



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



In the matter of:)
)
) ISCR Case No. 17-03362
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

09/24/2018

Decision

CERVI, Gregg A., Administrative Judge

This case involves security concerns raised under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 24, 2017. On October 30, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines D and E.¹

Applicant answered the SOR and elected to have the case decided on the written record in lieu of a hearing. The Government's written brief with supporting documents,

¹ The DOD CAF acted under Executive Order (Exec. Or.) 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 revised adjudicative guidelines (AG) effective on June 8, 2017.

known as the File of Relevant Material (FORM), was submitted by Department Counsel on January 29, 2018.

A complete copy of the 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 and submitted a letter from his spouse in response, marked as Applicant's exhibit (AE) A. Government's exhibits (GE) 1 to 10 and AE A are admitted into evidence. The case was assigned to me on June 6, 2018.

Findings of Fact

Applicant is a 32-year-old software engineer, employed by a defense contractor since July 2016. He received a bachelor's degree in 2008. He married in 2008. He previously held a DOD security clearance but was denied continued eligibility for access to sensitive compartmented information (SCI) in January 2017 after disclosing disqualifying information during a full-scope polygraph exam.

The SOR alleges under Guideline D, and cross-alleged under Guideline E, that Applicant viewed child pornography from 1998 to 2015. Applicant admitted both SOR allegations. During a polygraph exam in 2015 by a DOD agency, Applicant admitted that between the ages of 13 to 17 years old, he actively searched, downloaded, and viewed pornographic images of humans and anime between the ages of a "fetus to a grandmother." He claims that he stopped actively seeking out child pornography in 2002, but between 2002 and 2015, he would "stumble" upon sexually explicit images of children while viewing pornography.

In his Answer to the SOR, Applicant claimed that as an adult, he found these images by accident as they appeared in "pop-ups" and were unintentional. He took steps to prevent unintentional child pornography images from appearing by accessing more reputable websites. He also told his spouse about his website viewing and agreed to stop viewing pornography altogether. Applicant acknowledged in his Answer that his behavior showed a severe lack of good judgment.

Applicant submitted a favorable character reference letter from his spouse, who discussed his revelation of his pornography viewing and the incidents which led to his SOR. She has forgiven him, helped him stop all further pornography viewing, and encouraged him to attend church regularly.

Policies

"[N]o one has a 'right' to a security clearance." Department of the Navy v. Egan, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." Id. at 527. The President has authorized the Secretary of Defense or his designee to grant applicants

eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

National security eligibility is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider a person's stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See Egan, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. 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. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” Egan, 484 U.S. at 531; see AG ¶ 1(d).

Analysis

Guideline D: Sexual Behavior

AG ¶ 12 expresses the security concern:

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.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. The following condition may be 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 or that reflects lack of discretion or judgment.

Applicant's inappropriate and illegal behavior, including accessing child pornography over a number of years, raise the disqualifying conditions above.

AG ¶ 14 provides conditions that could mitigate security concerns. I reviewed the facts against all of the mitigating conditions. No mitigating condition fully applies.

Applicant's actions with regard to the SOR allegation under this guideline involves repeated inappropriate and criminal conduct that reflects a lack of good judgment and a pattern of inappropriate sexual behavior. The occurrences were frequent, happened under normal circumstances, and continued until at least 2015. Applicant has claimed responsibility for his actions, but has not submitted to psychological treatment or provided other evidence to mitigate his behavior, nor has he sufficiently demonstrated that the behavior has ceased and will not recur. Based on the record and the length of time the behavior occurred, there is insufficient evidence in the record to believe that Applicant's inappropriate conduct has permanently ceased or that it will recur in the future.

Guideline E: Personal Conduct

The concern under this guideline 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.

The relevant disqualifying conditions under AG ¶16 are:

(c) credible adverse information in several adjudicative issues 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;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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. This includes but is not limited to, consideration of:

. . .

(2) any disruptive, violent, or other inappropriate behavior

(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, may affect the person's personal, professional, or community standing.

Applicant's conduct as noted in the findings of fact, invokes an assessment of questionable judgment and personal conduct that creates a vulnerability to exploitation, manipulation, or duress. AG ¶¶ 16(c), (d), and (e) apply.

Conditions that could mitigate personal conduct security concerns are provided under AG ¶ 17. 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 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.

Applicant's behavior, taken as a whole, shows a pattern of unmitigated inappropriate activity. Despite his recent claims of abstinence from child pornography, Applicant's judgment continues to be questionable. He has not submitted sufficient evidence to alleviate those concerns. The allegations are not minor, nor did they occur in unique circumstances where they are not likely to recur. He has not taken sufficient steps to remediate his behavior or eliminate the vulnerabilities that it creates. I find no mitigating condition is fully applicable.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), 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. 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).

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

Applicant has shown a history of inappropriate sexual conduct. His actions have not been appropriately mitigated by counseling or psychological treatment, and he has not shown sufficient evidence that continued misconduct will not occur in the future. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility for access to classified information.²

² No exceptions under Security Executive Agent Directive (SEAD) 4, Appendix C, are applicable.

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
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant's eligibility for access to classified information. Clearance is denied.

Gregg A. Cervi
Administrative Judge