



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



In the matter of:)	
)	
)	ISCR Case No. 12-06944
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: Eric A. Eisen, Esq.

10/31/2013

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated sexual behavior and personal conduct security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On August 7, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D (sexual behavior) and E (personal conduct). The action was taken 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) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on August 25, 2013, and requested a hearing before an administrative judge. The case was assigned to another administrative judge on September 23, 2013, and reassigned to me on October 15, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 11, 2013, scheduling the hearing for October 16, 2013. The hearing was convened as

scheduled. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through G, which were admitted without objection. DOHA received the hearing transcript (Tr.) on October 24, 2013.

Findings of Fact

Applicant is a 31-year-old engineer for a defense contractor. He is applying for a security clearance. He has a bachelor's degree. He has never married, and he does not have any children.¹

Applicant has worked consistently as an engineer for various companies since he graduated from college. His uncle is a retired special agent and polygraph examiner for a federal investigatory agency. Applicant admired his uncle since he was a child, and he wanted to follow in his uncle's footsteps.²

Applicant applied for a job with the federal agency in 2010. He passed the written examination and the interview process with a panel of three special agents. He did not pass the physical fitness test, but he had another opportunity to take the test. He submitted a Questionnaire for National Security Positions (SF 86) in June 2010. He was administered a polygraph as a requirement for his employment. There was a pre-test interview and a post-test interview. The polygraph examiner determined that the test indicated deception.³ The polygraph examiner summarized Applicant's statement in the post-test interview as follows:

When I discussed my viewing of pornography during the pre-test interview, I was not completely forthcoming regarding what I viewed. I don't know why I didn't reveal this during the pre-test interview, other than it makes me very uncomfortable to talk about. When I was 18 years old, I used Google or some other search mechanism to look for pornography of underage girls sixteen to seventeen years old. Also, about five years ago, I was searching the web for adult pornography. When I saw an underage girl, 13-16 years old on one of the sites. I returned to that same site about two more times, each time seeing an underage girl, 13 to 16 years old. I don't recall whether it was the same underage girl each time or different girls.⁴

Applicant admits that he has searched for and viewed pornography on the Internet, but he denies intentionally seeking pornographic images of underage females

¹ Tr. at 16, 28, 67-68; GE 1.

² Tr. at 17-20; GE 1, 2; AE A.

³ Tr. at 18-20, 41-48; Applicant's response to SOR; GE 3.

⁴ GE 3.

(child pornography).⁵ He was uncomfortable discussing pornography with the polygraph examiner, and he admits that he told the polygraph examiner that it made him uncomfortable. When Applicant was about 18 years old (approximately 2002), he viewed adult pornography on the Internet. He also searched the Internet for “hot 16 or 17-year-olds,” but he was looking for scantily-clad girls, not pornographic images.⁶

When Applicant was about 22 or 23 years old (approximately 2005), he viewed pornography on the Internet. While on an adult pornographic web site, a pop-up came on the screen showing what appeared to be an underage girl. There was nothing about the site to establish the female’s age, but Applicant estimated that she appeared to be between 13 and 16 years old. Applicant returned to the pornographic web site on several occasions, during which the same or a similar pop-up appeared. He stopped going to the web site because of the pop-ups.⁷

Applicant admitted his involvement with pornography in about 2002 and 2005. He has a 28-year-old girlfriend, and he credibly denied having any interest in child pornography.⁸

Applicant submitted a copy of a magazine article about pornography. Part of the article addressed the prevalence of “Lolita Porn” on the Internet. According to the article: “This is not actual child pornography, a genre still blessedly beyond the reach of the casual Web browser. . . . Lolita Porn features girls who are 18 or older but look like 14-year-olds.”⁹

Applicant was told after the polygraph and interview that the federal agency was declining his application. Applicant’s uncle encouraged him to contest the polygraph results or request another test, but Applicant decided not to pursue the position any further. He was somewhat disillusioned by the process, and his engineering job was going well, with a recent promotion.¹⁰

Applicant submitted an SF 86 for his DOD clearance in March 2012. Section 25 asked: “Has the U.S. Government (or a foreign government) **EVER** investigated your background and/or granted you a security clearance eligibility/access?” (emphasis in

⁵ For adult pornography, I am using the common definition of pornography: “movies, pictures, magazines, etc., that show or describe naked people or sex in a very open and direct way in order to cause sexual excitement.” See Merriam-Webster’s Dictionary available at: <http://www.merriam-webster.com/dictionary/pornography>. The SOR alleges that Applicant viewed “pornographic images of underage females.” That term is not defined. For the purpose of this decision, I will use the definitions of child pornography contained in 18 U.S.C. §§ 2252, 2252A, and 2256.

⁶ Tr. at 25-31, 48-58; Applicant’s response to SOR.

⁷ Tr. at 29-30, 50-51, 55-58; Applicant’s response to SOR.

⁸ Tr. at 28-31.

⁹ AE G.

¹⁰ Tr. at 19-20, 59-60; AE A.

original) Applicant was unsure how to answer this question. He submitted the SF 86 to the federal agency, and he went through the polygraph and interview, but he did not know if that constituted a background investigation. He asked his uncle, the retired agent. His uncle told him that the background investigation came after the polygraph, and that since Applicant ended his job application after the polygraph interview, the background investigation never took place. Applicant believed he answered the question correctly when he answered “No.”¹¹

Applicant is highly regarded professionally and in his community. He submitted a number of letters and documents attesting to his excellent job performance, strong moral character, judgment, maturity, professionalism, trustworthiness, work ethic, honesty, dedication, responsibility, leadership, and integrity.¹²

Policies

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 access to classified information will be resolved in favor of 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

¹¹ Tr. at 33-36, 60-67; Applicant’s response to SOR; GE 1; AE A.

¹² AE A-F.

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, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which can subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. 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 and/or that reflects lack of discretion or judgment.

When Applicant was about 18 years old, he viewed pornography on the Internet, and he would also search for “hot 16 or 17-year-olds,” in order to view images of scantily-clad girls. Applicant’s testimony was candid and credible. It was slightly inconsistent with the polygraph examiner’s summary of the post-polygraph interview, but it was not so inconsistent as to ascribe a fabrication on Applicant’s part.

When he was about 22 years old, while viewing adult pornography on the Internet, pop-ups came on the screen showing what appeared to be an underage girl in sexually-explicit poses. Applicant estimated that the female was between 13 and 16 years old. It is unlikely that Applicant ever viewed child pornography over the Internet,

as opposed to “Lolita Porn,” which specializes in adult women who look like they are minors.

Applicant’s viewing of sexually-explicit material that did not involve minors does not establish any of the above disqualifying conditions. However, returning on more than one occasion to a web site that contained possible child pornography constituted risky behavior. AG ¶¶ 13(c) and 13(d) are applicable. There is insufficient evidence for a finding that Applicant committed a criminal act. AG ¶ 13(a) is not applicable.

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; and

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

Applicant is now 31 years old, and it has been about eight years since his last questionable involvement with pornography. He has a girlfriend; a good job where he is highly regarded; and a strong reputation in his community. I find that the behavior is unlikely to recur; it no longer serves as a basis for coercion, exploitation, or duress; and it does not cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 14(b) and 14(c) are 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(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 person may not properly safeguard protected information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant arguably underwent a background investigation when he applied for a position with a federal investigatory agency, submitted an SF 86, and went through a polygraph with an interview. A reasonable person could conclude otherwise. Applicant was unsure how to answer the question on the 2012 SF 86, so he asked his uncle. His uncle told him that the background investigation was separate and came after the polygraph. Applicant followed his uncle's advice and determined that he had not undergone a background investigation. He did not intentionally provide false information on his SF 86. AG ¶ 16(a) is not applicable. SOR ¶ 1.a is concluded for Applicant.

Applicant's involvement with pornography, as discussed above under Guideline D, showed poor judgment. It also created a vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(c) and 16(e) are applicable.

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

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

AG ¶¶ 17(c), 17(d), and 17(e) are applicable for the same rationale discussed above under Guideline D.

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(a):

(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 and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is 31 years old. When he was a young man, he had some questionable involvement with pornography. There has been no problematic conduct in about eight years. He now has a girlfriend; a good job where he is highly regarded; and a strong reputation in his community.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated sexual behavior and personal conduct 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 E:	For Applicant
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline D:	For Applicant
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Edward W. Loughran
Administrative Judge