



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



In the matter of:)
)
) ISCR Case No. 22-01917
)
Applicant for Security Clearance)

Appearances

For Government: Tara R. Karoian, Esq. Department Counsel
For Applicant: *Pro Se*

10/25/2023

Decision

MURPHY, Braden M., Administrative Judge:

In April 2021, Applicant was arrested and charged with felony possession of obscene matter. In January 2023, he pleaded guilty to possession of obscene matter. He was sentenced to 10 years in prison, all of which was suspended for two years, and placed on two years of probation. He was also required to register as a sex offender. He remains on probation until January 2025. Applicant did not provide sufficient information to mitigate sexual conduct and criminal conduct security concerns. Guideline E concerns are resolved for Applicant. His eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on July 19, 2021, in connection with his employment in the defense industry. On February 28, 2023, following a background investigation, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS), formerly the Department of Defense Consolidated Adjudications Facility (DOD CAF), issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline D, (sexual conduct),

cross-alleged under both Guideline J (criminal conduct), and Guideline E (personal conduct). DOD issued the SOR under Executive Order (Exec. Or.) 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 Security Executive Agent Directive 4 (SEAD 4) *National Security Adjudicative Guidelines* (AG), which became effective on June 8, 2017.

Applicant answered the SOR on March 23, 2023. He requested a decision by an administrative judge from the Defense Office of Hearings and Appeals (DOHA) based on the administrative (written) record, in lieu of a hearing. On May 17, 2023, Department Counsel submitted the Government's File of Relevant Material (FORM), including documents identified as Items 1 through 7. Applicant was afforded an opportunity to note objections and to submit material in refutation, extenuation, or mitigation, and was given 30 days from receipt of the FORM to do so. On June 21, 2023, DOHA received a response from Applicant. (FORM Response) The response includes four letters, which are marked as Applicant's Exhibits (AE) A through D.

The case was assigned to me on September 11, 2023. Government Items 1 and 2, the SOR and the Answer, respectively, are the pleadings in the case. Items 3 through 7 are admitted without objection. Applicant's FORM Response and AE A through D are also admitted without objection.

Findings of Fact

In his Answer to the SOR, Applicant denied SOR ¶ 1.a and the two cross-allegations (SOR ¶¶ 2.a and 3.a). He also provided a narrative statement. After a thorough and careful review of the pleadings and evidence submitted, I make the following findings of fact.

Applicant is 41 years old. He has some college credits. He served in the military in the 1990s. He and his wife have been married since 1995. They have two grown children. He has been employed with a defense contractor since 2008 and indicated on his SCA that he has held a clearance since 2011. He lives in State 1.

In March 2021, City 1, State 1 police received a cyber tip from the National Center for Missing and Exploited Children (NCMEC) and Google regarding possible child pornography on an account linked to Applicant. His name and e-mail addresses were on the account, and they were linked to an internet service provider (ISP) address under his name at the address in City 1, State 1. When the warrant was executed, several family members were there but Applicant was not. He was contacted by police, told about the search warrant, and was requested to come to the premises, which he did. (Item 4 at 2)

Images downloaded via Applicant's ISP address were deemed to be:

of pubescent minor[s] and prepubescent minor[s] in lascivious exhibition and sex acts, sado-masochistic abuse, masturbation, breast nudity, [and] genital nudity. The minors appeared to [range] in age from 7-8 to 13-14. (Item 4 at 2 (Police incident report))

This City 1 police incident report led to a search warrant signed and issued by a judge. The warrant was executed at the address, which led, in turn, to Applicant's detention and interview at the police station. His cell phones were secured. He was given a Miranda warning and waived his rights and agreed to speak to police. (Item 4)

Applicant confirmed his name, date of birth, phone number, ISP, and three separate email addresses. He denied being "into kiddy porn." He was asked about specific photos with sexually explicit descriptions referencing girls aged 9, 11, and 12. According to the police report, Applicant said he "would download it to see what it was and then delete it." (Item 4 at 3)

Applicant was then placed under arrest. Forensic examination revealed that his phone contained file names that matched the cyber tips from the NCMEC, and Applicant's name and one of his e-mail addresses. Another search warrant was then executed at the home. (Item 4 at 3-4)

On his SCA, Applicant reported that he lived at the address in question from about May 2007 to about December 2020 "until my father's health declined." (Item 3 at 9) He disclosed the arrest on his July 2021 SCA. He noted that the case remained pending action from a grand jury. He also said, "there was a tip from Google that some obscene photos were downloaded to my router. My account has been hacked multiple times and there is no evidence other than a tip from Google." He said he had informed his employer's security office. (Item 3 at 27)

In September 2021, Applicant had a background interview relating to his clearance application. In discussing his April 2021 arrest, he asserted that his Gmail account had been hacked many times during 2020 and early 2021. At the time of the warrant, his daughter and her fiancé lived at the residence in question with their new baby. He said his lawyer had explained that he had been charged because the Google tip had been traced to a modem and IP address that was registered in his name. Applicant acknowledged that he paid for the internet service in the home. (Item 7 at 3-5)

In discussing the police interview, Applicant said he denied downloading anything inappropriate. He said anyone at the home, such as his daughter, her fiancé, or any visitors, would be able to access the Wi-Fi network even though it was password protected. He was told by police that the downloads occurred in December 2020, which was right when he moved out of the home and allowed his daughter and fiancé and their new baby to move in. He was caring for his father who was in poor health and in hospice care. (Item 7 at 3-4) (On his July 2021 SCA, Applicant listed his father as deceased).

In March 2022, Applicant answered an interrogatory from the DOD CAF. Grand jury action on his case remained pending. Applicant said he had “never downloaded anything that was known to be illegal.” He said his grandson (12 years old at the time of the warrant) “used to play on my phone and computer often.” (Item 5 at 2)

In discussing his police interview, Applicant said he told the police that “I had not downloaded anything like that on my devices. I did admit that I have downloaded normal adult pornography sometimes and that if anything was ever questionable it was deleted immediately to remove any question.” He also said that due to his family history, he had “zero tolerance for people doing anything with children.” (Item 5 at 3)

On January 26, 2023, Applicant pled guilty to the offense charged, i.e., possession of obscene matter. Applicant was sentenced to a 10-year jail term, to be suspended for two years, with Applicant placed on two years of probation. He was fined and ordered to pay fees and court costs. He was also required to register as a sex offender under the State 1 Sex Offender Registration and Notification Act. (Item 6)

In addressing the SOR allegations in his Answer, Applicant said he “was not the one that committed the infractions listed.” His daughter and her fiancé had moved into the home with his son and two daughters. He asserted that the fiancé’s son “had downloaded pictures on my phone that he had found on Twitter, Instagram, and other such sites.” Applicant had confirmed to the police that Applicant had previously downloaded adult images “on commercial, age-verified sites” (i.e., adult pornography) but he denied downloading child images (i.e., child pornography). He asserted that this was because his wife had previously been sexually assaulted by a family member and that he is protective of his wife and daughters. He asserted that his daughter’s fiancé’s 12-year-old son had admitted downloading the images. (Answer)

Applicant asserted that he pled guilty because there was a guarantee of no prison time, and no further action would be taken. A trial would risk the jury that “would want to go after him just based off of the charges” and the risk that he would be seen to be “trying to throw [his grandson] under the bus to stay out of trouble.” (Answer)

In his FORM Response, Applicant again said that “I never downloaded any material such as I was accused.” He acknowledged downloading adult pornography from age-verified sites and he would delete any images of any females who looked younger (16-18). He said he would never download “something that was of a child.” (i.e., child pornographic images). He asserted that during the investigation he was concerned that it may have been his son-in-law or grandson (then age 12) who had downloaded the images, and that the grandson admitted weeks later that he had downloaded the images but deleted them for fear of getting into trouble. Applicant said he took a plea because of the risk of jail time and of possible charges against his grandson. (FORM Response)

Applicant acknowledged that it was his responsibility and that of his son-in-law to monitor what Applicant’s grandson was doing on the devices. Applicant asserted that he

is not vulnerable to coercion, exploitation, or duress, in part because he took the plea. His supervisor and security department are aware of the charges and said they cannot be used against him. (FORM Response)

Applicant asserted that he can be trusted. He has worked for his employer for 15 years, mostly with a clearance. He served in the military and has never had a security violation. (FORM Response)

Applicant's FORM Response included letters from his wife and his mother, and a joint letter from his daughter and her fiancé. (AE B – AE D) The grandson's parents said they recently found out that their son had downloaded some inappropriate materials on Applicant's Google account. They talked to their son about "why it wasn't ok to do that." They said Applicant did not want any "backlash" to happen to their son, so he took the blame. Applicant is a "great man." His daughter insists Applicant would not take advantage of any minor over the internet. (AE D)

Applicant's mother asserted that he never showed interest in younger females in his "formative years." He always dated older women. He detests people who mistreat women and children. (AE C) Applicant's wife offered a "guarantee [that] he has not done what he is accused of." He is the protector of the family and when their adult daughters were young, he refused to change them, bathe them, or be alone with them." She trusts him around any child. She believes their grandson downloaded the material and thought he had deleted everything. (AE B)

A manager at Applicant's employer has known him for four years. Applicant possesses integrity and has healthy boundaries. He is trustworthy, reliable, and concerned for the well-being of others. He is an asset to the organization. (AE A)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court has noted, "the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials." *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

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 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 not drawn 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 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 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.

Analysis

In April 2021, Applicant was charged in State 1 with possession of obscene material. The exact criminal statute he was charged with violating is not clear from the record. However, in January 2023, he pled guilty to the offense charged and received a 10-year jail term. That sentence was suspended, and he was placed on two years of probation, until January 2025. Applicant was also required to register as a sex offender. (SOR ¶¶ 1.a, 2.a, 3.a)

The doctrine of collateral estoppel generally applies in DOHA hearings and precludes applicants from contending that they did not engage in criminal acts for which they were convicted. ISCR Case No. 95-0817 at 2-3 (App. Bd. Feb. 21, 1997). There are exceptions to this general rule, especially with respect to misdemeanor convictions based on guilty pleas. Relying on federal case law, the DOHA Appeal Board has adopted a three-part test to determine the appropriateness of applying collateral estoppel to criminal convictions. First, the applicant must have been afforded a full and fair opportunity to litigate the issue in the criminal trial. Second, the issues presented for collateral estoppel must be the same as those resolved against the applicant in the criminal trial. Third, the application of collateral estoppel must not result in “unfairness,”

such as where the circumstances indicate lack of incentive to litigate the issues in the original trial. Federal courts recognize that an individual may not have an incentive to fully litigate a misdemeanor offense because there is less at stake or because a plea bargain creates a disincentive to litigate the issues. ISCR Case No. 04-05712 (App. Bd. Oct. 31, 2006).

Applicant denies the SOR allegation and the cross-allegations. He also asserts, in various ways, that he did not download any child pornography or inappropriate images of minor children. He asserts at various points that his son-in-law or his minor grandson did it, and that the child admitted doing so when asked about it by his parents. Even so, Applicant pleaded guilty to a felony, for which he received a 10-year suspended jail term. Having done so, he is barred from claiming in this forum that he did not engage in the felony criminal conduct to which he pleaded guilty.

Indeed, according to the police report, Applicant was asked about specific photos with sexually explicit descriptions referencing girls aged 9, 11, and 12. According to the police report, Applicant said he “would download it to see what it was and then delete it.” (Item 4 at 3) This admission cuts against his assertions that he did not engage in the alleged criminal conduct.

The Government has met its burden in this case. Notwithstanding Applicant’s denials, the SOR allegations are established. Specific disqualifying conditions, as applicable, are discussed below.

Guideline D: Sexual Behavior

AG ¶ 12 expresses the security concern for sexual conduct:

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:

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

- (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.

The definition of sexual behavior under the Guideline D general concern “includes conduct occurring in person or via audio, visual, electronic, or written transmission.” I find that accessing and downloading sexually explicit images of children satisfies this definition. I find that AG ¶¶13(a) and 13(c) apply, as does AG ¶ 13(d), since Applicant’s conduct reflects a serious lack of judgment, even though it was not public.

AG ¶ 14 sets forth potentially applicable mitigating conditions for sexual conduct, including:

(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

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress;

Applicant’s actions put him in position where he might have been subject to coercion, exploitation, or duress. As he notes, however, his employer’s security department is aware of the charges, as is his family. The possibility of coercion is also lessened by the fact that he pleaded guilty. His arrest is also a matter of public record. Thus, AG ¶ 14(c) has some application.

AG ¶ 14(b), however, is not applicable. Applicant engaged in the conduct as charged as recently as late 2020 or early 2021, pleaded guilty in January 2023, and remains on probation, facing a possible 10-year jail term if his probation is revoked, until January 2025. He was also required to register as a sex offender. This means that the State 1 criminal authorities do not trust him to be out in society without restrictions. As noted below, being on probation is itself a disqualifying condition under Guideline J. Applicant has not established that his conduct “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.” AG ¶ 14(b) does not apply. Guideline D security concerns are not mitigated.

Guideline J: Criminal Conduct:

AG ¶ 30 expresses the security concern for criminal conduct:

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. The following disqualifying conditions are 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 individual was formally charged, prosecuted, or convicted; and

(c) individual is currently on probation or parole.

Applicant was arrested and charged with felony possession of obscene matter, and he pleaded guilty to the charge. He was sentenced to ten years in jail, suspended for two years, and was sentenced to two years of probation. He was also required to register as a sex offender. AG ¶¶ 31(b) and 31(c) both apply to SOR ¶ 2.a, the criminal conduct cross-allegation of Guideline D ¶ 1.a in the SOR.

AG ¶ 32 sets forth the potentially applicable mitigating conditions:

(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.

AG ¶¶ 32(a) and 32(d) do not apply for the same reasons that Guideline D AG ¶ 14(a) does not apply, as discussed above. In addition, Applicant has repeatedly asserted that he did not engage in the felony conduct alleged, despite having pleaded guilty to that felony conduct in court. His continued denials undercut any evidence of reform and rehabilitation.

Guideline E, Personal Conduct

AG ¶ 15 details the personal conduct security concern:

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. . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(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.

SOR ¶ 3.a is merely an additional cross-allegation, under Guideline E, of conduct already alleged under Guideline D and cross-alleged under Guideline J. AG ¶ 16(c) is not established, as it requires “credible adverse information in several adjudicative areas that is not sufficient for an adverse determination under any other single guideline. . . .” Because the conduct is fully addressed and disqualifying under other guidelines, as discussed above, I consider the personal conduct cross-allegation to be duplicative, and I find SOR ¶ 3(a) for Applicant on that basis.

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, J, and E in my whole-person analysis.

Since Applicant elected a decision on the written record, in lieu of a hearing, I did not have the opportunity to ask him questions about his conduct. I also had no opportunity to observe his demeanor during a hearing, and thus, to assess his credibility beyond the documentary record. The fact that I cannot assess his credibility undercuts

the strength of his denials. Further, when balanced against his guilty plea, his denials undercut any acceptance of responsibility and any claim of rehabilitation.

The simple fact in this case is that Applicant engaged in serious criminal conduct for which he remains on probation and has had to register as a sex offender. It is not clearly consistent with the national interest to grant him eligibility for access to classified information, because the record evidence leaves me with questions and doubts as to Applicant's eligibility for access to classified information.

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 J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3: Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the interests of national security to grant Applicant access to classified information. Eligibility for access to classified information is denied.

Braden M. Murphy
Administrative Judge