



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



In the matter of:)
)
) ISCR Case No. 11-04104
)
)
Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel

For Applicant: *Pro se*

08/31/2012

Decision

MASON, Paul J., Administrative Judge:

In view of the lack of evidence to rehabilitate Applicant’s sexual and larcenous behavior, his deliberate omission of information from his two security application forms in 2004 and 2007, and his deliberate omission of relevant information to a government investigator in December 2010, Applicant has not mitigated the sexual behavior, personal conduct, and criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP, Item 4) on May 25, 2007. He provided signed affidavits to an investigator from the Office of Personnel Management (OPM) on two occasions, December 21, 2010 (Item 5), and January 21, 2011 (Item 6). In his interrogatory response dated June 22, 2011, to DOHA’s request for information that he may have received from another United States government agency (AGA) regarding revocation,

suspension, or denial of a security clearance or sensitive compartmented information (SCI) access, Applicant indicated “yes,” and provided his signature that he had received correspondence from AGA. (Item 7 at 2) He indicated “yes,” and provided his signature that he mailed the requested information to DOHA. (Item 7 at 3)) His signature on page 3 of the form was not notarized. (Item 7 at 3)

On December 7, 2011, DOHA issued a Statement of Reasons (SOR) detailing security concerns under sexual behavior (Guideline D), personal conduct (Guideline E), and criminal conduct (Guideline J). 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), implemented by the Department of Defense on September 1, 2006.

Applicant furnished his notarized answer (Item 3) to the SOR on January 5, 2012. He requested a decision be made on the record in lieu of a hearing. A copy of the Government’s File of Relevant Material (FORM), the Government’s evidence in support of the allegations of the SOR, was sent to Applicant on March 20, 2012. He received the FORM on June 21, 2012. In an attachment to the FORM, he was advised he could respond to the information in the FORM by submitting additional information in rebuttal, explanation, mitigation, or extenuation. His response was due by July 21, 2012. No response was received. The case file was assigned to me on August 8, 2012.

Findings of Fact

The SOR contains five allegations under sexual behavior guideline (SOR ¶ 1), five allegations under the personal conduct guideline (SOR ¶ 2), and one allegation under the criminal conduct guideline (SOR ¶ 3). Applicant admitted all the allegations except for SOR ¶¶ 2.a and 2.b. He supplied no explanations for his admissions or denials.

Applicant is 32 years old. He has been married since November 2006. He has no children. He has been employed by a defense contractor since October 2003. He began his employment as a proposal analyst for almost two years before becoming an information analyst in June 2005. In November 2009, he was promoted to senior systems analyst. He received a bachelor’s degree in June 2003. In December 2009, he was awarded a master’s degree in information technology.

In 2001, Applicant underwent security processing (including a polygraph examination) by AGA for sensitive compartmented access (SCI). On December 11, 2001, he was disapproved for program access based on Director of Central Intelligence Directive, DCID 6/4 issues of personal conduct, criminal conduct, and misuse of information technology systems. During the 2001 security processing with AGA, Applicant admitted intentionally viewing child pornography. He submitted a security clearance application, Standard Form 86, on October 19, 2004. In response to Section

32, Applicant did not disclose that he had been denied access authorization in December 2001. (SOR ¶ 2.b) On May 25, 2007, Applicant submitted an electronic questionnaire for investigations processing (e-QIP). In response to Section 26, Applicant did not disclose that he had been denied access by AGA in December 2001. (SOR ¶ 2.a)

During a security interview with AGA in August 2009 for SCI access, Applicant stated he was not forthcoming in the 2001 polygraph examination because he feared prosecution for any issues he talked about during the polygraph. In the August 2009 interview, Applicant initially stated he had three child pornographic images currently stored on his flash drive. Then, he increased the number of pornographic child images to 20. He noted his wife would be shocked if she knew he was viewing pornography. During the August 2009 interview, Applicant recalled taking office supplies and computer accessories for personal use while working for his current employer. He took two software programs that he used for his graduate course school work. He downloaded proprietary information from his current employer to use as an academic reference.

While he was taking two polygraph examinations in November 2009, Applicant admitted masturbating twice between March 2000 and March 2001: once in the stall of the women's restroom at his workplace where he was an intern in a law office, and once in his female supervisor's office. He also admitted masturbating four times at his current employment location between 2005 and 2009. He admitted viewing adult pornography, but denied viewing child pornography while at work. Following his sexual behavior and theft disclosures during the November 2009 polygraph examinations conducted by AGA, Applicant's SCI access was revoked in February 2010, based on guidelines of personal conduct, criminal conduct, sexual behavior, and misuse of technology systems.

On December 21, 2010, Applicant submitted an affidavit to an OPM investigator. He stated he never concealed or falsified information on any security form used to determine employment eligibility.

Character Evidence

Other than his scholastic record and promotion in November 2009, Applicant provided no other character evidence, e.g., certificates of recognition, cash awards, regarding his job performance. He provided no character evidence from coworkers or supervisors.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. Each guideline lists potentially disqualifying conditions and mitigating conditions, which are to be applied to the extent they are deemed necessary in evaluating an applicant's eligibility for access to classified

information. The conditions must be evaluated in the context of general factors that comprise the whole-person concept.

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 for obtaining a favorable security decision.

Analysis

Sexual Behavior

AG ¶ 12 defines 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 the individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 13 describes four conditions that may be potentially disqualifying:

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

AG ¶ 13(b) a pattern of compulsive behavior, whether or not the individual has been prosecuted;

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

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

Applicant's viewing of child pornography is generally recognized as criminal conduct under state and federal law, regardless of whether the viewing location is in the workplace or at home. His viewing, downloading, and retention on a flash drive of approximately 20 images of underage females, and his pattern of masturbation in public places between 2001 and 2002, and between 2005 and 2009, demonstrate a lack of discretion and judgment. His masturbation has independent significance as compulsive or high risk sexual behavior because of the locations of the behavior. Applicant is considered vulnerable to coercion, exploitation, and duress because there is no

indication that he has informed his family or coworkers of his sexual behavior, The above four disqualifying conditions under the sexual behavior guideline apply.

AG ¶ 14 describes three conditions that may be potentially mitigating:

AG ¶ 14(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 reliability, trustworthiness or good judgment;

AG ¶ 14(c) the behavior no longer serves as a basis for coercion, exploitation, or duress; and

AG ¶ 14(d) the sexual behavior is strictly private, consensual, and discreet.

None of the mitigating conditions under AG ¶ 14 apply. Applicant's sexual behavior occurred between 2001 and 2009. Though his last admitted viewing of child pornography was in 2001, his downloading and current retention of 20 images of underage females on his flash drive does not support the conclusion that the behavior is unlikely to recur. The continued possession of illegal pornography and pattern of public sexual behavior raises security concerns about Applicant's current reliability, trustworthiness, and judgment. He remains a candidate for coercion and duress because there is no indication that his wife or his coworkers are aware of his sexual behavior. Applicant's viewing and retention of child pornography and his practice of masturbation in public places is criminal. AG ¶ 14(d) is irrelevant.

Personal Conduct

The security concern for personal conduct is set forth in AG ¶ 15:

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 contains four disqualifying conditions that may be applicable:

AG ¶ 16(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;

AG ¶ 16(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

AG ¶ 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 the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; (2) disruptive, violent, or other behavior in the workplace; (3) a pattern of dishonesty or rule violations; and (4) evidence of significant misuse of government or other employer's time or resources; and

AG ¶ 16(e) personal conduct, or concealment of information about one's conduct, that creates 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 country or intelligence service or other group.

The omission of relevant facts from a security clearance form can occur for a number of unintentional reasons. Those reasons, which include haste, oversight, or negligence, are not present here. The documents submitted by the Government show that Applicant was disapproved for access by AGA in December 2001. I conclude that Applicant deliberately omitted relevant information from his SCA in October 2004 (SOR ¶ 2(b)) and from his e-QIP in May 2007 (SOR ¶ 2(a)). AG ¶ 16(a) applies.

Even after receiving the correspondence from AGA in March 2010, that informed him of AGA's decisions in December 2001 and February 2010, disapproving his SCI access, Applicant continued to deny to the OPM investigator in December 2010 that he had ever falsified a security form to determine employment eligibility. AG ¶ 16(b) applies.

Applicant's illegal taking of office supplies, computer accessories, software, and proprietary information from his current employer, demonstrate a pattern of rule violations within the scope of AG ¶ 16(d)(1), (3), and (4). His sexual behavior could serve as a basis for coercion, duress, while affecting his professional and community standing as set forth in AG ¶ 16(e).

There are three mitigating conditions under AG ¶ 17 that are potentially applicable to the circumstances in this case. Those conditions are:

AG ¶ 17(a) the individual made prompt, good-faith efforts to correct the omission, concealment or falsification, before being confronted with the facts);

AG ¶ 17(c) the offense was 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); and

AG ¶ 17(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur).

None of the mitigating conditions apply. AG ¶ 17(a) does not apply because Applicant made no effort to rectify his deliberate omissions before being confronted with the facts. AG ¶ 17(b) does not apply because Applicant's sexual behavior is recent and cannot be considered minor. While he has acknowledged his sexual behavior, Applicant has furnished no evidence of taking positive steps to reduce the factors that triggered the behavior. He has taken no corrective measures to reduce his vulnerability to coercion or duress.

Criminal Conduct

AG ¶ 30 of the criminal conduct guideline sets forth the security concern related to criminal conduct:

Criminal activity creates 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.

The two potentially disqualifying conditions under AG ¶ 31 are:

AG ¶ 31(a) a single serious crime or multiple lesser offenses; and

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

Applicant's viewing of pornography, and his downloading and retention of 20 images of underage females since 2001 meets the above two disqualifying conditions under the criminal conduct guideline.

There are two mitigating conditions under AG ¶ 32 that may apply:

AG ¶ 32(a) so much time has passed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 32(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community development.

AG ¶ 32(a) is not applicable for same reasons as discussed under the sexual behavior guideline (AG ¶ 14(b)) and the personal conduct guideline. (AG ¶ 17(c)) AG ¶ 32(d) requires evidence of successful rehabilitation. Though Applicant's scholastic achievements constitute evidence of higher education, and his promotion in November 2009 is interpreted as a good employment record, there is no evidence of treatment to relieve the stressors that caused his sexual behavior and other acts of criminal conduct.

Whole-Person Concept

I have examined the evidence under the disqualifying and mitigating conditions of the sexual behavior, personal conduct, and criminal conduct guidelines. I have also weighed the circumstances within the context of nine variables known as the whole-person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors:

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 the participation was 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 a commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

Applicant is 32 years old and married. It is fair to assume that his good job performance was rewarded by a promotion he received in November 2009. However, Applicant has viewed child pornography and still keeps a flash drive containing 20 images of underage females. During his employment with his current employer, Applicant has engaged in dishonest conduct and rule violations by taking office supplies, software programs, and proprietary information for personal use. His

larcenous conduct also exposes him to prosecution under state criminal laws. Lastly, Applicant deliberately omitted relevant information during the security investigation in 2004, 2007, and December 2010.

After weighing and balancing the disqualifying conditions with mitigating conditions, and considering all the evidence under the whole-person concept, Applicant has not mitigated the security concerns arising under the sexual behavior, personal conduct, and criminal conduct 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 D):	AGAINST APPLICANT
Subparagraphs 1.a through 1.e:	Against Applicant
Paragraph 2 (Guideline E):	AGAINST APPLICANT
Subparagraphs 2.a through 2.e:	Against Applicant
Paragraph 3 (Guideline J):	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

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

Paul J. Mason
Administrative Judge