



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



In the matter of:)
)
) ISCR Case No. 11-07608
)
Applicant for Security Clearance)

Appearances

For Government: Stephanie Hess, Esquire, Department Counsel
For Applicant: Mark S. Zaid, Esquire

10/31/2013

Decision

RIVERA, Juan J., Administrative Judge:

Applicant successfully underwent psychological counseling from 1998 to 2010, made lifestyle changes, and has not viewed images of underage girls in sexually provocative poses since 2004. Considering the evidence as a whole, his past sexual behavior and personal conduct does not raise doubts about his current judgment and his ability to comply with the law and regulations.

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 2, 2009. On August 29, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR), listing security concerns under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct).¹ Applicant answered the SOR on September 11, 2012,

¹ DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

and requested to have his case decided on the written record in lieu of a hearing. The Government requested a hearing on September 25, 2012. (Appellate Exhibit 1) The case was assigned to me on May 8, 2013.

The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 3, 2013, convening a hearing for July 2, 2013. At the hearing, the Government offered exhibits (GE) 1 and 2, which were admitted without objection. Applicant testified, presented two witnesses, and submitted exhibits (AE) A through N. AE N was received post hearing. The Government objected to AE H through L based on relevance. I admitted all of Applicant's exhibits. DOHA received the hearing transcript (Tr.) on July 11, 2012.

Findings of Fact

Applicant admitted the two factual allegations in the SOR, with explanations. After a thorough review of all the evidence, and having observed Applicant's demeanor and considered his testimony, I make the following findings of fact.

Applicant is a 63-year-old vice president of a company performing sensitive contracts for the U.S. Government. He married his wife in 1981, and they have two adult children, ages 29 and 26. His education includes a bachelor's degree, a master's degree, and a doctorate degree. He has extensive experience in research and development, and as a manager and supervisor of research scientists. Applicant's performance appraisals, covering the period 2008 through 2012, indicate that he is a highly-valuable employee. His supervisors indicated that Applicant exceeded all major performance objectives and delivered results beyond expectations. He is considered to be a brilliant problem solver with outstanding knowledge, skills, and abilities.

Applicant's references have known him for over 20 years. They consider Applicant to be a man of great integrity and high moral character. He is extremely dedicated to his family and work. He has been found to be dependable, reliable, loyal, trustworthy, and honest. He disclosed to his supervisors his depression and the criminal sexual behavior that led to the revocation of his clearance in 1998 and 2004, and to the issuance of the current SOR.

Applicant worked for a government contractor and possessed a security clearance from 1987 to 1995. In 1997, he was hired by his current employer, and submitted a new security clearance application. He was granted a top secret security clearance with access to sensitive compartmented information (SCI) by another government agency (Agency). To qualify for additional access to sensitive programs, Applicant underwent several polygraph-assisted interviews. He disclosed that from 1998 to 2004 he actively sought and viewed images of underage girls (less than 18 year old) in sexually-provocative poses or engaged in sexual intercourse.

Applicant explained that he performed Internet searches using the terms "teen" and "school girls" because he was sexually aroused by images of girls between the

ages of 14 and 20. He was fixated with a certain body type shared by females from ages 14 and up, if they were not well developed. (Tr. 136) Based on the Agency's denial document (GE 2), during the 1998 polygraph-assisted interviews, Applicant told the investigators that he sought the girl images on a daily basis. At his hearing, Applicant admitted that he was habitually seeking images of underage girls three to four times a week, for periods of three to four hours. (Tr. 139-140) He denied doing it on a daily basis.

During the 1998 interviews and at his hearing, Applicant denied intentionally seeking images of pre-pubescent girls. He claimed he never had any sexual attraction to pre-pubescent girls. He admitted that once in a while he would incidentally find pictures of pre-pubescent girls, and claimed that he would immediately delete them. At his hearing, Applicant testified that he now understands his behavior was illegal. He claimed that while he was seeking the images of underage girls, he allowed himself to believe that child pornography involved only viewing pre-pubescent girls, but not viewing images of underage girls between ages 14 and 17. Applicant repeatedly stated that he no longer has the desire to view underage girls. He testified he has not accessed Internet pornography since 2004.

Applicant's security clearance was denied or revoked by the Agency in June 1998, because of his addiction to Internet pornography and viewing child pornography. After the denial of his security clearance, Applicant sought counseling with a licensed psychologist-psychoanalyst in July 1998. He informed the psychologist that his security clearance had been denied because of his viewing of Internet pornography, sporadic instances of voyeurism, some of which involved under age females, and his occasional use of marijuana.

Applicant received psychological counseling from July 1998 to the summer of 2010. He was diagnosed with dysthymic depression (early onset) and anxiety disorder not otherwise specified. In the psychologist's opinion, Applicant's voyeuristic behavior and his use of pornographic material were secondary to the primary diagnosis of dysthymic depression and anxiety. From age 15 to 54, Applicant used pornography, voyeurism, and masturbation to cope with his depression and anxiety. As part of his treatment, Applicant was prescribed an anti-depressant useful in treating both the depression and obsessive-compulsive behaviors.

In 2004, Applicant submitted another SCA to the Agency. During his security testing, Applicant stated that his viewing of Internet pornography declined from almost daily in 1998, to 10 times from 2000 to 2001. He claimed he did not view Internet pornography from 2001 until April 2003, when he viewed Internet pornographic sites depicting young females under the age of 18 for several hours. In 2004, Applicant told the investigators that since 1998, he accidentally viewed images of girls younger than 10 years old (pre-pubescent) on one or two occasions, and deleted them. He also stated that since 1998, he had viewed pornographic images of girls between age 10 and 14 on approximately 20 occasions. In October 2004, the Agency denied Applicant's request for a security clearance.

Applicant submitted his current SCA in October 2009, and disclosed his long-term mental counseling and prior security clearance denials. In February 2013, Applicant requested a follow-up evaluation from his psychologist for the purpose of mitigating the allegations in the current SOR. At his hearing, Applicant presented the testimony of his psychologist and a written mental evaluation. (AE C) The psychologist noted that Applicant's response to the anti-depressant has been excellent. In the doctor's opinion, Applicant's commitment to his treatment was extraordinary and he made significant strides to rehabilitate himself.

According to the psychologist's latest mental evaluation, Applicant currently shows no remaining evidence of dysthymic depression or anxiety disorder. The psychologist believes that Applicant has worked hard over the last 12 years (since 1999) in individual, group, and conjoint psychotherapy sessions to address his past questionable behavior. In his opinion, Applicant has made significant positive changes to his life, and those changes and the therapy have freed Applicant from the self-destructive behavioral patterns that led him to lose his security clearance in 1998. Applicant's progression allowed him to end his counseling treatment in 2010. His counseling improved his relationship and communication with his wife and children. He has been able to reduce his anxiety while interacting with people and dealing with problems at work.

At his hearing, Applicant claimed he has not viewed any Internet pornography since 2004, and that he has had no interest in obtaining or viewing pornography during the last five years. He promised not to view pornography in the future. Applicant repeatedly apologized for his past behavior, and expressed regret and remorse. Applicant was candid and forthcoming during his testimony. He accepts responsibility for his past criminal acts. He understands what is required of him to be eligible for a security clearance.

Policies

Eligibility for access to classified information may be granted "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available,

reliable information about the person, past and present, favorable and unfavorable must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline D, Sexual Behavior

AG ¶ 12 describes the concern about sexual behavior:

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.

AG ¶ 13 provides four disqualifying conditions relating to sexual behavior that apply to this case, raise a security concern, and may be disqualifying:

- (a) sexual behavior of a criminal nature, whether 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.

Between 1998 and 2004, Applicant actively sought out and viewed images of underage girls in sexually-provocative poses or engaged in sexual intercourse. Applicant's misconduct exposed him to possible criminal charges; made him vulnerable to coercion, exploitation, and duress; and reflects lack of judgment and discretion. All of the sexual behavior disqualifying conditions apply.

AG ¶ 14 lists conditions that could mitigate the sexual behavior security concerns:

(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.

From at least 1998 to 2004, Applicant actively sought out and viewed images of underage girls in sexually-provocative poses or engaged in sexual intercourse. He engaged in voyeuristic behavior and used pornography and masturbation to cope with depression and anxiety disorders from around age 15 to age 54. He successfully underwent psychological counseling to deal with his depression and anxiety from 1998 to 2010.

Applicant's most recent mental evaluation shows no remaining evidence of dysthymic depression or anxiety disorder. According to Applicant's psychologist, he made significant positive changes to his life that freed him from the self-destructive behavioral patterns that led him to lose his security clearance in 1998. Applicant's progression allowed him to end his counseling treatment in 2010. His counseling improved his relationship and communication with his wife and children. He also was able to reduce his anxiety while interacting with people and dealing with problems at work.

Applicant has not viewed images of underage girls in sexually-provocative poses or engaged in sexual intercourse since 2004. He has had no interest in obtaining or

viewing pornography during the last five years. He promised not to view pornography in the future. Applicant understands that viewing images of underage girls is a felony offense. He repeatedly apologized for his past misconduct, and expressed regret and remorse. Applicant's wife is aware of his misconduct and participated with him in psychological counseling. As a result of the security clearance process, his employer and supervisors are also aware of his past questionable behavior. Thus, Applicant's past behavior no longer serves as a basis for coercion, exploitation, or duress.

Applicant was candid and forthcoming during his testimony. He accepts responsibility for his past acts. He understands what is required of him to be eligible for a security clearance. Considering Applicant's current diagnosis (indicating that Applicant overcame his depression and anxiety problems), his 12 years of successful psychological counseling, and his abstention from viewing pornography since 2004, I find Applicant's past sexual behavior no longer raises questions about his reliability, trustworthiness, and judgment. Applicant established that his high-risk behavior is unlikely to recur. Considering Applicant's circumstances (his age, education, work experience, and period of treatment), his past behavior does not cast doubt on his current judgment. AG ¶¶ 14 (b) through (d) apply.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

Between 1998 and 2004, Applicant actively sought out and viewed images of underage girls in sexually-provocative poses or engaged in sexual intercourse. Applicant's misconduct exposed him to possible criminal charges; made him vulnerable to coercion, exploitation, and duress; and reflects lack of judgment and discretion.

Applicant's behavior triggers the applicability of the following disqualifying condition under AG ¶ 16:

(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.

AG ¶ 17 provides three conditions that could mitigate the personal conduct security concerns.

(c) the offense is 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;

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

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Considering the record as a whole, I find that AG ¶¶ 17(c), (d), and (e) apply. Applicant acknowledged his mistakes and successfully participated in long-term psychological counseling. He has taken steps to reduce his vulnerability to exploitation and duress. For the same reasons stated in the Guideline D discussion, incorporated herein, Applicant's past misconduct does not raise questions about his current judgment, reliability, trustworthiness, and his ability to protect classified information.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c).

Applicant, 63, is considered to be a highly productive and valuable employee. From 1998 to 2010, he successfully underwent psychological counseling and overcame his depression and anxiety. Since 2004, he has not viewed images of underage girls in sexually-provocative poses or engaged in sexual intercourse. He has taken responsibility for his past misconduct. He expressed remorse for his past questionable behavior and promises never to engage in it again. Considering the record as a whole, his past sexual behavior and personal conduct does not raise doubts about his current judgment and his ability to comply with the law and regulations.

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 the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Eligibility for a security clearance is granted.

JUAN J. RIVERA
Administrative Judge