



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 10-10726

Appearances

For Government: Jeff A. Nagel, Department Counsel
For Applicant: Alan V. Edmunds, Attorney At Law

November 9, 2012

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) dated July 28, 2012. (Government Exhibit1.) On April 9, 2012, the Defense Office of Hearing and Appeals (DOHA), pursuant to Executive Order 10865 (as amended), and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the reason why DOHA could not make the preliminary affirmative finding under the Directive that is it clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR on May 2, 2012, and he requested an administrative hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on July 20, 2012. A notice of hearing was issued on July 26, 2012, and the hearing was scheduled for September 19, 2012. At the hearing the Government presented eight exhibits, referred to as Government Exhibits 1 through 8, which were admitted without objection. The Applicant called three witnesses and

presented seventeen exhibits, referred to as Applicant's Exhibits A through Q, which were also admitted without objection. He also testified on his own behalf. The record remained open until close of business on September 26, 2012, to allow the Applicant the opportunity to submit an additional document. The Applicant submitted one Post-Hearing Exhibit, referred to as Applicant's Post-Hearing Exhibit A, which was admitted without objection. The official transcript was received on September 28, 2012. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

FINDINGS OF FACT

The following Findings of Fact are based on the Applicant's Answer to the SOR, the testimony and the exhibits. The Applicant is 56 years old, married, and has a Bachelor of Science Degree in Engineering. He is employed by a defense contractor as a Structural Engineer and is seeking to obtain a security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). After a complete and thorough review of the evidence in the record, and upon due consideration of the same, the following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness 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.

Paragraph 2 (Guideline D - Sexual Behavior). The Government alleges that the Applicant is ineligible for clearance because he has engaged in sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects a lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress. All of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.

The Applicant served on active duty in the United States Army from May 1982 to May 1985. He then served for a year in the Army reserves. He began working for his current employer in 1990, and has held a security clearance for eighteen years.

He has been married for almost 25 years. He explained that his sexual relationship with his wife has always been limited. His wife suffers from some medical problems, and they have sex only once a month. Their sexual infrequency has been disappointing to the Applicant and over the years he has suffered from loneliness. (Tr.

p. 61.) To mask his pain, he self-medicated himself by viewing pornography and masturbating which became an addiction. Although he testified that he started masturbating at the young age of 13, he started masturbating again on a regular basis in 1998. At that time, he was masturbating to images of nude women in magazines or movies. He also found that when he encountered stress, it triggered his addictive behavior. To get help for his addiction, he attended therapy at his church with his wife for about six months. (Tr. p. 54.)

From 1998 to 2005, the Applicant received no therapy or counseling for his pornography addiction. He soon learned that he could find pornography on the computer and he became addicted to internet pornography. He started viewing images of nude women on the computer at home. By 2000, his pornography viewing had escalated to the point where he was viewing pornography at work. From 2000 to 2005, he continued to view pornography, namely images of nude adult women several times a week at work. He testified that at that time he was looking for oral sex. (Tr. p. 87.) On at least 30 occasions, he also viewed nude females who could have been underaged on his company computer. (Tr. p. 65.) He stated that while accessing adult pornographic sites at work he also viewed child pornography, but immediately discarded them. (Government Exhibit 2.) He stated that he would sit in his office, lock the door, view pornography and masturbate. (Tr. p. 65.) At times he spent 8 hours a week at work doing this. This misconduct was in violation of company policy and procedure. (Government Exhibit 8.)

Between 2000 to 2005, he created a power-point presentation of adult and underaged female pornographic images on his company computer. He would masturbate every other day in his office while viewing the power-point presentation. (Tr. p. 65.)

In 2004, his youngest son, who was nine years old at the time, became ill with a tumor, that required an operation. It took his son about six years to fully recover. When his son got sick, the limited sex that he and his wife did have ceased completely, as her focus turned to their son. Their son's illness coupled with the growing distance between he and his wife further triggered his addictive behavior.

In mid-December 2005, during a routine company "computer sweep," a security search of the Applicant's computer disclosed the fact that he had been viewing pornography at work on his company computer. (Government Exhibits 2 and 7.) In February 2006, the Applicant received a Letter of Reprimand from his employer for using the computer to access pornographic web sites and for downloading sexually explicit materials. In addition to the Letter of Reprimand, he was demoted from Manager to Senior Engineer, he lost internet access, and was suspended without pay for three weeks. (Tr. pp. 64-65.) The Applicant testified that he knew that his conduct was a violation of company rules and Department of Defense security clearance regulations. (Tr. p. 83.) He also knew that it was morally wrong. (Applicant's Exhibit G.)

From November 2005 to October 2009, the Applicant abstained from pornography and was involved in a program called "Every Man's Battle," a weekend intensive program that was followed by a Sunday morning mens group at his church. The Applicant did not view pornography again until November 2009, first at home and then over time at work. He explained that at that time his daughter was struggling with some emotional and mental health issues and this triggered his pornography addiction.

In late May, early June 2010, he was scheduled to undergo a polygraph examination. Prior to the examination, the investigator confronted the Applicant about his pornography addiction and the Applicant gave him the best estimates of his pornography use. At that time the Applicant told the investigator that he viewed pornography at work from February 2010 to May 2010. At a subsequent interview with a different investigator, the Applicant had time to think about it and gave a more accurate answer. This time he told the investigator that he viewed pornographic materials from October 2009 to April 2010. (Tr. p. 58-59.) The Applicant contends that at no time did he intentionally provide false material information to the Government.

Since 1998 when he first received counseling at his church for his pornography addiction, the Applicant has received therapy on at least four other occasions. Following the disciplinary action he received at work, the Applicant received therapy from his company's Employee Assistance Program for one year from a licensed Marriage and Family Therapist, who is well acquainted with addictions, both chemical and non-chemical, including sexual addictions, as well as the recovery process. The Applicant saw the therapist 33 times in 2006, 4 times in 2007, 1 time in 2008 and 2009, and 2 times in 2011. The therapist states, "The Applicant has a program of recovery that he must continue to work." (Applicant's Exhibit G.) In late 2009 to May 2010, he was treated by his therapist. (Government Exhibit 4 and Tr. p. 71.)

In 2010, the Applicant started an in-depth character development program called "Celebrate Recovery" step study. He has completed the 12-step program and received a coin to signify this accomplishment. He has also been the leader of the 12-step program and received a coin to signify this accomplishment. He now has 28 months abstaining from pornography. He has received a coin to signify 24 months for this accomplishment. The Applicant testified that the sober recovery program has helped him to start healing. His pornography is not a secret anymore. He has told his wife and children, his church and those he works with. He has learned to communicate with his wife and family more, and they are supporting him. (Tr. p. 76.) For the past four months, he has been receiving therapy. (Tr. p. 71-72.)

Paragraph 3 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The viewing of underaged female pornographic images at work on his company computer and in a power-point presentation he created on his company computer, is criminal. Although slight, there is evidence that the Applicant did view underaged female pornography at work.

Mitigation.

Two church group members, both of whom are in the Celebrate Recovery program, one who has known the Applicant for 26 years, and the other who has known him for one year, testified that they consider the Applicant to be honest and trustworthy. (Tr. pp. 34 - 49.)

The Applicant's wife testified that she is aware of her husband's proclivities. She believes that he has changed and is a different man now. He now communicates with her and the family and their relationship has improved. She has confidence in his ability to abstain from pornography in the future. She believes he is trustworthy, reliable and responsible.

A psychological evaluation of the Applicant dated September 10, 2012, states among other things that, "[The Applicant] is aware that, given his current life situation and the "addiction pull" he experiences, he must be vigilant to not take recovery for granted and continue treatment, not only for addiction proneness but to reduce the stressors, which in the past have been triggers, as well as to improve his support systems and healthier coping mechanisms." The psychologist does not believe the Applicant to be a security risk. (Applicant's Exhibit Q and Applicant's Post-Hearing Exhibit A.)

Letters of recommendation from personal and professional associates of the Applicant that include church associates, long time friends, coworkers, Celebrate Recovery associates, a counselor, a pastor, and the leader of his 12-step program, collectively indicate that the Applicant exhibits courage, openness, honesty and frankness about his addiction to pornography. He has taken his problem seriously and addressed the issue publicly. He has been and continues to work hard to overcome his compulsion. He is said to be a good leader who is trustworthy. He is a highly respected member of his church and also a hard worker on the job. (Applicant's Exhibits A through K.)

The Applicant has received a number of awards, commendations and certificates of achievement from his employer for his outstanding performance on the job. (Applicant's Exhibit L.)

Applicant's Manager Close-Out Evaluations for the years 2009, 2010, and 2011 reflect a variety of ratings depending on the duties and level of skill involved. The evaluations reveal that he either "met some expectations", "met expectations" "exceeds expectations" or "far exceeds expectations" in various categories. Overall his evaluations are favorable. (Applicant's Exhibits N, O, and P.)

POLICIES

Enclosure 2 of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline E (Personal Conduct)

15. *The Concern.* 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.

Conditions that could raise a security concern:

16.(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;

16.(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of:

2. disruptive, violent or other inappropriate behavior in the workplace;
3. a pattern of dishonesty or rule violations;
4. evidence of significant misuse of Government or other employer's time or resources.

Conditions that could mitigate security concerns:

None.

Guideline D Sexual Behavior

12. *The 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.

Conditions that could raise a security concern:

13.(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

13.(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;

13.(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;

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

Conditions that could mitigate security concerns:

None.

Guideline J (Criminal Conduct)

30. *The Concern.* Criminal activity creates a doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Conditions that could raise a security concern:

31.(a) a single serious crime or multiple offenses;

31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Conditions that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct;
- b. The circumstances surrounding the conduct, to include knowledgeable participation;
- c. The frequency and recency of the conduct;
- d. The individual's age and maturity at the time of the conduct;
- e. The extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavioral changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states:

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination.

The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865,

“Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned.”

CONCLUSIONS

In the defense industry, a security clearance is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for such access may be involved in instances of Personal Conduct, Sexual Behavior and Criminal Conduct, which demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has been engaged in poor Personal Conduct (Guideline E), Sexual Behavior (Guideline D), and Criminal Conduct (Guideline J). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

The evidence shows that the Applicant's internet pornography addiction at work began in 2000 and continued until 2005. He did not report this misconduct to his company. It was discovered by his employer during a routine computer security check that he was viewing pornography on his company computer during work hours. His conduct knowingly violated both DoD and company policy and procedure. By viewing images of underaged girls, he also engaged in criminal conduct. Despite the fact that he was severely disciplined for the misconduct, he started viewing pornography at work again in 2009 that continued until 2010. Since 2010, he has not viewed pornography and he has been abstinent now for 28 months. He is obviously making some progress in treatment now. He recognizes his compulsion, takes it seriously, and is dealing with it in a more constructive way, which he is commended for.

Admittedly, he has had some difficult challenges in life with his family. His motivation for the intentional misuse of the company computer system was for sexual gratification to cover the emotional pain he was experiencing in other areas of his life. He must, however, learn to deal with these stresses without turning to internet pornography at work and on company computers. Throughout this period, he has

undergone various types of therapy and counseling, both individual and group, and it is the opinions of the professionals that he must continue to be involved in his recovery program or he will find himself in trouble again. Based upon the extent of his addiction and his history of relapses after extended periods of abstinence, I believe that more time in rehabilitation is needed before the Government can be guaranteed that the Applicant will be responsible and trustworthy and will not return to his old ways.

I find the Applicant to be honest and credible. I do not believe that he intentionally provided false material information to the Government investigators at any time concerning his viewing of pornography at work. Accordingly, this allegation is found for the Applicant.

Under Guideline E, Personal Conduct, Disqualifying Conditions 16.(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 16.(d) *credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of: 2. disruptive, violent or other inappropriate behavior in the workplace; 3. a pattern of dishonesty or rule violations; 4. evidence of significant misuse of Government or other employer's time or resources* apply. None of the mitigating conditions are applicable. Accordingly, I find against the Applicant under Guideline E (Personal Conduct.)

Under Guideline D, Sexual Behavior, Disqualifying Conditions 13.(a) *sexual behavior of a criminal nature, whether or not the individual has been prosecuted*; 13.(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*; 13.(c) *sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*; and 13.(d) *sexual behavior of a public nature and/or that reflects lack of discretion or judgment* apply. None of the mitigating conditions are applicable. Accordingly, I find against the Applicant under Guideline D (Sexual Behavior).

Under Guideline H, Criminal Conduct, Disqualifying Conditions 31.(a) *a single serious crime or multiple lesser offenses*, and 31.(c) *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted* apply. None of the mitigating conditions are applicable. Consequently, I find against the Applicant under Guideline J (Criminal Conduct).

I have also considered the “whole-person concept” in evaluating the Applicant’s eligibility for access to classified information, including his favorable witnesses and letters of recommendation. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole-person assessment of poor judgement, untrustworthiness, unreliability, lack of candor, an unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard classified information.

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1, 2, and 3 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: Against the Applicant.

Subpara. 1.a.: For the Applicant.

Subpara. 1.b.: Against the Applicant.

Subpara. 1.c.: Against the Applicant.

Subpara. 1.d.: Against the Applicant.

Subpara. 1.e.: Against the Applicant.

Subpara. 1.f.: Against the Applicant.

Subpara. 1.g.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: Against the Applicant.

Paragraph 3: Against the Applicant.

Subpara. 3.a.: Against the Applicant.

DECISION

In light of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge

