



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



In the matter of:)
)
) ISCR Case No. 15-00266
)
Applicant for Security Clearance)

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Appellant: *Pro se*

12/04/2015

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guideline E (personal conduct) and Guideline D (sexual behavior). Clearance is denied.

Statement of the Case

On July 30, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines E and D. DOD CAF took that action under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

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Exemption 6 applies

The SOR detailed reasons why DOD CAF could not find under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's security clearance. On August 21, 2015, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. On September 25, 2015, Department Counsel compiled the Government's File of Relevant Material (FORM) that contained documents identified as Items 1 through 7.

The Defense Office of Hearings and Appeals (DOHA) forwarded to Applicant a copy of the FORM with instructions to submit any additional information and objections within 30 days of its receipt. On October 31, 2015, Applicant submitted a response. In his Response to the FORM, Applicant expressed no objections to Items 1 through 7. Department Counsel had no objection to Applicant's Response to the FORM, which has been marked as Item 8. The case was assigned to me on November 10, 2015. Items 1 through 8 are entered into the record.

Findings of Fact

Applicant is a 54-year-old technical publications librarian who works for a defense contractor. He has worked in his current position since May 2013. He graduated from high school in 1979 and received a diploma in theology in 1980. He served on active duty in the Navy from December 1980 to December 2002 and retired honorably. He has been married since 1986 and has four children ranging in age from 18 to 28. He has held a security clearance for a number of years.¹

Most of the SOR allegations were alleged under both Guidelines E and D. The SOR alleged that Applicant was terminated from a job in December 2009 after a coworker observed him viewing what was believed to be child pornography on a desktop computer (SOR ¶¶ 1.a and 2.a); that his wife does not know that he continued to view child pornography after his job termination (SOR ¶¶ 1.c and 2.a); and, that he communicated with others online his desire to view and fantasize about engaging in sexual contact with children, traded child pornography, masturbated while viewing such images, and viewed such images after his job termination (SOR ¶¶ 1.d and 2.b). The SOR alleged solely under Guideline E that he falsified facts about his viewing of pornography at his work computer during an interview with a DOD investigator (SOR ¶ 1.b).²

In his Answer to the SOR, Applicant admitted the allegation in SOR ¶ 1.a and denied the allegations in SOR ¶¶ 1.b and 1.c. He admitted part of the conduct alleged in SOR ¶¶ 2.a and 2.b and denied other aspects of those allegations. He neither admitted

¹ Item 3.

² Item 1.

nor denied the allegation in SOR ¶ 1.d, which solely cross-alleged the allegation in SOR ¶ 2.b.³

In September 2007, Applicant obtained a job at a company [hereinafter referred to as “Company B”]. On December 16, 2009, he was terminated from his position at Company B for “Gross Conduct.” In his security clearance application dated June 6, 2013, Applicant indicated that he was fired from Company B for “internet use.”⁴

On November 18, 2013, an Office of Personnel Management (OPM) investigator interviewed Applicant. The summary of that interview stated in part:

On an unrecalled date in Dec 2009 [Applicant] was at work in his cubicle at [Company B] surfing the internet and was looking at pictures on Myspace.com and Flickr. [He] stated that [Company B’s] policy was that the internet resources were not to be used except for the conduct of [Company B’s] business and that his use of the internet to access the Myspace.com and Flickr sites was bad judgment on his part. As one image linked to another, subject found himself looking at pictures of scantily clad women and girls. At no point did the images depict nudity or sexual acts. [He] only went to the Myspace.com and Flickr websites and at no time accessed any pornographic website. All of the pictures of women were bikini poses. The pictures showing girls were fully clothed. [He] did not begin surfing with the intent to look at pictures of women and girls; the pictures came up as links, one hyperlink led to another, and [he] followed them. This was the first and only time [he] had misused the internet at work. Unknown to [him] at the time, one of the female team leads (name unrecalled) had passed by [his] cube and saw the pictures displayed on his computer screen. [He] did not recall the amount of time he spent looking at the pictures but within a few moments [he] realized that he was violating [Company B’s] policy against internet use and turned away from the websites. [He] assumed that the female team lead had gone to the manager and reported [his] activities. [He] already exited the websites when the female team lead came back to [his] cubicle and summoned [him] to the conference room. The [Company B] manager (name unrecalled) was in the conference [room] waiting for [him], and upon [his] entry, restated the [Company B] policy against internet use and terminated [his] employment.⁵

³ Item 2.

⁴ Items 3 and 5.

⁵ Item 4. In responding to DOD CAF interrogatories on April 30, 2014, Applicant indicated the summary of his OPM background interview on November 18, 2013, accurately reflected the information he provided to the investigator on that occasion.

A federal law enforcement report dated December 31, 2009, indicated an internal investigation revealed that Applicant's work computer contained numerous images of pornography and several images of suspected child pornography. While accessing his Flickr account, Applicant apparently conducted an internet search using the search term "nude kids" with the internet search engine's "safesearch" preferences set to off. The report also noted that it appeared Applicant had been in contact with traders of child pornography while accessing his Flickr account. During a work-exit interview, Applicant reportedly stated he had been distributing and receiving child pornography on his work computer and indicated his interest was in "8 to 9 year old girls." A forensic examination of the images on Applicant's work computer confirmed the presence of child pornography.⁶

On July 28, 2010, federal law enforcement agents interviewed Applicant at his home. During that interview, Applicant indicated that he was fired from his job at Company B because he admitted to viewing child pornography at his work station. He further stated that he began looking at both adult and child pornography at his work station in the summer of 2009. His wife knew why Company B fired him, but did not know that he continued to view child pornography. He admitted that he conducted online chats in which he communicated his desire to view and fantasize about engaging in sexual contact with female children. He stated he never touched a child in an inappropriate manner nor had he taken inappropriate photographs of children. He used an alias computer name and had a username that included the term "toddlerlover." He identified a website in which he viewed and traded child pornography and admitted to viewing such images as recently as a week before the interview. He explained that he retrieved such images from a computer link, masturbated while looking at them, and would then logout of the link without saving the image to his computer. No images were found during a cursory search of his home computer. Applicant described "child pornography" as images of children under the age of 18 engaging in sexual contact with other children or adults. He indicated that he "did not think that images of nude girls was a problem." In August 2010, the local U.S. attorney declined to prosecute Applicant.⁷

In his Answer to the SOR, Applicant denied that he intentionally lied to the OPM investigator. He stated that he misunderstood the question about how long he had been viewing pornography. He claimed he told the investigator he viewed it for a few months, but was unsure when he started doing so. He also said he thought the investigator was asking if he had ever looked at that type of material at any other job or time in his life, and he could honestly answer "no" to that question. In his Response to the FORM, he made similar statements claiming he misunderstood the timeframe of the investigator's question.⁸

⁶ Item 6.

⁷ Items 6 and 7.

⁸ Items 2 and 8.

In his Answer to the SOR, Applicant provided a letter dated August 10, 2015, from his wife. She noted the he admitted to her why he was fired from Company B. She was devastated upon learning of his behavior and left him for a period. Upon her return in the spring of 2010, he informed her that he had three or four relapses while she was gone. She further stated that he “last strayed” months before being interviewed by the federal law enforcement agents. In his Response to the FORM, Applicant stated that, after the federal law enforcement interview, he “came clean with his wife” and has not “returned to child or any other pornography.”⁹

In his Answer to the SOR, Applicant admitted that he conducted internet chats with unknown people about his desire to view child pornography. He acknowledged this was a grave error in judgment. He denied ever masturbating while looking at those images. He indicated that he became confused during the federal law enforcement interview and stated he only continued to view such images until late spring 2010. He indicated that he is willing to undergo treatment, but provided no evidence that he has actually received any treatment.¹⁰

In his Response to the FORM, Applicant submitted a work performance evaluation dated October 26, 2015. On a scale of one to five, he received an overall rating of 3.88, which was between the categories of “satisfactory” and “outstanding.” He was described as very dependable and was recommended for retention at the company.¹¹

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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, *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).

⁹ Items 2 and 8.

¹⁰ Items 2 and 8.

¹¹ Item 8.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AGs. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, to reach his decision.

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 of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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.

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

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(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 person may not properly safeguard protected 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 person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

* * *

(3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing

In December 2009, Applicant was terminated from his job because he viewed pornography on his work computer. During a federal law enforcement interview, Applicant admitted that he chatted online about his fantasies of engaging in sexual contact with children, masturbated when viewing child pornography, and traded child pornography online. The evidence also supports a determination that, as of August 10, 2015, his wife did not know that he continued to view child pornography until at least a week before his federal law enforcement interview in July 2010. Her letter also contradicts his statement in the Response to the FORM that he "came clean" to his wife after the federal law enforcement interview. AG ¶¶ 16(c), 16(d), and 16(e) apply.

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An incorrect statement or omission, standing alone, does not prove falsification. A falsification must be made with a culpable state of mind, such as intent to deceive. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the incorrect statement or omission. See ISCR 03-09483 (App. Bd. Nov. 17, 2004). In this case, SOR ¶ 1.b alleged Applicant falsified material facts during the OPM interview when he stated the incident in December 2009 was the first and only time he misused the internet at work. The federal law enforcement report, however, revealed that Applicant had begun looking at both adult and child pornography on his work computer in the summer of 2009. A comparison of the summary of his OPM interview and the federal law enforcement report also revealed other significant inconsistencies between those two statements. In the OPM interview, Applicant claimed he stumbled upon the questionable images while surfing the internet and indicated those images did not depict nudity or sexual activity. The federal law enforcement revealed the he actively searched for child pornography and, in doing so, viewed such images on his work computer. He intended to mislead the investigator by his statements. Substantial evidence exists to establish that Applicant intentionally falsified material facts during the OPM interview by stating the December 2009 incident was the first and only time he misused the internet at work. AG ¶ 16(b) applies.

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

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of

unauthorized personnel or legal counsel advising or instructing the individual specifically concerning security clearance process. Upon being made aware of the requirement to cooperate or provide information, the individual cooperated fully and truthfully;

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability.

According to the record, Applicant last viewed child pornography in July 2010, which was over five years ago. He indicated that he was willing to undergo treatment, but failed to provide proof he has received any treatment. He intentionally provided false information during a November 2013 interview. He has continued to deny the falsification allegation in his Answer to the SOR and Response to the FORM. He has failed to establish that he has reformed and rehabilitated himself. His misconduct is recent and repetitive. After examining all of the applicable mitigating conditions, I find that none apply.

Guideline D, Sexual Behavior

AG ¶ 12 expresses the security concern pertaining to 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, 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 sexual orientation of the individual.

Four sexual behavior disqualifying conditions are listed under AG ¶ 13:

(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 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.

Applicant continued to engage in the self-destructive behavior of viewing child pornography online even after he was fired from his job and his wife left him for a temporary period. For the reasons stated under the disqualifying conditions for Guideline E, AG ¶¶ 13(a) through 13(d) apply.

Four sexual behavior mitigating conditions are listed under AG ¶ 14:

(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.

Applicant's illegal sexual behavior occurred while he was an adult. His misconduct and his attempts to minimize it raise serious questions about his reliability, trustworthiness, and judgment. For the reasons stated under Guideline E, none of the Guideline D mitigating conditions apply.

Whole-Person Concept

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

(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 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 E and D in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's personal information, military service, and work history. Except for a work performance evaluation and letter from his wife, minimal whole-person evidence was presented. Considering the seriousness of Applicant's repeated misconduct, his attempts to minimize it, and the absence of sufficient evidence showing reform or rehabilitation, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant failed to mitigate the security concerns arising under the personal conduct and sexual behavior guidelines.

Formal Findings

Formal findings 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 E: Subparagraphs 1.a – 1.d:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline D: Subparagraphs 2.a – 2.b:	AGAINST APPLICANT Against Applicant

Decision

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

James F. Duffy
Administrative Judge