



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



In the matter of:)
)
) ISCR Case No. 07-15094
)
Applicant for Security Clearance)

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: Robert R. Bohn, Esquire

July 29, 2011

Decision

CURRY, Marc E., Administrative Judge:

Applicant's failed to mitigate the security concern generated by his fascination with stories involving incestuous sexual encounters with children. Clearance is denied.

Statement of the Case

On May 6, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing one allegation under Guideline D, Sexual Behavior, cross-alleged under Guideline E, Personal Conduct. The SOR also included one additional Guideline E allegation. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on May 27, 2010, denying the Sexual Conduct allegation and admitting the Personal Conduct allegation. He requested a hearing. The case was assigned to another administrative judge on January 25, 2011. A notice of hearing was issued on February 8, 2011, scheduling the hearing for February 24, 2011. After a change of venue, the hearing was cancelled. On February 24, 2011, the case was transferred to me. On March 4, 2011, DOHA issued a notice of hearing scheduling the case for March 30, 2011. The hearing was held as scheduled, and I received 11 Government exhibits, five Applicant exhibits, and the testimony of Applicant. The transcript (Tr.) was received on April 7, 2011.

Findings of Fact

Applicant is a 41-year-old married man with three children, ages four, two, and one. He has an associate's degree, earned in 1995, and a master's degree in networks and operating systems, earned in 1999. (Tr. 14)

For the past 15 years, Applicant has worked for a defense contractor. He has held a security clearance for this entire time. Currently, he is the leader of a software engineering team that develops products "dealing with mostly the display, query, and dissemination of satellite imagery." (Tr. 17)

Applicant is highly respected on the job. He has earned various performance awards over the years. (GE 5 at 6-9; AE D) According to his supervisor, he "generates effective solutions to problems [and] makes sound business decisions." (AE E at 2)

In approximately 2003, Applicant and his wife travelled to a South American country in the Andes mountains. Shortly after arriving, they became debilitated by severe altitude sickness. The hotel staff prepared them coca-leaf tea, a pre-Columbian folk remedy for altitude sickness. (Tr. 74; GE 11 at 9) The tea relieved their altitude sickness.

Because cocaine is a derivative of the coca leaf, coca-leaf tea is illegal in the United States. (GE 11 at 9) Applicant was aware of the relationship between coca leaves and cocaine when he drank the tea. Once he returned home, he immediately reported his consumption of coca-leaf tea to his facility security officer. (Tr. 50) Applicant has never used any illegal drugs, either before or after the episode with the coca-leaf tea.

Applicant enjoys viewing pornography over the Internet. (Tr. 37) Once in 1999 while "surfing pornography," Applicant "came across" a picture of a naked child who appeared to be approximately six years old. (Tr. 65; GE 6 at 3) He promptly deleted the image. Later, he disclosed this to a polygrapher during an investigation related to his application for access to sensitive compartmented information (SCI). After the disclosure, Applicant was ordered to undergo a psychological exam. (Tr. 30) Applicant

did not take the exam. Instead, after consulting with his boss, he withdrew his application for SCI and his boss reassigned him to a project that did not require access to SCI. (Tr. 33)

In approximately 2004, Applicant downloaded stories from the Internet about children involved in incestuous sexual activity. (GE 6 at 3) When asked on cross-examination whether these stories were arousing to him, Applicant responded as follows:

The parts having to do with children was not. The description of the acts was, if that makes sense. (Tr. 69)

Applicant did not have any children when he downloaded the stories about incest. He has deleted them and has not downloaded any additional stories since 2004. His wife and his boss know about these downloads. (Tr. 42, 53, 57)

Applicant's two-year-old child had a twin sibling who passed away approximately two weeks after birth. (Tr. 69) Devastated by this loss, Applicant and his wife began attending grief therapy.

Approximately three weeks after Applicant's child died, an adult family member died. Since then, Applicant has been having nightmares that he may have been a victim of incest. (Tr. 41) Upon talking with his therapist, Applicant suspects his interest in stories about incest stems from the possibility he may have been an incest victim. (Tr. 43) Applicant continues to receive counseling from his therapist addressing both the issues of his child's death, and the possibility he may be repressing memories of being molested by a family member. (Tr. 42-43) Applicant did not provide any therapist records.

Applicant has never committed an act of incest with his children. (Tr. 44) He has never intentionally accessed child pornography. (Tr. 43) Although he used to access adult pornography in the past, he has not accessed it since one of his children almost "walked in on [him] looking at naked pictures," three years ago. (Tr. 44)

When asked during direct examination whether he regretted accessing stories about incest over the Internet, Applicant responded, "since it's caused this mess, yes." (Tr. 59)

Policies

In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. 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. 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 applicant or proven by Department Counsel. . . .” Applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

Analysis

Guideline D, Drug Involvement

Under this guideline, “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.” (AG ¶ 12) The following disqualifying conditions under AG ¶ 13 are potentially applicable:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;
- (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 a lack of discretion or judgment.

The possession of child pornography constitutes a crime. (State X Code Ann. § 374.1:1 (2010)) To constitute child pornography, the material must be sexually explicit and visual. (State X Code Ann. § 18.2-374.1A (2010)) Also, it must be reproduced with “lascivious intent.” (State X Code Ann. § 18.2-374.1C (2010))

The picture of a naked girl that Applicant came across while surfing the Internet for pornography in 1999 meets the statutory definition of child pornography. However, he was not intentionally seeking child pornography when he came across the picture. Also, he promptly deleted it. Consequently, no criminal conduct occurred.

The stories Applicant downloaded about incest were sexually explicit, and he acknowledged downloading them for his sexual gratification. However, they were not visual. Consequently, these stories did not constitute child pornography.

Although the stories Applicant downloaded did not constitute child pornography, they were obscene. (State X Code Ann. § 18.2-372 (2010)) However, possession of obscene material absent proof of marketing or distribution does not constitute a crime. The Government presented no evidence that Applicant downloaded the obscene material for sale or distribution. (State X Code Ann. § 18.2-374)

I conclude Applicant's downloading and possession of stories about incest does not constitute criminal conduct. Therefore, AG ¶ 13(a) is inapplicable.

Applicant is receiving therapy, in part, to understand, what compelled him to download stories about incest. Although this indicates that Applicant's problem may have a compulsive element, he has not engaged in the conduct for more than six years. Consequently, this behavior does not constitute a pattern. AG ¶ 13(b) is inapplicable.

Applicant's wife, boss, and therapist know about the behavior. AG ¶ 13(c) does not apply.

Although Applicant's behavior was not public, it did reflect a lack of judgment. AG ¶ 13(d) applies.

Applicant's interest in stories about incest is troubling. The nature and seriousness of this behavior are not lessened by the fact he has never molested his children, particularly given that he is still trying to understand, with his therapist's help, why stories about incest sexually aroused him.

Applicant has deleted the stories he downloaded, and has not downloaded any additional stories about incest for more than six years. However, because of the nature and seriousness of the conduct, the passage of time does not mitigate the security concern. Applicant explained that his interest in downloading the stories about incest may have stemmed from the possibility he may have himself been an incest victim. His therapy involves, in part, the issue of whether he repressed these memories.

Applicant provided no records from his therapist detailing the scope of the therapy and the prognosis. Without this information, Applicant's reassurances and the

passage of time since the conduct last occurred are insufficient to mitigate the security concern.

Personal Conduct

Under this guideline, “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.” (AG ¶ 15)

Applicant was given coca-leaf tea by the hotel staff during his Andes mountain vacation to combat severe altitude sickness. He had never used illegal drugs before the incident, and has not used illegal drugs since the incident. Also, he reported drinking the coca-leaf tea to his facility security officer as soon as he returned from vacation. This episode does not generate a personal conduct security concern.

Applicant exercised bad judgment when he downloaded stories involving incest. I conclude Applicant failed to mitigate the personal conduct concerns for the reasons set forth in my analysis of the Sexual Behavior guideline.

Whole-Person Concept

Under the whole-person concept, 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.

I have considered the applicability of the whole-person factors in my analysis of the Sexual Behavior guidelines above, and I conclude that they do not warrant a favorable conclusion. In reaching this decision, I also considered Applicant’s troubling responses to questions regarding whether he was sexually aroused by the stories involving incest, and whether he regretted accessing the stories.

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 E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	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.

MARC E. CURRY
Administrative Judge