



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



In the matter of:)
)
) ISCR Case No. 14-01278
)
Applicant for Security Clearance)

Appearances

For Government: Caroline Heintzelman, Department Counsel
For Applicant: *Pro se*

12/31/2014

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on July 22, 2013. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) on June 5, 2014, detailing security concerns under Guideline D, sexual conduct, and Guideline J, criminal conduct. The action was taken under Executive Order 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 For Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR on June 17, 2014, and he answered it on June 25, 2014. Applicant requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on September 2, 2014, and I received the case assignment on September 4, 2014. DOHA issued a Notice of Hearing on October 2, 2014, and I convened the hearing as scheduled on October 22, 2014 by video-conference. The Government offered exhibits (GE) marked as GE 1 through GE 4, which were received and admitted into evidence without objection. Applicant testified. He submitted one exhibit (AE) marked as AE A, which was received and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on November 3, 2014. I held the record open for Applicant to submit additional matters. Applicant timely submitted AE B - AE D, which were received and admitted without objection. The record closed on November 17, 2014.

Procedural and Evidentiary Rulings

Notice

Applicant received the notice of the date, time and place of the hearing less than 15 days before the hearing. I advised Applicant of his right under ¶ E3.1.8. of the Directive to receive the notice at least 15 days before the hearing. Applicant affirmatively waived this right under the Directive. (Tr. 11)

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in the SOR. His admissions are incorporated herein as findings of fact. He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 51 years old, works occasionally as a part-time computer technician for a DOD contractor. He began this employment in 2010 on an as-needed basis, and he has not worked since 2011. Applicant attends college full-time, working towards a degree in information systems. He anticipates receiving his bachelor's degree sometime in 2015. Applicant completed an associate's degree in telecommunications engineering in 2001 and several certificate programs since that time.¹

Applicant married his first wife around February 1989, and they divorced in 1999 because of her drug use. They had a daughter, who is 24, and two sons, who are 21 and 20. The court awarded Applicant sole legal and physical custody of his three children, whom he raised as a single parent. For several years after his divorce, Applicant did not date or go out to meet women. He chose to remain at home to provide a stable environment for his children. In 2006, Applicant married his second wife, and they divorced in 2008. Applicant married his third wife in October 2009. They provide shelter and care for a disabled 37-year-old cousin. His wife manages the finances and

¹GE 1; GE 2; Tr. 29-31.

oversees the daily living needs of this person, whose intellectual ability is about age 12. Applicant also has a 26-year-old daughter, who does not live with him or near him.²

Applicant maintained approximately four computers in his home. One laptop computer belonged to him, and only he used this computer. He also had three computer towers and monitors, at least one of which had been set up for all members of the household to use. Each household member had his or her own account, access code, and password.³

In August 2007, Applicant's second wife called the police to report that she had found child pornography on Applicant's computer two months earlier. After talking with Applicant's second wife, the police came to Applicant's home to discuss the report. Applicant gave the police permission to search his home. At the end of their search, the police removed three computer towers, a laptop, a thumb drive, and a box of miscellaneous computer storage items, such as CDs and DVD-Rs.⁴

Over more than seven months, the police conducted an investigation. The police interviewed his second wife and his three children. The police also conducted a forensic review of Applicant's computers and other materials taken from his home. Applicant's second wife told the police that she believed that she saw sexually-explicit pictures of a five-year-old child. Applicant's youngest child, who was 13 at the time, acknowledged to the police that he typed the term "porn" on the computer, and then accessed a site titled "teen porn". He saw pictures of naked girls on this website, but did not know whether he saved the material. He thought the computer automatically saved the material. Except for this, his youngest child denied seeing any inappropriate material involving a young child or other inappropriate material. The two older children denied seeing any inappropriate material on the computer. After the forensic review, the police again interviewed Applicant's daughter because the forensic review showed four pictures of a naked girl on the daughter's computer. The daughter revealed that the girl in the picture was a former friend and that the pictures were "selfies" taken by the former friend. The police also spoke with the former friend who confirmed that she had taken the pictures and sent them to her boyfriend, who may have sent them to Applicant's daughter.⁵

During the investigation, Applicant initially stated that there might be child pornography on his computer, which he believed his youngest son and the disabled person may have downloaded. Throughout further conversations with the police, Applicant denied that he had "pulled up the child pornography", but eventually admitted that he might have looked at the pictures. He continued to state that he believed his children had accessed these pictures and that he had deleted the pictures. The forensic

²GE 1; Tr. 22-28, 31, 45-47.

³GE 4; Tr. 23, 48-49.

⁴GE 4; Tr. 23.

⁵GE 4.

examination of these computers found 11 pictures of female children under the age of 18 posing provocatively in a deleted file on Applicant's computer profile. The police later showed the 11 pictures to a sexual assault nurse examiner, who, based on her training and experience, determined that the subject of the pictures were females under age 18 and that six of the pictures were of children under age 15. She did not specifically identify any pictures of female children age five or other very young children.⁶

At the conclusion of their investigation, the police drafted an arrest warrant, which was served on Applicant and resulted in his arrest on April 19, 2008. The police charged Applicant with 11 counts of sexual assault, sexual exploitation/child, and possession of material [child pornography], all felony charges. At his hearing on July 9, 2008, the prosecutor dismissed 10 charges. Applicant pled guilty to one image charge. The court deferred judgment and his sentencing, then placed him on probation for four years. The terms of his probation required him to attend sexual counseling, be on supervised probation, and register as a sex offender. Applicant attended group sexual therapy once a week for four years. Initially, he met with his probation officer once a week, but his probation officer later reduced the meetings to twice a month or less, and Applicant registered as a sex offender. He also paid the fines imposed by the court.⁷

Applicant complied with the terms of his probation. During his probation, his three children remained in his home, with court approval, as the police investigation did not reveal that the children had been sexually abused or otherwise harmed by Applicant. His probation officer randomly visited Applicant's home more than 20 times during the four years of his probation. These visits included an inspection of his computer for pornography.⁸ The probation officer did not find any incidents to report and no negative interactions at Applicant's home. At first, Applicant was not allowed access to computers, but eventually he and the probation department signed a computer use agreement, which allowed Applicant to use computers for work and college. Applicant complied with the terms of this agreement. The probation office advised that Applicant did well while being supervised and that his probation terminated successfully on September 16, 2012. Applicant's sexual therapy treatment ended on September 24, 2012, when his probation concluded. While in treatment, Applicant completed and passed a sex history polygraph and maintained a consistent record of passing maintenance polygraphs. Applicant was not diagnosed with any sexual problem nor was further treatment recommended. As a result, in an order dated July 21, 2014, the court dismissed his case and directed that he be removed from the sex offender list. Applicant is no longer a registered sex offender.⁹

⁶GE 4; Tr. 49.

⁷GE 2-GE 4; Tr. 24, 31-33.

⁸Applicant's supervisor was aware of his probation and reviewed his work computer regularly for pornography. Tr. 34-35, 59-60.

⁹AE A-AE D; Tr. 33-34, 42-43, 60-61, 68.

As previously stated, Applicant denied to the police that he downloaded the child pornography images found on the computers in his house. When he met with the investigator, he acknowledged that he had 10 pictures of teenage girls on his computer. He told the investigator that he thought these girls were 18 or older. In his response to the SOR, Applicant stated that he had an addiction without being more specific. He used this term at the hearing, but, on cross-examination, he explained that he did not think he continued to have an addiction because he no longer viewed pornography. Throughout the hearing, Applicant acknowledged that he looked at child pornography. He stated that he did not specifically seek out child pornography, but that as he viewed pornography on the internet, he started looking at various aspects of pornography, including child pornography. He believed his child pornography viewing began about one year before he started dating his second wife because that is when his overall pornography viewing increased.¹⁰ He did not recall looking at a five-year-old, nor did he clearly remember specifically downloading child pornography. He acknowledged that some of the pictures he saw were of underage girls and that some he could not tell if they were underage.¹¹

Applicant learned from his sexual therapy group how to critically evaluate his thinking about his conduct, particularly about choices he was making in a sexual context. He learned to always be aware of what he was doing and why, and to recognize clues in his conduct and emotions. Although he no longer attends a sexual therapy program, he sets limits for himself, and he stays within his limits. He follows the concepts he learned during his four years in his sexual therapy program. He acknowledged making poor decisions and choices with this conduct and that he cannot blame anyone but himself.¹²

As one of his limits, Applicant no longer views pornography. He acknowledged that if he did, this activity would become a problem. His wife provides support to him to stay away from pornography.¹³

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 used in evaluating an applicant's eligibility for access to classified information.

¹⁰Applicant testified that he had viewed pornography since he was 18 years old, but that his use increased around 2004. Tr. 31-32.

¹¹Response to SOR; GE 2; GE 4; Tr. 49-52, 54-58, 63-64.

¹²Tr. 44, 55-58.

¹³Tr. 41.

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 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." 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, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for obtaining 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 an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 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

AG ¶ 12 expresses the security concern as:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may 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 the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following 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.

Applicant viewed pornography on his personal computer at home, which is not illegal. However, he expanded his viewing of pornography to include periodic viewing of child pornography, which raises a security concern about his judgment and vulnerability to coercion, exploitation, and duress. A security concern has been raised under AG ¶¶ 13(a), 13(c), and 13(d).

The sexual conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 14(a) through ¶ 14(d), and 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
- (d) the sexual behavior is strictly private, consensual, and discreet.

Applicant last viewed child pornography around 2007 following his second wife's complaint to the police. His actions were private and discreet. Although time has passed since he last viewed child pornography in the privacy of his home, his decision to view child pornography continues to raise concerns about his judgment. Based on the record, Applicant has only partially mitigated the security concerns raised by his sexual conduct under AG ¶¶ 14(b) and 14(d). Partial mitigation under Guideline D is insufficient to resolve the security concerns in Applicant's favor.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "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.”

AG ¶ 31 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

In April 2008, the police arrested and charged Applicant with 11 counts of sexual assault, sexual exploitation/child, and possession of material, all felony charges. A security concern has been established under AG ¶¶ 31(a) and 31(c).

The Criminal Conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 32(a) through ¶ 32(d), and the following is potentially applicable:

- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant has not been convicted of a crime. The prosecutor dismissed 10 of the 11 charges. Applicant pled guilty to one charge, and the court deferred judgment and sentencing conditioned upon Applicant's successful completion of all the terms outlined in his probation of four years. Applicant completed all the terms of his probation, and the court dismissed his case with no conviction. During these years, he attended sexual therapy once a week. He did not commit any criminal acts and avoided conduct that could cause further criminal charges. It has been more than six years since this arrest. Applicant has shown remorse for his past conduct. He continues to attend school to improve his skills, and the record does not reflect any recent negative work history. He has mitigated the security concerns about his criminal conduct under AG ¶ 32(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 an 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant provided a stable and caring home environment for his children and did not expose them to his pornography habit. Despite the reason for his arrest, the police found no evidence of harm to his children from his conduct, and the court approved the continued placement of his children in his home during his probation. The record lacks any definitive evidence that he viewed sexually explicit pictures of very young children. His second wife told the police she thought she observed a picture of a five-year-old girl, but the expert did not conclude that the pictures found on Applicant's computer had any pictures of children this young. Applicant is beginning to take full responsibility for his decision to view child pornography on his personal home computer. It is true that his youngest son viewed teen pornography prior to Applicant's arrest; however, Applicant also viewed these pictures and other child pornography. This conduct is egregious and his son's actions do not negate his conduct. Applicant showed a great reluctance to take responsibility for his conduct for a long time. He now acknowledges his conduct and is working on remaining away from pornography. However, I do not find that Applicant has provided sufficient evidence to show that he has fully accepted his conduct and has set enough parameters to show that he will not again view pornography. If he does view it, he readily admits a problem can arise. His judgment, and thus his trustworthiness, remain a security concern.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his criminal conduct under Guideline J, but he has not mitigated the security concerns raised about his past sexual conduct.

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 J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

MARY E. HENRY
Administrative Judge