DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 22-00372
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Andrew Henderson, Esq., Department Counsel
For Applicant: *Pro se*

February 14, 2023

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Decision

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CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On March 15, 2022, in accordance with DoD Directive 5220.6, as amended (Directive), the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines M, D, and E. The SOR further informed Applicant that, based on information available to the government, DoD adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant's security clearance.

Applicant answered the SOR on March 21, 2022, and subsequently requested a hearing before an administrative judge. (Answer.) The case was assigned to me on June 21, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 22, 2022, scheduling the hearing for August 29, 2022. The hearing was convened as scheduled. The Government offered Exhibits (GX) 1 through 9, which were admitted without objection. Applicant testified on his own behalf. Applicant offered 12 documents, which I marked Applicant's Exhibits (AppXs) A through L, which were admitted into evidence. The record was left open until September 30, 2022, for receipt

of additional documentation. On September 28, 2022, Applicant offered one additional document, marked as AppX M, which was admitted into evidence. DOHA received the transcript of the hearing (TR) on September 8, 2022.

Findings of Fact

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

Applicant is a 56-year-old employee of a defense contractor. (GX 1 at page 7.) He has been employed with the defense contractor since August 20, 2020. (AppX I.) Applicant is married, but separated from his current spouse, and has two children. (GX 1 at pages 18~19, and 22~23.) He served in the Marine Corps as an enlisted member, and was honorably discharged. (TR at page 15 lines 9~20.)

Guideline M - Use of Information Technology, Guideline D - Sexual Behavior & Guideline E - Personal Conduct

1.a., 2.a. and 3.a. Applicant admits that beginning in at least January 2018, he used his Government-Issued computer to store and view images containing sexually explicit, sexually orientated, and/or inappropriate content. (TR at page 17 line 12 to page 23 line 17.) As a result of this, on June 3, 2019, Applicant was suspended from duty and pay for 14 days, for Misuse of a Government Computer. (TR at page 34 line 8 to page 35 line 2.) He was further advised that any further misconduct may result in a more severe disciplinary action. (GX 3.)

1.b., 2.a. and 3.a. Applicant admits that from July 2019 to at least April 2020, he again used his Government computer to store and view images containing sexually explicit, sexually orientated, and/or inappropriate content. (TR at page 24 line 16 to page 31 line 6.) As a result of this misconduct, on June 16, 2020, Applicant was terminated from his place of employment, and thereby removed from Federal service. (GXs 6~9.)

Most recently, in September of 2022, a Doctor of Psychology determined Applicant to be suffering from "compulsive behavior," but not from a "compulsive disorder." She also averred, in part, the following: "I feel his lapse in judgment was the product of severe and atypical psychosocial stressors the specific nature of which he is unlikely to again experience." The Doctor further averred: "the preponderance of the evidence in this case suggests that . . . [Applicant] is a reliable, ethical, and trustworthy employee." (AppX M.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially

disqualifying conditions and mitigating conditions, which are useful 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 AG ¶ 2 describing 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. 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. Under Directive ¶ E3.1.15, an "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 protect or 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 Executive Order 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 M - Use of Information Technology

The security concern relating to the guideline for Use of Information Technology is set out in AG ¶ 39:

> Failure to comply with rules, procedures, guidelines, or regulations pertaining to information technology [IT] 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 40. One is potentially applicable in this case:

(e) unauthorized use of any information technology system; and

Applicant, despite being previously suspended for such conduct, he continued to download unauthorized pornography on his Government computer.

AG ¶ 41 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 41 including:

> (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;
>
> (b) the misuse was minor and done solely in the interest of organizational efficiency and effectiveness;
>
> (c) the conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification to appropriate personnel; and
>
> d) the misuse was due to improper or inadequate training or unclear instructions.

None of these apply. Despite a repeated warning; and a suspension, Applicant continued his unauthorized IT misconduct. Use of Information Technology is found against Applicant.

Guideline D - Sexual Behavior

The security concern relating to the guideline 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 13. Three are potentially applicable in this case:

> (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 or that reflects lack of discretion or judgment.

Applicant received sexual gratification from downloading pornography on to a Government computer on numerous occasions until at least April of 2020. His conduct represents a pattern of high-risk sexual behavior that reflects a lack of discretion or judgment. The evidence is sufficient to raise these disqualifying conditions.

AG ¶ 14 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 14 including:

> (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 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.

There is clear evidence from a Doctor of Psychology that future instances of this nature are unlikely to occur. (AppX M.) Sexual Behavior is found for Applicant.

Guideline E - Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

> 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:
>
> > (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and
> >
> > (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. Two are potentially applicable in this case:

> (c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and
>
> (d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the

individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

> (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;
>
> (2) any disruptive, violent, or other inappropriate behavior;
>
> (3) a pattern of dishonesty or rule violations; and
>
> (4) evidence of significant misuse of Government or other employer's time or resources.

Applicant continued to misuse his Government computer after being suspended and advised that any such future misconduct could result in severe disciplinary action. As a result, he was removed from Federal service. The evidence is sufficient to raise these disqualifying conditions.

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17 including:

> (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.

None of these apply. In light of Applicant's fairly recent 2020 removal from Federal serve as the result of his repeated failure to comply with rules and regulations, Personal Conduct is found against Applicant.

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 national security eligibility 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 facts and circumstances surrounding this case. I have incorporated my comments under Guidelines M, D, and E in my whole-person analysis. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Information Technology and Personal Conduct security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline M:	AGAINST APPLICANT
Subparagraphs 1.a.and 1.b:	Against Applicant
Paragraph 2, Guideline D:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.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. National security eligibility for access to classified information is denied.

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Richard A. Cefola
Administrative Judge