



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



In the matter of:)
)
) ISCR Case No. 11-06260
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esq. Department Counsel
For Applicant: Mark S. Zaid, Esq.

10/24/2012

Decision

NOEL, Nichole L., Administrative Judge:

Based on incriminating comments attributed to Applicant during an interview with another government agency in 2010, his security clearance and access to sensitive compartmented information (SCI) were revoked. However, Applicant did not engage in criminal conduct nor did he have the specific intent to do so. Clearance is granted.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on January 13, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under the sexual behavior and personal conduct guidelines. DOHA recommended the case be submitted to an administrative

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.

judge for a determination to revoke or continue Applicant's access to classified information.

Applicant timely answered the SOR and requested an administrative determination. Under the Directive, Department Counsel timely requested a hearing.² The case was assigned to me on April 19, 2012. The hearing took place as scheduled on June 20, 2012. At hearing, I admitted Government's Exhibits (GE) 1 through 10 and Applicant's Exhibits (AE) A through L, without objection. After the hearing, I received AE M without objection. I have appended to the record as Hearing Exhibit (HE) A, a memorandum prepared by Applicant's counsel. I received the transcript (Tr.) on June 28, 2012.

Findings of Fact

Applicant, 29, is a consultant employed by a federal contractor. He is unmarried and has no children. Initially granted a security clearance in 2004, another government agency (OGA 1) granted him SCI access in 2009. In anticipation of an upcoming project, Applicant's employer nominated him for SCI access from a second government agency (OGA 2) in November 2009.³

In conjunction with OGA 2's investigation, Applicant underwent a routine lifestyle polygraph in March 2010, which also included a post-polygraph interview. Applicant, then 26 years old, disclosed that during the previous four years he regularly viewed pornographic videos on the Internet, primarily accessed through two websites. He discovered one website through a generic online search for pornographic videos. He learned of the other site from his then girlfriend. Applicant revealed that some of the categories of pornographic videos he often watched and received sexual gratification from contained the word "teen." Applicant recalls being asked by the investigator if the females in the videos were over 18 and if the two websites were in compliance with 18 U.S.C. §2257, a statute that aims to ensure that pornographic material on the Internet does not contain minors by imposing name-and-age-verification, recordkeeping, and labeling requirements on producers of visual depictions of actual human beings engaged in actual or simulated sexually explicit conduct. At the time of the interview, Applicant did not know the answer to either question and could not provide a definitive answer. Upon being prompted by the interviewer and concerned that he may have unintentionally viewed videos containing underage females, Applicant guessed the ages of the females in the videos he watched.⁴

According to the interviewer's report, Applicant stated that "approximately once per week he [would] come across a video that involve[d] the participation of females under the age of 18, approximately 16 or 17 years old." The decision also indicates that Applicant intentionally clicked on "teen" categories approximately once per month to see

² Directive, Additional Procedural Guidance, Enclosure 3 ¶ E3.1.7.

³ Tr. 35-36; GE 1, 7.

⁴ Tr. 39-43, 57; GE 7, 9-10; Answer: Attachment A.

a 16 or 17 year old engaged in sexually explicit conduct. Applicant estimated the ages of the females depicted in the videos based on their appearances. He told the investigator that sometimes he could not visually determine the ages of the females in the video, but assumed they were at least 16. He also believed that some of the videos he watched contained women pretending to be teenagers. He denied ever viewing pornographic videos or images of prepubescent girls. When he encountered an image of females that appeared to him as being 15 years old or younger, he became uncomfortable and immediately closed the image because it did not give him sexual pleasure. Applicant did not have the opportunity to review or sign the statements contained in the interviewer's report.⁵

After the interview, Applicant checked the two websites for the required disclosure statements and found that both websites were in compliance with the statute. Applicant concluded that he incorrectly assumed that some of the females in the "teen" themed videos were underage and that he did not view any child pornography. He also believed that because the websites he disclosed in his interview were in compliance with the federal statute, that his viewing of the videos did not raise a security issue. However, he did not have any means to contact OGA 2 to correct his interview statements. He assumed that he would have the chance to do so in a follow-up interview, a practice he believed was common based on his understanding of the OGA 2 investigation process.⁶

However, in April 2010, OGA 2 issued a Clearance Decision Statement denying Applicant's access to SCI because of his involvement in "apparent criminal sexual behavior through his viewing of probable child pornography", relying only on the March 2010 interview. Based on this denial, the Defense Security Service (DSS) suspended Applicant's security clearance. Applicant requested OGA 2 review its decision because the statements he made in his interview were made in ignorance of the websites' compliance with the federal recordkeeping statute, making it highly unlikely that he actually viewed child pornography. He also reported that he had taken steps to avoid any confusion regarding the pornographic content he viewed by purchasing, as recommended by the OGA 2 interviewer, a subscription to the website of a longstanding and well known adult entertainment company. In its First Appeal Review in February 2011, OGA 2 upheld the initial Clearance Decision Statement finding that Applicant did not meet the standards of Intelligence Community Directive (ICD) 704 that the "subject must be stable, trustworthy, reliable, discreet, of excellent character, and sound judgment" Applicant did not appeal this decision because he was no longer eligible for the project being offered by his employer. In March 2011, OGA 2 issued a Final Outcome of Appeal Case memorandum upholding the agency's original denial decision.⁷

⁵ Tr. 38; GE 7; Answer: Attachment A.

⁶ Tr. 50-51; GE 6, 9-10; AE J, L.

⁷ Tr. 51-53, 69; GE 3-5, 7-8.

Unbeknownst to Applicant, OGA 2 referred him to the state police, who then contacted the prosecutor's office in Applicant's county of residence for further investigation. In August 2010, two detectives came unannounced to Applicant's home at six o'clock in the morning to investigate the child pornography allegations. Applicant explained that he erroneously thought that he viewed pornographic videos containing underage females. He assured the detectives that he did not possess any child pornography. Applicant consented to an on-the-spot search of all of his computers. The detectives searched the images of each hard drive visually and used forensic software to execute searches using the terms "teen" and "pre-teen." They found no evidence of child pornography.⁸

Applicant denies having looked at or searched for child pornography. At hearing, Applicant talked openly and without embarrassment about his pornography viewing habits. Applicant was unable to recall many details of the OGA 2 interview, which occurred over two years ago. He does not recall his statements that he intentionally sought out images of 16-and-17-year-old females. While he admits he told the OGA 2 investigator that he viewed some pornographic videos in categories labeled "teen", he testified that he intended to see 18-and-19-year-olds, not minors. He affirmed his previous statements that images containing actors that appeared too young, even if they were over 18, made him uncomfortable, did not give him any sexual pleasure, and that he would not view the content.⁹

Applicant presented a letter from an attorney who is an expert in computer forensics and the legal and cultural implications of emerging technologies with an emphasis on the operation of the online adult industry. In this capacity, the expert has also studied the mechanisms by which contraband material is created and distributed around the world. He has worked as an expert witness in the defense of obscenity and child pornography cases. He has also delivered legal seminars at the adult industry's annual trade show focusing on the potential for federal criminal prosecution of adult webmasters, particularly following the adoption of regulations to enforce 18 U.S.C. § 2257. He served as an expert consultant to the U.S. Department of Justice during the litigation of the Child Online Protection Act, teaching workshops to federal prosecutors on the operations of the online adult industry. The expert is extensively published in areas related to constitutional law and has published a book on the economics of the online adult entertainment industry.¹⁰

After reviewing the two interviews Applicant gave to investigators from the Office of Personnel Management,¹¹ the SOR, and Applicant's response to the SOR, the expert determined that it is unlikely Applicant actually viewed any child pornography. He explained that the two websites Applicant used to view pornographic material are well

⁸ Tr. 53-56; AE M.

⁹ Tr. 43-50, 63-65, 78-86.

¹⁰ AE C- F.

¹¹ These interviews are included in the record as GE 9-10.

known and have been existence for over a decade. Given the lengthy existence and high-profile status of the websites, there is strong incentive to comply with the record keeping requirements of 18 U.S.C. § 2257. The risks of hosting or producing contraband material, significant fines as well as prosecution on federal child pornography charges, is outweighed by the profitability of fantasy content, which uses, for example, women who are 18 and over, but look two to four years younger. This content, the expert explains, is factually and legally distinct from child pornography—the visual depiction of sexually explicit conduct involving the use of a minor engaging in sexually explicit conduct.¹²

The expert also observed, based on his ten years of experience working on computer forensics cases involving child pornography, that Applicant's actions are not consistent with someone interested in viewing child pornography. The expert noted, for example, that there is no evidence to indicate that Applicant has trolled message boards looking for child pornography websites, executed web searches for child pornography, traded or maintained a cache of illegal images sometimes necessary to gain access to child pornography sites, or purchased contraband content through surreptitious international transactions.¹³

Applicant still views pornography, albeit with less frequency than in the past, through the same subscription service he purchased after the OGA 2 interview. He does not believe that the allegations that he viewed child pornography are a potential source of exploitation for him. He reported all of the issues raised by his OGA 2 interview and shared all of the resulting correspondence with his facility security officer (FSO). He also reported to the FSO his contact with the detectives who searched his computers. He voluntarily provided copies of the documentation he received from OGA 2 to DOHA in his Answer to the SOR, even though it contained potentially disqualifying information. Although he has not told his parents about the OGA 2 allegations, he has shared them with his professional mentor, now retired, who hired and formerly managed Applicant at his current job, and two of his close friends, all of whom recommend him for access to classified information.¹⁴

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

¹² AE C.

¹³ AE C.

¹⁴ Tr. 24-32, 53, 57, 66, 70 – 71, 91-92; Answer: Attachment B; AE G.

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 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.

Three of the disqualifying conditions under AG ¶ 13 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 between 2005 and 2010, Applicant intentionally visited websites to view images and pornographic videos depicting minor females. Applicant denies the allegation. The SOR allegation is based on OGA 2's decision to deny Applicant's access to SCI on the grounds that he engaged in "apparent criminal sexual behavior though his viewing of probable child pornography." OGA's 2 findings and conclusions were based on a limited record—the March 2010 post-polygraph interview. However, the record in this case supports a finding that Applicant did not actually view child pornography or engage in any criminal conduct. After his interview with OGA 2, Applicant verified that the two websites he disclosed in the interview were in compliance with 18 U.S.C. §2257, leading him to conclude that he did not actually view child pornography and that he underestimated the ages of the women appearing the videos. His conclusion is corroborated by the letter from the expert witness that it is more than likely that Applicant viewed fantasy, not contraband materials. Finally and most importantly, the visual and forensic search conducted of Applicant's personal computers by law enforcement did not yield any evidence of child pornography.

Although Applicant did not engage in conduct disqualifying under AG ¶ 13(a), Department Counsel argues that the specific intent to view child pornography is disqualifying under AG 13 ¶¶ (c) and (d). Indeed, the statements contained in the clearance decision statement are serious, potentially disqualifying, and cannot be ignored. Given that these admissions could have negative personal consequences, including the loss of his security clearance and exposure to criminal charges, it is reasonable to assume that Applicant would not have made statements regarding his intent to view child pornography if they were not true. Absent any indicia of irregularity or misbehavior, the clearance decision statement produced by OGA 2 is granted a high level of credibility and reliability. However, this does not mean that the document is sacrosanct or that the statements therein attributable to Applicant should not be considered in the light of the contrary evidence in the same record—a record unavailable to OGA 2 when evaluating Applicant's suitability for SCI access.

Here, the inculpatory statements recorded during the OGA 2 interview must be considered along with the conflicting statements made in the same interview, evidence showing Applicant's intent to avoid contraband materials, and the negative results of the forensic search conducted by law enforcement. Also, accepting the statements alone as evidence of Applicant's specific intent to view illegal images requires drawing inferences not supported by the record evidence. Applicant's acts of avoidance would have to be characterized as contrived and calculated to give the appearance of innocence—an unreasonable inference given that Applicant spoke openly and with candor about his use of pornography in a manner not usually employed by an individual engaging in morally repugnant, let alone illegal behavior. Also, Applicant would have had to employ evasive measures to render years of illegal conduct undetectable by the forensic search conducted by law enforcement. This is also unlikely given that Applicant did not have any prior knowledge of the law enforcement referral or the resulting search of his personal computers. When considered as a whole, the record does not support a finding that Applicant had the specific intent to view child pornography.

Guideline E, Personal Conduct

The findings in the clearance decision statement regarding Applicant's intent to view child pornography raises concerns under AG ¶ 15 because it denotes, "[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations," which in turn "can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." However, none of the personal conduct disqualifying conditions apply because Applicant did not actually view child pornography nor did he have the intent to do so, as explained above.

Whole-Person Concept

After considering the whole-person factors at AG ¶ 2, I have no reservations about Applicant's current reliability, trustworthiness, and ability to protect classified information. While Applicant's predilection for fantasy adult entertainment may be unsavory, it is not criminal or disqualifying. Given the openness with which he discussed his pornography habits, his disclosure of the allegations to his FSO, mentor, and at least two close friends, it is not likely that either his sexual fantasies or his regular viewing of pornography are a potential source of exploitation.

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:	FOR APPLICANT
Subparagraph 1.a.:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant

Conclusion

In light of all of the circumstances presented in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

Nichole L. Noel
Administrative Judge