

DATE: October 17, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04419

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esquire, Department Counsel

Julie Edmunds, Esquire, Department Counsel

FOR APPLICANT

Robert Crum, Esquire

SYNOPSIS

In 2002, Applicant surreptitiously took photographs of women undressing at two tanning salons, resulting in two misdemeanor peeping charges against Applicant. Applicant also downloaded and possessed pornographic images of children engaged in sexual acts with adults and was charged with possession of child pornography. The peeping charges were placed on a stet docket for one year conditioned on Applicant's good behavior. In April 2003, he pled guilty to the child pornography charge and was placed on probation for 18 months. His conduct continues to be a source of embarrassment and possible coercion. Clearance is denied.

STATEMENT OF THE CASE

On December 22, 2003, the Defense Office of Hearings and Appeals (SOR) issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns under Guideline D (sexual behavior) and Guideline J (criminal conduct). The SOR informed Applicant that, based on investigative information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to continue Applicant's security clearance. [\(1\)](#)

Applicant timely responded to the SOR (Answer), wherein he denied with explanations each of the allegations and requested a hearing. The case was assigned to me on January 3, 2005, and I convened a hearing in this matter on March 24, 2005. The parties appeared as scheduled and the government presented eight exhibits (GE 1 through 8), of which GE 7 and GE 8 were presented for administrative notice purposes only. All eight exhibits were admitted without objection. Applicant presented two exhibits (AE A and B), which were admitted without objection. Applicant also presented his own testimony and that of two other witnesses. DOHA received the transcript (Tr) on April 8, 2005. Issuance of this decision was delayed due to an unusually large caseload.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is 40 years old and employed by a defense contractor doing logistical support for helicopter and other vertical launch aircraft programs. After high school, Applicant served in the U.S. Air Force as a jet engine technician until he was honorably discharged in 1990. He also has about 40 college credits. Before he was hired by his current employer, Applicant worked for a major defense contractor in support of the same DoD aviation program, and held a security clearance in connection with that job. (2) He has been with his current employer since July, 2002. Applicant and his wife have been married since 1986. They have two children, ages 18 and 16, and the family is active in their church and in the children's school band activities.

In late 2001 or early 2002, Applicant and his wife began frequenting tanning salons. At these establishments, which attract a significant female clientele in their late teens or early 20's, customers are provided private dressing rooms separated by partitions that reach to about one foot below the ceiling, leaving a gap between each room. In January, 2002, Applicant bought a small, easily concealed digital camera, which he used to take pictures of female tanning salon customers in various stages of undress by holding the camera over the top of a dressing room partition. Applicant would then download the pictures onto a portable disk using his home computer.

On February 21, 2002, a female customer looked up while changing and saw what turned out to be Applicant's hand holding a camera. She notified police, who determined from the tanning salon sign-in sheet, that Applicant was assigned the dressing room adjoining hers, and went to his home to question him about the complaint. Applicant was eventually charged with peeping and with peeping with prurient intent, both misdemeanors. The charges were placed on a stet docket for one year conditioned on Applicant's good conduct. (3)

During the police investigation into Applicant's conduct at the tanning salon, Applicant disclosed that he had transferred pictures from the camera to his home computer. Police executed a search warrant at Applicant's home, and confiscated three computers and several diskettes containing 28 pictures of women taken at two tanning salons.

During the search of his home, Applicant specifically identified to police one disk, which, in addition to the tanning salon pictures, also contained over 90 pornographic images he had downloaded from the internet. Among these downloaded pictures were several pictures Applicant knew to be pictures of minors under age 16 engaged in sexual acts with adults. Applicant asked that the disk be destroyed because he was afraid of what his wife and children would think.

On September 26, 2002, Applicant was formally charged with one count of possession of child pornography, a felony. On April 2, 2003, Applicant entered a guilty plea and was sentenced to six months in jail (suspended), and placed on 18 months probation. He successfully completed his probation in October 2004.

Applicant's wife learned of his conduct when she arrived home as the police were executing the aforementioned search warrant. His previous employer learned of the charges after they were reported in a local newspaper article. Assuming he would eventually be fired, Applicant resigned from that job in July 2002. Applicant has not told his current employer about these criminal charges, and he is concerned he will lose his job if his employer learns of his past conduct. (4)

Applicant's conduct in the tanning salon and in surfing the internet caused significant stress on his marriage. He sought counseling from his pastor almost immediately after being approached by the police. The counseling soon involved Applicant and his wife, who had considered leaving Applicant when she learned what he had done. Their pastor has over 20 years of counseling his parishioners, but has no formal training in counseling. He feels Applicant has matured and learned from his mistakes and is not likely to repeat his conduct.

About two years ago, Applicant and his wife replaced the home computers seized by the police. They also resumed their access to the internet, but it is strictly controlled by Applicant's wife. Until December 2004, she alone knew the password needed to get on the computers. Since then, Applicant has been given the password, but his wife still checks everyday to see what internet sites Applicant has visited. She expects to continue this supervision of her husband's conduct for the foreseeable future. (5)

Applicant testified at hearing, and stated to a Defense Security Service (DSS) agent that his access to internet pornography began about six months before he was caught taking pictures in the tanning salon.⁽⁶⁾ However, his wife testified he had been accessing internet pornography for a few years.⁽⁷⁾

POLICIES

The Directive sets forth adjudicative guidelines⁽⁸⁾ to be considered in evaluating an Applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline D (sexual behavior) and Guideline J (criminal conduct).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁹⁾ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for the Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽¹⁰⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁽¹¹⁾

CONCLUSIONS

The government has alleged in the SOR that Applicant had surreptitiously taken numerous pictures of women in various stages of undress at a tanning salon (SOR ¶ 2.b), that he had also downloaded and possessed several images of minor children engaging in sexual acts with adults (SOR ¶ 2.c), and that he was charged with three criminal offenses as a result of his conduct (SOR ¶ 2.a). Under Guideline D, sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress or reflects lack of judgment or discretion.⁽¹²⁾ The government has presented sufficient information to establish these allegations, and to support application of Guideline D disqualifying condition (DC) 1⁽¹³⁾ as his conduct violates both state and federal criminal laws. His conduct in the tanning salons, businesses that draw customers from the general public, also supports application of DC 4.⁽¹⁴⁾

The record also shows Applicant's conduct in this regard continues to be a source of embarrassment and possible duress insofar as Applicant remains concerned he will lose his job if his current employer learns what he did. Accordingly, I conclude DC 3⁽¹⁵⁾ also applies. By way of mitigation, I conclude none of the listed mitigating conditions (MC) apply here. MC 2⁽¹⁶⁾ might apply were it not for the apparent disconnect between Applicant's representation that his internet access of child pornography occurred for only a few months and his wife's testimony it had occurred over a few years. This discrepancy undermines a conclusion there has been no other similar conduct here. Further, I cannot conclude Applicant is not likely to repeat such conduct when Applicant's wife still feels compelled to review his internet activity every day. A fundamental tenet of the personnel security program is that the government must be able to trust an individual to exercise sound judgment and self-control without excessive oversight. If Applicant's own wife does not trust him to not repeat his past behavior, the government is not obliged to assume such a risk. I conclude Guideline D against the Applicant.

The government has alleged Applicant engaged in criminal conduct based on charges of peeping and peeping with prurient intent (SOR ¶ 1.a) and possession of child pornography (SOR ¶ 1.b). Criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. A person who will disregard the law and risk incarceration may not be reliable when it comes to abiding by rules and regulations intended to protect classified information.⁽¹⁷⁾ The government has presented sufficient information to establish Applicant indeed engaged in such conduct, thereby supporting application of Guideline J DC 1⁽¹⁸⁾ and DC 2.⁽¹⁹⁾ Applicant made a deliberate decision to purchase an easily concealed camera specifically for the purpose of taking pictures of women for his own sexual gratification. He also downloaded and kept images of what he knew to be children under the age of 16 engaged in sexual acts with adults. He claims he did not know at the time he downloaded those images that it was against the law to do so. I do not accept his claim. This applicant was in his mid 30's when he engaged in this conduct. Further, he is an Air Force veteran with some college course work to his credit, and several years experience in the defense industry. He knew or should have known what he was doing was illegal.

After reviewing the Guideline J mitigating conditions, I conclude only MC 1⁽²⁰⁾ applies as the conduct occurred more than three years ago. However, the remaining mitigators do not apply, and, in light of the discussion of Guideline D, above, I conclude the mere passage of time is insufficient to overcome the government's case. His crimes were not isolated in that he committed each violation several times. Given his wife's continued supervision of his internet access, I cannot conclude the factors leading to his past conduct are not likely to recur because he has failed to show an independent ability to avoid such conduct in the future. In short, Applicant has failed to present clear evidence of successful rehabilitation. Accordingly, I conclude Guideline J against the Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions listed under Guideline D and Guideline J. No single fact or adjudicative factor is dispositive of the security concerns raised in this case; however, a fair and commonsense assessment⁽²¹⁾ of the entire record before me reflects an unacceptable security risk raised by Applicant's prior criminal conduct and sexual behavior.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Criminal Conduct (Guideline J): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Paragraph 2, Sexual Behavior (Guideline D): AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: Against the Applicant

Subparagraph 2.c: Against the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

2. As will be discussed below, the current adjudication follows an investigation initiated by an Adverse Information Report (GE 3) submitted by Applicant's previous employer.
3. This process equates to "probation before judgment" in other states.
4. Tr., p. 104.
5. Tr., p. 99 - 106.
6. Tr., p. 53; GE 3.
7. Tr., p. 99.
8. Directive, Enclosure 2.
9. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
10. *See Egan*, 484 U.S. at 528, 531.
11. *See Egan*; Directive E2.2.2.
12. Directive, E2.A4.1.1.
13. Directive, E2.A4.1.2.1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
14. Directive, E2.A4.1.2.4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.
15. Directive, E2.A4.1.2.3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;
16. Directive, E2.A4.1.3.2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;
17. Directive, E2.A10.1.1.
18. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
19. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
20. Directive, E2.A10.1.3.1. The criminal behavior was not recent;
21. Directive, E2.2.3.