



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-03475
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

May 28, 2010

Decision

CURRY, Marc E., Administrative Judge:

Applicant mitigated the security concern generated by his employment dismissal in 2004 for viewing pornography on the job, but failed to mitigate the security concern generated when he falsified the circumstances of his departure during a subsequent security clearance investigation. Clearance is denied.

Statement of the Case

On June 30, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, Personal Conduct. The action was taken 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).

Applicant answered the SOR on July 21, 2009, admitting all of the allegations. He requested an administrative determination. On August 28, 2009, Department Counsel submitted a File of Relevant Material (FORM). Applicant then requested a hearing, and the case was assigned to another administrative judge who scheduled it for December 10, 2009. The case was continued, then reassigned to me on December 15, 2010. On January 13, 2010, a notice of hearing was issued scheduling the case for February 4, 2010. The hearing was conducted as rescheduled. I received two Government exhibits, six Applicant exhibits, marked Applicant's Exhibits (AE) A through E and I,¹ and the testimony of three Applicant witnesses. At the close of the hearing, I left the record open at Applicant's request to allow him to submit additional exhibits. Within the time allotted, he submitted five additional exhibits that I admitted as AE J through N. The transcript was received on February 16, 2010.

Findings of Fact

Applicant is a 58-year-old married man with two adult children. A prior marriage ended in divorce. He has been married to his current wife since 2001. In 1973, Applicant earned a bachelor of science degree in electrical engineering. He has spent his entire career working for defense contractors and has held a security clearance for 35 years. (GE E) Since June 2008, he has worked as a senior systems engineer. He supervises 25 to 30 people. Applicant has received multiple awards on the job for his "critical leadership," "personal accountability," and "exceptional achievements." (AE J - N)

For approximately six to eight months in 2003, Applicant "lost track of his moral and ethical bearings" and began viewing pornography on his then-employer's work-issued laptop computer. (GE 2 at 4) None involved children. In approximately February 2004, Applicant's then-employer discovered this activity through a routine audit of the company's computers. (Tr. 32) Applicant admitted to this behavior upon being confronted and was fired immediately. (Tr. 33)

Applicant obtained another job approximately two months later. (Tr. 33) On June 2, 2005, Applicant completed a security clearance application. He answered "no" in response to **Question 20. Your Employment Record** (*Has any of the following happened to you in the last 7 years? - Fired from a job - Quit a job after being told you'd be fired - Left a job by mutual agreement following allegations of misconduct - Left a job by mutual agreement following allegations of unsatisfactory job performance - Left a job for other reason under unfavorable circumstances*). He did not disclose the circumstances of his departure from his previous employer because he "was absolutely terrified" that the information "would get out into the open." (Tr. 34, 35)

In June 2006, a DoD security clearance investigator interviewed Applicant. When asked why he left his previous job, Applicant again did not disclose the circumstances of his departure. (GE 2 at 3) He testified that he failed to disclose it because he could not

¹I did not admit GE F though H.

confirm that the person was a security clearance investigator because the interview occurred over the telephone. (Tr. 36) The record evidence indicates the investigator conducted the interview at Applicant's job site. (GE 2 at 3)

In 2007, another investigator interviewed Applicant. (GE 2 at 6) The investigator asked Applicant about the circumstances surrounding his dismissal from his previous job. (Tr. 54) Applicant then disclosed them. Later, in response to Government interrogatories, Applicant stated that he did not tell the first investigator the circumstances surrounding his departure because he "was not asked, during [his] interview, why [he] left . . ." (GE 2 at 9)

Applicant characterized his interest in pornography as an addiction. (Tr. 38) Shortly after losing his job, he "made a commitment to honor [his] faith, his wife, [and] to change, and never hurt her again." (Tr. 43) In April 2004, he attended an intensive, four-day, three-night, church-based counseling program dealing with pornography addiction. (Tr. 40) After the program ended, Applicant continued to attend weekly church-based workshops regarding this issue for the next three months. (Tr. 39) He then attended a weekend conference with his wife on strengthening marriage. (Tr. 40)

Applicant has not viewed any pornography since losing his job in 2004. His current employer knows the circumstances of his departure from his previous job. (Tr. 45)

Applicant is active in the community, volunteering at food banks and assisting the elderly with lawn and home maintenance. He also volunteers at a local animal shelter. (Tr. 81)

Policies

In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to 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. 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. . . .” The Applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

Analysis

Guideline E, Personal Conduct

The security concern under this guideline is as follows:

[c]onduct 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 ¶ 15).

Applicant viewed pornography on his work-issued laptop computer prompting his employment dismissal, then failed to disclose the circumstances of his departure from the job on a 2005 security clearance application and during a 2006 interview with a security clearance agent. The following disqualifying conditions apply:

AG ¶ 16(a), deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

AG ¶ 16(b), deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and

AG ¶ 16(e), personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person’s personal, professional, or community standing.

Shortly after losing his job in 2004, Applicant participated in intensive counseling regarding his self-described addiction to pornography. After completing a four-day session, he continued to attend weekly counseling for the next three months. Applicant then attended marriage counseling with his wife to repair the marital strain caused by the revelation of his pornography addiction. His current employer now knows about the circumstances of his departure from his previous job. Applicant has not viewed pornography in nearly six years. I conclude the following mitigating conditions under AG ¶ 17 apply to Applicant’s viewing of pornography at work:

(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 the behavior or taken other steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

None of the mitigating conditions apply to Applicant's falsifications. Although he eventually disclosed the circumstances of his departure from his employment, he did not do so until a second investigative interview three years later. Also, his explanation for failing to disclose this information during the first interview was not credible.

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.

Applicant deserves credit for overcoming his addiction to pornography. Moreover, he has, for the most part, enjoyed a distinguished career spanning more than 30 years, and has held a security clearance for nearly the entire duration. I cannot reconcile this positive information, however, with the lack of candor that he continued to display when discussing why he failed to disclose the circumstances surrounding the departure from his job to the first investigative agent who interviewed him. Upon evaluating this case in the context of the whole-person concept, I conclude Applicant has failed to mitigate the security concerns.

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 E:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b - 1.c:	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.

MARC E. CURRY
Administrative Judge