



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



In the matter of:)	
)	
)	ISCR Case No. 21-00717
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrew Henderson, Esq., Department Counsel
 For Applicant: *Pro se*
 09/29/2022

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to deny his eligibility for a security clearance to work in the defense industry. During a January 2015 polygraph examination, he admitted to sexual behavior that raised concerns about his ongoing security worthiness. He failed to mitigate these concerns and is no longer a suitable candidate for access to classified information. Clearance is denied.

Statement of the Case

On July 30, 2021, DOD issued a Statement of Reasons (SOR) detailing security concerns under the sexual behavior guideline. The Agency acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive), and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on June 8, 2017.

Based on the available information, DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant’s security clearance and recommended that the case be submitted to a Defense Office of Hearings and Appeals

(DOHA) administrative judge to determine whether to grant or deny his security clearance.

Applicant timely answered the SOR and requested a decision on the written record without a hearing. Department Counsel exercised its option to request a hearing under Directive, Additional Procedural Guidance ¶ E3.1.7, and notified Applicant of the conversion in writing on November 2, 2021. Department Counsel sent Applicant the disclosure letter and proposed government's exhibits on November 23, 2021. The hearing convened on January 14, 2022. I admitted to the record as Hearing Exhibits (HE):

HE I: Prehearing Order, dated December 15, 2021;

HE II: Hearing Conversion Letter from Department Counsel to Applicant, dated November 2, 2021; and,

HE III: Disclosure Letter, dated November 23, 2021.

I admitted Government's Exhibits (GE) 1 through 9, without objection. Applicant did not offer any documentary evidence. DOHA received the transcript on January 27, 2022.

Findings of Fact

Applicant, 66, has worked for the same federal contracting company since 1990. He currently works in a product design and engineering role. DOD granted him access to classified information in 1998. Another government agency (OGA) granted him access to sensitive government programs in 1992, which he held continuously until January 2015. OGA revoked Applicant's access after he disclosed information during two polygraph examinations that raised concerns under the sexual behavior guideline. He completed his most recent security clearance application in November 2017, disclosing the 2015 OGA revocation. The SOR in this case raises the same sexual behavior concerns cited by the OGA, a history of sexual behavior related to minors. (GE 1,7)

Over the course of two polygraph examinations in January 2015, Applicant admitted to deliberately searching for and viewing child pornography approximately 25 times between 2008 and December 2014, using the search term 'preteen.' He reported that he preferred viewing images of girls between the ages of 12 and 16, but viewed materials containing children as young as 10. He denied downloading child pornography, only viewing it to masturbate. (GE 4 -5)

He also admitted to masturbating while watching preteen girls on at least three occasions. In 1995, he admitted to masturbating in the bathroom of a friend's home while watching a preteen girl playing outside. In 2003, he admitted that after falling asleep in the living room of his home with his second wife, his then five-year-old daughter, and his wife's 12-year old niece, that he masturbated to thoughts of the niece

after waking from an arousing dream. He also admitted to touching his foot against the sleeping girl's foot as he completed the sex act. He does not believe that anyone in the room was aware of what he was doing. In 2007, Applicant admitted to masturbating in his ex-wife's home while he watched his preteen daughter and her friend sunbathing through a window. Before the second polygraph examination, the polygraph examiner gave Applicant a document memorializing the information Applicant revealed during the first examination. Applicant reviewed and signed that document. During the second polygraph examination, Applicant confirmed the information he disclosed during the first interview. In the final report, the polygraph examiner noted that Applicant "in some respects rationalized and minimized his behavior." (GE 4-5)

DOD CAF referred Applicant for a psychological evaluation in March 2020. The psychological interview consisted of a clinical interview with Applicant and a consultation with Applicant's current marriage counselor. He completed the Personality Assessment Inventory (PAI) and Garos Sexual Behavior Inventory (GSBI) - a test designed to assess for problems related to sexuality and sexual behavior. Neither test revealed any areas on concern. However, the psychologist noted that Applicant's responses to the personality assessment indicated an attempt to portray himself in a favorable light. The results indicated that Applicant may be hesitant to admit minor faults to himself as well as others. The psychologist noted that although the results did not indicate any attempts to intentionally distort the findings of the assessment, his tendency toward repressing undesirable characteristics indicated that the results of the assessment should be reviewed with caution. The results of the sexual behavior inventory indicated that Applicant responded to the items in an inconsistent manner. His score on this test indicated a 96% likelihood of random responding. The psychologist noted that Applicant did not rush through the inventory, but appeared to approach the questions carefully, which may suggest an attempt at impression management. (GE 9)

The psychologist noted that Applicant's explanations about his behavior showed flawed and questionable judgment. His behavior, the psychologist opined, raised questions which were unable to be answered with confidence through the assessment. The psychologist found that while Applicant's defensiveness and denial to himself about the incidents resulted in his flawed justifications for his actions, he did not engage in conscious attempts to distort or provide inaccurate information about them. The psychologist did not find any current issues with emotional or behavior functions that required a mental health diagnosis. Ultimately, the psychologist concluded that despite clear instances of poor judgment, Applicant did not have any current impairment in judgment or decision-making as it pertained to his work responsibilities, and that he did not present any clinically significant issues that contributed to concerns about his ongoing security worthiness. The evaluating psychologist did not have access to the OGA reports that serve as the basis for the SOR allegations. (GE 9)

Applicant's explanation of his behavior is consistent with the polygraph examiner's observations and the evaluating psychologist's assessment. In addition to his testimony at the hearing, the record contains Applicant's statements to the OGA, the DOD CAF, a background investigator, the evaluating psychologist, and DOHA about his conduct. Applicant was not evasive or dishonest about the incidents, but did try to

minimize the seriousness of them. He couched his statements as a desire to clear up the inaccuracies of the record created by OGA.

He admitted masturbating while watching minor girls or while being in the vicinity of minor girls, but denied that the girls were the object of his sexual interest. He confessed the incidents because they did not feel right to him and that he wanted to be honest. He denied ever intentionally searching for child pornography, but stated that he felt guilty looking at pornography with adult women with child-like appearances. According to Applicant, he believed the purpose of the polygraph examination was to determine if he was a potential target for exploitation by a hostile entity. He thought that if he disclosed these incidents, they would no longer be a potential source of vulnerability. (Tr. 20-28, 35-39, 41, 44-49 GE 2, 3, 6, 8)

Applicant considers himself to be very security conscious. He reported that he has never mishandled classified information and that he is very careful not to discuss or disclose the details of his employment with others. He also admitted no one else is aware of his behavior. He only disclosed it to the polygraph examiner in January 2015. Although he admitted that his behavior bothered him and served as a source of shame, he has not sought any counseling or other professional intervention for his behavior. (Tr. 33-34, 40, 43, 53)

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 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(a), 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.

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

The SOR alleges disqualifying conduct under sexual behavior guideline. The Government has established a *prima facie* for disqualification.

An individual’s sexual behavior, which includes conduct occurring in person or via audio, visual, electronic, or written transmission, becomes a concern when it involves a criminal offense; reflects a lack of judgment; 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 information. (AG ¶ 12) Applicant admitted to engaging in maladaptive sexual behaviors involving preteen girls. Specifically, he intentionally sought and viewed child pornography between 2008 and December 2014. He also admitted to masturbating in inappropriate locations while watching or being in proximity preteen girls on at least three occasions between 1995 and 2007. The following disqualifying conditions apply:

AG ¶ 13(a) sexual behavior of a criminal nature whether or not the individual has been prosecuted; and,

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

None of the sexual behavior mitigating conditions apply. Applicant’s statements that OGA misunderstood his disclosures about his viewing child pornography are not credible. There is a rebuttable presumption of good-faith and regularity amongst government employees acting in their official capacity. (See ISCR Case No. 97-0184, App. Bd. June 16, 1988) Applicant did not present any evidence that the report contained any errors; only that the information in the OGA report presented him in an

unfavorable light. Applicant confessed to multiple sexual acts in which preteen girls were the object of his attention, which also lends credibility to his admissions that he deliberately sought and viewed child pornography depicting girls in the same age group.

The conclusion in the 2020 psychological evaluation that Applicant does not have any current impairment in his judgment or decision-making as it pertains to his work responsibilities, does not assuage the security concerns raised by Applicant's admissions. The psychologist did not have a chance to review the OGA interview report, which contains his admissions in an environment where he did not have the opportunity to manipulate the outcome. After the first of the January 2015 polygraph examinations, Applicant realized that his admissions had and were going to continue to have a negative impact on his ability to maintain a security clearance. In each of his statements since then, he has denied his previously admitted illegal conduct and minimized the seriousness of his other actions. His attempts to minimize the potential concerns are highlighted in the way he completed the GSBI (the sexual behavior inventory) and the PAI, the results of which suggested that he may have attempted to manipulate the results. Applicant's behavior since the January 2015 polygraph examinations confirms both the observations of the polygraph examiner and the evaluating psychologist that Applicant has a need to present himself to others in the best possible light. His need to do so prevents mitigation of the alleged security concerns.

Applicant admitted maladaptive sexual behavior for which he has not sought any professional help. He has admitted to a pattern of behavior, spanning 23 years that shows a history of poor judgment and recklessness. Applicant engaged in sex acts in other people's homes and while in the same room as his sleeping family. These concerns are not mitigated by the passage of time. He did not present any evidence to suggest that he is not currently engaged in or that he will not engage in similar behavior in the future.

Whole Person Concept

Based on the record, I have significant reservations about Applicant's current security worthiness. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(d). When considered together, Applicant's conduct supports a negative whole-person assessment. In the closed environment of the security clearance adjudication process, Applicant admitted illegal conduct and other sexual behavior related to preteen girls. In doing so, he did not eliminate the conduct as a potential source of vulnerability or exploitation. Applicant's behavior cannot be considered minor or inconsequential. The behavior remains a source of shame for him. He has an ongoing interest in keeping the behavior a secret because disclosure would negatively affect his personal and professional standing. None of the favorable character information in the record outweighs the existing potential for exploitation.

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, Sexual Behavior	AGAINST APPLICANT
Subparagraphs 1.a – 1.d:	Against Applicant

Conclusion

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

Nichole L. Noel
Administrative Judge