



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



In the matter of:)
)
) ISCR Case No. 15-08346
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

10/20/2017

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the sexual behavior, personal conduct, criminal conduct, and use of information technology security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On June 7, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D (sexual behavior), E (personal conduct), J (criminal conduct), and M (use of information technology). Applicant responded to the SOR on June 27, 2016, and elected to have the case decided on the written record in lieu of a hearing.

The Government's written case was submitted on October 19, 2016. At the same time, Department Counsel amended the SOR by striking the word "government" from SOR ¶¶ 1.a, 1.b, and 1.d, and replacing it with "company-issued," and by striking the words "and your spouse" from SOR ¶ 1.c.

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 October 26, 2016. He responded to the FORM with documents that I have marked Applicant's Exhibits (AE) A and B. The case was assigned to me on October 17, 2017. The Government exhibits included in the FORM and AE A and B are admitted in evidence without objection.

Findings of Fact

Applicant is a 47-year-old employee of a defense contractor. He has worked for his current employer since 1993. He has a bachelor's degree, which was awarded in 1992, and additional education without a post-graduate degree. He has been married for more than 24 years. He has three children, ages 19, 17, and 13.¹

All of the allegations in the SOR, with slight variations, were adjudicated previously. Applicant had a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge in December 2008. In March 2009, the administrative judge revoked Applicant's security clearance based on the same information alleged in the current SOR and additional information not currently alleged. The revocation was affirmed by the DOHA Appeal Board in May 2009.²

The information alleged in this case came to light by virtue of a lifestyle polygraph in early 2005. From about 1996 through 2005, Applicant used his company computer to access adult pornography about once or twice a week. He knew that was against company policy. He viewed child pornography on his company computer about 6 to 12 times between about 1998 and 2004. He knew that was against company policy and in violation of federal law.³

Applicant testified at his DOHA hearing in December 2008 that his "accessing of child pornography came out of frequent use of regular pornography," and that his "access to child pornography did not stem from sexual desire, but rather a sense of looking at something taboo that [he] shouldn't be accessing." He stated that the polygraph opened his eyes to how wrong it was to view child pornography, and he confessed his actions to his wife. He stated that he has never viewed child pornography again.⁴

After the polygraph, Applicant received counseling from his pastor. He installed content-monitoring software on his company computer that prevented him from accessing pornographic sites. However, he was able to turn the software off and access

¹ Items 4, 6.

² Items 5-9.

³ Items 3, 5-9.

⁴ Item 6.

pornography. He continued to view adult pornography on his company computer until about six months before his first DOHA hearing in December 2008. He continued to occasionally view pornography on his personal computer until about six to eight months before his background interview in March 2015.⁵

Applicant asserted that he is deeply remorseful for his actions, he will never view child pornography again, and he will never again access pornography on a company computer. He told the background investigator in March 2015 that he struggles with the temptation to view pornography every day, but prevents the behavior by constantly thinking about the repercussions associated with his actions. He learned to identify his triggers, such as fatigue and working in a secluded place. He stated that he made sure to work in open spaces to avoid further temptation. Applicant's wife, two pastors, and a former supervisor are aware of Applicant's conduct. He also shared his struggles with pornography with various men's groups. It does not appear that his employer ever became fully aware of his conduct.⁶

Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

⁵ Items 3, 6, 9.

⁶ Items 3, 6, 9; AE B.

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 the 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 safeguard 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 EO 10865 provides that adverse 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 security concern for sexual behavior is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual’s judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. 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 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) a pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;

(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.

Applicant viewed pornography, including child pornography, on his company computer. He knew that was against company policy and in violation of federal law. His behavior reflected a severe lack of judgment and made him vulnerable to coercion, exploitation, and duress. The above disqualifying conditions have been established.

SOR ¶ 1.c alleges that Applicant sought counseling from his pastor to help with his compulsion to view pornography. Seeking counseling for a problem is a positive action. It does not raise a disqualifying condition. Applicant's compulsive pornography viewing is already alleged in other allegations. SOR ¶ 1.c is concluded for Applicant.

Conditions that could mitigate sexual behavior security concerns are provided under AG ¶ 14. The following are potentially applicable:

(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;

(d) the sexual behavior is strictly private, consensual, and discreet; and

(e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

Applicant received counseling from his pastor and participated in men's groups. It has been more than 12 years since he accessed child pornography and about 9 years since he accessed any pornography on his company computer. I nonetheless have lingering concerns. Applicant still struggles with the temptation to view pornography. His wife, two pastors, and a former supervisor are aware of Applicant's conduct, but it does not appear that his employer ever became fully aware of his conduct. Applicant has lessened, but not eliminated, his vulnerability to coercion, exploitation, and duress. Accessing child pornography on a company computer is a serious crime and a significant abuse of company policy. The stigma that attaches when children are sexualized is not easily cast off. The conduct continues to cast doubt on Applicant's

current reliability, trustworthiness, and good judgment.⁷ While nobody ever discovered Applicant viewing pornography, it cannot be considered strictly private or discreet because it occurred on his work computer. AG ¶¶ 14(b) and 14(d) are not applicable. AG ¶¶ 14(c) and 14(e) are partially applicable. I find that sexual behavior concerns remain despite the presence of some mitigation.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant committed a federal crime when he accessed child pornography on his computer. The above disqualifying condition is applicable.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

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

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

It has been more than 12 years since Applicant accessed child pornography. Nonetheless, I have unmitigated concerns under the same rationale discussed in the sexual behavior analysis.

⁷ See ISCR Case No. 09-03233 (App. Bd. Aug. 12, 2010). The Appeal Board determined that an applicant's child molestation offense "even though it occurred long ago, impugn[ed] his trustworthiness and good judgment."

Guideline M, Use of Information Technology

The security concern for use of information technology is set out in AG ¶ 39:

Failure to comply with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology includes any computer-based, mobile, or wireless device used to create, store, access, process, manipulate, protect, or move information. This includes any component, whether integrated into a larger system or not, such as hardware, software, or firmware, used to enable or facilitate these operations.

AG ¶ 40 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(e) unauthorized use of any information technology system.

Applicant knew he was violating company policy when he accessed pornography on his company computer. The above disqualifying condition is applicable.

Conditions that could mitigate the use of information technology systems security concerns are provided under AG ¶ 41. The following is potentially applicable:

(a) so much time has elapsed since the behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

The above analysis under sexual behavior also applies here. Applicant's conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 41(a) is not applicable.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during the national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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 individual may not properly safeguard classified or sensitive information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant accessed pornography, including child pornography, on his company computer. His conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable because Applicant's conduct is sufficient for an adverse determination under the sexual behavior, criminal conduct, and use of information technology guidelines. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

SOR ¶ 4.a alleges that Applicant's "children, friends, family members and/or co-workers are not aware of his conduct and [he does] not wish for them to know." That allegation does not allege any conduct that is not already alleged in SOR ¶ 4.b. It goes to whether the conduct is mitigated, which is not the purpose of an allegation. SOR ¶ 4.a is concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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 contributed to 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.

Under the same rationale discussed above for sexual behavior, I find that Applicant's conduct continues to cast doubt on his current reliability, trustworthiness, and good judgment. I find that personal conduct concerns remain despite the presence of some mitigation.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines D, E, J, and M in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the sexual behavior, personal conduct, criminal conduct, and use of information technology security concerns.

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-1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant

Paragraph 2, Guideline J:	Against Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline M:	Against Applicant
Subparagraph 3.a:	Against Applicant
Paragraph 4, Guideline E:	Against Applicant
Subparagraph 4.a:	For Applicant
Subparagraph 4.b:	Against Applicant

Conclusion

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

Edward W. Loughran
Administrative Judge