



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



In the matter of:)
)
) ISCR Case No. 22-01131
)
Applicant for Security Clearance)

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: Dan Meyer, Esq.

03/29/2024

Decision

HALE, Charles C., Administrative Judge:

Applicant did not mitigate the sexual behavior, use of information technology, and personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On December 1, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D (sexual behavior), M (use of information technology), and E (personal conduct). Applicant responded to the SOR on February 24, 2023, and requested a hearing before an administrative judge.

The case was assigned to me on September 11, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 16, 2023, scheduling the hearing for November 7, 2023. The Government amended the SOR on November 1, 2023. After confirming Applicant had sufficient notice and was prepared to proceed the hearing was convened as scheduled. (Tr. at 7.) Government Exhibits (GE) 1 through 5 were admitted in evidence without objection. Applicant testified, called a witness, and submitted Applicant's Exhibits (AE) A through C, which were admitted without objection.

Applicant's Answer contained a number of administrative documents, AE A through AE C had been assigned different letters by Applicant's counsel. (Tr. 17, 19.) The record remained open until November 21, 2023. Applicant timely submitted two exhibits ((AE D employee evaluation) and (AE E Military Awards)), which were admitted without objection. DOHA received the transcript on November 22, 2023.

Findings of Fact

Applicant is a 39-year-old information technology (IT) project manager employed by a defense contractor since June 2022. He has worked in the defense industry since about 2015. He seeks to retain a security clearance, which he has held since 2002 when he was an active-duty Marine. He joined the military after the 9/11 attacks. His military occupational specialty (MOS) involved computer administration. He deployed for a year to a combat zone. He was discharged honorably in December 2014. He has a associate's degree, which was awarded in 2018. He is married and has two middle school aged children. (Tr. at 23-25; GE 1 at 12, 31-32, 38.)

Applicant is an admitted sex addict, whose addiction is to pornography. In his Answer he admitted SOR ¶¶ 1.a and 1.b, which are cross alleged under Guidelines M (SOR ¶ 2.a) and E (SOR ¶ 3.e), that he used his company computer to view pornography and resigned in lieu of being fired. He testified that while working at the IT help desk, as the system administrator, he used his company computer to view pornography while at the worksite. He cited working at a site where all the employees were working from home because of COVID and the possibility of catching COVID because of having to come into work as the reason for his decision to look at pornography on his work computer. (Tr. at 28.) He estimated he spent "four to five hours, maybe more" viewing pornography at work during his eight-hour workday. (Tr. at 52.) As a result, in September 2020 he was fired by his employer for viewing pornographic material on his company computer. He acknowledged he knew it was a violation of rules, procedures, and regulations. (Tr. at 55, 76.) He admitted he did not want to disclose during the security clearance eligibility process his viewing pornography at work, the misuse of his government computer, or losing his job because of viewing pornography because he knew that it would be problematic for his security clearance. (Tr. at 81-82.) He did list on his February 2021 Questionnaire for National Security Positions (SF 86) that he had been caught viewing pornography at work, which resulted in him relinquishing his government issued computer and access card and being escorted off the installation. (GE 1; Tr. at 81.)

Applicant testified the last time he looked at any pornography was June of 2021. He has been undergoing marriage counseling and therapy for sexually compulsive behavior since June 2021. (Tr. at 30-31; GE 3; AE B; AE C.) He did not stop viewing pornography until he went into therapy in June 2021. (Tr. at 36-37.) His treatment provider and sponsor for Sex Addicts Anonymous both noted he had made significant strides in being sober and dealing with his sexually compulsive behaviors. (AE B; AE C.)

In his SOR answer, Applicant denied that he falsified his SF 86 responses and added after the denial "with the mitigating evidence provided." (SOR ¶¶ 3.a, 3.b, 3.d) He acknowledged his actions but cited his intent at the time was not to falsify his answers based on his understanding of the situation. (GE 1; Tr. at 72.) He testified he believed the statements were the truth at the time. He denied falsifying the SF 86 because when he

was escorted out of his facility he was not specifically told why. He acknowledged he knew that what he had been doing was wrong and that he should not have done it. Because he did not get an official statement saying why he was relieved of his position at the time, he thought he was putting in the correct information. (Tr. at 77-78.)

Applicant did not report on his SF 86 that between April 2020 and August 2020, he used his company computer to view pornography. In Section 27 he answered “No” to the use of information technology systems questions, which stated:

In the last seven (7) years have you introduced, removed, or used hardware, software, or media in connection with any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines, or regulations, or attempted any of the above? [He] answered “No” and deliberately failed to disclose that information set forth in subparagraph 1.a., above.

Applicant was interviewed for his background investigation in July 2021. The investigator asked him if he had used media with any information technology system without authorization when specifically prohibited by rules procedures, or regulations, and he answered "no." (GE 2 at 8; Tr. at 80-81.) Upon being confronted with information, he told the investigator that he had viewed pornographic material and pictures while employed as the system administrator for his company. (Tr. at 81; GE 2 at 8.) He told the investigator during his interview in July 2021 that he was aware that he was violating government policy and procedures by viewing pornography and having sexually explicit chats while working and on a government computer. He acknowledged to the investigator that he was extremely embarrassed and that was a reason he did not disclose the incident. (Tr. 55-57; GE 2 at 8.)

Applicant did not report on his SF 86 that in September 2020, he resigned in lieu of being fired by his employer for viewing-pornographic material on his company computer. SOR ¶¶ 3.b and 3.d alleged he falsified his answers to Section 13A – Employment Activities:

[I]n the last seven (7) years?... Fired...Quit after being told you would be fired...Left by mutual agreement following charges or allegations of misconduct...Left by mutual agreement following notice of unsatisfactory performance.” [He] answered “No” and deliberately failed to disclose that information set forth in subparagraph 1.b, above.

Provide the reason for leaving the employment activity. [He] answered that [he] left because the contract was canceled and deliberately failed to disclose that information set forth in subparagraph 1.b, above.

Applicant cited a misunderstanding based on how he was removed from the facility by two security guards. He testified the guards said you know what you did, when they removed him from the property, and he was never told why he was being escorted from the property. (Tr. at 33, 60, 77; GE 1 at 16.) When he gave his answers, he believed he was telling the truth. (Tr. at 77-78.) He admitted he knew he did not leave his position

because the contract had been cancelled. (Tr. at 80.) He did not disclose the circumstances until confronted by the investigator in his security clearance interview. (Tr. at 81-82.) Applicant did not disclose in his SF 86 the circumstances of him being caught viewing pornography at work, his subsequent termination, or that he was escorted off the site by security and his government devices were confiscated. He stated he “had convinced [himself] that those were the correct answers.” (Tr. at 81, 83-84.)

Applicant attributed his denials as “acting out and during [his] addiction, I had convinced myself that those were accurate statements.” (Tr. at 84.) After going through therapy and speaking with other people with the similar addiction and similar experiences, he realized that as he had been lying to himself, the Government, his wife, his friends, and his family. (Tr. at 84.) He then went on to explain the lack of communication about the circumstances of his termination from his former employer and that he did not receive an official email or document advising him of the reasons for his termination. (Tr. at 84; GE 2 at 8-9.)

Applicant’s testimony, that he did not deliberately falsify his SF 86, was not credible. He was the system administrator, and he knew viewing pornography on his work computer at his worksite was prohibited. (Tr. at 53-57.) The conduct that required him to find a new job had happened just five months prior to completing the SF 86. He was aware of each falsification on his SF 86 when he completed it. When he was interviewed by the investigator a few months later, he denied his actions and only discussed them after being confronted by the investigator. He acknowledged that putting these matters on his SF 86 would jeopardize his employment chances. (Tr. at 55, 80-82; GE 2 at 8.)

Applicant has now configured his life to prevent him from accessing pornography. His home is now behind a wireless router that he has set up to completely block explicit material. He also blocks TikTok, Twitter, Instagram, and porn sites. He has made sure his other laptops and the tablets have profiles that are configured to block inappropriate sites and the laptops do not leave the house. (Tr. at 88.) Applicant offered four character letters attesting their trust and confidence in him to deal with his addiction. (AE A.)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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(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."

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

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 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:

- (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 and/or that reflects lack of discretion or judgment.

Applicant admitted he used his employer's computer to view pornography while working as his company's system administrator. He knew that his behavior was against company policy, which resulted in him resigning from his position, in lieu of being fired. His behavior reflected a severe lack of judgment and made him vulnerable to coercion, exploitation, and duress. The above disqualifying conditions have been established.

Conditions that could mitigate sexual behavior security concerns are provided under AG ¶ 14. The following are potentially applicable:

- (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 good 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.

Applicant behavior is recent, and his treatment is ongoing. His actions occurred in a nonprivate place, his workplace. His viewing pornography cannot be considered strictly private or discreet because it occurred on his work computer. He spent a significant amount of time at work engaged in viewing pornography during working hours. While he has made progress in his treatment, insufficient time has passed to determine whether his treatment has been effective. I find that Applicant's conduct continues to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 14(b) and 14(d) are not applicable. AG ¶¶ 14(c) and 14(e) may have some applicability, but they are insufficient to mitigate Applicant's unacceptable behavior and rule violations.

Guideline M, Use of Information Technology

The security concern for use of information technology is set out in AG ¶ 39:

Failure to comply with rules, procedures, guidelines, or regulations pertaining to information technology 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.

AG ¶ 40 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(e) unauthorized use of any information technology system.

Applicant knew he was violating company policy when he accessed pornography on his employer's computers while working in the IT component of his company. The above disqualifying condition is applicable.

Conditions that could mitigate the use of information technology systems security concerns are provided under AG ¶ 41. The following is potentially applicable:

(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.

The above analysis under sexual behavior also applies here. Applicant's conduct is recent, and he did not acknowledge it until he received the SOR. His conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 41(a) is not applicable.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 clearance investigative or adjudicative processes.

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

(a) deliberate omission, concealment, or falsification of relevant facts from

any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

(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;

(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

(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 or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

AG ¶¶ 16(a) 16(b) 16(c) and 16(e) are applicable. Applicant willfully did not disclose his viewing pornography at work; the misuse of his government computer; and losing his job because of viewing pornography on his SF 86, because he knew that it would be problematic for his security clearance. His explanation that he was never informed why he was terminated after having been escorted out by security was not credible. He spent half of his workday viewing pornography and having sexually explicit online chats.

When Applicant was interviewed by a government investigator and asked if he used media information technology without authorization in the last 7 years he responded "no" and did not disclose that he was viewing pornography on a work computer until he was confronted. He admitted to the investigator he did not disclose his actions because of extreme embarrassment. He also cited that he was not informed by his company because he had not received any further communication, so he assumed his clearance was in good standing. This later response is not credible.

Applicant's testimony about what he believed when he completed the SF 86 was not credible. Stating on the SF 86 that he left because the contract had been cancelled, when he had been the system administrator and had been escorted out of his workplace by security after viewing pornography on his company computer, is not credible.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

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

None of the mitigating conditions are applicable. Applicant was not credible when he says, he convinced himself that when he was completing the SF 86, he believed he was not lying and was not deliberately providing false information. He did not make a prompt effort to correct the omissions. He denied his misuse of information technology in multiple sections of his SF 86 and during his security clearance interview, as well as not disclosing his employment history on his SF 86. He continued blame his former employer for not fully communicating with him. His conduct is recent. The above analysis under sexual behavior also applies here to his personal conduct.

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, M, and E in my whole-person analysis. I also considered Applicant's honorable military service, character evidence, and the progress he has made in treatment.

Overall, the record evidence leaves me with questions and doubts about

Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the sexual behavior, use of information technology security, and personal conduct security concerns.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline D:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2, Guideline M:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a-3.e:	Against Applicant

Conclusion

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.

Charles C. Hale
Administrative Judge