



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



In the matter of:)
)
) ISCR Case No. 09-00079
)
Applicant for Security Clearance)

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: *Pro se*

May 25, 2011

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline D, Sexual Behavior and Guideline E, Personal Conduct. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On September 1, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline D, Sexual Behavior, and Guideline E, Personal Conduct. DOHA acted under 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 adjudicative guidelines (AG), effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on September 20, 2010. He requested a hearing before an administrative judge. The case was assigned to me on January 18, 2011. DOHA issued a notice of hearing on January 24, 2011, with a hearing date of February 17, 2011. The hearing was convened as scheduled. The Government offered exhibits (GE) 1 through 4, which were admitted into evidence without objection. Department Counsel's exhibit index was marked as hearing exhibit (HE) I. Applicant testified, and offered one exhibit (AE) A. It was admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on February 25, 2011.

Findings of Fact

In Applicant's answer to the SOR, he denied all the Guideline D allegations (SOR ¶¶ 1.a – 1.e), but admitted all the Guideline E allegations (SOR ¶¶ 2.a – 2.e). After a thorough and careful review of the pleadings, testimony, and exhibits, I make the following findings of fact.

Applicant is 68 years old. He has been married for 41 years. He has two adult children. He retired from working for a defense contractor in January 2011. He is seeking his security clearance to continue working for the same defense contractor as a consultant. He works as a systems engineer. He is a high school graduate with some college credits. He has no military service. He does not currently hold a security clearance.¹

Applicant's conduct raised in the SOR includes: (1) purchasing a pornographic magazine depicting teenagers in 1991 engaged in sexual acts or nudity; searching the internet for child pornography once a week from 1995 until 2000; storing pictures of child pornography on his computer's hard drive from 1995 until 2000; searching the internet for nudist colonies and downloading pictures of naked children as young as two years old, receiving emails with pictures of child pornography for about 10 years through July 2003 (SOR ¶¶ 1.a - 1.e); (2) being denied access to sensitive compartmented information (SCI) by a government agency in 2003; having his access to SCI and eligibility for a top secret clearance revoked by a government agency in 2005; his wife's lack of knowledge of his denial of and revocation of SCI access and top secret eligibility, and the reasons for such denial or revocation. (SOR ¶¶ 2.a – 2.e)

In January 2003, Applicant was interviewed by a government agency in connection with his security clearance access. During that interview, he admitted to purchasing a pornographic magazine at a sex shop in 1991 while in Germany. He further stated that the magazine depicted teenagers from ages 13-18 engaged in sex acts or posing nude. Applicant later stated that the magazine was purchased in the Netherlands. He also stated that he recently (before January 2003) used his home computer to search for nudist colonies on the internet. From this search he downloaded approximately 24-36 images of naked nudists, including some pictures of children as young as two years old. He disputed the characterization of his internet nudist colonies

¹ Tr. at 6, 7, 36, 38-39; GE 1.

search. He stated that he was searching for beach resorts and a “pop up” link directed him to the nudist colony site.²

Applicant was re-interviewed by the same government agency in August 2003. During this interview, the term child pornography was defined and explained to him. With this in mind, he disclosed to the interviewer that between 1995 and 2000, he used his computer and the internet to view child pornography on a weekly basis. He would seek out these pictures by visiting “news group sites”. The particular news group sites that he sought out shared various types of pornography including child pornography. He collected and stored child pornography pictures on his computer’s hard drive. He stopped collecting these pictures and removed them from his computer in 2000 because he was concerned about child pornography laws. He also stated that he still was receiving child pornography one or two times a month through emails. He has received these emails for ten years, the last one was in July 2003. The last one included an image of a boy and girl approximately six to seven years old, posed in a sexually explicit fashion.³

Applicant, through his answer to the SOR and his testimony at hearing, denies his intentional involvement with child pornography. He also asserts that the narrative summaries of his two interviews by the government agency were inaccurate.⁴

Based upon the information provided by the Applicant during his two interviews in January and August 2003, as discussed above, a government agency denied him access to SCI in September 2003. Another government agency revoked his access to SCI and his top secret eligibility in April 2005. Applicant’s wife is unaware of the denial or revocation actions or the reason for those actions.⁵

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.

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 GE 2 at I-31, I-32, I-33.

³ GE 2 at I-35, I-37, I-39.

⁴ Tr. at 29-30; GE 2 at I-36, I-38, GE 4.

⁵ Tr. at 40; GE 3.

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, and has the ultimate burden of persuasion to obtain 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 that an applicant may deliberately or inadvertently fail to 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:

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.

I have considered all of the Sexual Behavior disqualifying conditions under AG ¶ 13 and especially considered the following:

- (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 admitted to viewing child pornography over an extended period of time (1995-2000) and storing images on his computer's hard drive. He received emails through 2003 that contained links to child pornographic images. In 2002, he conducted internet searches that led him to child pornographic sites. He also bought a magazine in 1991 containing nude images of teenagers. After his interviews with a government agency, he essentially recanted his earlier admissions and claimed that the reports memorializing his interviews were not accurate. After reviewing the reports and considering the detailed facts that are referred to in those reports and the contemporaneous nature of the interviews, I conclude that they accurately reflect Applicant's admissions at the time and are more persuasive than Applicant's after-the-fact minimizations and retractions. Possessing or viewing child pornography is a criminal offense. Child pornography, possession or viewing, by its very nature, causes the possessor to be vulnerable to coercion, exploitation, or duress. It is especially true here where Applicant has never revealed his actions to his wife of 41 years. Any activity involving possessing or viewing child pornography reflects a lack of judgment. AG ¶¶ 13(a), 13(c), and 13(d) all apply.

I have considered all of the Sexual Behavior mitigating conditions under AG ¶ 14 and especially considered:

- (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; and,
- (d) the sexual behavior is strictly private, consensual, and discreet.

Although Applicant's last admitted use of child pornography was in 2003, the number of times he possessed and viewed this material over an extended period of time (1995-2003) does not support the conclusion that the behavior is unlikely to recur. Moreover, his actions cast doubt on his reliability, trustworthiness and good judgment.

Because his wife remains unaware of his involvement with child pornography, his behavior serves as a basis for coercion, exploitation, or duress. AG ¶¶ 14(b) and (c) do not apply. Since viewing or possessing child pornography is a crime itself regardless if it is done privately and discretely, the applicability of AG ¶ 14(d) is irrelevant.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying conditions are potentially applicable:

(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Although the Guideline E allegations, ¶¶ 2.a – 2.c, are framed in terms of Applicant's denial or revocation of his SCI access and top secret eligibility by government agencies in 2003 and 2005, the underlying factual basis for each allegation is Applicant's involvement with child pornography. Therefore, the previous analysis under AG ¶¶ 13(a), 13(c), and 13(d) also applies here. Additionally, Applicant's conduct of viewing child pornography over an eight year time-frame created a vulnerability to his personal standing. This vulnerability was compounded by Applicant's failure to disclose his child pornographic involvement and his reasons for such involvement to his wife. AG ¶ 16(e) applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and especially considered the following:

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change 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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Viewing or possessing child pornography is a federal criminal offense and therefore not minor. Applicant's actions were not infrequent and are not unlikely to recur. They also cast doubt on his reliability, trustworthiness, and good judgment. Applicant did not acknowledge his behavior; rather he minimized his actions after his initial disclosures. No evidence was produced by Applicant regarding the reasons he engaged in obtaining child pornography. Applicant's decision not to inform his wife of his involvement with child pornography continues to make him vulnerable to exploitation, manipulation, or duress. Applicant questioned the reliability of the government agency's summarized interviews; however, the information contained in those interviews was detailed and contemporaneous. It was reliable and persuasive. None of the above mitigating factors apply here.

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. I considered Applicant's service to his company. I also considered the seriousness of his child pornography activity. Applicant's actions were violations of federal law. Based upon the number of admitted child pornographic events, I conclude Applicant engaged in this activity on a regular basis. Applicant did not meet his burden to provide sufficient evidence to mitigate the security concerns.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising under Guideline D, Sexual Behavior, and Guideline E, Personal 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
Subparagraphs 1.a – 1.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.e:	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.

Robert E. Coacher
Administrative Judge