



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 07-18673 |
| |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Francisco Mendez, Esq., Department Counsel
For Applicant: *Pro Se*

August 17, 2009

Decision

HEINY, Claude R., Administrative Judge:

Applicant downloaded pornographic pictures and movies at work to a government computer. During a six month period, Applicant fondled his former girlfriend's 11-year-old daughter on four occasions. Applicant has failed to rebut or mitigate the government's security concerns under sexual behavior, personal conduct, and information technology. Clearance is denied.

Statement of the Case

Applicant contests the Defense Department's intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG)

Statement of Reasons (SOR) on March 11, 2009, detailing security concerns under sexual behavior, personal conduct, and information technology.

On March 11, 2009, Applicant answered the SOR, and requested a hearing. On May 27, 2009, I was assigned the case. On June 5, 2009, DOHA issued a notice of hearing scheduling the hearing which was held on June 25, 2009. The government offered Exhibits (Ex.) 1 through 4, which were admitted into evidence. Applicant testified on his own behalf. On July 6, 2009, the transcript (Tr.) was received. The record closed on June 25, 2009.

Findings of Fact

In Applicant's Answer to the SOR, he denied the factual allegations in SOR ¶ 2.a. He admitted the remaining factual allegations, with explanations. Applicant's admissions to the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 35-year-old communications engineer who has worked for a defense contractor since June 1998, and is seeking to maintain security clearance.

Applicant had a job in the information technology (IT) field working on the local area network and administering firewalls. His job was to monitor the network looking for intrusions. When bored at work, he would view pornographic material. From 2000 to October 2005, Applicant downloaded and viewed pornographic images and movies on a U.S. Government owned computer. (Ex. 4) He had downloaded more than 500 pornographic images and approximately 25 pornographic movies. Nothing was stored on the computer. Once the movies were watched or the images viewed, they were deleted. (Tr. 32)

Applicant asserted his viewing preference is younger women, not necessarily teens, and definitely not underage individuals. Earlier, he had stated his preference was for pre-teen, teen, and "barely-legal" females. (Ex. 4) Occasionally, Applicant viewed child pornography, but never searched for it. In the search engine he would put in "younger, teen, barely legal." (Tr. 33, 43) Periodically, links would take him to inappropriate sites, which he asserts he would close once he discovered the content. He asserts he has no interest in child pornography. Since he browses the internet more at home than at work, the child pornography would inadvertently come up more often at home than at work. (Tr. 46) The last time child pornography inadvertently came up was six or seven months ago. (Tr. 50)

In 2005, some co-workers were caught viewing pornographic material. The program manager issued a general warning to all employees that such behavior would not be tolerated in the future. (Tr. 32) Applicant states the warning was not directly specifically to him. Earlier, around 2000 or 2001, a colleague who noticed Applicant's

promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

activity and told Applicant he should discontinue such activity. Applicant denies he downloaded pornographic images on his government computer after receiving the second warning.

Applicant no longer views pornographic material at work. Work has instituted more measures of monitoring productivity and activity on computers. (Tr. 52) Additionally, it is clear that his employer will not tolerate such behavior.

Applicant acknowledges some of his behavior showed non-compliance with rules and regulations at work. In the late 1990s, Applicant masturbated two or three times while viewing pornography at work. (Tr. 94) This occurred when Applicant was alone during weekend shifts or during an overnight shift. (Tr. 35, 53) Applicant acknowledges his conduct showed a severe lack of judgment. He stated he was younger and immature and did it when he was on a shift alone.

Applicant was born in El Salvador and periodically visits family there. (Ex. 1) Thirty to forty percent of the time, when he returns to El Salvador, he would frequent prostitutes. (Tr. 65) When he goes to adult entertainment clubs with his brothers, he does not have sex with prostitutes. (Tr. 66) If he attends with friends, he sometimes does. He prefers his brothers not know about his activities with prostitutes out of courtesy or respect to his brothers. (Tr. 111) Applicant engaged in sexual relationships with prostitutes in El Salvador. He learned after the fact that one of the prostitutes was 16 years old. (Tr. 61) She had told him she was 18. (Tr. 63) He discovered her age because she had told him she had a child when she was 14 and later told him the child was two years old. (Tr. 63) Prostitution is legal in El Salvador and brothels do enforce an 18-year-age limit on prostitutes. Applicant assumes the woman used false documents to get her job.

Applicant has used his home computer to browse pornographic sites where the subjects look underage. He told an investigator that ten percent of the pornography he viewed at home contained underage subjects. (Ex. 4) At the hearing, he stated the subjects were not underage and that five percent of his viewing was of younger women.

From 1998 through 2004, Applicant dated a woman. (Tr. 54, 74-75) She lived in her parent's home. When Applicant stayed overnight he would sleep in the same bed as his girlfriend, her daughter, and her son. During a six month period in 2003, Applicant fondled his former girlfriend's 11-year-old daughter on four occasions. (Tr. 73) The fondling was limited to touching the daughter's buttocks outside her clothing. He states his former girlfriend and her daughter were about the same height. Applicant does not fully remember the events as they happened. He says there are "just flashes here and there of uncertainty." (Tr. 110) The number of times it occurred is not based on his memory of the events, but on what the girl told her mother. The mother then confronted Applicant about his conduct. Applicant stated, "I felt really like guilty about it." (Tr. 57)

Each time the fondling occurred, Applicant and his girlfriend had been out late at night clubs and he was very drunk, exhausted, and disoriented. (Tr. 36, 37) At the

hearing Applicant stated, “. . . I still think it’s possible that I erroneously thought it was my girlfriend at the time. . .” (Tr. 37) He also said he “. . . was just very ashamed really.” At the time the events occurred, Applicant stated he had “drank heavily.” (Tr. 93)

Eventually, Applicant stopped sleeping in the same bed with his girlfriend and her children and started sleeping on the floor. (Tr. 111) His girlfriend moved into her parent’s basement where there was more room and then moved to her own home where her children had their own room. (Tr. 38)

In the early 2000s, his girlfriend and parents expressed a concern that Applicant was drinking too much. (Tr. 87) From 2000 to March 2006, Applicant suffered from blackouts while drinking. (Ex. 4) From 2003 to September 2004, he blacked out every other month. From September 2004 to January 2006, he was blacking out every month. (Tr. 91) He stated from 1998 until September 2004 he drove under the influence of alcohol twice a month. From 2004 until January 2006, he drove under the influence one or twice a week. (Tr. 91) At the hearing, he stated if he had one or two beers, he considered himself to be under the influence. (Tr. 92)

In March 2006, Applicant’s access to classified information and his access to special compartmented information (SCI) were suspended. (Ex. 4) In March 2008, his security clearance was suspended. (Ex. 2) His access was suspended based upon a decision by another government agency to deny his access to SCI. (Ex. 2) Applicant asked his company security representative for assistance in answering his Electronic Questionnaires for National Security Positions (e-QIP). (Ex. 1) He was asked if he had ever been “denied” a clearance. The security representative told him to answer “no” because his clearance was suspended and not denied. (Tr. 30)

The majority of the derogatory information was obtained during a voluntary polygraph. Applicant was given the opportunity for a top secret clearance with SCI access. He did not need this level of clearance to perform his current job. (Tr. 39) At the polygraph, Applicant believed he needed to be as forthcoming as possible and divulge as much information as was needed. (Tr. 21)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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, 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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. . . .” The applicant has the ultimate burden of persuasion as to 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 the 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

Revised Adjudicative Guideline (AG) ¶ 12 articulates the security concerns relating to sexual behavior :

The Concern: 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.

On four occasions he fondled his former girlfriend's 11-year-old daughter by grabbing her buttocks. Applicant said he had been drinking and was confused between his girlfriend and her daughter who were about the same size. He engaged in sexual relations with a 16-year-old prostitute in El Salvador. He continues to view pornographic material on his home computer of very young females.

Applicant states that five percent of the pornography he has viewed at home contains underage subjects. He states this was unintentional, inadvertent, and accidental viewing. Initially he acknowledged the material was child pornography, but on further reflection he asserted he was only seeking "teen" or "younger women" and not child pornography.

Even though he was not prosecuted, AG ¶ 13(a) "sexual behavior of a criminal nature, whether or not the individual has been prosecuted" applies to his fondling of the 11-year-old girl and the viewing of child pornography. He engaged in sexual relations with a 16-year-old prostitute in El Salvador. Prostitution is legal in El Salvador and Applicant was not aware the prostitute was underage until after they had sexual relations. I find AG ¶ 13(a) does not apply to his actions with the prostitute.

Applicant acknowledges some of his behavior showed non-compliance with rules and regulations at work. In the late 1990s, Applicant masturbated two or three times while viewing pornography at work. This occurred with Applicant was alone during weekend shift or during an overnight shift. He continued to view pornographic material at work after being warned not to do so.

AG ¶ 13(d) "sexual behavior of a public nature and/or that which reflects lack of discretion or judgment," applies to his viewing of pornographic material at work and his masturbating while watching pornographic material at work.

AG ¶ 14 lists conditions that could mitigate security concerns include:

- (a) the behavior occurred during or prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;
- (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.
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress;
- (d) the sexual behavior is strictly private, consensual, and discreet.

None of the mitigating conditions apply. AG ¶ 14(a) does not apply because the behavior occurred after adolescence. AG ¶ 14(b) does not apply because the behavior did not happen long ago and was not infrequent. He downloaded 500 pornographic images and 25 pornographic movies, which is not infrequent. He fondled his former

girlfriend's daughter four times over a six month period, which certainly casts doubt on his current reliability, trustworthiness, or good judgment. To have it happen once is inexcusable, but to continue sleeping in the same bed with his girlfriend and her children after the first time is unforgivable.

Applicant is likely to continue viewing adult material of very young women on his home computer. Initially, Applicant said ten percent of the material on his home computer contained underage material. He later reduced his estimate to five percent.

AG ¶ 14(c) does not apply because Applicant does not want his brothers to know he frequents prostitutes while in El Salvador. There is no evidence who, if anyone other than the company's security officials, knows of Applicant's conduct. AG ¶ 14(d) does not apply because the viewing of pornographic material and masturbation at work was not strictly private, consensual, or discreet behavior.

Additionally, Applicant has failed to take responsibility for his actions. His excuse for viewing of pre-teen pornography was because the search engines inadvertently took him there. He groped his ex-girlfriend's 11-year-old daughter, because she was about the same size as his girlfriend and he had been drinking. His excuse for masturbating at work while watching pornographic movies and other pornographic material was because there was no one else around and he was bored. A coworker told him he should not view pornographic material at work, but Applicant chose to do so anyway. It was not until a warning was issued to all personnel that he finally stopped viewing the material on the government computer.

The passage of time since the events is a factor to be considered. However, the passage of time, in and of itself, is not the controlling factor. The nature and relevant circumstances surrounding the conduct must also be considered. It is the intentional acts plus Applicant's failure to take responsibility for his conduct that is controlling. He knew his conduct was inappropriate, but he continued to do it anyway. Applicant acknowledges his conduct showed a severe lack of judgment.

Guideline E, Personal Conduct

The Directive sets out various factors relevant to an applicant's personal conduct that may be potentially disqualifying. Paragraph 15 of the adjudicative guidelines states a concern where there is 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."

A government agency denied Applicant's SCI access and his personal security clearance granted as a contractor was suspended. He continued to view pornographic material on the government computer after having been told to stop. He stopped after a

warning was issued to everyone. His viewing of pornographic material at work, masturbating at work, and fondling his former girlfriend's 11-year-old daughter are conduct which shows questionable judgment and an unwillingness to comply with rules and regulations.

Under the Directive, an applicant may mitigate the security concerns arising from questionable personal conduct under certain circumstances. AG ¶17 provides conditions that could mitigate personal conduct security concerns.

AG ¶ 17(a) "if a person "provides the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts," does not apply because omissions have not been alleged. AG ¶ 17(b) does not apply because there was no refusal or failure to cooperate.

Mitigating factor AG ¶ 17(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" does not apply. As previously stated, the behavior did not happen long ago and was not infrequent. The fondling of an 11-year-old is not a minor incident. There is no evidence his conduct occurred under such unique circumstances that it is unlikely to recur.

Applicant acknowledged some of his behavior was inappropriate, but there has been no counseling and there is no evidence of positive steps to alleviate the stressors or evidence the behavior is unlikely to recur. Mitigating factor AG ¶ 17(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" does not apply.

There is no evidence of what steps, if any, Applicant has taken to reduce or eliminate vulnerability to exploitation, manipulation, or duress. Even Applicant's brother are unaware he frequents prostitutes. Mitigating factor AG ¶ 17(e) "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress" does not apply.

Applicant's inappropriate conduct is substantiated by his admissions and government exhibits. The information was pertinent to a determination of his judgment, trustworthiness, and reliability. AG ¶ 17(f) provides mitigation where "the information was unsubstantiated or from a source of questionable reliability." This mitigating factor does not apply. There was no allegation of association with other persons involved in criminal activity other than frequenting prostitutes. The prostitution was legal where it occurred. Mitigating factor AG ¶ 17(g) "association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations" does not apply.

GUIDELINE M, Misuse of Information Technology Systems

Revised Adjudicative Guideline (AG) ¶ 39 articulates the security concerns relating to misuse of information technology systems :

The Concern. Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, and protection of information.

Between 2000 and October 2005, Applicant viewed and downloaded pornographic images and pornographic movies onto a government owned computer. A co-worker warned Applicant to discontinue such activity. Applicant did not do so until co-workers were caught viewing pornographic material and the program manager issued a general warning to all employees that such behavior would not be tolerated in the future. AG ¶ 40(e) "unauthorized use of a government or other information technology system" applies.

AG ¶ 41 lists conditions that could mitigate security concerns include:

- (a) so much time has elapsed since the 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;
- (b) the misuse was minor and done only in the interest of organizational efficiency and effectiveness, such as letting another person use one's password or computer when no other timely alternative was readily available; and
- (c) the conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification of supervisor.

AG ¶ 41(a) applies only partially. It has been less than four years since the last behavior at work. Applicant no longer views pornographic material at work because of the warning and because work has instituted more measures of monitoring productivity and activity on computers. He is unlikely to view pornography at work again. However, the serious nature of the misconduct raises a security concern.

AG ¶ 41(b) and AG ¶ 41(c) do not apply because the misuse was not minor nor was the conduct unintentional or inadvertent. The conduct was not followed by a prompt, good-faith effort to correct the situation. Even after being warned he continued to view pornography until the program manager gave a warning to all personnel.

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 the 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.

Applicant acknowledges some of his behavior showed non-compliance with rules and regulations at work and his conduct shows a severe lack of judgment. However, he does not accept the inappropriate nature of his conduct and instead offers excuses.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his sexual behavior, personal conduct, and misuse of information technology systems.

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:

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| Paragraph 1, Sexual Behavior: | AGAINST APPLICANT |
| Subparagraph 1.a—1.d: | Against Applicant |
| Subparagraph 1.e: | For Applicant |
| Subparagraph 1.f—1.g: | Against Applicant |

Paragraph 2, Personal Conduct: AGAINST APPLICANT

 Subparagraph 2.a—2c: Against Applicant

Paragraph 3, Information Technology: AGAINST APPLICANT

 Subparagraph 3.a: Against 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.

CLAUDE R. HEINY II
Administrative Judge