



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



In the matter of:)	
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-----)	ISCR Case No. 09-08672
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Phillip J. Katauskas, Esquire, Department Counsel
For Applicant: *Pro se*

June 14, 2011

Decision

MOGUL, Martin H., Administrative Judge:

On February 16, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines D and E for Applicant. (Item 1.) 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.

On March 9, 2011, Applicant replied to the SOR (RSOR) in writing, and he requested that his case be decided on the written record in lieu of a hearing. (Item 4.) On April 13, 2011, Department Counsel issued the Department's written case. A complete copy of the file of relevant material (FORM) was provided to Applicant. In the FORM, Department Counsel offered eight documentary exhibits. (Items 1-8.) Applicant was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. A response was due on June 7, 2011. Applicant submitted a

three page response to the FORM, dated May 8, 2011, which has been identified and entered into evidence without objection as Item A. The case was assigned to this Administrative Judge on May 19, 2011.

Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Findings of Fact

In his RSOR, Applicant admitted all of the SOR allegations, 1.a. through 1.c., and 2.a. through 2.c. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 51 years old. He is married, and he has two children. He has received a Master's degree and a Doctorate degree. Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline D - Sexual Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in sexual behavior that is either criminal, indicates a personality or emotional disorder, reflects lack of judgement or discretion, or which may subject an individual to undue influence or coercion.

1.a. It is alleged in the SOR that Applicant downloaded sexually explicit images of underage females, to include both video and photographs, to his home computer, from approximately 1998 to about September 2008. Applicant admitted this allegation in his RSOR. (Item 4.)

1.b. It is alleged in the SOR that Applicant downloaded sexually explicit images of underage females, to include both video and photographs, to his work computer, from approximately 1997 to about October 2000. Applicant admitted this allegation in his RSOR. (Item 4.)

1.c. It is alleged in the SOR that Applicant masturbated after viewing sexually explicit material, to include sexually explicit material of underage females, on his home computer. Applicant admitted this allegation in his RSOR. (Item 4.)

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he engaged in conduct that exhibited questionable judgement, unreliability, unwillingness to comply with rules and regulations, and untrustworthiness.

2.a. It is alleged in the SOR that Applicant's conduct, reviewed above in Paragraph 1, above, constitutes the kind of behavior that is of concern to the Government, as it exhibits questionable judgement, unwillingness to comply with rules and regulations, and untrustworthiness. As stated, Applicant admitted SOR allegations 1.a., 1.b., and 1.c., above, and he admitted this allegation in his RSOR. (Item 4.)

2.b. It is alleged in the SOR that Applicant's Special Compartmented Information (SCI) access was revoked by another Government agency in about February 2009, due to that information set forth under paragraph 1., above. Applicant admitted this allegation in his RSOR. (Item 4.)

2.c. It is alleged in the SOR Applicant's spouse is unaware of his actions, as set forth under paragraph 1., above, and he does not want her to know. Applicant admitted this allegation in his RSOR. (Item 4.)

In Item 7, Applicant wrote a 13 page letter, dated January 22, 2010, in which, among other things, he explained, in great detail, the reasons for his fascination with images of underage females in child pornography; they stemmed largely from the love he felt for a childhood female friend. He also expressed his intent not to engage in this conduct in the future because of the potential severe consequences. He wrote, "The thought of being apprehended for this type of crime, the loss of respect of my friends and family, the loss of my career and livelihood and everything I have worked for my whole life would be too much for me to bear. There is absolutely no chance that I will ever download another illegal image again."

While it appears that Applicant's expressed intention to abstain from this conduct in the future is sincere, since this case is an Administrative Determination, I have not had the opportunity to assess the credibility of the Applicant in person, nor has any independent evidence concerning Applicant's character been submitted, so it is difficult to find his stated intention controlling. Additionally, Applicant's grave concern over having this information become public has the great potential to make him subject to coercion and undue influence.

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 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 over-arching 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 Conduct

It has been established by substantial evidence that Applicant engaged in the kind of sexual behavior that is of concern to the Government, as it is criminal conduct, and it exhibits a lack of discretion and good judgement. Applicant engaged in the downloading on his home computer of sexually explicit images of underage females for a ten year period from 1998 to 2008. Viewing images of underage females for sexual

gratification is criminal conduct. He also downloaded sexually explicit images of underage females on his work computer from 1997 to October 2000. While Applicant has stated that he intends to abstain from this conduct in the future, and the conduct has stopped in the last two years, when I consider the frequency and longevity of his sexual history and the fact that he continued to engage in the conduct at home, after he was discovered to be engaged in this conduct at his place of employment. I cannot conclude that he has established a pattern of significant sexual abstinence. Additionally, and most significantly, I find that Applicant is vulnerable to coercion because his wife is unaware of his conduct, and he has indicated his great concern that this conduct not become known by the public.

Under AG ¶ 13 (a) “sexual behavior that is of criminal nature, whether or not the individual has been prosecuted” applies to the facts of this case. AG ¶ 13 (d) also applies because Applicant has admitted that his spouse is unaware of his actions that are the subject of this case, and he does not want her to become aware. That certainly has the potential to make Applicant “vulnerable to coercion, exploitation or duress.” Finally, AG ¶ 13 (d) applies because Applicant “engaged in sexual behavior that reflects lack of discretion or judgement.”

Regarding mitigating conditions under AG ¶ 14, I cannot find that Applicant’s “behavior occurred prior to or during adolescence,” or that “the sexual behavior happened so long ago or under such unusual circumstances that it is unlikely to recur,” and since it is illegal, I do not find it “consensual or discreet.” Finally, since Applicant’s wife is still unaware of his conduct, it is not applicable that “the behavior no longer serves as a basis for coercion, exploitation, or duress.” Therefore, no mitigating condition under AG ¶ 14 can be found to apply here. Paragraph 1, Guideline D is found against Applicant.

Guideline E, Personal Conduct

With respect to Guideline E, the evidence establishes that Applicant engaged in conduct, which considered as a whole exhibits questionable judgement, unreliability, unwillingness to comply with rules and regulations and a lack of candor. I resolve Paragraph 2, Guideline E, against Applicant.

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, including all of the reasons cited above as to why the Disqualifying Conditions apply and no Mitigating Condition is applicable. Also, as reviewed above, because this case is an Administrative Determination, I have not had the opportunity to assess the credibility of the Applicant in person, nor has any independent evidence concerning Applicant's character been submitted. Therefore, I find that the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated 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 D:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.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.

Martin H. Mogul
Administrative Judge