



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



In the matter of:)	
)	
[Name Redacted])	ISCR Case No. 16-03703
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert Blazewick, Esquire, Department Counsel
For Applicant: Aileen Xenakis, Esquire

03/23/2018

Decision

HOGAN, Erin C., Administrative Judge:

On January 6, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline D, Sexual Behavior; Guideline E, Personal Conduct; and Guideline J, Criminal Conduct. The action was taken under Executive Order (EO) 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) effective within the Department of Defense after September 1, 2006. On June 8, 2017, the AGs were updated and the AGs effective September 1, 2006, were cancelled. This decision will be decided based on the new AGs effective on June 8, 2017. If I were to consider this case under the AGs effective September 1, 2006, it would result in the same outcome.

On February 16, 2017, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 9, 2017. The case was assigned to me on October 11, 2017. On October 24, 2017, a Notice of Hearing was issued, scheduling the hearing for December 13, 2017. The

hearing was held as scheduled. During the hearing, the Government offered four exhibits which were admitted as Government Exhibits (Gov) 1 – 4. Applicant testified, called one witness, and offered ten exhibits which were admitted as Applicant Exhibits (AE) A - J. The record was held open to allow Applicant to submit an additional document. Applicant timely submitted a document which was admitted as AE K, without objection. The transcript (Tr.) was received on December 21, 2017. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

Applicant is a 26-year-old employee of a Department of Defense contractor seeking a security clearance. He was hired by his current employer in June 2013. He previously worked as an intern at the same employer for two summers before graduating from college. He has a bachelor's degree in computer information systems. He is single and has no children. (Tr. 34-35; Gov 1)

The SOR alleges that Applicant was charged with seven counts of Possession of Child Pornography in 2013 and that he is currently serving probation for the offense. He was actually charged in February 2014, the illegal conduct occurred in October 2013. He possessed a security clearance, which was suspended after he self-reported his arrest to his facility security officer in October 2014. (Gov 1 at 34-35; Gov 2; Gov 3; Gov 4)

At the age of 13, Applicant began to look at swimsuit photographs on the computer. His parents had web filtering so he could not see anything really explicit. When he got older, Applicant had his own computer and he began to view nudity. He eventually began to view more graphic content. Applicant testified that he had a sense of curiosity and a sense of challenge to try and find certain things. He started finding illegal material on line. He estimates he was about 20 or 21 when he began to look at illegal material. He perceived he had a problem when he was a senior in college. He would view pornography two to three times a week for about one hour on each occasion. (Tr. 39-40, 56-58, 62-64, 70-71; AE A)

During the hearing, Appellant testified that he would often access pornographic sites by peer to peer file sharing. When peer to peer file sharing is used, a folder is downloaded. The contents of the folder will not be revealed until the folder is opened. Applicant said that he would not become aware that the material contained images of prepubescent subjects until he opened the file. Applicant usually observed pornography involving people who were in their twenties. He never intended to actively access files containing children. He estimates he would come across sites containing underage children every one to two months. When asked to estimate as to the age, Applicant estimated "toddler, maybe five." Applicant would download and delete files immediately after viewing them. He claims the seven files that contained child pornography were immediately deleted. However, he also testified that the seven files for which he was arrested were not found on his computer. They were found on a flash drive which would

indicate that Applicant took the active step of transferring the files to the flash drive. (Tr. 41, 62-66, 72-73)

In February 2014, Applicant's mother called him to tell him that the police searched the house and confiscated all the computers in the household. Applicant was arrested and he admitted that he was accessing pornography. He was charged with seven misdemeanor accounts of possessing child pornography. On July 7, 2015, Applicant pled guilty to one misdemeanor account and the other six counts were dropped. He was given Probation Before Judgment and sentenced to three years probation. He was required to attend Sex Addicts Anonymous (SAA) meetings every other week during his probation. He was not required to register as a sex offender. On December 18, 2017, his probation was terminated early. He has to wait three years before he can apply to expunge his records. (Tr. 40, 42; Gov 2; Gov 3; Gov 4; AE J; AE K)

After his arrest, Applicant began attending SAA meetings. In February 2017, he received a three-year chip, an award for consistent weekly attendance for over three years. He had not looked at pornography of any kind since February 2014. Applicant believes that his arrest was a blessing in disguise. It gave him the help to fight his addiction. Applicant states that he cannot fight this on his own. He gets help from the SAA community. He has a close friend from church who also struggles with pornography. After three years and eight months of not accessing pornography, Applicant accessed a legal pornography site containing adults in October 2017. He is disappointed in himself. He told his parents and SAA support group. Having a support group in place has helped him deal with his relapse. He used his personal computer. He never used his work computer to access pornography. It is important for Applicant to move forward, keep his integrity and be honest. (Tr. 45-53; 71; AE H at 3)

Counseling

Dr. W., a licensed psychologist for 41 years, met with Applicant on February 13, 2017. He interviewed Applicant via video-teleconference for two hours. He also arranged for Applicant to take the Minnesota Multiphasic Personality Inventory, Second Revision, Restructured Format (MMPI-2-RF) test. The test is the most well researched and understood psychological test currently available. It is an objective psychological test scored by an impartial computer, without any input or direction from the test administrator. Based on his observations of Applicant as well as the results of the test, he does not believe Applicant is a sex offender. He notes Applicant was young at the time of his offense. He had no social life and primarily used the internet for entertainment. (Tr. 17-21; AE A; AE B)

Dr. W. testified that Applicant's interest in pornography involved post-pubescent girls. It is not abnormal for a man of Applicant's age to be attracted to post-pubescent girls. Applicant has no interest in child pornography. He only looked at images of child pornography for the purpose of identifying them and deleting them. Dr. W. is aware that Applicant accessed pornography using a peer to peer filing system. Dr. W. has worked

on several criminal cases in which the peer to peer filing system was used to obtain pornography. He is aware that the user does not know in advance what files he will be receiving until he opens them. (Tr. 21- 22; AE A at 5)

Dr. W. opines that Applicant has turned his life around. He is strongly committed to his religion. He attends SAA on a regular basis, which is a 12-step program similar to Alcoholics Anonymous. He moved out of his parents' home, started dating, and purchased a condominium. Dr. W. believes Applicant is at no risk of reoffending. Applicant's behavior was caused by immaturity, lack of a social life, and shyness. (Tr. 22-28; AE A)

The result of the MMPI-2-RF indicates Applicant has no psychological problems or defects that would cause him to be unable to control his behavior. Applicant did not fit the profile of someone who is likely to reoffend. Every significant person in Applicant's life is aware that he is working to overcome this problem. Dr. W. testified that Applicant is in recovery. Like any addict, Applicant will always need to work on the issues of his addiction. (Tr. 22-24; AE A) During the hearing, Dr. W. was not asked about whether his opinion would have changed based on Applicant's October 2017 relapse.

Mr. L., Applicant's SAA sponsor, wrote a letter in April 2015, pending Applicant's court proceedings and in February 2017, pending his security clearance proceedings. Mr. L. has been Applicant's SAA sponsor for three years. He meets with Applicant and discusses his progress at least weekly. He states Applicant was making strides within his program doing formal step work. He is impressed by Applicant's sincerity in dealing with his addiction problems. Applicant made the most progress of all the people he currently sponsors. Applicant accepted responsibilities for his actions and is willing to accept the consequences. Mr. L. states Applicant deserves recognition for how he has taken positive actions to ensure that he does not return to the activities that caused him legal difficulty. He states by accepting his addiction, working with a therapist and working a 12-step program, Applicant is managing his disease. He states Applicant is at the lowest risk category for re-offending because of his actions dealing with the addiction. He is positive Applicant is not a threat to repeat the offenses. Applicant has grown and matured over the three years Mr. L. has known him. Applicant now helps others dealing with similar addiction issues. (AE G at 3-5)

In 2014, Mr. W., a licensed sex offender – assessment and team provider, conducted a psychosocial evaluation of Applicant pending his court proceedings. Mr. W. met with Applicant to complete the assessment process over a several week period. He found all areas of the evaluations resulted in low risk scores. He did not recommend counseling or therapy to address sexually inappropriate behaviors. (AE I)

Mr. S., a professor of Christian Counseling, counseled Applicant shortly after his arrest for child pornography. He met Applicant ten times for one on one counseling sessions. He found Applicant to be honest, reliable and forthright. Applicant demonstrated great remorse and repentance for his past use of child pornography.

Applicant was completely responsive and compliant in following through on an action plan to mitigate his past mindset and choices. (AE G at 11)

Whole-Person Factors

Applicant's manager assessed Applicant as a "Top Performer" during the period January 1, 2016, to December 31, 2016. His manager described his performance as "outstanding." Applicant is the "go-to-guy" with his reliable work ethic and positive attitude. (AE E) Mr. T., applicant's manager since 2013, is aware of the allegation in the SOR and does not believe the allegations are reflective of Applicant's character, patriotism or willingness to protect classified information. He finds Applicant to be trustworthy, reliable and, with the exception of the incident in question, to possess good judgment. Applicant has been a valuable and model employee from the time he was an intern to his current assignment. He understands the severity of Applicant's actions and believes the situation was caused by a temporary, albeit serious, lapse of reason. He recommends Applicant for a security clearance. (AE G at 1-2)

Mrs. B., a family friend and neighbor of Applicant states Applicant has high moral character and integrity. As a mother of sons, she says males often do stupid things. She states Applicant made a poor choice during a brief moment of time. It is not indicative of who Applicant is as a man, neighbor, citizen. She trusts him implicitly, including around her children. Applicant is bright, studious, responsible, trustworthy and honest with a strong moral compass. Applicant's singular lapse in judgment should not forever define him or characterize him. (AE G at 6-7)

Other church members and friends have said similar favorable things about Applicant. (AE G at 8-10, 12-14)

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 useful 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, these guidelines are applied 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 access for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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 as to obtaining 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 that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 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).

GUIDELINE D: Sexual Behavior

The security concern relating to the guideline 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 notes several disqualifying conditions that could raise security concerns. The disqualifying conditions that are relevant to Applicant's case include:

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

AG ¶ 13(b) a pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;

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 or that reflects lack of discretion or judgment.

All four disqualifying conditions are relevant to Applicant's case. Child pornography is illegal. Applicant admits that he is addicted to pornography. He is primarily interested in adult pornography, but his compulsion resulted in him accessing child pornography as well. Applicant's conduct made him vulnerable to coercion, exploitation, or duress. While not of a public nature, Applicant's conduct shows a lack of discretion and judgment.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline D. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 22, 2005))

AG ¶ 14 includes examples of conditions that could mitigate security concerns arising from the sexual behavior guideline. The following mitigating conditions apply to Applicant's case:

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 current reliability, trustworthiness, or judgment;

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

AG ¶ 14(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.

AG ¶ 14(a) applies because the record indicates that the Applicant accessed and possessed child pornography over a one-month time period in October 2013. His

conduct was discovered in 2014. There may have been more occasions, but Applicant immediately deleted most of the pornographic files that he accessed. Regardless, based on Applicant's proactive steps to confront his pornography addiction and his honesty regarding his problem, his past issues with child pornography are unlikely to recur and do not cast doubt on his current reliability, trustworthiness, and judgment.

AG ¶ 14(c) applies because Applicant fully disclosed his issues with child pornography and pornography to his parents, his family, his friends, his church members, and his co-workers. His past behavior no longer serves as a basis for coercion, exploitation, or duress.

AG ¶ 14(e) applies because of Applicant's involvement with SAA since his arrest. His efforts resulted in him refraining from accessing pornography over a three-year period. At hearing, he disclosed that he relapsed in October 2017 and accessed adult pornographic sites. He immediately disclosed his relapse to his family, friends, and members of his SAA community. There is no indication that the relapse involved child pornography. He received a favorable prognosis in 2014 from Mr. W. before his court proceedings. He received another favorable prognosis from Dr. W. in February 2017. Dr.W. indicated that Applicant's pornography addiction is something he will have to deal with his whole life. Applicant's relapse in October 2017 supports this assessment. However, the relapse involved legal adult pornography and Applicant sought immediate help to cope with this relapse. Sexual Behavior concerns are mitigated.

GUIDELINE J: Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

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.

AG ¶ 31 notes several disqualifying conditions that could raise a security concerns. The disqualifying conditions that are relevant to Applicant's case include:

AG ¶ 31(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;

AG ¶ 31(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; and

AG ¶ 31(c) individual is currently on parole or probation.

Applicant's past criminal conduct in relation to child pornography raised questions about his judgment reliability and trustworthiness. Applicant admitted to possessing child pornography in his court proceedings. At the time the SOR was issued, Applicant remained on probation for his child pornography offense. AG ¶¶ 31(a), 31(b) and 31(c) applies to Applicant's case.

AG ¶ 32 includes conditions that could mitigate security concerns arising from criminal conduct. The following mitigating conditions apply to Applicant's case:

AG ¶ 32(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

AG ¶ 32(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.

AG ¶¶ 32(a) and 32(d) apply to Applicant's case. Applicant's last incident involving child pornography occurred in October 2013, More than four years have passed. During that time, Applicant has been evaluated by two different experts, both of whom concluded that Applicant's conduct involving child pornography is unlikely to recur. Applicant complied with the terms of his probation. He was released early from his probation in December 2017. His performance evaluations and the statements from his supervisors reveal he has a good employment record. He continues to be active in SAA to help him deal with his issues with pornography. Criminal Conduct concerns are mitigated.

GUIDELINE E – Personal Conduct

The security concern relating to the guideline 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 or adjudicative processes.

The following disqualifying conditions potentially apply to Applicant's case:

AG ¶ 16(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

AG ¶ 16(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.

Both AG ¶ 16(c) and AG ¶ 16(e)(1) apply to Applicant's past issues with child pornography. His past conduct raises issues about his judgment, willingness to comply with rules and regulations, and reliability. This raises doubts as to Applicant's ability to protect classified information. Applicant's issues with child pornography made him vulnerable to exploitation, manipulation, or duress. His past activities, if made known, could affect his personal, professional, and community standing.

Under Guideline E, the following mitigating conditions potentially apply in Applicant's case:

AG ¶ 17(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 is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

AG ¶ 17(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

AG ¶ 17(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

All three mitigating conditions apply. While Applicant's child pornography issues cannot be considered a minor offense, the evidence supports that Applicant stopped accessing child pornography over four years ago. After his arrest, Applicant proactively sought steps to deal with his problems with pornography. He sought religious and professional counseling. He has been an active member of SAA for over three years. He has made positive steps to alleviate the stressors and circumstances that

contributed to his untrustworthy and inappropriate behavior. While Applicant relapsed and accessed legal adult pornography in October 2017, he has not accessed child pornography since October 2013. He immediately disclosed his relapse to family members, his SAA community, and friends. Any future conduct with regard to child pornography is unlikely to recur. Applicant's disclosure of his issues with pornography to family, friends, and co-workers, reduced his vulnerability to exploitation, manipulation, or duress.

While Applicant's past conduct involving child pornography raised serious security concerns, he has taken actions to deal with the problem by attending and serving as an active member of SAA, counseling and relying on his family members for help. By proactively dealing with his problem, Applicant has demonstrated that he is reliable, trustworthy, and has good judgment.

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 the 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. Applicant's involvement with child pornography raised serious security concerns. It demonstrated a serious error in judgment on Applicant's part. I considered that upon his arrest, Applicant immediately sought out counseling and joined SAA in order to deal with his issues with pornography. I considered the psychosocial evaluation of Mr. W in 2014 which occurred over a period of several weeks before Applicant's court proceedings. Mr. W. concluded Applicant was at low risk to reoffend. I considered that the court did not require Applicant to register as a sex offender. I considered that the court allowed Applicant to complete his probation early. I considered the recent evaluation of Dr. W., who concludes Applicant is not a sex offender and has turned his life around.

I considered Applicant's favorable reference letters from his superiors, co-workers, SAA sponsor, neighbors and friends. Applicant's involvement with child pornography in October 2013, raised serious security concerns. It demonstrated extremely poor judgment and criminal conduct. Applicant is given credit for recognizing the problem and taking steps to deal with his issues with pornography after his arrest in February 2014. Applicant has not accessed child pornography in over four years. While he continues to deal with his issues with legal adult pornography, Applicant has never accessed pornography while at work. He mitigated questions raised about his involvement with child pornography. He demonstrated he is trustworthy and reliable. Based on the record evidence, security concerns are mitigated.

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
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

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

ERIN C. HOGAN
Administrative Judge