



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



In the matter of:)
)
) ISCR Case No. 10-08550
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: Stephen Douglas Gardella, Esq.

December 28, 2011

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant is a 41-year-old employee of a defense contractor. Applicant has not mitigated the security concerns raised by his Personal Conduct and his Sexual Conduct. He falsified his April 2010 e-QIP and viewed sexually explicit materials involving minors. Eligibility for access to classified information is denied.

Statement of the Case

On July 20, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E, Personal Conduct, and D, Sexual Behavior. The action was taken under Executive Order (EO) 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 after September 1, 2006.

Applicant answered the SOR on August 12, 2011, and requested a hearing before an administrative judge in the instant matter. The case was assigned to me on October 5, 2011. DOHA issued a notice of hearing on October 12, 2011, and scheduled

the hearing for October 26, 2011. Applicant requested a continuance and it was granted. On October 20, 2011, an Amended Notice of Hearing was issued, rescheduling the hearing for November 7, 2011. The hearing was held as scheduled. The Government offered Exhibits (GEs) 1 through 3, which were admitted without objection. The Applicant offered Exhibits (AEs) A through M, which were admitted without objection, and testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on November 17, 2011.

Findings of Fact

Applicant denied all of the allegations in the SOR. (Answer.) After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 41-year-old employee of a defense contractor. He has worked for his current employer since 1990. He has a bachelor's degree from one of the most prestigious schools for his field of study in the United States, and excelled academically during his years of schooling. He has held a security clearance since September 2001. He is married and has a seven-year-old son. (GE 1; AE E; AE F; Tr. 24-25, 57, 73-74.)

Prior to December 2009, Applicant held a program access clearance, which was granted in May 2008. During the period June 25, 2009, through July 13, 2009, Applicant underwent three polygraph interviews in relation to his program access clearance. He indicated that he was given three polygraphs because, "I guess whoever was doing the review felt that it wasn't - - they didn't get the right answers. So they needed to check on certain answers." Each polygraph consisted of a pre-polygraph interview and the polygraph examination. Applicant indicated that he was nervous during the polygraph examinations, but he answered truthfully to all of the questions. (GE 3; Tr. 33-43.)

During Applicant's second pre-polygraph interview, Applicant indicated that he had viewed pornography. He was further questioned on the content of the pornography, including questions on whether the pornography included minors. (GE 2; Tr. 33-44.)

In December 2009, Applicant received a letter advising him that his program access was revoked. The specific reasons for the revocation were listed as follows:

During your polygraph interviews, conducted on 25-26 June 2009 and 13 July 2009, you admitted to downloading and viewing child pornography. You admitted to downloading seven videos of girls under the age of 18 engaged in sexual activity with adult males onto your home computer from 1999 to June 2009. These videos were found when you accessed various adult pornography websites . . . You indicated that you watched each video once and then deleted them from your home computer.

During the same interview, you stated that from 1998 to 2006, you also downloaded five pictures of girls that you believed to be 15-16 years old performing sex acts with adult males. These images were taken from

various links connected to adult pornographic websites. You saved these images on your home computer for one or two days prior to deleting them. (GE 3.)

In August 2010, Applicant was interviewed by a special investigator for the Office of Personnel Management in connection with his security clearance. As a result of that interview, he signed an affidavit that addressed the prior revocation of his program access. On it, he discussed the allegations made in the December 2009 revocation letter. In the affidavit he stated, "I have learned my lesson, and promise to never look at or download any child porno again." (GE 2; Tr. 45-46, 79-81.)

At hearing, Applicant contended that his admissions as stated in the revocation letter of December 2009 took his statements out of context. He asserted that when he was asked if he viewed under age women, he answered, "Well I can't answer that for sure. I reasonably assume that, yes, these women are over 18," yet the person conducting the interview pressed him for more information. He explained that his belief at the time was that he didn't know for sure whether the women in the images were 18 years old or older. (Tr. 33-44.)

Applicant presented disclaimers from the websites he allegedly visited which indicate all models appearing in the photos and movies are 18 years or older. However, the disclaimers were only obtained in the week prior to the hearing and historical disclaimers dating to when the images and videos were downloaded and viewed were not offered into evidence. (AE G; AE H; Tr. 65-67.)

Additionally, on April 21, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On this document, he was asked in Section 25: Investigations and Clearance Record, "b. To your knowledge, have you EVER had a clearance or access authorization denied, suspended, or revoked; or been debarred from government employment? If "Yes," give the action(s), date(s) of action(s), agency(ies), and circumstances. Note: An administrative downgrade or termination of a security clearance is not a revocation." Applicant answered this question, "No." (GE 1.)

Applicant claims he initially answered, "Yes," to Section 25.b. because he had his program access clearance revoked in December 2009. He indicated that his facility security officer (FSO) who reviewed his e-QIP instructed him to change his answer to, "No," after she could not find a record of his revocation in his security files. Applicant had difficulties remembering the FSO's name and he did not provide a copy of the first e-QIP he allegedly submitted or a statement from the FSO to support this claim. (GE 1; Tr. 28-32, 55-56.)

Applicant testified that his wife and some of his co-workers are aware of these allegations. He presented a number of letters of support that show Applicant is well respected by his supervisors, co-workers, friends, mother-in-law, and his wife. He is considered to be honest and moral. Of his letters of recommendation, it is unclear if each of the authors knew of the specific allegations involved in this case (although a few of the letters refer to knowledge of accusations without specifically addressing what they

are). He also presented documentation of numerous awards, certificates, and accolades he received while working for his present employer. (AEs A through D, AE F; AEs I through M.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be 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, administrative judges apply the guidelines 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.

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 the applicant or proven by Department Counsel." The applicant 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 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 EO 10865 provides that adverse 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 E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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. The following disqualifying conditions are potentially applicable:

- (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;
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;
- (c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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; and
- (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.

The evidence shows that Applicant has made contradictory statements to the government concerning relevant facts in this case with respect to both his viewing of pornographic materials depicting minors and his answer to Section 25.b. on his April

2010 e-QIP. He admitted downloading pictures and videos from the internet which depicted underage females engaged in sexual acts during a pre-polygraph interview. He gave a detailed explanation that he downloaded seven videos and five pictures of underage girls performing sex acts. He again admitted he viewed minors engaged in sexual acts in his affidavit when he promised, "to never look at or download any child porno *again*." (Emphasis added.) However at hearing, he denied admitting viewing underage women. Instead, he asserted that the women must have been 18-years-old or older due to the disclaimers on the websites. He indicated that he only told the interviewer that it was possible some of the women were not of age and that he could not be sure of their ages. His testimony at hearing was not credible. There is no proof the disclaimers were on the websites from 1998 to 2009. Applicant's inconsistent statements indicate he exhibits questionable judgment and candor. Further, after his program clearance was revoked, he failed to disclose that revocation on his April 2010 e-QIP. Applicant has not shown himself to be trustworthy and could be vulnerable to exploitation, manipulation, or duress. The Government has established sufficient concern under AG ¶¶ 16(a), 16(b), 16(c), and 16(e) to disqualify Applicant from possessing a clearance.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (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 positive 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.

After considering the mitigating conditions outlined above in AG ¶ 17, it is apparent that none of them apply. Applicant did not make prompt or good-faith efforts to correct his falsification or concealment. Instead, he denied he intentionally falsified the

e-QIP and made semantic arguments which in essence retracted his statement that he viewed underage girls performing sex acts. He provided no evidence other than his self-serving testimony that indicates he was ill-advised in completing his e-QIP. His self-serving claim that the FSO advised him to input, "No," on the e-QIP is not credible, given his difficulty in being honest with the Government on the issue of viewing child-pornography. While his lack of judgment displayed in his choice to download underage girls performing sex acts last occurred about two years ago, Applicant has done nothing to show that similar lapses in judgment are unlikely to recur. He failed to take responsibility for his actions and has not demonstrated concrete steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress. Applicant has not provided information in this record to show that he has met his burden of proof for mitigation of his personal conduct.

Guideline D, Sexual Behavior

The security concern relating to the guideline for Sexual Behavior is set out in AG ¶ 12:

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 ¶ 13 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

Appellant has clearly engaged in sexual behavior that reflects a lack of discretion and judgment. He downloaded seven videos and five pictures of underage girls performing sex acts. The above disqualifying condition has been established.

AG ¶ 14 provides conditions that could mitigate security concerns. The following are potentially applicable:

(b) the sexual behavior happened so long ago, so infrequently, or under such 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.

None of the above mitigating conditions apply. Appellant's conduct was not an isolated incident, but occurred multiple times between 1998 through 2009. Further, by arguing that he was unsure whether the women in the videos and pictures were in fact under 18, in essence he asserts that he did not do anything wrong. Without acknowledging wrong-doing, I cannot hold that such actions are unlikely to recur, despite his promises to, "never look at or download any child porno again." It is possible that his past conduct could serve as a basis for coercion in the future. While the downloading of seven videos and five pictures of underage girls performing sex acts was done in private at his residence, the sexual victimization of the children in those photos and videos was in no way consensual.

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 relevant 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 Guidelines E and D in my whole-person analysis.

Applicant has performed successfully at work, receiving many awards and recognition for his performance. He is trusted by his supervisors, friends, colleagues, and family. However, his deliberately dishonest conduct and sexual behavior indicates a lack of judgment and trustworthiness, and raises doubts as to whether he understands what is required of those who hold security clearances. He is a mature individual who is accountable for his voluntary choices, and failed to demonstrate either rehabilitation or reduced potential for pressure, coercion, exploitation, or duress.

Overall, the record evidence fails to overcome the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative 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, Guideline E: | AGAINST APPLICANT |
| Subparagraph 1.a.: | Against Applicant |
| Subparagraph 1.b.: | Against Applicant |
| Paragraph 2, Guideline D: | AGAINST APPLICANT |
| Subparagraph 2.a.: | 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.

Jennifer I. Goldstein
Administrative Judge