



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



## Appearances

For Government: Andrew Henderson, Esq., Department Counsel  
For Applicant: Scott Andrew Taylor, Esq., Applicant's Counsel

June 15, 2018

## Decision

CEFOLA, Richard A., Administrative Judge:

## Statement of the Case

On June 30, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines D, Sexual Behavior; and M, Use of Information Technology. The action was taken 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) effective within the DOD on June 8, 2017.

Applicant answered the SOR in writing (Answer) on July 27, 2017, and requested a hearing before an administrative judge. The case was assigned to me on August 28, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on August 29, 2017. I convened the hearing as scheduled on September 18, 2017. The Government offered Government Exhibits (GXs) 1 through 3, which were admitted without objection. Applicant testified on his own behalf, and presented Applicant Exhibits

(AppXs) A through D, which were admitted. DOHA received the transcript of the hearing (TR) on September 26, 2017. The record closed as scheduled on September 18, 2017.

### **Findings of Fact**

Applicant admitted all the SOR allegations with explanations. After a thorough and careful review of the testimony, pleadings, and exhibits, I make the following findings of fact:

Applicant is a 60 years old “Test Engineer.” (TR at page 16 line 4 to page 17 line 8, and GX 1 at page 5.) He is married, and has one adult child. (GX 1 at pages 14 and 18.)

### **Guideline D – Sexual Behavior & Guideline M – Use of Information Technology (IT)**

1.a. and 2.a. Applicant admits that from about January to July of 2016, he searched for and viewed pornography on his unclassified, employer-issued computer, sporadically, 60~80 times during the six month period. (TR at page 19 line 25 to page 23 line 21, at 29 line 24 to page 31 line 1, at page 34 line 24 to page 37 line 5, and at page 48 line 2 to page 49 line 11.) As a result of this conduct, he was “disciplined with a one-week suspension without pay.” (*Id.*)

1.b. Applicant’s wife is aware of this past-conduct and subsequent suspension, which is evidenced by a signed statement from his spouse, dated less than a month after the issuance of the SOR. (TR at page 27 line 5 to page 28 line 11, and AppX B.)

1.c. Applicant is not addicted to pornography, as is evidenced by a letter from a licensed mental health care professional. (TR at page 24 lines 5~22, at page 25 line 10 to page 27 line 2, at page 40 lines 1~13, at page 49 lines 12~16, and AppX A.) Furthermore, this mental health care professional opines that Applicant also is not “a compulsive rule breaker.” (AppX A at page 2.)

### **Policies**

When evaluating an applicant’s national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an “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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 an applicant may deliberately or inadvertently fail to 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.

Finally, 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 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 13. Two are potentially applicable in this case:

- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and
- (d) sexual behavior of a public nature or that reflects lack of discretion or judgment.

Applicant viewed pornography on his employee computer, which reflects a lack of discretion or judgment. It also created a vulnerability to coercion, as discussed above under Guideline E. The evidence is sufficient to raise these disqualifying conditions.

AG ¶ 14 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 14 including:

- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress; 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's wife knows of his past transgressions; and as such, he is not subject to coercion, exploitation, or duress. He has also received a favorable prognosis from a qualified mental health professional. This allegation is found for Applicant.

### **Guideline M - Use of Information Technology (IT)**

The security concern relating to the guideline 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 40. One is potentially applicable in this case:

- (e) unauthorized use of any information technology system.

Again, Applicant viewed pornography on his employee computer.

AG ¶ 41 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 41 including:

- (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;

Applicant's conduct occurred only 13 months prior to his hearing; and as such, it is too soon to find that similar IT rule violations are unlikely to be repeated in the future. This allegation is also found against Applicant.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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 national security eligibility 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 pertinent facts and circumstances surrounding this case. Although Applicant appears to be well respected in the workplace (AppXs C and D), the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For this reasons, I conclude Applicant has not mitigated the security concerns arising under Guideline M, Use of Information Technology.

## **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ 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  
Subparagraph 1.c.: For Applicant

Paragraph 2, Guideline M: **AGAINST APPLICANT**

Subparagraphs 2.a.: 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 access to classified information. National security eligibility is denied.

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Richard A. Cefola  
Administrative Judge