



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



In the matter of:)
)
) ISCR Case No. 08-05730
SSN:)
)
Applicant for Security Clearance)

Appearances

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

May 15, 2009

Decision

MASON, Paul J., Administrative Judge:

Based on the case file, pleadings, exhibits, and statements, Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his Security Clearance Application (SCA) on May 29, 2007. On November 26, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under sexual behavior (Guideline D), and personal conduct (Guideline E). The action was taken pursuant to 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) promulgated by the President on December 29, 2005, and made effective within the Department of Defense for SORs issued on or after September 1, 2006.

Applicant submitted his answer to the SOR on May 12, 2008. He requested a decision be made on the record in lieu of a hearing. A copy of the Government's File of Relevant Material (FORM, the government's evidence in support of the allegations in the SOR) was sent to Applicant on February 24, 2009. He received the FORM on February 26, 2009. His response was due by March 28, 2009. No response was received.

Findings of Fact

The SOR alleges seven factual allegations under the sexual behavior guideline, and five allegations under the personal conduct guideline. Applicant admitted all allegations. Applicant, 48 years old, has been married to his wife since May 1991, and has two children, ages 15 and 17. He has been employed as a principal engineer at his current job since March 1999. He served in the United States Army from September 1980 to September 1984, and received an honorable discharge. Applicant, who has held a security clearance since at least December 1990, seeks to have his security clearance continued.

Sexual Behavior

The allegations under sexual behavior are based on interviews Applicant participated in with another agency of the DoD on June 8 and July 19, 2006. He was asked to explain his involvement in child pornography and sexual encounters with juveniles since he has been an adult. After the July 19, 2006 interview, Applicant's access to special compartmented information (SCI) was suspended. On December 22, 2006, Applicant's (SCI) access was revoked by the agency. On March 1, 2007, Applicant appealed the revocation decision, and on March 6, 2007, the agency denied Applicant's appeal. A record of interviews and official decisions of the investigation are included in Item 5 of the FORM.

On June 8, 2006, Applicant was interviewed by a DoD investigator in connection with his reinvestigation for SCI access. He provided the following information: He received fellatio from a 15-year-old female in 1986 (SOR 1.a.). In 1987 and 1995, Applicant looked in the window of a neighbor's residence and through the window of his residence to see her in the nude (SOR 1.b.). In 1990 (SOR 1.c.), he inserted his hand underneath the clothes of a 16-year-old female, touching her vaginal area. He decided she was too young for sex. Around 1996 and 2005 (SOR 1.d.), he used women's underwear to masturbate. In 2003 (SOR 1.e.), Applicant posted a nude photograph of his wife on the Internet without her knowledge. From approximately 2003 to 2005, Applicant downloaded from the Internet to his home personal computer pictures of females under the age of 18 (SOR 1.f.). He kept some of the sexually explicit pictures of females under the age of 18 until at least 2006 (SOR 1.g.).

During the second agency interview on July 19, 2006, Applicant indicated he was initially repulsed by the child pornography, but the more he viewed the pictures, the less uncomfortable he felt about the pictures' contents. Applicant admitted he was attracted

to younger women between the ages of 18 and 22. He was also attracted to juvenile women who had fully developed breasts and pubic hair (Item 5). From 2003 to September 2005, Applicant estimated downloading and saving 20 to 30 sets of child pornography, with each set containing 20 to 30 photographs. The sets included nude photographs of females between 13 and 17 years old. Applicant protected the pornography on his home computer with encrypted software or a special cable because of the illegal nature of the pictures, and to prevent his wife from viewing the pictures.

In his March 1, 2007 appeal of the initial decision to revoke his SCI, Applicant recalled his childhood and teenage life in his community where 90% of the females, ages 15 or older, were engaged in sexual activity. Applicant noted that his contact with underage females occurred 20 or more years ago. Regarding the posting of his wife's picture on the Internet, Applicant explained that the two photos were posted to an "adult news group" in an unidentifiable form revealing only partial nudity. In addition, the photo headers had a disclaimer warning that restricted viewing of individuals 18 or older. Applicant also indicated the photos were not "thumbnail," and required the viewer to specifically download the file to open (Item 5). No additional information was furnished.

Also in Applicant's March 1, 2007 appeal letter, he disputed the investigator's claim that he had illegal pornography in his computer at the time of the examination in July 2006. Applicant claimed he had no specific recollection of viewing illegal pornography in 2005, 2006 or 2007. While he had hundreds of photographs, he was certain only about 10% of the photos showed any nudity at all. Applicant did not (as the Item 5 agency memorandum claims) masturbate while reviewing photos of females less than 13 years of age. Applicant also protested he was not provided food in the six or seven-hour interview in July 2006. Finally, he stated he is not proud of his behavior with underage females or his downloading/viewing of child pornography. Applicant considers the conduct in his past. He concluded his appeal statement in Item 5 by stating that his interview responses in July 2006 were provided in a manner that would reduce the chances of leaving out any detail. On reflection, he may have provided too much information because he was uncertain about some of the activity or conduct (*Id.*).

On March 6, 2007, the original decision to revoke Applicant's SCI was affirmed. The reviewer noted that Applicant was under oath during the interview on July 19, 2006, and was reminded he was under oath as the gathered information was summarized. The reviewer concluded the information that was affirmed by Applicant was too detailed to be to be simply tossed out by his claims that the information was false and/or that interviewer misinterpreted him. Finally, the reviewer confirmed that Applicant was provided several breaks during the examination, and a 78 minute lunch break (*Id.*).

In his interview with an investigator from the Office of Personnel Management (OPM) on August 9, 2007 (Item 7, contained in interrogatory answers dated June 16, 2008), Applicant unequivocally stated that the downloading and viewing of child pornography lasted only a month in 2003, rather than the lengthy period of time detailed in his interviews in July 2006. Applicant stated after reviewing the interview on June 16, 2008, that: the downloading (and storage on compact discs (CDs)) and viewing lasted

several months, ending in early 2004; the CDs were stored in an inaccessible location for more than two years, with Applicant accessing the pictures once or twice; the last time he downloaded any illegal material was in November 2004; and, he discarded all the CDs in May 2006 without looking at any of the pictures. Applicant concluded the June 2008 statement by indicating he was ashamed at being involved in the activity, and did not intend to get involved in the behavior in the future.

Personal Conduct

During a personnel screening interview in approximately 1980, Applicant told an investigator he used marijuana about five times with friends between 1976 and 1978. Applicant admitted in his answer to the SOR that he deliberately tried to conceal marijuana use of 50 to 100 times (SOR 2.b.). Applicant's use of marijuana in the U.S. Army on one occasion in 1981, and on one occasion in July 1982 (SOR 2.c.), occurred after he told an investigator he would not use marijuana in the future (SOR 2.d.). Applicant's SCI access was revoked in March 2007 (SOR 2.e.).

Character Evidence

Applicant was advised when he received the FORM on February 26, 2009 that he could file objections to the information included in the FORM or supply additional material in support of any claims he wanted to advance. He provided no information.

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 are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are flexible rules of law. Recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's ultimate adjudicative goal is a fair, impartial and common sense decision. According to the AG, the entire process is a careful, thorough evaluation 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. If residual doubts still remain concerning personnel being considered for access to classified information, those doubts 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 is not restricted to normal duty hours. Rather, the relationship is an-around-the-clock responsibility between an applicant and the federal government. 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.

Analysis

Sexual Behavior (SB)

¶ 12. *The Concern.* Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects a 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 the Guideline may be raised solely on the basis of the sexual orientation of the individual.

The sexual behavior that Applicant engaged in the 1980s, 1990s, and also between 2003 and 2006 falls within the scope of SB disqualifying condition (DC) ¶ 13.a. (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*). Downloading and viewing the numerous child pornography photos is clearly sexual behavior of a criminal nature. Engaging in sexual behavior with underage females, e.g., fellatio and fondling, also represents criminal behavior regardless of whether the individual was ever prosecuted.

Applicant was troubled when he first viewed the pornography. However, his feelings changed as he viewed more child pornography. The repetitive nature of his behavior between 2003 and September 2005 invokes SB DC ¶ 13.b. (*a pattern of compulsive, self-destructive, or high risk behavior that the person is unable to stop or that may be symptomatic of a personality disorder*).

SB DC ¶ 13.c. (*sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*) applies because Applicant is still uncomfortable about his conduct with the underage females and the child pornography. Since his examination in July 2006 with the other agency of the DoD regarding continued SCI

access, Applicant has furnished statements about the information he provided in July 2006. In his March 2007 appeal, he essentially disowned a substantial amount of information concerning the sexual behavior. In his August 2007 interview, and his interrogatory responses in June 2008, he disavowed other portions of his July 2006 interviews, while also claiming the pornography lasted only a month or a few months. Applicant's retraction of increasing amounts of information since his interviews in July 2006 indicate to me he is minimizing and/or rationalizing the full scope of his conduct, thus making him vulnerable to duress within the ambit of SB DC ¶ 13.c, as well as the personal conduct guideline discussed below.

SB DC ¶ 13.d. (*sexual behavior of a public nature and/or that reflects a lack of judgment or judgment*) also applies based on Applicant's poor judgment between 1986 and 2006.

The SB guideline identifies four mitigating conditions (MC) that have been considered. SB MC ¶ 14.a. (*the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct*) is not available for mitigation as the behavior began after Applicant became an adult and lasted until 2006.

SB MC ¶ 14.b. (*the sexual behavior happened a long time 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, untrustworthiness, or good judgment*) may apply if the conduct occurred a long time ago, was infrequent, or occurred under unusual circumstances. While there is no indication of sexual misconduct with juveniles after 1990, Applicant continued to engage in masturbation followed by extensive child pornography activity between 2003 and the second half of 2005, and retained some of the sexually explicit pictures of females under 18 years old until 2006. The 20-year-history of sexual behavior, specifically the period after 1990 when Applicant held SCI access in addition to a security clearance, continues to have a negative impact on his credibility, trustworthiness and good judgment.

Applicant has provided insufficient evidence to activate SB MC ¶ 14.c. (*the behavior no longer serves as the basis for coercion, exploitation, or duress*). Though an applicant is not required to stand on a street corner and boast about his sexual behavior, he should furnish adequate evidence to show the behavior could not be used as a basis for coercion. Applicant has not met his burden under this mitigator. SB MC ¶ 14.d. (*the sexual behavior is strictly private, consensual, and discreet*) is inapplicable because Applicant's sexual activity with juveniles and his viewing of child pornography was illegal. Applicant exhibited poor judgment in 1986 when he engaged in fellatio with a 15-year-old female, and fondled a 16-year-old in 1990. Applicant's lack of judgment continued with the peeping tom activity in between 1987 and 1995. Applicant masturbated in 1996 and 2004 to women's underwear. Considering the totality of incidents between 1986 and 2006, and particularly the child pornography activity between 2003 and 2006, the government has established a case under the SB guideline that has not been mitigated.

Personal Conduct (PC)

¶ 15. *The Concern*. “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.”

PC DC ¶ 16.d. (*credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of: (1) or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; and (3) a pattern of dishonesty or rule violations*) applies based on Applicant’s sexual behavior between 1986 and 2006, coupled with the serious falsifications and misrepresentations he made about his marijuana use, and use of the drug while in the U.S. Army. The falsifications and sexual behavior raise ongoing concerns about Applicant’s trustworthiness and judgment.

The sources for exploitation and duress discussed under the SB guideline also exist under PC DC ¶ 16.e. (*personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing . . .*). Applicant clearly did not want anyone to know about his child pornography activity based on his use of encrypted software and special cables. His minimization of the activity increases his vulnerability to coercion under this disqualifying condition.

PC MC ¶ 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*) receives limited application, but does not meet his ultimate burden of persuasion under the PC guideline. While Applicant acknowledges the illegality of the child pornography, there is no indication he has received any counseling for the behavior. Unless evidence is provided on the issue, there is no way for me to determine what action Applicant has taken to alleviate the stressors, and prevent the child pornography and other sexual activity from resurfacing in the future.

I have examined the evidence with the disqualifying and mitigating conditions in my ultimate finding against Applicant under the SB and PC guidelines. The case still must be weighed within the context of nine variables known as the whole person

concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors:

¶ 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 the participation was 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.

Applicant provided false information about his drug use in 1980. In 1986 he received fellatio from a 15-year-old juvenile female. In 1987 and 1995, he engaged in peeping tom activity. In 1990, he fondled a 16-year-old female. From 2003 to 2006, while holding SCI and collateral access, he engaged in a pattern of extensive child pornography activity because of his attraction for young women and developed juvenile females. Though Applicant indicated he is ashamed of his despicable behavior, given the lack of counseling and/or other steps taken to relieve his stressors, it is too soon to conclude he is rehabilitated. Accordingly, I find Applicant has not overcome the adverse evidence under the SB and PC guidelines.

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 (Sexual Behavior, Guideline D): **AGAINST APPLICANT**

Subparagraph 1.a.	Against Applicant
Subparagraph 1.b.	Against Appellant
Subparagraph 1.c.	Against Applicant
Subparagraph 1.d.	Against Applicant
Subparagraph 1.e.	Against Applicant
Subparagraph 1.f.	Against Applicant
Subparagraph 1.g.	Against Applicant

Paragraph 2 (Personal Conduct, Guideline E): **AGAINST APPLICANT**

Subparagraph 2.a.	Against Applicant
Subparagraph 2.b.	Against Applicant
Subparagraph 2.c.	Against Applicant
Subparagraph 2.d.	Against Applicant
Subparagraph 2.e.	Against Applicant
Subparagraph 2.f.	Against Applicant.

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Paul J. Mason
Administrative Judge