



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



In the matter of:)
)
) ISCR Case No. 22-02433
)
Applicant for Security Clearance)

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: Ronald C. Sykstus, Esq.

08/23/2024

Decision

PRICE, Eric C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline M (use of information technology). Eligibility for access to classified information is denied.

Statement of the Case

On February 3, 2023, the Department of Defense issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline M. The action was taken under Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4 (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on March 2, 2023, and requested a hearing before an administrative judge. (Answer) The case was assigned to me on October 16, 2023. On October 26, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing scheduling the hearing via video teleconference.

I convened the hearing as scheduled on December 11, 2023. The Government's exhibit list, Government's disclosure letter, and Applicant's exhibit list were marked as Hearing Exhibits (HE) I through III. Department Counsel offered Government Exhibits (GE) 1 through 3. Applicant and five witnesses testified, and Applicant offered Applicant's Exhibits (AE) A through G. The record was held open until December 18, 2023, to permit Applicant to submit additional documentary evidence but he chose not to do so. GE 1 through 3 and AE A through G were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on December 26, 2023.

Findings of Fact

Applicant is 32 years old. He received bachelor's and master's degrees in mechanical engineering in 2016 and 2018, respectively. He married in October 2021 and has no children. He has held a security clearance since 2017. (GE 1; AE B-E; Tr. 19-26)

Applicant was employed as an intern engineer for Company A, a defense contractor, from May to August 2017, and then as an engineer from about June 2018 until his termination in August 2022. He has been employed by another defense contractor, Company B, since September 2022. (GE 1-2; AE A, Tr. 19-26, 46-54)

The SOR alleges on various occasions between at least July 2022 and August 2022, Applicant used a company-issued computer to access websites containing adult material, and that his employment was terminated for violation of the company's authorized use policy (AUP). (SOR ¶ 1.a) In Applicant's Answer to the SOR, he admitted the allegation, with explanation. His admission is incorporated in my findings of fact.

Applicant was issued a computer by Company A in about August 2018. On August 1, 2022, security personnel discovered he used an authorized, privacy-oriented web browser to access unauthorized adult material websites during business hours. (GE 3 at 1, GE 2) Investigation revealed that from July 26 to August 3, 2022, he accessed prohibited sites at least 21 times. When questioned by Company A officials, he admitted his misuse of company-issued information technology (IT) equipment. (GE 2-3; 35-36, 52-59; Answer)

Applicant testified he had been addicted to viewing pornography online since about eighth grade. He viewed online pornography on his personal devices for 30-60 minutes most days through high school and college. In early 2021, he installed software to block his access to pornography on his home computers because he was getting married and thought it would be wrong to continue viewing pornography online and because it was contrary to his religious beliefs. In about October 2021, he was using his company-issued computer to search an authorized file-sharing website, noticed an adult category, and first accessed pornography on his work computer. He was not looking for pornography, but "made the choice to pursue [pornography] when the opportunity presented itself." (*Id.*) He started accessing pornography on his work computer every few weeks, then weekly, and then almost daily from about April 2022 until his unauthorized actions were detected in

August 2022. He was aware Company A's AUP prohibited such conduct. (GE 2-3; Tr. 26-30, 35-38, 49-59)

Applicant sought out and in mid-August 2022 started faith-based counseling for "sexual addiction". (Answer; Tr. 39) He has met with a counselor for about two hours a week since. After he received the SOR, he talked with his pastor and learned his church had a support group for men who have faced similar sexual addictions. He joined the support group in late February 2023 and has attended weekly meetings since. He believes he has been forthright and cooperative with others in his recovery, found support, encouragement and accountability for himself and others, gained insights into his addiction and the discipline needed to break it, and has not displayed indications he would improperly use a company's IT system again. He has not used a computer issued by his current employer to access pornography online. (Answer; AE G; Tr. 26-32, 38-43, 59-63)

Applicant estimated he has viewed pornography online less than 10 times since August 2022. He said he last viewed pornography online in July 2023, and that he looked at sexual material "he wouldn't want to look at . . . shortly before Thanksgiving [2023]." (Tr. 62-63) He said "[i]t hasn't been a perfect recovery", and that he has disclosed his relapses to his wife, counselor, and support group. (Tr. 63) He stated:

[He and his wife have] gotten more software since then . . . to kind of close the loopholes. And that's been pretty effective.

Any lapses, I would say the July and the Thanksgiving lapse, were because of . . . we've had to bring the [software] down to add a website to the whitelist, and either we forget about it, or we set it correctly (sic), and a lapse happens. And then I tell [my wife] a lapse happened, and tell my group a lapse happened, and we'll get things fixed back up.

[When asked if he felt a strong impulse to view pornography if the blocking software was not in place – Applicant responded] Not always. There have been several times where the filters have been down and I've said, hey, we need to bring these back up. (Tr. 70-71)

Applicant's wife testified they worked through some difficult issues regarding his urges that has strengthened them, improved accountability, intimacy, and honesty. She said he has faithfully attended individual counseling and group sessions and spends hours doing his homework. Before they were married Applicant informed her that he struggled with a pornography addiction, and he installed accountability software in about February 2021. She learned he relapsed when he lost his job in August 2022. He sought and has seen trained and certified but unlicensed counselors through their church, and she has seen a lot of growth. He immediately informed her of relapses in November 2022, May 2023, and July 2023, and she said he had not relapsed at work. (Tr. 75-86)

Applicant's counselor has degrees in biblical studies and biblical counseling and has been a counselor for about 15 years. He has counseled Applicant weekly since August 2022. He said Applicant was "doing very well" in counseling, was "very conscientious", an "exemplary counselee", and that Applicant's prognosis was "excellent." (Tr. 93-95) He said relapses including viewing pornography "are very common in people." (Tr. 97) He did not recall when Applicant last relapsed and said, "it's been very good in the last several months." (Tr. 99) He thought Applicant relapsed "[a] few weeks ago, probably" but was not sure he viewed pornography. (Tr. 97) He said they would likely conclude counseling in the next few weeks. The counselor, a retired GS 15 federal civilian employee who had a security clearance for about 40 years, said Applicant was open and honest with him, and that he had no concerns with Applicant being granted access to classified information. (Tr. 89-103)

Applicant's immediate supervisor and second level supervisor at Company B testified. They both have DoD security clearances and were involved in Applicant's preemployment interview in August 2022 but did not discuss the conditions of his separation from Company A. After the interview and before accepting a position with Company B, Applicant disclosed he was terminated by Company A for using a company-issued computer to access adult websites. Both supervisors described his disclosure as sincere and believed he was committed to making positive changes in his life. They described him as reliable, a good worker who adheres to rules applicable to handling classified information, and neither had concerns about him having a security clearance. (Tr. 104-128) His appraisal from Company B for 2022 was successful overall. (AE A)

The facilitator for the faith-based support group for men struggling with sexual addiction testified Applicant had attended weekly group meetings since about March 2023. He described Applicant as sincere, engaged, and as a contributing member of the group, who shows good insight into the problem and actions needed to mitigate it, and that Applicant is "on a good path forward." (Tr. 133) He said Applicant would likely complete the curriculum in about six months. The witness, a former Army Chaplain and current defense contractor with a security clearance, said he had no concerns with Applicant being granted access to classified information. (Tr. 128-139)

Applicant's pastor noted Applicant had shared his situation at work, took the initiative to seek help and strongly desired to overcome the challenge he has faced since being exposed to pornography at a young age. He described Applicant as receptive to accountability, noted he joined a men's group to address this topic, and that Applicant had been honest and shown significant success in facing this challenge. The pastor lauded Applicant's involvement and service in the church and commented favorably on his integrity, goal of seeking to be a man of honor, and strong spousal support. (AE G)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to

“control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline M, Use of Information Technology

The security concern under this guideline 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.

Applicant's admitted use of a company-issued computer to access adult websites in violation of Company A's AUF raises the following security concern under AG ¶ 40:

(e) unauthorized use of any information technology system.

The following mitigating conditions under AG ¶ 41 are 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;

(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.

AG ¶ 41(a) is not fully established. Applicant's admission he misused a company-issued computer when questioned in August 2022, the lack of recurrence since, disclosures to his wife, and continued participation in faith-based counseling and group

sessions are positive developments. These actions evidence his commitment to gaining insight into and better controlling his desire to view pornography online and to prevent recurrence. However, his interest in viewing pornography online, albeit apparently reduced, is long-standing, and his misuse of a company-owned computer to do so in August 2022 is relatively recent. Since Applicant was fired for his computer misuse, he has legally viewed pornography on his personal computer on multiple occasions by exploiting gaps in software he installed for the express purpose of preventing him from doing so as recently as July 2023. He also viewed sexual material “he wouldn’t want to look at” after he received notice of the date his security clearance hearing was scheduled. The evidence is insufficient to conclude his unauthorized use of an IT system happened under unusual circumstances or is unlikely to recur. His behavior casts doubt on his current reliability, trustworthiness, and good judgment.

AG ¶¶ 41(b) through 41(d) do not apply. Applicant misused a company-issued computer to view pornography online numerous times over a period of 10 months, and almost daily from about April 2022 until August 2022. His misuse was intentional, for personal reasons, with knowledge it was prohibited by his employer, and only stopped when his employer discovered his misuse and terminated his employment.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant’s eligibility for a public trust position by considering the totality of the applicant’s conduct and all the 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.

I have incorporated my comments under Guideline M in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). I considered Applicant’s age, education, employment history, counseling and participation in a support group, and the strong support from his wife, counselors, and supervisors. I also found Applicant to be credible and sincere.

I weighed these factors against his extended and relatively recent unauthorized use of a company-issued computer to access pornography and resulting termination of his employment, his apparently reduced but continuing interest in viewing pornography online including his exploitation of vulnerabilities in software he installed on his home

computer to prevent him from doing so. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to be eligible for a security clearance. The determination of an individual's eligibility and suitability for a security clearance is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under his current circumstances, a clearance is not warranted. In the future, he may well demonstrate persuasive evidence of his security worthiness.

After weighing the disqualifying and mitigating conditions under Guideline M and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his unauthorized use of an IT system.

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 M:	AGAINST APPLICANT
Subparagraph 1.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 security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Eric C. Price
Administrative Judge