



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



In the matter of:)
)
) ISCR Case No. 09-05273
)
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: *Pro se*

September 29, 2010

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the Government's security concerns under Guideline D, Sexual Behavior. Applicant's eligibility for a security clearance is granted

On May 27, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline D. 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on June 25, 2010, and requested a hearing before an administrative judge. The case was assigned to me on August 6, 2010. DOHA issued a Notice of Hearing on August 17, 2010. I convened the hearing as scheduled on September 7, 2010. The Government offered Exhibits (GE) 1 through 4.

Applicant did not object and they were admitted. Applicant and a witness testified on his behalf. Applicant offered Exhibit (AE) A, which was admitted without objection. DOHA received the hearing transcript (Tr.) on September 17, 2010.

Findings of Fact

Applicant admitted all of the allegations in the SOR with explanations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 56 years old. He has been married for 32 years and has two daughters, ages 20 and 25. He is a college graduate and is a business development manager for a federal contractor. He has worked for his present employer since October 2006. Before then, he worked for a different federal contractor. He estimated he has held a security clearance for at least 15 years.¹

In 2005, Applicant held a Secret security clearance. His employer requested it be upgraded to a Top Secret security clearance. It required he participate in a lifestyle polygraph. During the interview prior to the polygraph, Applicant admitted that he viewed and masturbated to pornography from 2000 to April 2005. He did this in his home. When asked if any of the pornography included children, he told the examiner that he had pictures of females who were young looking and possibly underage, but he was not sure of their ages. He was advised by the examiner that maintaining pornographic pictures of children was illegal. After the interview, Applicant immediately went home and deleted all pornographic pictures from a zip drive he maintained.²

In Applicant's answers to interrogatories he stated the following:

I did choose [the] "adolescents" category but did not expect such young ages. I did not select a particular age category as there were none. Nor would I have chosen images of children. As I recall there were small icons and I clicked on them at random without knowing what would appear. I had no interest nor did I pleasure myself from images of the lower end of the age range specified above. I was looking more at what I expected were 18 + year olds and sometimes it was hard to tell.³

Applicant explained he was not deliberately seeking child pornography, but when accessing pornographic websites, on occasion he might view child pornography. He admitted that he continued to frequent the sites where he had previously inadvertently accessed child pornography. He stated if he clicked on an icon and it had a very young

¹ Tr. 76.

² Tr. 26, 40, 43.

³ GE 2.

image, he would delete it. He could not provide an explanation for why, if he knew there were images of young females on a site, he would continue to access it. He thought perhaps he returned to the site because he was familiar with it. Applicant stated he believed all pornography was illegal.⁴

Applicant admitted in his personal subject interview in April 2005 that he downloaded at least 200 images of child pornography onto a zip drive. On May 6, 2010, Applicant answered interrogatory questions. He was asked:

Q: During an interview with another government agency in April 2005, you stated that you had downloaded at least 200 images of child pornography onto a zip drive. You further stated that you stored the images on a zip drive because you did not want your wife and daughters to know about what you'd been viewing. Is this an accurate summary of the information you provided during the interview?⁵

Applicant checked the block "yes." He was provided a space for additional explanation. He stated: "This is true. The day of the interview I deleted all images and never downloaded or stored pornographic images since."⁶ He told the examiner that he had pictures of females who were young looking and possibly underage, but he was not sure of their ages.⁷ At his hearing, he denied that he intentionally downloaded child pornography to the zip drive.

Applicant accessed pornographic websites. The websites included non-distinct icons. He randomly would click on the icon. He stated it was difficult to determine the ages of the females. He admitted that he would use a drop-down menu and click the site for "teenagers and adolescents." He understood that this could include females from ages 13 to 19 years of age. He was adamant that he was not searching for underage females. He continued to access the same icon and was aware it might include teenagers who were underage. During his pre-polygraph interview, he acknowledged that some of the females he viewed could possibly have been underage. He stated he could not tell. He stated that when he clicked the icon he did not know what he would get. He stated he did not selectively download underage females, but acknowledged accessing the "teenager and adolescent" section. He stated he was not looking for children, but he was looking for "teenagers." He used this website more than once.⁸

⁴ Tr. 24-25, 53-59, 70-75, 86-89.

⁵ GE 2.

⁶ *Id.*

⁷ Tr. 67-69.

⁸ Tr. 41, 71-72.

Applicant's wife was aware that he viewed pornography in their home. Applicant admitted he did not tell his wife that he masturbated while viewing the pornography. She testified that her husband told her he stopped viewing pornography about five years ago. She was aware he took a polygraph, but never learned the results. She was told by him that some of the material that was downloaded had adolescent content, but it was accessed randomly. She is unaware if he has obtained counseling. She does not believe he has psychological problems or can be blackmailed. They did not discuss what websites he accessed. She was aware he downloaded images, but did not discuss the specifics. She was told by her husband that he accessed the sites by icons he clicked. She does not believe his actions were intentional. She is aware that child pornography is illegal. She has not reviewed the SOR. She is aware he was viewing pornography multiple times a week. Applicant stated that he was initially reluctant to tell his wife about his conduct because of the shame, but concluded it was necessary for her to understand, so he could not be blackmailed. Applicant's current employer is not aware of why his application was denied.⁹

Applicant stated he was not looking for children, but was seeking young women. Applicant's daughters are not aware of his actions. His former supervisor was aware he did not receive his upgraded security clearance. No one else knows about Applicant's conduct.¹⁰

Applicant credibly testified that after his pre-polygraph interview, he deleted the zip drive with the pornography and he has never viewed any pornography again. He stated the reason he viewed pornography was because he was bored and could not sleep. Applicant has not sought any counseling. He takes full responsibility for and regrets his actions. He has not participated in any similar conduct in five years. He considers himself a good husband and father. He has not had problems with drugs or alcohol, or been involved in any other criminal activity. His finances are stable. He does not gamble. He considers himself a loyal American who would never be coerced. He understands the gravity of his actions. He regrets his behavior. He apologized for his conduct, and his lack of judgment and common sense. He recognizes his conduct was irresponsible and illegal. He explained his conduct was an exception and not the rule.¹¹

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.

⁹ Tr. 48-52, 61-63, 94-111.

¹⁰ Tr. 78-82.

¹¹ Tr. 23-26, 35-37, 63, 73, 82.

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, 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 pertaining to sexual behavior.

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I have considered the following as potentially applicable:

- (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 accessed pornographic websites from 2000 to 2005. Some of the images may have been of underage females. He downloaded 200 pornographic images that may have included underage females, to a zip drive. I find the above disqualifying conditions apply.

The guideline also includes examples of conditions that could mitigate security concerns arising under the sexual behavior guideline. The following mitigating conditions under AG ¶17 are potentially applicable:

- (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; and
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress.

Applicant's testimony was credible. He admitted he viewed pornographic websites. He admitted he was searching for young women. I believe him when he testified that he was not searching for child pornography, but was rather searching for adult pornography. He was searching for young women and admitted some of the women could have been underage, but he was not certain. If there was an image of a child, he would delete it. He believed the images he had on his zip drive were of young women, but not necessarily underage women. He admitted to masturbating while viewing pornography, but not child pornography. All of Applicant's actions were on his home computer and at home. Once Applicant learned that there could be images on his zip drive that were of underage women, he deleted all of its contents. He credibly stated that he has not accessed another pornographic site since his pre-polygraph interview. Applicant's wife is aware of most of his conduct. There is no physical evidence to

corroborate that the images viewed were actually of children. All of the information regarding accessing pornography was from Applicant's admissions.

It has been five years since Applicant accessed any pornographic website. He is remorseful and acknowledges he used poor judgment. He told his wife about his actions. Although Applicant does not acknowledge that he intentionally downloaded or was seeking access to underage pornographic websites, he accepted responsibility for his conduct when he searched for sites that may have exposed him to underage images. I find a sufficient period of time has passed and it is unlikely his conduct will recur. Therefore, I find the above mitigating conditions apply.

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 have incorporated my comments under Guideline D in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comments. Applicant admitted that five years ago he viewed pornography. He was searching for young women, but not underage women or children. Viewing of adult pornography on one's home computer is not illegal. Applicant acknowledged that some of the contents he viewed could have been of underage women, but he was not certain. In any event, he acknowledged he used poor judgment in his actions. He is remorseful for his conduct. His wife was aware that he viewed pornography and he later told her about his conduct. When Applicant learned that the images he downloaded might be of underage women, he deleted the contents. He has not accessed a pornographic website in five years. He intends never to access one in the future. I considered Applicant's demeanor, sincerity, composure, and candor when he testified. He acknowledged his poor judgment and lack of common sense when he accessed these sites. I believe Applicant did not

intentionally download or access child pornography. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under the guideline for Sexual Behavior.

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 F: FOR APPLICANT

Subparagraphs 1.a-1.c: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

Carol G. Ricciardello
Administrative Judge