



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 24-00695

**Appearances**

For Government: Brittany C. White, Esq., Department Counsel

For Applicant: Daniel P. Meyer, Esq.

01/30/2026

**Decision**

HARVEY, Mark, Administrative Judge:

Guidelines D (sexual behavior), J (criminal conduct), and E (personal conduct) security concerns are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On July 13, 2021, and September 15, 2022, Applicant completed Electronic Questionnaires for Investigations Processing or security clearance applications (SCAs). (Government Exhibits (GE) 1, GE 2) On May 9, 2025, the Defense Counterintelligence and Security Agency (DCSA) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and Security Executive Agent Directive 4, establishing in Appendix A, the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DCSA did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security

clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guidelines D, J, and E. (HE 2) On July 24, 2025, Applicant responded to the SOR, and she requested a hearing. (HE 3)

On August 5, 2025, Department Counsel was ready to proceed. On August 15, 2025, the case was assigned to me. On September 15, 2025, the Defense Office of Hearings and Appeals (DOHA) issued a Notice setting the hearing for October 31, 2025. All administrative judges were furloughed from October 1 through November 12, 2025, during a federal government shutdown due to a lapse in federal funding. On November 19, 2025, DOHA issued a Notice rescheduling the hearing for January 7, 2026. Applicant's hearing was held as rescheduled, in the vicinity of Arlington, Virginia, using the Microsoft Teams video teleconference system.

During the hearing, Department Counsel offered seven exhibits; Applicant offered six exhibits; and I admitted all proffered exhibits into evidence without objection. (Tr. 11-13; GE 1-GE 7; Applicant Exhibits (AE) A-AE F) On January 21, 2026, DOHA received a copy of the transcript. On January 28, 2026, I received a psychological evaluation, which I admitted into evidence. (AE G)

Department Counsel requested administrative notice of a *Citizen's Guide to the U.S. Federal Law on Child Pornography*, published by the Department of Justice. (Tr. 7) Applicant did not object, and I granted the request. (Tr. 7-8, 11-12) The *Citizen's Guide to U.S. Federal Law on Child Pornography* indicates child pornography is not protected under the First Amendment and is illegal under federal law. Federal law prohibits the production, distribution, reception, and possession of an image of child pornography. Any violation of federal child pornography law is a serious crime, and convicted offenders face severe statutory penalties. See ISCR Case No. 22-02113 at 2 (App. Bd. Jan. 31, 2024).

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

### **Findings of Fact**

In Applicant's SOR response, she denied the SOR allegations in ¶¶ 1.a, 1.b, 2.a, and 3.a. (HE 3; Tab B) She also provided some clarifying and mitigating information about the allegations. Her admissions are accepted as findings of fact.

Applicant is a 42-year-old senior principle cyber software engineer systems administrator who has worked for the same defense contractor for about nine years. (Tr. 16-17, 53; SOR response) From 2007 to 2016, the DOD employed her as an information systems security engineer. (Tr. 17, 54) She has three children between the ages of 10 and 15 and maintains a friendly relationship with her ex-spouse since their amicable divorce in 2022. (Tr. 17, 50) In 2005, she was awarded a bachelor's degree in computer science, and in 2007, she was awarded a master's degree in computer science and a

master's degree from a DOD school. (Tr. 53-55; SOR response; July 13, 2021 SCA at 14-15) Her father is a retired U.S. Navy captain, who served 26 years in the Navy. (AE C)

An important element is Applicant's life is her history of gender dysphoria. She said:

My gender dysphoria is something that I feel like I always struggled with, it's something that I can trace back even into adolescence, and pre-adolescence, an overall incongruity with my sense of self. But it's not something that I ever really had words for prior to about 2015, [which] is when I really started looking into it. And in 2016 I was working with a therapist, and that's when I kind of had a breakthrough, and recognized that I was transgender, and that a lot of what I was dealing with was gender dysphoria, the notion that my sense of [whom] I was disconnected from the body, and the way that I was perceived by society around me. I'm not sure how much deeper we necessarily want to get into that. But I did pursue further treatment, including both psychological therapy, medicine, and eventually surgeries. (Tr. 19)

### **Sexual Behavior and Criminal Conduct**

SOR ¶ 1.a alleges under the sexual behavior guideline that Applicant downloaded and viewed thousands of pornographic images of children from about 2013 to at least about 2014 while working for DOD at a base outside the United States. SOR ¶ 1.b alleges under the sexual behavior guideline that she was investigated for these actions and warrants were issued for her electronic devices. She left the job before the investigation could conclude. SOR ¶ 2.a cross-alleges under the criminal conduct guideline the same conduct alleged in SOR ¶¶ 1.a and 1.b.

Applicant said her interest in the pictures she downloaded was "an aesthetic interest, [she] pursued as [she was] attempting to resolve [her] gender status as opposed to a prurient interest." (Tr. 28) She explained why she utilized the dark web as follows:

[I]t was mostly just for the ability to find a large collection of images that could be downloaded without attendance that I could go through later to find things that I found soothing. I wasn't specifically looking for illicit images, whether prurient or otherwise. There was some intent to bypass purchasing things that were for sale, that is just the facts of it. I was not trying to per se hide my identity through going there, it wasn't the need for anonymity in that sense. But just not having to engage in a person to person kind of way. (Tr. 82)

A criminal investigation began when local base security received a tip from the base Internet service provider that Applicant's Internet protocol (IP) had been flagged as accessing certain marked resources or servers. (Tr. 44) The investigators interviewed Applicant in February of 2016, and she said she was "not attracted to minors." (Tr. 44-45, 64) She believed she consented to the search of her residence. (Tr. 45) Applicant said

she was not advised of the result of the investigation. (Tr. 45) She was not told that she was arrested or charged. (Tr. 45)

Later at her personal appearance, Applicant said she declined to provide her cell phone and computer, and investigators obtained a search warrant for her electronic property. (Tr. 63) The investigators seized her electronic devices. Her February 2016 DOD investigative summary of interview<sup>1</sup> states:

When the Reporting Agent asked if she had pornography on her computer, [Applicant] stated she did. When asked if she had illegal pornography on her computer, [Applicant] stated she did not. The Reporting Agent asked how many images of children between the ages of nine to 12 [Applicant] had on her computer, she stated over 100, less than 200 images, and she did not believe it was child pornography. she described the images as erotica and deemed them separate from pornography.

\* \* \*

The Reporting Agent asked [Applicant] if she has been constantly downloading images from [an application] for approximately one year, how it is possible she only had less than 200 images of children between the ages of nine and 12. She was unable to provide an explanation. Later in the interview, it was explained to her the [DOD] found 40,000 pornographic images on her computer, 30,000 of them are of females between the ages of nine to 12, wearing tight clothing, usually a leotard, sitting with their genitals facing the camera, and in most instances, one can see the outline of their genitals. [Applicant] stated that was a possibility but she did not know how many images she had because she did not view all of them. She only viewed some of them and deleted the images that were “disturbing,” meaning “naked kids.” When asked why she stated she had less than 200 images earlier in the interview and is now stating it could be as many as 30,000, she stated she never said that and was not asked that question by the Reporting Agent. (GE 6 at 3-4)

At the hearing, Applicant disagreed with the use of the term, “erotica” in the investigative summary for the images of children because the children were wearing clothing. (Tr. 66-67, 80) She conceded children dressed erotically would still violate local national law at the overseas location where the images were possessed. (Tr. 88)

Applicant believed she was pre-adolescent or during adolescence when she was downloading images of children on her computer in 2013 to 2014 even though she was chronologically about 30 years old. (Tr. 37-40) She explained she was biologically or physically an adolescent in 2016, which was three or four years after she downloaded child pornography. She said:

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<sup>1</sup> For consistency, when referring to Applicant, I have replaced “he” with “she” and “him” with “her” in quotes without use of brackets.

So, I think that I can pretty confidently say that yes, this happened prior to adolescence as I experienced it. I think it gets to be kind of complicated, I think you kind of indicate that there is a social aspect to adolescence. . . . [It] is also important to recognize the biological and chemical aspect of adolescence. . . . I was taking estrogen for the first time, my body was receiving it in very much the same way that cis gendered women receive their estrogen when they first start puberty at 9, 10, 11, however old it is. And so in a very real sense I went through feminine puberty over the last eight years. . . . [T]here has been a lot of development biologically, and psychologically through that process of receiving estrogen, and processing it, and everything that comes naturally, biologically through that. . . . [Blood tests showed her testosterone levels were very low and] I'm not confident that you could say that I had completed even male adolescence in the same way that cis men would have completed it. . . . I think that this happened during or prior to, depending on how you want to look at it, my adolescence. (Tr. 38-40)

Applicant said, "[A] cis man is someone who was assigned male at birth, and identifies as male, and a trans man is someone who was assigned female at birth and identifies as male." (Tr. 40)

Applicant believed her conduct downloading sexual images of children was not a crime. She denied that she engaged in sexual behavior because "for me, it was purely aesthetic, purely being able to project my sense of self onto an image that felt like me." (Tr. 43) She explained:

So . . . the long and short of it is that from my perspective it was never a sexual pursuit. I was experiencing intense gender dysphoria that as I noted, I didn't really have any way of understanding, or conceptualizing. I knew that I was under a lot of distress. And what's more is that I, being overseas the way that we were, was separated from any kind of support system that I had managed to build up over the years to subconsciously alleviate that distress. I was away from all of my friends, and family, and anyone who helped mediate that feeling for me. I ended up finding modeling sites where there were images of young women and young girls.

And most of the images on those sites were very tame, girls in dresses sort of thing. And those I found to be very soothing, they were something that I was able to project myself onto, and be like that is who I want to be, that is the image that matches myself, my sense of self. And so I started looking into ways of finding more images like that to help alleviate that distress that I was feeling. . . . And so I went to peer to peer software, where I could basically queue up large swathes of files that would be downloaded, and then I would go in after the fact, and pick through them, and see if anything matched what I needed.

And so a big piece of it is I was never looking for any illicit images, I wasn't looking for anything sexual. And the images that I was looking for, I don't believe cross into that line of illicit photographs, child sexual abuse, that sort of thing. And so, none of my intent matched what I believed would have been criminal. (Tr. 26-28)

Applicant conceded her conduct was "probably imprudent;" however, she did not believe that "it harmed anyone, in that any harm that would have gone into making any of these images had already been committed before I accessed anything." (Tr. 46)

Applicant denied that she has had any interest in sexual images of children for several years. (Tr. 30) She denied any sexual activities as an adult with anyone under 18 years of age. (Tr. 61) She continues to view pornography from the Internet. (Tr. 86-87) Her change in interests was achieved through psychological therapy and counseling and the support of her family. (Tr. 30-32; AE E) She has been "receiving therapy for anxiety and depression" since 2013. (Tr. 31; AE E) After she recognized herself "as transgender, a lot of that depression resolved itself very quickly." (Tr. 31) Her current "level of dysphoria . . . is basically zero." (Tr. 30) She said her "drive to seek out even that aesthetic kind of relief is not something that I have had any inclination towards in years." (Tr. 30) She has publicly disclosed her transgender identity, and she could not be pressured or coerced over this issue. (Tr. 33) Her therapy records and character statements indicate she follows rules. (Tr. 47)

Applicant would not make the same choices she did in the past, and she does not believe she will make judgment errors in the future because she has the support of the trans community. (Tr. 42, 48) Her current circumstances are different from the 2013 to 2014 time period. (Tr. 42) She said:

[The conduct at issue] occurred at a specific time and place, both geographically and chronologically, under a set of circumstances, specifically a measure of distress that is no longer part of my life. I have a very good support network with my friends and family, I am living authentically as myself. I don't have any of that gender dysphoria anymore, and so it is something that I feel like you could say that because of the distress that I was under it was a lapse in judgment, it was a poor choice, and that is true in the past. I think that today none of those considerations are relevant anymore. I'm no longer that person, and I'm no longer under that level of distress. (Tr. 41)

In sum, for about one year, Applicant continuously downloaded pornographic images from the Internet to her personal desktop computer or electronic devices. (Tr. 76) She downloaded batches of files from the dark web, and then later she reviewed or curated the files that were downloaded. (Tr. 36, 74-75, 81) The pictures and videos were downloaded during the workday and on weekends. (Tr. 77) Due to the size of the files and the capacity of the servers, it might take days or weeks for the items to download. (Tr. 92-93) The DOD investigation concluded that "approximately 5000 files of known child pornography or child sexual abuse material were found," on Applicant's electronic

devices in 2014. (Tr. 83; GE 7) She admitted she had a compulsion to download the images in 2013 and 2014. (Tr. 91) She denied that she knew at the time she was viewing the images that she understood that what she was doing was illegal. (Tr. 82) Some of the pictures she viewed were nude children or children engaged in sexual activities, and she said she deleted those pictures after viewing them. (Tr. 78) The deleted pictures and videos went into her computer's recycle bin. (Tr. 94) She conceded that during the time she was viewing the pictures, she was in possession of the pictures, and she engaged in possession of child pornography. (Tr. 95-97)

## Personal Conduct

SOR ¶ 3.a alleges under the personal conduct guideline that Applicant provided false information during an August 18, 2021 Office of Personnel Management (OPM) personal subject interview (PSI), when she “denied having any knowledge of or participation in any activity related to child pornography or anything that would have been considered inappropriate or illegal, when, in fact, [she] deliberately sought to conceal the information” alleged in SOR ¶¶ 1.a and 1.b, *supra*.

In response to questions on her July 13, 2021 and September 15, 2022 SCAs about previous suspension or revocation of her security clearance, Applicant said:

My clearance was suspended by the agency pending an investigation by the [DOD] into flagged internet activity while I was living on [a DOD] base overseas. The investigation was not related to my clearance or my work. I was never made aware of any resolution to the investigation. (GE 1 at 40; GE 2 at 37)

On August 18, 2021, Applicant advised an OPM investigator that her security clearance was suspended in 2014. (GE 3 at 27) The OPM PSI discussed the investigation leading to her clearance suspension as follows:

Subject stated that while working at [an overseas DOD base] network traffic on a server detected a download at subject's personal residence in 10/2014. Base Security contacted subject and advised her that they had traced something (specifics not provided) to a computer at subject's residence. Subject believes, but was unable to confirm, that there were several downloads that had occurred on various devices that were related to child pornography. Subject stated that she was advised [that a DOD entity] had requested the investigation. **Subject flatly denied having any knowledge of or participating in any activity relating to child pornography or anything that would have been considered inappropriate or illegal.** Subject stated that this type of activity is against her codes of moral decency and that she has never engaged in any activity of this nature and to her knowledge neither has anybody in her household. Subject was never given any information about the status of the investigation by [DOD] and was advised that until the case was resolved her security clearance would be suspended. (GE 3 at 28 (emphasis added))

In her response to DOHA interrogatories, Applicant did not make any corrections to this quoted statement. (GE 3) A DOHA interrogatory asked Applicant to explain the above paragraph as follows:

During an interview with a federal investigator in August 2021, you flatly denied having any knowledge of or participating in any activity relating to child pornography or anything that would have been considered inappropriate or illegal in October 2014 while living [overseas at a DOD base]. . . . Please explain your lack of responsiveness [in] detail of the [DOD] investigation to the investigator during your August 2021 interview with the [OPM] investigator. (GE 3 at 7)

Applicant responded to this interrogatory as follows:

I've read the transcripts over and over and simply do not see the discrepancy referenced. [The OPM investigative interviews in 2023 as discussed on other interrogatory pages] show that I provided details about the investigation. [My descriptions of my current and future intentions regarding child pornography on other interrogatory pages] affirm that I never felt I had been less than forthcoming. Nowhere does the transcript indicate that I denied knowledge of the investigation. (GE 3 at 7)

On July 25, 2025, Applicant signed an affidavit, which said:

I was contacted by federal agents regarding the investigation two or three times between 2015 and 2018, though I believe at least once was by an agent of [another federal agency] rather than the [DOD investigative agency] conducting the investigation, and I can't say for certain which agents represented which portions of the government. On one of these occasions I was told that no [child sexual abuse material (CSAM)] had been found on my devices but that thousands of what the agent called "child erotica" had been. That was the last or near the last time I heard anything about the investigation. (AE C at ¶ 7)

Applicant did not provide the name of the investigative entity or agent who told her that no CSAM was found on her electronic devices. On July 25, 2025, Applicant briefly mentioned the conduct in SOR ¶ 3.a relating to her denial in 2021 of "having any knowledge of or participating in any activity relating to child pornography or anything that would have been considered inappropriate or illegal" to the OPM investigator. Applicant said

[I]t's reasonable to conclude that I didn't have any knowledge of anything criminal. I had no intention to mislead or be anything other than forthright and accurate and would not have had an expectation that an attempt to mislead the government about an investigation performed by the government would be effective. (AE C at ¶ 13)



Applicant explained why she believed she did not make a false statement to the OPM investigator. (Tr. 25-26) She said:

So, I think that the disconnect comes down to one of perspective. I think that the crux of the matter is that I did not consider this as a situation where I was engaging with individual investigators in separate interviews. From my perspective, this was an ongoing engagement with the federal government.

And so, it never occurred to me that any given investigator that I spoke with would have been ignorant of anything that had come before. And so I only ever made my statements to be as accurate as they could be given my current understanding at the time. And I believe that when it comes down to it, the question was do you have any knowledge of criminal activity?

And at the time my understanding was this has been ongoing for seven or eight years, I have never been charged as far as I know, and it's my understanding that if there had been criminal activity, there would have been charges filed in that time. And so, I felt that it was an accurate statement to say that no, I'm not aware of anything like that." (Tr. 25-26)

In response to Department Counsel's question at her hearing, about her statement on August 18, 2021, to the OPM investigator about not being involved with child pornography, she said:

I would stand by that statement in the context of the full process. It was made in the context and understanding that everything that had gone before was known between both me and the investigator, and as I've said before, I was never charged with anything. And so it seems improbable for me to say that yes, there was criminal activity, and it never materialized into anything. I don't know how to make sense of that. (Tr. 84)

## **Psychological Evaluation**

On July 21, 2025, Dr. K, a Licensed Clinical Psychologist, evaluated Applicant. (AE G) Dr. K's family, history included the following statement:

[Applicant] stated that she was accused of viewing thousands of pornographic images of children on a personal home computer while employed by the Department of Defense at an [DOD overseas base] between 2013 and about 2014. Her electronic devices were investigated, but she was never notified that any illegal images were found, and no consequences were issued. (AE G)

Under relationship, and sexual history, Dr. K indicated the following in his evaluation:

Between 2013 and 2014, [Applicant's] gender identity-related distress intensified, and she began exploring femininity online. She felt she was missing out on the female adolescent development experience and began searching for images of teenage girls. She found teen modeling sites featuring adolescent females. She was drawn to and envious of their developing female identities. [She] became nearly obsessed with searching for images of teenage girls. She reports that these teen modeling sites were all legal, and no girls were depicted in sexual poses. She stated that she has never searched for or viewed child pornography and has not felt sexual attraction toward minors online or in real life. Additionally, [Applicant] did not indicate any fetish or unconventional pornographic interests and believed her consumption of pornography was neither excessive nor out of control. (AE G)

In his "Formulations" paragraph, Dr. K concluded:

[Applicant] is a 42-year-old single woman being evaluated for concerns about viewing problematic pornography. [She] appeared open and honest with this examiner and has had a positive educational and professional life, as well as a good relationship with her ex-wife and children. After conducting my evaluation of [Applicant], I believe she has no uncontrolled issues with online pornography, no diagnosable mental health or sexual conditions, including pedophilia. [She] reports no sexual attraction toward minors. The teenage modeling image viewing was not sexually motivated. To qualify for a pedophilia diagnosis, she would need to have consistent and persistent sexual arousal toward prepubescent children under age 12.

[Applicant's] internet search for teenage girls was over ten years ago, which was related to her clarification of her own female gender identity. She no longer has a desire to view adolescent girls, and all of her erotic sexual attractions now focus on adults. This evaluator believes that [she] has an excellent prognosis for never returning to viewing teenage modeling sites. In my professional opinion, [she] has no sexual diagnosis or problematic mental health dynamics related to her sexual makeup. She lacks any psychological functioning problems. (AE G)

### **Character Evidence**

Eight coworkers and friends attested to Applicant's technical expertise, professionalism, diligence, responsibility, and trustworthiness. (AE D) Their statements support reinstatement of her security clearance.

Applicant received substantial therapy and counseling. She submitted hundreds of pages of medical and counseling records to establish her well-documented actions to improve her stability, judgment, and mental health. (AE E) She said she would like to retain a security clearance because she enjoys working for the government. (Tr. 52-53)

She believes she has skills and experience that enable her to contribute to the national defense. (Tr. 52-53)

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 her designee to grant applicant’s 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.

Eligibility for a security clearance 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, these guidelines are applied 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 all available, reliable information about the person, past and present, favorable and unfavorable.

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 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 “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. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and Director of National Intelligence 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. 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 her [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**

### **Sexual Behavior and Criminal Conduct**

AG ¶ 12 contains the security concern for sexual behavior:

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 ¶ 30 describes the security concern about criminal conduct, “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 ¶ 13 includes conditions that could raise a security concern and may be disqualifying:

- (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.

AG ¶ 31 provides one criminal conduct condition that could raise a security concern and may be disqualifying in this case:

(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.

AG ¶¶ 13(a), 13(d), and 31(b) are established. Applicant was able to stop possessing child pornography, and she is not vulnerable to coercion, exploitation, or duress because security officials and law enforcement are aware of her involvement with child pornography. AG ¶¶ 13(b) and 13(c) do not apply. Additional discussion is in the mitigating section, *infra*. AG ¶ 14 lists conditions that could mitigate sexual behavior security concerns:

(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 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.

AG ¶ 32 lists four conditions that could mitigate criminal conduct security concerns:

(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;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; 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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

Title 18 U.S.C. § 2252A(a)(2)(B), *Certain activities relating to material constituting or containing child pornography*, states:

- (a) Any person who—
  - (2) knowingly receives or distributes—
    - (B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer. . . . ;
- (b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years.

Title 18 U.S.C. § § 2256, *Definitions for chapter*, states:

For the purposes of this chapter [18 USCS §§ 2251 et seq.], the term—

- (1) "minor" means any person under the age of eighteen years;
- (2)
  - (A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated—
    - (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
    - (ii) bestiality;
    - (iii) masturbation;
    - (iv) sadistic or masochistic abuse; or

- (v) lascivious exhibition of the anus, genitals, or pubic area of any person; responsibility for a minor whether legally or illegally obtained; . . .
- (8) “child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
  - (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
  - (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
  - (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

A DOD investigative agency found about 30,000 images of children dressed in a manner showing the shape of their genitals under their clothing or otherwise displaying the genital area of their bodies under clothing. These images may constitute child pornography under 18 U.S.C. § 2252A(a)(2)(B). The court in *United States v. Knox*, 32 F.3d 733, (3d Cir. 1994) said:

A visual depiction of a child, whether the child is clothed or naked, must be lascivious to be proscribed. Whether a depiction is lascivious is essentially a subjective inquiry into whether or not the material is intended to elicit a sexual response from the viewer. Only a minuscule fraction of all pictures of minor children will be sufficiently sexually suggestive and unnaturally focused on the genitalia to qualify as lascivious. Even fewer images where a minor’s genital area is not fully exposed will constitute a lascivious exhibition since the fact that a child’s genital area is covered is a factor militating against a finding of lasciviousness. Thus, including scantily clothed displays of the genitals within the meaning of an exhibition leaves the statute directed at the hard core of child pornography, which results in leaving an indelible psychological scar on the exploited child. Our interpretation simply declines to create an absolute immunity for pornographers who pander to pedophiles by using as their subject’s children whose genital areas are barely covered.

*Id.* at 823 (internal quotation marks and citations omitted). See *United States v. Kemmerling*, 285 F.3d 644 (8th Cir. 2002) (stating the “lascivious” standard may be met when a picture shows a child nude or partially clothed, when focus of image is child’s genitals or pubic area, and when the image is intended to elicit a sexual response in the viewer).

The DOD investigators determined Applicant had about 5,000 images of child pornography on her electronic devices. “Police reports, which are admissible both as an official record under Directive ¶ E3.1.20 and as a public record under Federal Rule of

Evidence 803(8), are presumed to be reliable by virtue of the government agency's duty for accuracy and the high probability that it has satisfied that duty." ISCR Case No. 22-02391 at 4 (App. Bd. Oct. 17, 2023). Applicant said she had "over 100, less than 200 images, and she did not believe it was child pornography. She described the images as erotica and deemed them separate from pornography." (GE 6 at 3-4) There is substantial evidence that from 2013 to 2014, Applicant possessed and viewed thousands of pornographic images of children while working for DOD at a base outside the United States. A warrant was issued and DOD investigators seized her electronic devices and found about 5,000 images of child pornography.

Applicant's statement in February 2016 that she had between 100 and 200 images of child pornography on her computers and electronic devices was an intentionally false or misleading statement to the DOD investigator about the number of child pornography images. Initially at her hearing, she denied that she was in possession of child pornography in 2013 and 2014. Later in her hearing, she admitted she possessed child pornography; however, she never stated that she believed she possessed thousands of child pornographic images. These false statements were not alleged in the SOR. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

*Id.* (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See *also* ISCR Case No. 12-09719 at 3 (App. Bd. Apr. 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). These non-SOR allegations will not be considered except for the five purposes listed above.

At her hearing, Applicant said: she suffered from gender dysphoria in 2013 to 2014; her intention was not to receive sexual gratification from the pictures she downloaded from the Internet, instead she found them to be soothing; and she did not consider the pictures of children to be pornographic. Applicant did not submit a legal brief or otherwise meet her burden of showing these issues were affirmative defenses to the crime of possession of child pornography.

Applicant said she was an adolescent or preadolescent at the time of the viewing of the child pornographic images and now she has transitioned, received therapy, and has not possessed child pornography for more than 10 years. See *generally* AG ¶¶ 14(a), 32(a), and 32(d).

Applicant told Dr. K that "no girls were depicted in sexual poses. She stated that she has never searched for or viewed child pornography." (AE G) This was not true.



However, I accept Dr. K's diagnosis as accurate that she "has no sexual diagnosis or problematic mental health dynamics related to her sexual makeup. She lacks any psychological functioning problems." (AE G)

None of the mitigating conditions fully apply. Applicant did not take full responsibility for her possession of thousands of images of child pornography. She did not admit that she engaged in a series of criminal offenses over one year period as she collected and possessed images of child pornography. She minimized her conduct. "[R]ehabilitation and reform is difficult to establish if an applicant refuses to accept responsibility for her actions." ISCR Case No. 22-02113 at 7 (App. Bd. Jan. 31, 2024) (reversing grant of security clearance in part where Applicant said receipt of child pornography images was unintentional). See *also* ISCR Case No. 08-05351 at 8 (App. Bd. Mar. 12, 2010) (reversing a grant of security clearance in part because the judge failed to consider the applicant's refusal to accept responsibility for accessing child pornography). Applicant's possession of child pornography was in 2013 to 2014, which is not recent; however, "[w]hatever mitigating value attaches to the passage of time since the conduct, it is seriously diminished by Applicant's failure to acknowledge the misconduct." ISCR Case No. 22-02113 at 7 (App. Bd. Jan. 31, 2024) (internal quotation marks omitted; citation omitted). ISCR Case No. 17-01680 at 4 (App. Bd. Jul. 19, 2019) ("Applicant's reliance on the age of the misconduct is undercut by the fact that currently Applicant denies that he has viewed or possessed child pornography.").

Applicant's history of minimization and some outright denials of criminal culpability raise obvious questions about her honesty throughout the security clearance process. See ISCR Case No. 22-02113 at 7 (App. Bd. Jan. 31, 2024). Her false statements damage her credibility, integrity, and reliability. *Id.*

Acceptance of responsibility, which includes a candid admission of conduct, is often considered an important step on the road to rehabilitation. More time must pass without actions of security concern, such as lying during the security clearance process, see *also* personal conduct section, *infra*, before reinstatement of her security clearance is warranted. Guidelines D and J security concerns are not mitigated.

## **Personal Conduct**

AG ¶ 15 explains why personal conduct is a security concern stating:

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 provides one personal conduct condition that could raise a security concern and may be disqualifying in relation to her provision of inaccurate information on her SCA:

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

AG ¶ 16(b) is established. Discussion is in the mitigation section, *infra*. AG ¶ 17 provides conditions that could mitigate security concerns in this case:

(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 advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the 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 contributed to 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.

On August 18, 2021, Applicant advised an OPM investigator that her security clearance was suspended in 2014. (GE 3 at 27) The OPM PSI discussed the investigation leading to her clearance suspension in part as follows:

Subject stated that while working at [an overseas DOD base] network traffic on a server detected a download at subject's personal residence in 10/2014. Base Security contacted subject and advised her that they had traced something (specifics not provided) to a computer at subject's residence. Subject believes, but was unable to confirm, that there were several downloads that had occurred on various devices that were related to child pornography. Subject stated that she was advised [that a DOD entity] had

requested the investigation. **Subject flatly denied having any knowledge of or participating in any activity relating to child pornography or anything that would have been considered inappropriate or illegal.** Subject stated that this type of activity is against her codes of moral decency and that she has never engaged in any activity of this nature and to her knowledge neither has anybody in her household. (GE 3 at 28 (emphasis added))

In 2016, Applicant made this statement to the investigator, and at time she had knowledge that she downloaded and possessed thousands of images of child pornography on her computers and electronic devices in 2013 and 2014. She was aware when she was interviewed that the DOD investigators in 2021 that the devices seized from her residence contained numerous child pornography images.

In her DOHA interrogatories, Applicant was confronted with the highlighted sentence, and she responded:

I've read the transcripts over and over and simply do not see the discrepancy referenced. [The OPM investigative interviews in 2023 as discussed on other interrogatory pages] show that I provided details about the investigation. [My descriptions of my current and future intentions regarding child pornography on other interrogatory pages] affirm that I never felt I had been less than forthcoming. Nowhere does the transcript indicate that I denied knowledge of the investigation. (GE 3 at 7)

"Applicant's statements about [her] intent and state of mind when [she] executed [her] Security Clearance Application were relevant evidence, but they [are] not binding on the Administrative Judge." ISCR Case No. 04-09488 at 2 (App. Bd. Nov. 29, 2006) (citation omitted). In ADP Case No. 17-03932 at 3 (App. Bd. Feb. 14, 2019), the Appeal Board recognized the importance of circumstantial evidence of intent in falsification cases:

When evaluating the deliberate nature of an alleged falsification, a Judge should consider the applicant's *mens rea* in light of the entirety of the record evidence. *See, e.g.*, ADP Case No. 15-07979 at 5 (App. Bd. May 30, 2017). As a practical matter, a finding regarding an applicant's intent or state of mind may not always be based on an applicant's statements, but rather may rely on circumstantial evidence. *Id.*

Applicant is very intelligent. She has two master's degrees and substantial professional experience working for the federal government and a DOD contractor. She was well aware that the investigators were not asking her about whether there was an investigation. They were asking her about her underlying conduct which was being investigated.

Applicant's answer to a DOHA interrogatory about possession of child pornography was intentionally misleading. It was not alleged in the SOR, and it will not

be considered for disqualification purposes. However, it shows a lack of credibility and rehabilitation.

None of the mitigation conditions apply for the reasons in this section and the previous section. Her false statements in the security clearance process continue to cast doubt on her reliability, trustworthiness, and good judgment. Personal conduct security concerns are not mitigated.

## **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), "[t]he 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. My comments under Guidelines D, J, and E are incorporated in the whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 42-year-old senior principle cyber software engineer systems administrator who has worked for the same defense contractor for about nine years. From 2007 to 2016, the DOD employed her as an information systems security engineer. In 2005, she was awarded a bachelor's degree in computer science, and in 2007, she was awarded a master's degree in computer science and a master's degree from the DOD school. Her father is a retired U.S. Navy captain, who served 26 years in the Navy.

Applicant received medical treatment, including psychological therapy, medicine, and eventually surgeries to treat her gender dysphoria. She indicated she has much less stress in her life than in 2013 and 2014. She has the support of her friends, family, coworkers, and community. Eight coworkers and friends attested to Applicant's technical expertise, professionalism, diligence, responsibility, and trustworthiness. Their statements support reinstatement of her security clearance. She would like to retain a security clearance because she enjoys working for the government. She believes she has skills and experience that enable her to contribute to the national defense. She denied that she has possessed any child pornography since 2014.

The reasons for denial of her security clearance are more persuasive. Applicant falsely denied or minimized her viewing and possession of about 5,000 images of child pornography while she was a DOD employee overseas in 2013 and 2014. Her failures to be forthright and candid about security-relevant conduct show a lack acceptance of responsibility and a lack of credibility, rehabilitation, judgment, and trustworthiness.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. *See Dorfmont*, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No.12-00270 at 3 (App. Bd. Jan. 17, 2014)).

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate sexual behavior, criminal conduct, and personal conduct 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 and 1.b:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

### **Conclusion**

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

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Mark Harvey  
Administrative Judge