/2022

Decision

RICCIARDELLO, Carol G., 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 December 4, 2020, the Defense Counterintelligence and Security Agency issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines, D, sexual behavior, and E, personal conduct. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective on June 8, 2017.

Applicant answered the SOR on December 22, 2020, and requested a hearing before an administrative judge. The case was assigned to me on April 8, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 19,

2022. I convened the hearing as scheduled on June 1, 2022. The Government offered exhibits (GE) 1 through 3. There were no objections to the exhibits, and they were admitted into evidence. Applicant testified on his behalf and did not offer any exhibits. The record was held open until June 8, 2022, to permit Applicant to submit documents. None were received and the record was closed. DOHA received the hearing transcript on June 10, 2022.

Findings of Fact

Applicant denied all of the SOR allegations. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 33 years old. He married in 2017. He earned a bachelor's degree in 2018. He does not have children. He has been employed by a federal contractor since January 2019. (Transcript (Tr.) 16-17)

Applicant testified that he was recruited while in college by the federal government for a potential job. The interview process was over a three-day period in May 2014 and included a polygraph examination. He testified he was not fully prepared for the process. The SOR alleges that from 2010 to 2014, Applicant viewed child pornography. During the polygraph interview, Applicant was questioned about viewing child pornography. He told the investigator that in 2010 he became bored with legal pornography and searched the internet using the following search words: incest, mother and daughter, brother and sister, mother and son, young girls, young lesbians, teens, and girls. (Tr. 18-20 GE 3)

Applicant told the polygraph examiner, he viewed the following sites: "Anime", "Hard Core", "Beautiful Girl", and "Motherless" image boards. He viewed these sites about every other day from 2010 to 2014. He viewed other sites with images and videos consisting of brothers and sisters, mothers and daughters, and mothers and sons having sexual intercourse. He reported that he viewed these images about every other day from 2011 to 2014. (GE 3)

During Applicant's interview with the polygraph examiner, he stated some of the images were of children between the ages of 14 and 18 years old. He would masturbate to the images and videos. He said that the "Beautiful Girl" image board contained images of females ranging from 14 to 30 years old. He reported he masturbated to images of females as young as 14 years old. He reported that on less than 30 occasions, he viewed and masturbated to pornographic images of females he believed were under 18 years old. (GE 3)

Applicant also reported to the polygraph examiner that for approximately three months, sometime between 2011 and 2012, he visited a "Motherless" board daily, and recalled masturbating to an underage female who he estimated to be between 14 and 18 years old. He told the polygraph examiner that in the video, the female was masturbating, and he described her as having breasts and pubic hair, but he knew she was underage due to her young looking face. At his hearing, he testified and explained that he had his

hands down his pants, but then clicked off the video and he did not have any indication of her age, but she looked younger. He confirmed that the polygraph examiner accurately reported what he told her. (Tr. 43-44)

Applicant reported to the polygraph examiner that from 2010 to March 2014, he was addicted to pornography and stopped viewing it the day he received a conditional letter of employment from a government agency in March 2014, and he did not intend to view pornography again. (GE 3)

Applicant reported to the polygraph examiner, with specificity, other types of pornography that he viewed that is not illegal, such as anime pornography, and bestiality. He also viewed Anime images of children performing sexual acts. These are cartoon images and not real people. (Tr. 44-45; GE 3)

In May 2019, Applicant was interviewed by a government investigator as part of a background investigation. During the interview, he told the investigator that he never intentionally searched for child pornography, however when visiting mainstream pornography websites, there would be advertisements and videos that appeared to include child pornography. He told the investigator he did not watch any videos that contained child pornography. He could not provide the dates or years he encountered these videos. He said it was only two or three times that he encountered these kinds of videos when he was on websites. He told the investigator that he had no motivation to access child pornography and would only come across it accidentally. He told the investigator that he is now married and no longer visits pornography sites and it will not happen in the future. (Tr. 45-50; GE 2)

Applicant's explanation for his statement to the investigator that minimized his behavior as reported to the polygraph examiner was that he was not actively and consistently looking for underage material. He claimed when he realized there was child pornography on a site he would click it off. Applicant admitted that his statement to the investigator that he had not watched any videos that included child pornography was not the full truth. He said he was unsure of the age of the female in the above-mentioned video and turned off the video. His testimony is not credible. He deliberately provided false statements to the government investigator. (Tr. 49-51)

Applicant testified that he grew up in a sheltered family environment and attended church. He said he was asked during his polygraph about viewing pornography. He testified that he spent most of his time visiting adult pornography sites and for a short period of time he viewed other sites. He would click on sites that he was unaware of what types of images they contained. He said it was not uncommon to see stuff he did not expect. He testified that he did not intentionally search for sites with child pornography. He explained that this period of his life is in his past and he has attempted to disassociate himself with this lifestyle. (Tr. 20-23)

Applicant testified that he believes the polygraph examiner inaccurately reported his conduct. He stated that he felt he was telling the polygraph examiner the truth, but it

was being “conflated.” (Tr. 25) He admitted that he did not believe the polygraph examiner had a personal bias against him. He testified that he was on the websites: “Anime”, “Hard Core”, “Beautiful Girls”, and “Motherless,” and he told the polygraph examiner that he visited pornography sites every other day. He believes now his frequency of viewing such sites was less than he said to the polygraph examiner. He disagreed with the polygraph examiner’s summary that stated he was viewing females between the ages of 14 and 18 every other day. He explained he was viewing pornography every other day, but he was not viewing females 14 to 18 years old. (Tr. 23-26, 30-31)

Applicant stated that he had viewed 100 videos of Anime pornography, as was stated in the polygraph examiners summary of interview, and some may have included Anime children between 5 and 10 years old. He emphasized that he did not seek out viewing child images, but those he saw were not pornographic. He does not know where the polygraph examiner got the statement he watched 100 pornography videos of Anime cartoon characters portraying children. (Tr. 31-38)

Applicant also stated that he does not know where the polygraph examiner got the statement that he viewed females whose ages were between 14 and 30 years old. He was questioned by Department Counsel and made the following statements:

DC: The next paragraph related to the Beautiful Girl image board and that one says they contain images of females ranging from 14 to 30, is that an accurate statement?

A: So, Beautiful Girl, I vaguely remember what Beautiful Girl is but 14 to 30, I don’t know.

DC: So, where did the 14 to 30 come from?

A: I think she asked me if I had ever seen someone that I wasn’t sure of and if I could give an age range. I said she was younger, I don’t know, I’m sure I gave an age of 14, that’s what it says here.

DC: And the Beautiful Girl image board, is it primarily nude images, is that what that is?

A: I would assume so, I don’t know, I’m not 100 percent sure.

DC: The next sentence says you masturbated to images of females as young as 14 years old, is that an accurate statement?

A: I think I had seen something before where I wasn’t sure of the age of and if I had to give an age, I gave the age of 14. Looking back on it, I don’t know just because I just don’t know.

DC: Is it a fair statement that if you estimated they were 14 years old, you at least at a minimum believed they could have been as young as 14 when [you] were masturbating to them?

A: I don't know.

DC: You don't know. I think they might have been as young as 14, you don't know whether you believed they were as young as 14?

A: I think that more than likely I'm putting myself in this situation where I'm feeling bad about what I'm doing and I'm going into this just trying to offer an answer and I don't know.

DC: But help me understand, your interview from the [government], you're talking to a government official and you think it's I'm not sure so I'm going to estimate that I viewed and masturbated to child porn?

A: There's one instance that I can think of, of a video, where I'm watching it and it's like somewhere through it I don't know how old this person is. I had my hands down my pants or whatever and I clicked off of it. It's not this is something I was going to find and I don't know the age. Because I don't know the age and this person is asking me how old do you think they were, I'm saying, I don't know they could be anywhere between this age and I gave an age. That doesn't mean that's what it is, I was trying to just produce an answer for an occasion where I viewed something where I wasn't 100 percent sure of what the age of the person was. I felt like I had to give an answer. (Tr. 38-40)

Applicant also testified that he has no idea how the polygraph examiner came up with the statement that less than 30 times he masturbated to images of females younger than 14. When Applicant was asked by Department Counsel if he told the polygraph examiner that he had masturbated to images of females under the age of 18, he testified he did not know what he told the polygraph examiner. He repeated his admission of the incident noted above that he masturbated while watching a video of a female who had a young face. He then said he had no indication of her age and then clicked off the video. I did not find Applicant's testimony credible. (Tr. 40-43, 58-60)

In Applicant's statement to the government investigator in May 2019, he stated he did not watch any videos that included child pornography. He was questioned about his statement to the polygraph examiner where he reported he had watched videos of females ages 14-18. He testified that he never intentionally or actively searched for child pornography. He testified if child pornography accidentally appeared he would click it off. I did not find Applicant's testimony credible. I find that he deliberately provided false facts to a government investigator during his May 2019 background interview by stating he never searched for or viewed child pornography and only inadvertently came across child

pornography on two or three occasions while searching mainstream pornography websites. (GE 2)

Applicant testified that he no longer watches pornography. He testified that he last viewed pornography in the summer of 2018. He told the polygraph examiner that he stopped viewing pornography when he received a conditional letter of employment in 2014. He testified that he was trying to stop watching pornography in 2012. He testified that from 2012 to 2018, he decreased his pornography viewing habits. He said that he wanted to clarify and give a more accurate depiction of his pornographic viewing habits. He said that he has made significant lifestyle changes and pulled away from viewing pornography. (Tr. 52-54)

Applicant testified that he believes his summary of interview by the polygraph examiner was misinterpreted. He was under a lot of stress when he was being interviewed.

Applicant testified that he would not want anyone to find out about his past addiction to pornography and allegations of viewing child pornography. No one but his wife is aware of his past. He believes if others were aware it could harm his personal and professional relationships. (Tr. 61-62)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. 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(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 states 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. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of sexual orientation of the individual.

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

The evidence supports that from approximately 2010 to 2014, at various times, Applicant viewed child pornography. The only one who is aware of Applicant's conduct is his wife. He is concerned if others were aware it would hurt his personal and professional relationships. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from sexual behavior. The following mitigating conditions under AG ¶ 14 are potentially applicable:

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a 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 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 repeatedly viewed child pornography at various times from 2010 to 2014. Viewing child pornography is criminal conduct. It was not alleged under the criminal conduct guideline, and will not be considered under that guideline, but the underlying conduct cannot be mitigated because he viewed it privately or discreetly. It was cross-alleged under the personal conduct guideline. Applicant's behavior did not occur during adolescence. There is no evidence Applicant has completed an appropriate treatment program. Applicant stated that he did not intentionally access child pornography. The evidence supports that he repeatedly viewed it. I did not find Applicant's testimony credible. I believe he repeatedly provided false testimony. I am not convinced that future conduct is unlikely to recur or that Applicant grasps the seriousness of his conduct. His behavior casts doubt on his current reliability, trustworthiness, and judgment. None of the mitigating conditions apply.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concerns 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. 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 may be disqualifying. I find the following potentially applicable:

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative; 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 group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

The evidence supports that from 2010 to 2014, Applicant repeatedly viewed child pornography. He disclosed his conduct during an interview with a polygraph examiner in 2014, detailing the specifics and admitting that he was aware some of the females involved were underage. In May 2019, when interviewed by a government investigator, Applicant stated that he never searched for or viewed child pornography and only came across it two to three times when he was searching mainstream pornography sites. This contradicts statements he made to the polygraph examiner in 2014. The evidence supports that Applicant deliberately falsified facts during his May 2019 interview with a government investigator. The above disqualifying conditions apply.

The following mitigating conditions under AG ¶ 17 are potentially applicable to the disqualifying security concerns based on the facts:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(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;

(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; and

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

I have addressed the security concerns under Guideline D and the same analysis applies under Guideline E. Applicant viewed child pornography over four years. This is not minor and casts doubt on his reliability, trustworthiness and judgment. He deliberately falsified material facts about his behavior when he was interviewed by a government investigator and contradicted statements he made during his polygraph interview. Providing false information to a government investigator is not minor. Although, Applicant says he no longer views any pornography and has taken steps to change his lifestyle, I found his conflicting statements and minimizing his conduct troublesome. Applicant testified that if others became aware of his past conduct it might impact his professional and personal relationships. There is insufficient evidence to apply any of the above mitigating conditions.

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 Guidelines D and E in my whole-person analysis. Applicant failed to meet his burden of persuasion regarding his past sexual behavior and personal conduct. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guidelines D, sexual behavior and E, personal conduct.

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-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 security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge