



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



In the matter of:)
)
) ISCR Case No. 10-10338
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: Rick B. Levinson, Esq.

October 24, 2011

Decision

COACHER, Robert E., Administrative Judge:

Applicant has not mitigated the Sexual Behavior security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On May 27, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline D, Sexual Behavior. DOHA acted 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 within the Department of Defense on September 1, 2006.

Applicant answered the SOR on June 21, 2011, and requested a hearing before an administrative judge. The case was assigned to me on July 20, 2011. DOHA issued a notice of hearing on August 2, 2011, and the hearing was convened as scheduled on August 24, 2011. The Government offered exhibits (GE) 1 through 8, which were

admitted without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) I. He also offered a demonstrative exhibit that was marked as HE II. Applicant testified, called three witnesses, and submitted exhibit (AE) A at the hearing. The exhibits were admitted into evidence without objection. The record was held open and Applicant submitted AE B through F that were admitted into evidence with no objection. Department Counsel's forwarding document is marked as HE III. DOHA received the hearing transcript (Tr.) on September 9, 2011.

Procedural Ruling

Department Counsel moved to amend the SOR to withdraw the allegations contained in SOR ¶¶ 1.a and 1.g. The motion was granted and the remaining SOR allegations were renumbered ¶¶ 1.a through 1.i accordingly.¹

Findings of Fact

Applicant admitted all the factual allegations in the SOR, except for the diagnosis of "mild schizoid and obsessive features" contained in SOR ¶ 1.i, and those admissions are incorporated as findings of fact. After a review of the pleadings, testimony and admitted exhibits, I make the following findings of fact. Applicant is a 54-year-old employee of a defense contractor. He has been married 34 years and has two adult children. He has a master's of business administration (MBA) degree. He spent 20 years in the Air Force, retiring in 1995. He held a security clearance while he was in the Air Force. He has worked for his current employer since 2004.²

In January 2009, Applicant was using his home computer to chat with, what he thought at the time was, a 14-year old girl. He thought this because she told him she was 14 years old. He was also using a web-camera at the time. He sent nude web-camera images of himself to the girl. It turned out that the underage girl was really an undercover detective working for the local district attorney's office. After Applicant sent the photos, the detective identified herself and requested that he turn himself into authorities. Applicant complied with that request and was arrested for internet exploitation of a child, a felony, among other charges. He ultimately pleaded guilty to the misdemeanor offense of indecent exposure and the remaining charges were dismissed. He was placed on supervised probation for three years. His probation is scheduled to end in June 2012. He was also required to attend court ordered counseling, although he started attending the counseling before it was mandated by the court. He was also required to register as a sex offender.³

During the course of his counseling, he was required to supply treatment intake information to include his sexual history. He disclosed that he engaged in exhibitionism

¹ Tr. at 8.

² Tr. at 106, 121, 130; GE 1.

³ Tr. at 118, 142; GE 4.

as a youth by riding his bike to deliver newspapers while he was naked (being covered only by the newspaper bag). He was about 13 years old at the time and engaged in this action about five times. More recently, in 2008, he walked outside of his house while naked to take his dog out. A neighbor saw him as he was naked outside, to whom he later apologized. He further disclosed that he had an extra-marital affair in 1999. The affair was with a coworker and lasted six to eight months. He disclosed that he masturbated at work one time (in a bathroom stall) in 1999 and about eight times while driving between 2000 and 2008. He disclosed that between 2007 and 2009 he engaged in sexually oriented computer internet chat and web-camera activities with people who could have been under 15 years old on about 50 occasions. He started out chatting about sexual-related topics and progressed to masturbating while on-line. In late 2007 or early 2008, he was chatting with a person on-line when that person began sending him what he believed was child pornography. He claims he had not requested this child pornography and immediately stopped his chatting with this person upon receipt of it. He also insured his computer did not retain those pictures. Prior to his arrest, he had not disclosed this information to anyone (other than the extra-marital affair). He later admitted, during his security clearance interview, he had struggled with an internet pornography addiction for about 18 months prior to his arrest in January 2009.⁴

Applicant's court-ordered therapist (JM) testified about the treatment Applicant has received. JM is a full level treatment provider under the Sex Offender Management Board of the state. His organization specializes in the treatment of sex offenders. The treatment program length is between four and eight years. The treatment is done through a community supervision team (CST) and polygraphs are used to verify sexual histories and specific areas of concern to insure full disclosure by the patient. Applicant started treatment in April 2009 and was seen once or twice a week. JM related that Applicant initially struggled with program restrictions, but soon became a leader for other group members. JM believes Applicant fully disclosed all of his past aberrant sexual behavior because he passed polygraphs concerning his answers. Testing showed no current deviant sexual arousal patterns by Applicant. JM reported that Applicant has been compliant with his treatment plan. There have been no issues concerning inappropriate computer uses over the past two years. JM believes the four to eight years for program completion is the appropriate time for Applicant to be in the program. He also believes treatment is necessary for the Applicant at this time. Once Applicant's probation ends, JM's organization has no control over whether he continues treatment. Applicant indicated that further voluntary treatment after his probation ended would be dependent on his finances. The treatment costs \$400 per month.⁵

Applicant's probation officer (DH) testified about Applicant's probation status. DH has been a probation officer for over four years and has specifically worked in sex offender probation for two years. He is also a former service member who held a security clearance. It is DH's opinion that Applicant should retain his security clearance. DH described Applicant as cooperative and forthcoming. He initially saw Applicant

⁴ Tr. at 115, 126, 133-134, 136; GE 4, GE 8.

⁵ Tr. at 35-36, 38-40, 45, 49-50, 56, 60; 69, 124; GE 8.

about every week, but now only sees him every six weeks. DH described two probation violations that were not serious enough for him to report to the court. One violation was when Applicant was naked in his outdoor hot tub. DH specifically told Applicant not to engage in this behavior. The other violation happened when Applicant watched some pornography on a hotel television. Applicant reported both violations to DH. DH recommended approval for allowing Applicant to travel out of the country for work purposes. At this time, DH has no reason to seek an extension of Applicant's probation beyond June 2012.⁶

Applicant's wife testified that she has known Applicant for 38 years. She has held a security clearance when she worked for a government contractor in the past. She was not aware of Applicant's sexual activities until he was arrested. She believes that his treatment has helped him change for the better.⁷

Applicant submitted letter from a psychologist who opined the Applicant "does not appear to meet the diagnostic criteria for schizoid personality disorder." Applicant also presented three certificates of appreciation for his work related accomplishments. He also presented a letter from his work supervisor who describes applicant as a trusted subordinate and top performer.⁸

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 that 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

⁶ Tr. at 73-74, 78-83, 98-99; AE A.

⁷ Tr. at 106-111.

⁸ AE B-F.

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 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 about 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* Executive Order 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 the Sexual Behavior disqualifying conditions under AG ¶ 13 and have determined the following are relevant:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;

(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 engaged in criminal activity when he used the internet to contact minors. He then conducted sexually related chats and masturbated on numerous occasions. He also masturbated in public places, including in the workplace, on more than one occasion. Applicant's actions were not revealed until he was arrested for having illegal internet sexual contact with an undercover detective posing as a 14-year old girl. All the disqualifying conditions listed above are triggered by Applicant's conduct.

I have considered all the mitigating conditions contained in AG ¶ 14 and determined the following are relevant:

(a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;

(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 most of Applicant's exhibitionism was when he was an adolescent, his most recent incident was in 2008. Additionally, he had numerous internet sexually-related contacts with minors. AG ¶ 14(a) does not apply. Applicant has a history of sexually deviant behavior that ranges from his adolescent years through his arrest for internet sexual conduct with a minor in 2009. His behavior was frequent and at this juncture it is too early to determine whether his behavior is likely to recur. He is still on probation and the completion of his sexual therapy treatment is still two to six years away. AG ¶ 14(b) does not apply. Because of Applicant's complete disclosure of his sexual history during the course of his treatment, there is no longer a concern that his past behavior could be used to coerce or exploit him. AG ¶ 14(c) applies. Applicant's use of the internet to chat with minors about sexual matters and masturbate while doing so was not private or discreet. AG ¶ 14(d) does not 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 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 relevant 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 comment.

I considered the serious nature of Applicant's secret internet sexual activities that only came to light when he was arrested while sexually chatting with a detective who was posing as a 14-year old girl. He engaged in this behavior numerous times. Applicant was in his late forties and fifties when he acted in this manner. I have also considered the progress he has made through his sexual therapy treatment and the positive recommendation from his probation officer. However, despite those positive factors, there are other troublesome facts that come into play. One is that despite a specific direction by his probation officer not to engage in nude hot tub use in his back yard, Applicant did so anyway. Additionally, his counselor feels that Applicant needs further treatment at this time and that a full treatment program should last between four and eight years for the Applicant. He is now in his second year of treatment. At this time, Applicant has not established that his behavior will not reoccur in the future and thereby create a security concern. Although some mitigation is present, it is too soon to tell whether Applicant has changed his behavior in these areas of concern.

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 has not mitigated the Sexual Behavior 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

Subparagraphs 1.a - 1.i: 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