



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



In the matter of:)
)
) ISCR Case No. 11-03500
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

December 29, 2011

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for a security clearance to work in the defense industry. Between 2006 and 2010, Applicant regularly viewed child pornography on his home computer. He does not take responsibility for his actions. Nor has he made any efforts toward rehabilitation or permanent behavioral changes. As such, he remains vulnerable to coercion, exploitation, and duress. Clearance is denied.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on August 10, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a statement of

¹ This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

reasons (SOR) explaining that it was not clearly consistent with the national interest to continue Applicant's access to classified information. The SOR detailed the factual bases for the action under the adjudicative guidelines for sexual behavior (Guideline D) and personal conduct (Guideline E).

Applicant answered the SOR and requested a decision without a hearing. Department Counsel submitted the Government's written case on September 21, 2011. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on September 29, 2011. He did not object to the items appended to the Government's brief, which are admitted as Government's Exhibits (GE) 1 through 6. Applicant responded to the FORM on October 14. His submission is admitted as Applicant's Exhibit A, without objection from Department Counsel. The case was assigned to me on November 1, 2011.

Procedural Matters

In his response to the FORM, Applicant made statements that could be construed as a request for a hearing. To clarify the issue, I conducted a conference call with Department Counsel and the Applicant. After a lengthy conversation, giving Applicant the opportunity to ask procedural questions, he decided to proceed without a hearing.

Findings of Fact

Applicant is a 53-year-old employee of a government contractor. He is divorced and has no children. Applicant has been employed as a test engineer for the same company since 1984. He has held a security clearance for 25 years and has had access to sensitive compartmented information (SCI) since at least 1995.²

Applicant underwent two polygraph interviews as part of the periodic reinvestigation for his SCI clearance with another government agency (OGA) in 2010. During the course of the two interviews, he admitted viewing child pornography two to three times per week on his home computer from 2006 up to the weekend before the polygraph interviews in January 2010. He admitted that he deliberately sought out pornographic images of children between the ages of 13 and 17, by executing Internet searches using the terms "teen" and "teenager." He also admitted that he masturbated to these images or thoughts of these images several times per week. On at least one occasion, he admitted viewing a pornographic image of a child between 10 and 12 years old. Based on this information, the OGA, in a clearance decision statement dated April 10, 2010, revoked Applicant's SCI access citing sexual behavior and criminal conduct concerns.³

² GE 5 – 6.

³ GE 6.

After losing SCI access, DoD suspended Applicant's security clearance in December 2010. In January 2011, an investigator from the Office of Personnel Management (OPM) interviewed Applicant about the child pornography issues. At the completion of the interview, Applicant executed an affidavit in which he recanted his previous admissions. In the affidavit, Applicant admitted accessing a "teen pornography site" 20 to 30 times expecting to see pornographic pictures of 18 and 19-year-old adults. He was surprised to see pictures of younger children on the site, but he continued to look through the images because he could not verify their ages. He reiterated this statement in his response to the FORM. Applicant claims that he did not know that looking at a teen pornography site on his personal computer raised a security issue. He stopped looking at the teen site in March 2010, when he received the denial letter from OGA, which contained "vague references to guidelines."⁴

Applicant insists that he has no interest in child pornography. He further declares that he does not have a problem with pornography of any kind and sees no need for counseling. Pornography, he believes, is a private matter. He admits he would be embarrassed if his friends and family thought he viewed child pornography because it is immoral. Nor does he want to be labeled a pedophile. Applicant believes that he has not done anything wrong or engaged in any behavior that runs afoul of any policy or regulations related to his security clearance. As such, he believes that he is not vulnerable to blackmail or coercion.⁵

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 used in evaluating an Applicant's eligibility for access to classified information.

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." 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 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

⁴ GE 7; AE A.

⁵ GE 7.

the possible risk the applicant may deliberately or inadvertently fail to protect 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

The concern regarding an applicant’s sexual behavior is explained 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 the Guideline may be raised solely on the bases of the sexual orientation of the individual.

AG ¶ 13 delineates the conditions that could raise a security concern and may be disqualifying. Three of the disqualifying conditions are relevant to this case:

- (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 reflect lack of discretion or judgment.

The SOR alleges that Applicant viewed, on the Internet, images of nude children, images of children in sexually provocative poses, and images of children engaged in various sexual acts. Applicant denies the allegation because his admissions to OGA, he avers, are insufficient evidence to invoke the application of any of the sexual behavior disqualifying conditions. Furthermore, Applicant argues that the Government, in particularly DOHA, did not undertake any investigation – such as examining the hard drive on his personal computer – to prove that he actually viewed child pornography. Absent concrete evidence to verify his admissions to OGA, Applicant argues the Government failed to establish a *prima facie* case under Guideline D.

Applicant’s arguments are not persuasive. The Government is required to prove contested facts by substantial evidence – “such relevant evidence as a reasonable mind

might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.”⁶ The documents submitted by the Government, the clearance decision statement from OGA and affidavit executed by Applicant after his OPM interview, satisfy this requirement. Applicant’s self-incriminating admissions cannot be ignored nor do they require independent verification. Although the Government did not submit evidence to prove the allegation 1.a. as written in the SOR, Applicant’s admissions that he routinely viewed child pornography over four years is sufficient to merit the application of the Sexual Behavior Disqualifying Conditions cited above. It is common knowledge that viewing children engaged in pornography is criminal conduct under state and federal law. Given that Applicant has had access to classified information and SCI for many years, his conduct shows an ongoing lack of judgment and disregard for the fiduciary duty he willingly entered into with the Government. His desire to conceal his predilection for child pornography from others underscores his vulnerability to coercion, exploitation, and duress.

The allegations in 1.b. and 1.c. – that Applicant masturbated to images or thoughts of images of child pornography, do not allege conduct that is disqualifying under the sexual behavior guideline. Applicant’s acts of private sexual behavior are incident to the underlying disqualifying conduct – accessing and viewing child pornography. Furthermore, a person cannot be denied access to classified information for the content of their thoughts, no matter how repellant.

None of the Sexual Behavior Mitigating Conditions available under AG ¶ 14 apply. Applicant’s misconduct began during middle age, his acts of sexual misconduct are recent and continued for several years, even during his reinvestigation for SCI access. His viewing of child pornography did not occur under any unusual circumstances, and continues to cast doubt on his current security worthiness. Given the criminal nature of his conduct, it does not matter, as Applicant repeatedly asserts, that he only viewed child pornography in the privacy of his home on his personal computer.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security 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.

⁶ Directive, Additional Procedural Guidance, ¶ E3.1.32.1.

The following disqualifying condition under ¶ AG 16 is relevant to this case:

(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.

Applicant's viewing of child pornography is disqualifying under the same rationale discussed above. Although not disqualifying under the sexual behavior guideline, the allegations that Applicant masturbates to the images and the thoughts of images of child pornography raise concerns under the personal conduct guideline. These facts, if they became known publicly, could serve as a basis for exploitation, coercion, or duress, and affect applicant's reputation and public standing. In fact, Applicant recognizes the social repercussions of his conduct becoming widely known and wishes it to remain private. He does not want to be considered immoral or labeled a pedophile.

None of the mitigating conditions available under AG ¶ 17 apply. Applicant's conduct cannot be classified as minor. Applicant has not taken any steps to reduce his vulnerability to coercion, exploitation, or duress. Instead, he is trying to protect against these risks by concealing his actions from others and couching the matter as "private".

Whole-person Concept

I have significant reservations about Applicant's current reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I have also considered the whole-person factors 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) 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole person concept. Under each guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant viewed child pornography on numerous occasions between 2006 and 2010. He continued to do so even after his SCI polygraph interviews, which indicates that he is unable to control himself or chose not to. His claims that he did not intentionally access child pornography on the Internet is disingenuous. It is not credible that he executed Internet searches using the terms “teen” and “teenager” to find pornographic images of adults. In executing such a broad search, Applicant succeeded in finding the images he was looking for, sexually graphic images of teenage children under the age of majority. Applicant does not take responsibility for the wrongfulness of his actions. He refuses to acknowledge what any reasonable person knows to be illegal conduct. He also refuses to acknowledge significant security concerns raised by his conduct.

Applicant has held a security clearance for 25 years with access to SCI for the past 15 years. He has been through multiple background investigations; he is no rookie to this process. His feigned ignorance of the high standards required of those privileged to have access to classified information italicizes the doubts about his security worthiness. His response to the issues raised confirms an absence of rehabilitation or reform and increases the likelihood that he will continue to engage in this conduct.

An evaluation of applicant’s security worthiness is not limited to his duty hours; off-duty conduct can be considered in evaluating an applicant’s security worthiness.⁷ What Applicant considers his “private” proclivities increases his potential of pressure, coercion, exploitation, and duress. The presence of any such risk is not clearly consistent with the national interests. As such, Applicant’s access to classified information must be revoked.

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
Subparagraphs 1.b. – 1.c.	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a:	Against Applicant

⁷ See, e.g., ISCR Case No. 98-0620 at 3 (App. Bd. Jun. 22, 1999).

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is denied.

Nichole L. Noel
Administrative Judge