



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



In the matter of:

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ISCR Case No. 22-00799

Applicant for Security Clearance

Appearances

Government: Daniel O'Reilly, Esq., Department Counsel
For Applicant: John V. Berry, Esq.

03/28/2024

Decision

Curry, Marc E., Administrative Judge:

Between 2015 and 2017, Applicant viewed child pornography, including images of children as young as one year old being molested by adults. This generates a security concern that he failed to mitigate. Clearance is denied.

Statement of the Case

On November 9, 2022, the Department of Defense Counterintelligence and Security Agency Consolidated Adjudication Services (CAS) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline D, sexual behavior, and Guideline E, personal conduct. The SOR explained why the CAS was unable to find it clearly consistent with the national interest to grant or continue his security clearance eligibility. The CAS acted 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DOD on June 8, 2017.

On February 3, 2023, Applicant answered the SOR, admitting SOR ¶ 1.a and denying SOR ¶ 2.a. In addition, he requested a hearing, whereupon the case was assigned to me on July 18, 2023. On September 8, 2023, DOHA issued a notice scheduling the case for October 26, 2023. The hearing was held as scheduled. I admitted six government exhibits (GE), incorporated into the record as GE 1 through GE 6; six Applicant Exhibits (AE), incorporated into the record as AE A through AE F; and the testimony of Applicant and two character witnesses. At the close of the hearing, I left the record open, at Applicant's request, to allow him to submit additional documents. Within the time allotted, he submitted three exhibits, identified as AE G to AE I. Department Counsel did not object, and I incorporated them into the record. The transcript was received on November 2, 2023.

Preliminary Rulings

At the close of the hearing, Department Counsel moved to amend the SOR, to add another allegation under Paragraph 1, as follows:

1.b. From about 2016 to at least 2021, you have had intrusive thoughts about underage girls and children, to include thoughts of what their genitals look like underneath their clothes, thoughts of abducting underage females, and thoughts of having sex with underage females.

Applicant's counsel objected, raising notice and due process issues. Alternatively, he argued that if I granted the motion to amend, that the allegation should be set forth under a separate paragraph for psychological conditions and that the record be re-opened to allow Applicant's treatment team to provide medical updates. (Tr. 165-169) I reserved judgment on Department Counsel's motion and Applicant's counter-motion. Instead, I extended the record to November 30, 2023, to allow Applicant's counsel an opportunity to submit additional evidence and to ascertain at that point if the parties still wanted to continue with their motions. (Tr. 168-169) Within the time allotted, Applicant's counsel submitted AE G through AE I, as noted above. After reviewing the new exhibits, Department Counsel, on December 8, 2023, renewed his motion to amend, together with a brief in support thereof. (Hearing Exhibit (HE) I) On December 12, 2023, Applicant's counsel filed a response to Department Counsel's motion, renewing his objection, and renewing his request for a second hearing to consider the proposed amended allegation under a Guideline I paragraph.

Upon considering both motions, I have decided to deny Department Counsel's motion to amend the SOR. Secondly, because Applicant's motion to re-open the hearing is now moot, I hereby deny that motion, also. In denying Department Counsel's motion, however, I am not excluding the facts from consideration. Specifically, the facts at issue are not controverted because Applicant readily admitted them during the hearing, and Applicant's intrusive thoughts were discussed by Applicant's psychologist in a report attached to his SOR answer, and in an updated, post-hearing report. (Answer, Enclosure (Enc.) 5; AE G) Moreover, regardless of whether it is set forth as a stand-alone allegation in the SOR, it constitutes relevant evidence for multiple reasons, including:

- 1) evaluating the credibility of Applicant's contention that he watched child pornography inadvertently;
- 2) evaluating the nature and seriousness of Applicant's decision to watch child pornography;
- 3) evaluating the status of Applicant's rehabilitation efforts; and
- 4) assessing the likelihood of whether Applicant may view child pornography in the future.

2. SOR subparagraph 2.a reads, as follows:

You falsified a material fact on an Electronic Questionnaire for Investigations Processing (e-QIP), executed by you on August 7, 2018, when you wrote in the "Additional Comments" section that you were "probed by the FBI in November/December 2018 in relation to an unspecified mental health condition." In fact, you were interviewed by the FBI in November/December 2018 to address your admission to viewing child pornography made during your July 2018 interview with the [government agency].

The only e-QIP on file is dated August 7, 2019, not August 7, 2018. (GE 1) Applicant in his answer, corrected the date and provided an explanation based on the actual e-QIP date, not the mistaken one as DOHA drafted. Consequently, I am amending SOR subparagraph 2.a *sua sponte*, striking "August 7, 2018," and replacing it with "August 7, 2019."

Findings of Fact

Applicant is a 37-year-old single man. He earned a bachelor's degree in 2010 and a master's degree in 2013. (GE 1 at 11) Applicant has been working in the defense contracting industry as a systems engineer since 2009. His duties include developing simulations, sensors, and user interfaces for weapons systems. (Answer at 10)

Applicant is highly respected on the job. According to a coworker, he performs all his duties with quality and integrity. (Answer, Enclosure (Enc.) 6 at 1) According to another coworker, he is an amazing resource to go to for help, who "would . . . often give in depth explanations about how . . . software worked to any employee who showed interest and wanted to learn." (Answer, Enc. 6 at 7) According to his supervisor, he provides excellent technical support and "is a tremendous asset upon which the government [can] call upon." (Answer, Enc. 6 at 11)

Applicant viewed pornography approximately once every other day between July 2015 and January 2017. (Tr. 117) Some of the pornography included child pornography with images such as three-second snippets of teenage girls being gang-raped, images of teenage girls performing oral sex on adult males, and images of adults performing oral sex

on children as young as one year old. (GE 3 at 6; Tr. 61, 113, 118) Applicant contends that he came across these images inadvertently while browsing adult pornography. (Tr. 55-56, 64)

From approximately 2016 to 2018, Applicant sometimes browsed the Facebook pages of his friends to see if they posted swimsuit pictures or other family photos of their daughters. The age of these girls ranged from 13 to 16. (GE 3 at 7) Such pictures aroused him. (GE 3 at 7) On one occasion, he ran into a former teacher and the teacher's family at church and fantasized about how one of his daughters would look underneath her clothing. (Tr. 69)

At times while running errands at the neighborhood shopping center, Applicant would see children and fantasize about how they looked under their clothing. (Tr. 138) This occurred most recently in 2021. During an interview with an FBI investigator in November 2018, that Applicant underwent related to a security clearance investigation of another agency, he admitted that he had at times fantasized about abducting children from "a place like a Stop and Shop or whatnot . . ." (GE 4 at 6; Tr. 132, 135-138) These thoughts increased when he viewed child pornography. (GE 4 at 5; Tr. 68) He testified that none of these thoughts ever led to any concrete plan to harm children. Rather, they were hypothetical. (Tr. 70)

Recognizing the severity of this problem, Applicant, shortly after the November 2018 FBI interview, began working with a therapist to address these thoughts. (Tr. 72) With the help of his therapist, these thoughts gradually began decreasing. The record contains therapist's notes of Applicant's counseling between 2020 and 2023. (AE C; Answer, Enc. 5 at 5; Tr. 85; AE I) The therapist helps him "reframe his intrusive thoughts" (Tr. 86) by thinking about something like an old family memory whenever he catches himself thinking about an underage female. (Tr. 95) Applicant has not had any intrusive thoughts since 2021. (Tr. 93)

Applicant also has been receiving treatment from a psychiatrist once every other month since 2020. (Tr. 84, 86) She prescribed Applicant an anxiety medication that has helped limit his intrusive thoughts. (Tr. 85)

In September 2022, a psychologist evaluated Applicant in relation to his fitness to possess a security clearance. After interviewing Applicant, he concluded that Applicant more likely than not never looked at child pornography, and instead, probably saw adult models on legal websites who were made to appear young, and that Applicant reported them as minors in an abundance of caution. (Answer, Enc. 5 at 10) The psychologist's conclusion was based in part on Applicant's characterization that he watched the child pornography inadvertently. (Answer, Enc. 5 at 2) Furthermore, he noted that reporting that pornography models are underage under the stress of a polygraph, like Applicant experienced, was a phenomenon not uncommon with security clearance applicants. (Answer, Enc. 5 at 10) Applicant testified that he was confident that some of the females he viewed in the pornography images and videos were underage. (Tr. 118)

As for Applicant's fantasizing about girls, the psychologist who evaluated him in September 2022 explained that this was indicative of obsessive-compulsive disorder (OCD) rather than any pedophilic interests. (Answer, Enc. 5 at 11) One of the symptoms of OCD is repetitive, unpleasant sexual thoughts, such as those that Applicant occasionally experiences. (Answer, Enc. 5 at 11) Per the psychologist, "the very fact that [Applicant finds] the images repulsive is what causes them to be experienced mentally as part of an anxiety disorder," as opposed to any urge to sexually exploit or otherwise harm children. (Answer, Enc. 5 at 10) The psychologist explained that this is why the medication, which his psychiatrist prescribed earlier, helped reduce his intrusive thoughts. The psychologist evaluated Applicant again in 2023 and reiterated his conclusions. (AE G at 11)

In early 2023, Applicant began attending Sexaholics Anonymous (SA), "a fellowship with a solution to the problems of lust, sex, and pornography addiction." (AE D; Answer at 7; Tr. 88) He attends phone meetings approximately once a week. (Tr. 89-90)

Subparagraph 2.a of the SOR alleges that Applicant falsified his August 2019 security clearance application in the "additional comments" section by disclosing an FBI investigation but characterizing the subject of the probe as being for "an unspecified mental health condition," rather than for suspicion of viewing child pornography. (GE 1 at 30) The "additional comments" section of the security clearance application invites applicants "to provide any information [they] would like to add." (GE 1 at 30) Applicant elaborated about the FBI investigation, providing the approximate date, and noting that [he] was extremely up front throughout the process," and that he had been seeking help from a qualified medical professional related to issues of concern in the investigation. (GE 1 at 30)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (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 required to be considered 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 overall 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 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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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:

This guideline concerns “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.” (AG ¶ 12) Applicant viewed child pornography between July 2015 and 2017 on multiple occasions. He contends that he inadvertently came across child pornography that flashed across the screen of otherwise legal adult pornography that he was viewing. Given Applicant’s testimony that he sometimes browses Facebook to look for pictures of underage girls for his sexual gratification, and he sometimes fantasizes about abducting and sexually assaulting children at the local shopping center, I do not find his contention that he ran across child pornography inadvertently while browsing adult pornography to be credible. Under these circumstances, the following disqualifying conditions under AG ¶ 13 apply:

- (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.

14: The following mitigating conditions are potentially applicable, as set forth under AG ¶

(c) 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;

(d) the sexual behavior no longer serves as a basis for coercion, exploitation, or duress; 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 has undergone therapy since 2017 and treatment with a psychiatrist since 2020. In addition, in early 2023, he enrolled in SA, a support group for people with addiction to pornography. Later that year, Applicant was evaluated by a psychologist who concluded that his fantasies about children were related to OCD, not pedophilia, and that the OCD was under control.

The psychologist who evaluated Applicant to ascertain his fitness for a security clearance based his findings, in part, on Applicant's characterization that his viewing of child pornography was inadvertent. Given Applicant's testimony that he knew that some of the girls he viewed were underage, and record evidence that watching underage girls arouses him, any contention that his viewing of child pornography was inadvertent is not credible. Similarly, Applicant's admission at the hearing that he knew that some of the girls that he viewed were underage, undercuts the psychologist's opinion that the pornography models were more likely than not adults masquerading as children. Most important, Applicant admitted that some of the child pornography involved toddlers. Such subjects cannot possibly be adult models masquerading as underage children, as the psychologist suggested. Consequently, although the psychologist's prognosis is favorable, it has limited probative value. Ultimately, AG ¶ 14(e) is applicable only insofar as Applicant has been attending therapy on an ongoing basis.

Although Applicant has not viewed child pornography in approximately seven years, he had intrusive thoughts about a child as recently as 2021. Insufficient time has elapsed to conclude that the behavior is unlikely to recur or that it no longer serves as a basis for coercion, exploitation, or duress. Neither AG ¶ 14(c) nor AG ¶ 14(d) applies. Applicant has failed to mitigate the sexual behavior security concerns.

Guideline E: Personal Conduct

Under this guideline, "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." (AG ¶ 15) Moreover, "of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative

processes.” (*Id.*) When Applicant completed his security clearance application in 2019, he disclosed that the FBI investigated him, but did not specify the specific nature of the investigation, Instead, he characterized the investigation as for “an unspecified mental health condition.” Given his otherwise comprehensive response to the question, together with the fact that he voluntarily disclosed this information in the “additional comments” section of the security clearance application, I conclude that he was sufficiently forthcoming so as not to mislead the Office of Personnel Management investigation. I conclude that AG ¶ 16(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,” does not apply.

Whole-Person Concept

In assessing the whole person, the administrative judge must consider the totality of Applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). Those factors are:

- (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.

Although Applicant’s misconduct is particularly egregious, he recognizes this and has been engaging in therapy from medical health professionals. Moreover, approximately seven years have elapsed since he last viewed child pornography. Ultimately, the nature and seriousness of Applicant’s misconduct, particularly, the violent imagery of some of the child pornography that he viewed is too significant for the presence of rehabilitation or the passage of time since the last episode of viewing child pornography, for Applicant to overcome. I conclude that Applicant failed to mitigate the security concerns.

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:	FOR APPLICANT

Subparagraph 2.a:

For Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge