



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



In the matter of:)
)
) ISCR Case No. 23-01426
)
Applicant for Security Clearance)

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: *Pro se*

09/24/2024

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines D (Sexual Behavior) and J (Criminal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 16, 2022. On October 24, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines D and J. The DCSA CAS acted under Executive Order (Exec. Or.) 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 adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), which became effective on June 8, 2017.

Applicant answered the SOR on November 20, 2023, and requested a decision on the written record in lieu of a hearing. Department Counsel timely requested a hearing on January 3, 2024, and the case was assigned to me on August 5, 2024.

On August 22, 2024, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on September 6, 2024. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Department Counsel requested that I take administrative notice of the information in the U.S. Department of Justice, *Citizen's guide to U.S. Federal Law on Child Pornography*, updated on August 11, 2023. I took administrative notice as requested. The document supporting the request for administrative notice is attached to the record as Hearing Exhibit I. Applicant testified but did not present the testimony of any other witnesses or submit any documentary evidence. DOHA received the transcript (Tr.) on September 20, 2024.

Findings of Fact

SOR ¶ 1.a alleges the following security concern under Guideline D: "On various occasions between at least approximately 2014 to 2019, you deliberately searched for and viewed images of naked underage children and child sexual abuse." The wording of SOR ¶ 2.a is identical to SOR ¶ 1.a, and it cross-alleges a security concern under Guideline J. In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a and 2.a. His admissions are incorporated in my findings of fact.

Applicant is a 28-year-old web designer employed by federal contractors since November 2018. His previous application for a security clearance was denied in February 2019. He earned a bachelor's degree in computer science in May 2018. He has never married and has no children. He began working for his current employer in June 2022. (Tr. 23)

During an interview by a security investigator in July 2022, Applicant admitted that he submitted an SCA in November 2018. He was scheduled to work on a contract that required a clearance for which a polygraph examination was required. During that examination, conducted in February 2019, he admitted using his personal computer to search, locate, and view photographs of naked underage girls. (GX 2 at 6-8) He told the investigator that he reviewed child pornography about one time every six months. He did so each time in a private location, such as a dormitory room or his bedroom. (GX 2 at 11)

During the July 2022 interview, Applicant told the security investigator that he had stopped viewing child pornography about three years before the interview, and that he had purchased and installed software on his personal computer that prevented him from accessing child pornography. He told the investigator that he continues to watch legally accessible adult pornography, but that he had not viewed child pornography since 2019.

He also told the investigator that he had become involved with the Boy Scouts of America¹ to stay busy, and he has risen to an adult leadership role with the Scouts. (GX 2 10-17) The security investigator's summary of the July 2022 interview noted that there were long pauses and considerable fidgeting and nervousness between his questions and Applicant's responses.

In Applicant's answer to the SOR, he admitted searching for naked images of teenage girls, with the "main time" being during 2014-2018, while he was in college. He stated that he believed the girls were all ages 18 and 19, but he was unsure if some of them were younger. He stated that he had not searched for any images of young girls within the last four or five years. He admitted that he had not sought counseling, but pointed out that he had installed a software application that helped him avoid websites that he should not visit.

Applicant first started viewing child pornography on his personal laptop computer in 2014. (Tr. 30) He has never viewed child pornography while at work or while working at home on a work computer. He searched for child pornography on the Internet, using a Google shared account. He found the Google account through an online forum. (Tr. 30-32)

Applicant testified that he thought the girls he viewed were teenagers, but he admitted that some of them might have been about 12 years old. (Tr. 34) He did not participate in the live chats that accompanied the images. He did not post any child pornography. He admitted that some of the videos he watched showed naked girls involved in sexual activity with themselves. (Tr. 37) He has not viewed child pornography since late 2018. He last viewed adult pornography in June 2022 (Tr. 38-39)

At the hearing, Applicant testified that while he was in college, he participated in a religious group on campus that has been helpful in steering his life. He testified that in June 2022, he subscribed to and installed software on his personal computer that blocks access to pornography websites. He installed the software on his cellphone in January 2023, after a second interview by a security investigator. The software is self-installed, and he can disable it or remove it at any time. He has not sought any counseling or therapy to help him avoid being involved with pornography. (Tr. 40-43)

Applicant has not disclosed his involvement with pornography to anyone associated with the Scouts. He admitted that parents of boys and girls in the Scouts might be concerned if they knew about his involvement in child pornography. (Tr. 44)

I have taken administrative notice that using the Internet to access, possess, or view child pornography is a violation of federal law, and it may also violate state law.

¹ The Boy Scouts of America now includes girl scouts as well as boy scouts, and it will be "rebranded" as Scouting America in February 2025. See <https://www.scoutingnewsroom.org/press-releases>.

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* at 531. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” *See* ISCR Case No. 17-04166 at 3 (App. Bd. Mar. 21, 2019) It is “less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “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. 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* at 531.

Analysis

Guideline D, Sexual Behavior

The concern under this guideline is set out in AG 12:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The following disqualifying conditions under this guideline are potentially applicable:

AG ¶ 13(a): sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

AG ¶ 13(c): sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

AG ¶ 13(d): sexual behavior of a public nature or that reflects lack of discretion or judgment.

All three disqualifying conditions are established by Applicant's admissions and the evidence submitted at the hearing. His conduct was criminal, made him vulnerable to coercion, exploitation, and duress, and reflected a lack of good judgment.

The following mitigating conditions are potentially relevant:

AG ¶ 14(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;

AG ¶ 14(c): the behavior no longer serves as a basis for coercion, exploitation, or duress;

AG ¶ 14(d): the sexual behavior is strictly private, consensual, and discreet; and

AG 14(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.

AG ¶ 14(b) is not established. Until 2019, Applicant's viewing of child pornography was not infrequent and did not occur under unusual circumstances. There are no bright-line rules for determining when conduct is recent. If the evidence shows a significant period of time has passed without any evidence of misconduct, then an administrative judge must determine whether that period of time demonstrates changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

The time from when Applicant stopped viewing child pornography in February 2019 until the present is a significant period of time. He stopped at about the time that his previous application for a clearance was denied because of his involvement with child pornography. Since February 2019, he has been employed by federal contractors. Since June 2022, he has relied on computer software on his personal computer to help him refrain from viewing child pornography. He continued to view adult pornography until June 2022, when he submitted his current SCA. He installed the software on his cellphone in January 2023, after a second interview by a security investigator. He has not been entirely candid. In his response to the SOR, he stated that he believed that the girls in the videos were all 18 or 19 years old. However, at the hearing, he admitted that some of the girls might have been about 12 years old. His responses to questioning by security investigators was hesitant, careful, and measured. At the hearing, he again was very careful and measured, with long pauses between the questions asked and his responses. His failure to seek treatment or counseling gives me pause. There is no evidence that his attraction to child pornography has declined. I am not convinced that he will continue to refrain from viewing child pornography after the pressure of qualifying for a clearance and keeping his job is removed.

AG ¶ 14(c) is not established. Applicant continues to be vulnerable to coercion, exploitation, or duress. He admitted at the hearing that his participation as a leader in the

Scouts would likely be compromised if his involvement in child pornography were disclosed.

AG ¶ 14(d) is not established. Applicant's involvement with child pornography was private, but it was not consensual and discreet. The children viewed by Applicant were victims of illegal human trafficking and were legally incapable of consent. Applicant's conduct was not discreet because it was illegal and made him vulnerable to coercion, exploitation, or duress.

AG ¶ 14(e) is not established. Applicant has not sought or received any counseling or treatment.

Guideline J, Criminal Conduct

The concern under this guideline is set out in AG ¶ 30: "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."

Applicant's admissions and the evidence submitted at the hearing establish the disqualifying condition in AG ¶ 31(b):

[E]vidence (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.

The following mitigating conditions are potentially relevant:

AG ¶ 32(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

AG ¶ 32(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.

Neither mitigating condition is established, for the reasons set out in the above discussion of Guideline D.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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 Guidelines D and J in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines D and J and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his sexual behavior and criminal conduct.

Formal Findings

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

Paragraph 1, Guideline D (Sexual Behavior):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge