DATE: October 28, 2005

In Re:

SSN: -----------

Applicant for Security Clearance

ISCR Case No. 03-06828

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Sabrina Redd, Esq., Department Counsel

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Dennis J. Sysko, Esq.

SYNOPSIS

Applicant admitted using the internet to download and save numerous images of "hardcore" child pornography, visit pedophilia-oriented chat rooms, and exchange "hardcore" images of children. Although no disqualifying conditions based on criminal conduct were established, security concerns based on sexual behavior and personal conduct were not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On August 12, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guidelines D (Sexual Behavior), E (Personal Conduct), and J (Criminal Conduct). The security concerns under all three guidelines were based on allegations that Applicant obtained and stored "less than 1,000 hardcore images of underage children" on his computer and magnetic tapes (SOR ¶ 1.a.) and "traded hardcore images of underage children" on the internet (SOR ¶ 1.b.).

Applicant answered the SOR in writing on September 3, 2004, denied the allegations, and requested a hearing. The case was assigned to me on June 13, 2005 and heard on August 22, 2005. DOHA received the transcript (Tr.) on September 6, 2005.[(1)]

PROCEDURAL ISSUES

Applicant's Motion in Limine

Before the hearing, Applicant filed a Motion in Limine to preclude Department Counsel from introducing in evidence "reports of investigation and documents based thereon," arguing such evidence was inadmissible under the Directive ¶ E3.1.20. I denied Applicant's motion as moot with respect to reports of investigation, based on Department Counsel's representation that no reports of investigation would be offered in evidence. I deferred ruling on the admissibility of documents based on reports of investigation until the hearing. At the hearing, I denied Applicant's motion to exclude a Clearance Decision Statement dated August 4, 2004, notifying Applicant he was determined ineligible for access to Sensitive Compartmented Information (SCI), and reciting the reasons for the decision.[(2)] Although the underlying report of investigation on which the government's decision to deny a clearance would not be admissible without an authenticating witness, I concluded the written notice of a decision to deny a clearance is admissible under ¶ E3.1.20 as an official record created in the regular course of business that was furnished by an investigative agency pursuant to its responsibilities in connection with assisting the Department of Defense to safeguard classified information.[(3)] *See* ISCR Case No. 02-12199 at 4 (App. Bd. Aug. 8, 2005).

Department Counsel's Motion to Compel Discovery

After receiving notice of Applicant's intent to call a licensed clinical psychologist as an expert witness, Department Counsel filed a Motion to Compel Discovery, seeking disclosure of "any treatment or progress notes, psychological testing information and all reports prepared by the witness." I granted the motion with respect to any documentary evidence Applicant intended to offer in evidence and denied it with respect to any confidential documents furnished to Applicant or his counsel that would not be offered in evidence at the hearing. Under the Directive ¶ E3.1.3., discovery is limited to documentary evidence intended to be submitted to the Administrative Judge. Under the Directive ¶ E3.1.11., "Discovery by Department Counsel after issuance of an SOR may be granted by the Administrative Judge only upon a showing of good cause." Department Counsel argued she could not prepare her case in chief or her cross-examination of the witness without the disclosures she requested. She did not assert, nor does the record suggest, she was prevented from interviewing the expert witness before the hearing. I concluded Department Counsel had not shown good cause for the requested discovery. Department Counsel renewed her motion at the hearing, and I adhered to my ruling.[(4)] In accordance with Federal Rule of Evidence 705, I permitted Department Counsel to cross-examine the expert witness about the facts underlying his diagnosis, and I required the witness to disclose the notes on which his testimony was based.

FINDINGS OF FACT

Based on the pleadings and the testimonial and documentary evidence introduced at the hearing, I make the following findings of fact:

Applicant is a 58-year-old information security engineer for a defense contractor. He has worked for his present employer since October 2001. He has been married for 35 years and has a 23-year-old daughter.[(5)] He served in the U.S. Air Force from August 1973 until September 1994 and retired as a lieutenant colonel. He received a security clearance in the Air Force and has held a clearance for more than 30 years.[(6)]

The record includes five affidavits from colleagues, supervisors, and a neighbor, attesting to Applicant's good judgment, trustworthiness, reliability, and integrity.[(7)] It also includes two awards and a letter of appreciation recognizing Applicant's contributions to his employer.[(8)] While the affiants knew Applicant's application for a security clearance was at issue, they were not aware of the specific allegations in the SOR.[(9)]

A Clearance Decision Statement dated August 4, 2004,[(10)] notified Applicant he had been determined ineligible for access to SCI. This determination was based on two interviews conducted on June 4 and July 19, 2004. The record does not reflect whether those interviews were reduced to writing. According to the Clearance Decision Statement, Applicant admitted he downloaded pornography from internet newsgroups from 1995 to 1999, downloading as many as a thousand pictures nightly. He admitted building a collection of pornography, and he estimated he had compiled 10-12 tapes of pornographic images, each tape containing about 10,000 images. Approximately one thousand images portrayed children engaged in sexual activities. He admitted seeking out child pornography for sexual gratification,

visiting pedophile chat rooms several times a week, and trading child pornography on the internet once or twice a week. He stated he erased all images of child pornography after undergoing a polygraph in 1999, because he feared legal action and loss of his security clearance. Applicant stated he continues to view adult pornography on the internet once or twice a week, but he has not intentionally sought out child pornography.[(11)] The interviews in June and July 2004 were a follow-up to an interview in October 2003, in which Applicant admitted downloading pornography on the internet, downloading pornographic images of children in order to "have a 'complete' collection of images," and asserting he was unaware possession of the images was illegal.[(12)]

In 1995, Applicant's marriage suffered "a little bit" because he began experiencing erectile dysfunction and his snoring "drove [his] wife out of the bedroom."[(13)] He began viewing and collecting pornography at this time. He asserted at the hearing that the Clearance Decision Statement denying him eligibility for access to SCI was "extremely exaggerated."[(14)] He testified he was asked to estimate the frequency of his activity and he gave large numbers to make sure he did not understate it.[(15)] He described the interviews in 2004 as contentious, because the interviewers insisted on Applicant telling them the specific number of images he downloaded and saved, and he repeatedly told them he did not know.[(16)] There was no discussion of the definition of pornography during the interviews.[(17)]

Applicant testified he started downloading materials nightly in 1995 but his activity was less frequent in the subsequent years. Because of the state of internet technology in 1995, the process was slow. He assumed the materials were legal because the internet service providers permitted them. He would download a few hundred images each time he worked at the computer, but did not print any of them. He testified many pictures depicted nudity but most did not depict erotic behavior. He testified he deleted images of children in sexually suggestive or erotic activity when he saw them because he considered them offensive. He estimated he kept about 100 images of children, but none showed their genitalia in a way intended to be sexually arousing.[(18)] He estimated there were no more than 10 incidents of trading images of children, each incident involving four or five images.[(19)]

Applicant testified he thought most of the images were old, based on hairstyles, clothing, and the environment. Many of the images appeared to be copied from magazines, with folds and torn edges in the images.[(20)]

Applicant denied accessing pedophile chat rooms.[(21)] He admitted visiting adult chat rooms but denied discussing fantasies of having sex with a child. He denied being sexually attracted to children.[(22)]

Applicant testified he used the term "hardcore" in his October 2003 statement to mean pornography that shows genitalia. At that time, he regarded pornography as "softcore" if it shows upper body nudity or apparent sexual activity without actually showing genitalia. He did not know the materials he downloaded might be illegal until October 2003.[(23)] He deleted the images of children involved in sexual activity because they were distasteful, not because he thought they were illegal.[(24)]

Applicant testified his erectile dysfunction has been solved with medication. He now uses a device to reduce his level of snoring. He and his wife now share the same bed again.[(25)]

Applicant sought and received treatment about a year ago for his attraction to pornography. He testified the doctor advised him to increase his intimacy with his spouse, and he has followed that advice.[(26)]

Applicant is an avid collector. He has extensive coin and stamp collections. In his October 2003 statement, he stated he downloaded pictures of children to have a complete collection of pornography.[(27)]

Applicant was evaluated by a licensed clinical psychologist during the summer and fall of 2004 in connection with his application for access to SCI. The psychologist had extensive experience making psychological diagnoses and evaluations of personal reliability.

The psychologist testified Applicant's preoccupation with pornography during 1995-1999 was "clearly dysfunctional,"

but it had ameliorated by the time of the clinical evaluation.[(28)] The psychologist found "no indications of pathology outside of being somewhat of a retiring, anxious, and avoidant individual." Applicant's personality would make him "more vulnerable than the average person to comply with an examiner's demands" during an interrogation.[(29)] He found Applicant to be embarrassed by the situation, remorseful, and somewhat guarded. He concluded Applicant did not meet the diagnostic criteria for pedophilia or any other sexual disorder or dysfunction, and he found no "counter-indications" for holding a position of trust.[(30)]

Department Counsel extensively cross-examined the psychologist about the factual basis for his diagnosis. The psychologist found Applicant to be a mildly compulsive, anxious person who collects things. Applicant would scan and look at what he collected and then store it, eventually storing a substantial quantity of images. A small percentage of the images were of children.[(31)]

The psychologist testified Applicant told him most of the images of children were "fairly benign" and he deleted the images that were blatantly sexual. The psychologist recalled Applicant telling him he stored some images of children that had "blatant sexual content," but he did not "go back and revisit those."[(32)] Applicant denied seeking out images of children's sexual acts for sexual gratification. Applicant admitted he had accessed two chat rooms whose names suggested child pornography. The psychologist concluded Applicant's access to those sites was a "casual hit," based on experimentation or curiosity, rather than a focused search.[(33)]

Applicant denied having fantasies of engaging in sex with children and did not find pedophilia sexually stimulating. He told the psychologist he did not find prepubescent children sexually attractive.[(34)] The psychologist's recollection of his discussions with Applicant was that Applicant referred to pornography as "hardcore" when it depicted sexual activity, but mere nudity was not "hardcore."[(35)]

Applicant's wife of 35 years testified Applicant is a loving, devoted husband and father. She corroborated Applicant's testimony about his problems with snoring and sexual impotence and supported his testimony that those problems have been ameliorated. She corroborated the psychologist's testimony that Applicant is a compulsive collector. She was unaware of Applicant's collection of pornography until he disclosed it after his application for access to SCI was denied. She testified Applicant has never demonstrated any interest in or curiosity about child pornography. To the contrary, he has declared his disapproval of it. [(36)]

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 occupy a position . . . that will give that person 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (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. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* 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 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* Directive ¶ E2.2.2.

CONCLUSIONS

The SOR sets out security concerns under three separate guidelines, but the concerns under all three guidelines were based on allegations that Applicant used the internet to obtain, trade, and store "hardcore images of underage children." The word "pornography" does not appear in the SOR, but the parties clearly understood the allegations to encompass pornography.

Guideline D (Sexual Behavior)

Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress, or reflects lack of judgment or discretion. Directive ¶ E2.A4.1.1. A disqualifying condition (DC 1) may apply if the sexual behavior is of "of a criminal nature." Directive ¶ E2.A4.1.2.1. DC 1 is not established for the reasons discussed below under Guideline J (Criminal Conduct).

DC 2 applies when there is "[c]ompulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high-risk behavior or that which is symptomatic of a personality disorder." Directive ¶ E2.A4.1.2.2. There is evidence Applicant is addicted to adult pornography, but he apparently was not attracted to child pornography except as a matter of curiosity. His behavior was not self-destructive or high risk, except to the extent it made him vulnerable to coercion, exploitation, or duress, discussed below under DC 3. The psychologist found Applicant was not suffering from pedophilia or any other sexual disorder or dysfunction. I conclude DC 2 is not established.

DC 3 applies when the sexual behavior "causes an individual to be vulnerable to coercion, exploitation, or duress." Directive ¶ E2.A4.1.2.3. Applicant was embarrassed by his behavior. He erased the tapes to avoid detection. He concealed his behavior from his family until after the SOR was issued. He has not disclosed it to the colleagues, supervisors, and the neighbor who submitted affidavits on his behalf. I conclude DC 3 is established.

DC 4 applies when sexual behavior "reflects lack of discretion or judgment." Applicant's behavior jeopardized his relationships with his spouse, his daughter, and his professional colleagues, and it made him vulnerable to blackmail. I conclude DC 4 is established.

Several mitigating conditions (MC) under this guideline are relevant. MC 2 applies when "[t]he behavior was not recent and there is no evidence of subsequent conduct of a similar nature." Directive ¶ E2.A4.1.3.2. Although Applicant continues to view adult pornography, he stated he has not sought out or viewed child pornography since 1999, and there is no evidence to the contrary. I conclude MC 2 is established.

MC 3 applies when "[t]here is no other evidence of questionable judgment, irresponsibility, or emotional instability." Applicant served in the Air Force for more than 20 years, has worked for a defense contractor for four years, and held a

security clearance for more than 30 years. His four-year period of involvement with child pornography is the only evidence reflecting adversely on his suitability for a security clearance. I conclude MC 3 is established.

MC 4 applies when "[t]he behavior no longer serves as a basis for coercion, exploitation, or duress." I conclude this mitigating condition is not established, because Applicant continues to feel embarrassment about his conduct and has disclosed it only to his spouse and a few government security officials. His neighbor and colleagues who submitted affidavits on his behalf were unaware of his involvement in child pornography.

In addition to the enumerated disqualifying and mitigating conditions discussed above, I also have considered the nature, extent, frequency, and seriousness of Applicant's conduct. Applicant was a mature adult at the time, married and the father of a teenaged daughter, and he should have realized the potential consequences of his behavior. He appears to have changed his behavior, and the likelihood of recurrence is low, but the potential for pressure, coercion, exploitation, or duress remains. His exercise of poor judgment spanned four years, and it stopped only because he feared detection. After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on his sexual conduct.

Guideline E (Personal Conduct)

Conduct involving questionable judgment can raise a security concern this guideline. Directive ¶ E2.A5.1.1. A disqualifying condition (DC 1) applies where there is "[r]eliable unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances." I conclude DC 1 is not established, because it applies to information from someone other than an applicant. In this case, all the unfavorable information was provided by Applicant himself during the security investigation.

DC 4 applies when there is evidence of personal conduct that increases an applicant's vulnerability to coercion, exploitation, or duress "such as engaging in activities which, if known, may affect the person's personal professional, or community standing or render the person susceptible to blackmail." I conclude DC 4 is established.

No enumerated mitigating conditions under this guideline are established. I note, however, Applicant has expressed remorse for his conduct, has refrained from involvement in child pornography since 1999, and recently sought treatment because of concern about his continued interest in adult pornography. He has a long record of government service.

On the other hand, Applicant's testimony at the hearing indicated a tendency to minimize his culpability. At the hearing, he categorically denied visiting internet chat rooms whose names suggested interest in pedophilia, but he specifically mentioned two such chat rooms when he was interviewed by the security investigator in June 2004 and again when he was interviewed by the psychologist. In his testimony, he claimed he was forced by security investigators to exaggerate the numbers of incidents. He testified he exchanged child pornography no more than a total of 10 times, suggesting his earlier admission of exchanging pornography one or twice a week was an exaggeration. He testified he deleted images of children engaged in sexual activity because he found them offensive, contradicting his admission to security investigators that he saved about one thousand images of children involved in sexual activity and his admission to the psychologist that he saved some images depicting sexual activity but did not later view them.

Applicant's lack of good judgment and his vulnerability to coercion, exploitation, or duress are not mitigated. After weighing the disqualifying and mitigating conditions and evaluating the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on his personal conduct.

Guideline J (Criminal Conduct)

Under this guideline, "A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness." Directive ¶ E2.A10.1.1. Two disqualifying conditions are enumerated under this guideline. DC 1 applies when there are "[a]llegations or admission of criminal conduct, regardless of whether the person was formally charged." Directive ¶ E2.A10.1.2.1. DC 2 applies when there is "[a] single serious crime or multiple lesser offenses."

The SOR does not use the word "pornography," nor does it allege Applicant violated any specific criminal statute. At the hearing, Department Counsel did not assert Applicant violated any state or local law. Instead, she asserted

Applicant's conduct violated the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2251 *et seq.*[(37)] Under this statute, "child pornography" means visual depiction of sexually explicit conduct. 18 U.S.C. § 2256 (8). Furthermore, the Supreme Court has declared those provisions of the statute prohibiting "virtual" pornography invalid, thus limiting the coverage of the statute to child pornography created by using real children, and excluding from its coverage pornography produced by using youthful-looking adults or computer-imaging technology. *Ashcroft v. The Free Speech Coalition, et al.,* 535 U.S. 234, 12 S.Ct. 1389 (2002). Finally, the statute created an affirmative defense if the individual possessed less than three pornographic images and promptly took reasonable steps to destroy them. 18 U.S.C. § 2252A(d).

Applicant testified he promptly deleted all images of children engaged in sexual activity because he found them offensive. His testimony, if believed, would establish an affirmative defense under the statute. His testimony, however, contradicts his earlier admissions to security investigators and the psychologist that he saved some images of children that were blatantly sexual. I have doubts about the veracity of this aspect of his testimony.

Applicant also testified at the hearing that he used the term "pornography" to mean upper body nudity or apparent sexual activity without actually showing genitalia, and "hardcore pornography" to mean depiction of nudity showing genitalia. His testimony, if believed, would establish his use of the term was much broader than the statutory definition, which requires depiction of sexually explicit conduct. On the other hand, the psychologist testified Applicant understood "hardcore pornography" meant depiction of sexual activity. Nevertheless, under either definition, Applicant's admissions of involvement in "hardcore child pornography" in the interviews with security investigators and the psychologist did not admit the involvement of real children in the production of the images. Furthermore, since the images were destroyed and never analyzed, it cannot be determined whether they meet the statutory requirement that real children be used in their production. I conclude the evidence of record does not establish an admission or violation of the Child Pornography Prevention act of 1996. Department Counsel did not assert or produce evidence that Applicant violated any other federal, state, or local law. Accordingly, I conclude DC 1 and DC 2 are not established.

FORMAL FINDINGS

The following are my findings as to each allegation in the SOR:

Paragraph 1. Guideline D (Sexual Behavior): AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Paragraph 3. Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraph 3.a.: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. There were several errors in the listing of exhibits on pages 2-3 of the transcript. After giving notice to the parties and without any objection, I corrected the errors by order dated October 24, 2005. The order and related correspondence are

attached to the record as Hearing Exhibit X.

2. Government Exhibit 2.

3. The motion, briefs of the parties, and my order are attached to the record as Hearing Exhibit VIII.

4. The motion, briefs of the parties, and my order are attached to the record as Hearing Exhibit IX.

5. Tr. 64.

6. Tr. 63.

7. Applicant's Exhibits B through F.

8. Applicant's Exhibit G.

9. Tr. 125.

10. The SOR was issued eight days later, informing Applicant of DOHA's decision to deny him access to "any classified information."

11. Government Exhibits 2 and 4.

12. Government Exhibit 3.

13. Tr. 65.

14. Tr. 70-71.

15. Tr. 95-96.

16. Tr. 115.

17. Tr. 143.

18. Tr. 76-78.

19. Tr. 84-87.

20. Tr. 106.

21. Tr. 87-88.

22. Tr. 89.

23. Tr. 119-20.

24. Tr. 124.

25. Tr. 97-98.

26. Tr. 132.

27. Government Exhibit 3.

28. Tr. 161-62.

29. Tr. 167.

30. Tr. 161, 167-69, 172.

31. Tr. 199.

32. Tr. 206.

33. Tr. 200-02.

34. Tr. 208-10.

35. Tr. 213-214.

36. Tr. 221-27.

37. Applicant, represented by a lawyer, did not object to lack of notice that he was accused of violating the Child Pornography Protection Act.