

DATE: March 26, 2007

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-07861

DECISION OF ADMINISTRATIVE JUDGE

JOHN GRATTAN METZ, JR

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esquire, Department Counsel

FOR APPLICANT

Elizabeth L. Newman, Esquire

SYNOPSIS

Applicant's demonstrated sexual behavior, criminal conduct, and poor judgement disqualify him for a security clearance. Clearance denied.

STATEMENT OF THE CASE

Applicant challenges the 29 July 2005 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of sexual behavior, criminal conduct, and personal conduct. ⁽¹⁾ Applicant answered the SOR on 22 August 2005 and requested a hearing. DOHA assigned the case to me 8 June 2006 and I convened a hearing 18 September 2006. DOHA received the transcript 27 September 2006.

FINDINGS OF FACT

Applicant admitted the SOR allegations. Accordingly, I incorporate his admissions as findings of fact. He is a 35-year-old senior consultant employed by a defense contractor since July 2000, seeking to retain his industrial clearance. He previously held a clearance since about 1990, while attending college on a military scholarship and serving his active-duty obligation following graduation.

From about 1993 to April 2002, Applicant downloaded, viewed and saved pornographic images on his computer (G.E. 2, 4). Initially, he downloaded these images manually, but later subscribed to various on-line newsgroups that would scan the internet for pornographic images and automatically download them to his computer. Applicant periodically reviewed these images, saving the images that interested him and deleting the rest. He estimates that his collection was 63,000 images by April 2002. Of these 63,000 images, Applicant estimates that about 100 images were of naked girls under age 18, collected between about 1998 and April 2002. These images included short video clips of adults engaging in sexual acts with minors.

Applicant's exotic interests were not limited to internet pornography. ⁽²⁾ Between 1994 and 2001, he used a radio

scanner to eavesdrop on neighbors' cordless telephone calls. Sometimes he tape-recorded the conversations so he could listen to them later. He continued to eavesdrop on conversations even after Federal law made it illegal to sell scanners capable of such eavesdropping; he modified a scanner to defeat modifications made by the vendor to comply with Federal law. During this same period (approximately 1994 to 2000), Applicant took photographs of Mardi Gras revelers in New Orleans exposing their breasts and otherwise "flashing" fellow revelers. By Applicant's own admission, these revelers may have included minor females. Applicant posted these photographs and videos to his website, and offered them for sale. Until about June 2003, he illegally downloaded copyrighted music and movies from the internet, and shared them with others, albeit not for money.

Applicant's conduct was discovered in May 2002, when he underwent a lifestyle polygraph required for him to obtain access to special compartmented information (SC I) with a government agency. As a result of the ensuing investigation, the government agency denied Applicant's request for access to SCI (G.E. 3, 4). He appealed (G.E. 7), but the original decision was affirmed (G.E. 5, 6). In anticipation of his polygraph, Applicant deleted all the pornographic images from his computer. He took the photographs and videos off his website around February 2004 (Tr. 61).

In an effort to obtain his SCI access, Applicant consulted a psychologist between August 2003 and January 2004 (A.E. B), to deal with what Applicant had described at one point as his "addiction" to pornography (Tr. 34-35). This practitioner concluded that Applicant suffered from a sexual disorder not otherwise specified, but opined (in September 2005) that there was no impediment to Applicant being granted access to classified information. However, he did not indicate what evidence he relied upon in reaching that conclusion. The forensic psychiatrist Applicant consulted in preparation for this hearing (Tr. 53) reached a similar conclusion (A.E. A), but was not available to be cross-examined on his conclusions, which were based on at least three documents (numbers 1, 4, and 5 in his report) that were not a part of the record at hearing.

Applicant testified that he spends 1-2 hours a week viewing pornography on line, because it brings him joy (Tr. 73, 89). He has to go looking for it directly because he no longer subscribes to the newsgroups that he previously used to collect the images. He claims that his current girlfriend knows about his viewing internet pornography.⁽³⁾ Applicant thinks of his interest in pornography as legal, except where it involved images of minors. He justified possession of some images of minors as artistic images from recognized photographers. He thought it "technically legal" to modify his scanner to do something it had been equipped by the vendor to prohibit (Tr. 90-92). Where he acknowledges the illegality of his conduct, he believes that the criminal conduct is less serious because he never sold pornographic images or copyrighted material. Aside from his girlfriend, he does not indicate who else may be aware of his past conduct. There are no character references in the record.

POLICIES AND BURDEN OF PROOF

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guidelines are Guideline D (Sexual Behavior), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite

judgment, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁽⁴⁾

CONCLUSIONS

The government established a case for disqualification under Guideline D by demonstrating that Applicant engaged downloaded, viewed, and saved pornographic images--including pornographic images of minors involved in sexual acts with adults--from about 1993 to April 2003.⁽⁵⁾ Applicant acknowledged that he was diagnosed as suffering from a sexual disorder not otherwise specified, and at one time considered himself addicted to pornography.⁽⁶⁾ Although Applicant claims that he is not in a position to be exploited, it does not appear that knowledge of his past conduct is known outside government personnel involved in his clearance adjudications.⁽⁷⁾ His conduct betrays a significant lack of discretion and judgment.⁽⁸⁾

The expert's report does little to help Applicant's cause. Even if I accept the expert's medical conclusions under Guideline D and Guideline I (Emotional, ental, and Personality Disorders) regarding Applicant's current condition, there are many reasons for discounting his report. First, I am not bound by his conclusions regarding the security significance of Applicant's conduct. Second, he apparently relied on documents provided to him by Applicant that were not otherwise part of the record in this case. Finally, his unavailability for cross-examination undercuts his credibility, particularly where he was consulted solely to provide a report for introduction at hearing.

The conclusions of the report notwithstanding, Applicant failed to mitigate the security concerns raised by his sexual behavior. The most serious conduct occurred when Applicant was not an adolescent,⁽⁹⁾ he continues to view pornography regularly, and we have only his uncorroborated testimony that he does not view illegal pornography, or does not view pornography more frequently than he says. Even if I accept that Applicant stopped viewing illegal pornography in 2003, that conduct is still recent.⁽¹⁰⁾ Further, his sexual behavior is not the only evidence of questionable judgment, irresponsibility, or emotional instability.⁽¹¹⁾ His downloading and sharing copyrighted material and his eavesdropping demonstrate additional irresponsibility and poor judgment. Finally, even accepting that Applicant has stopped his most egregious conduct, he has not demonstrated that his past conduct does not serve as a basis for coercion, exploitation, or duress.⁽¹²⁾ I resolve Guideline D against Applicant.

The government also established a case for disqualification under Guideline J by demonstrating that Applicant possessed and viewed pornographic images of minors, illegally downloaded and shared copyrighted material, and modified his radio scanner to permit eavesdropping on frequencies it was otherwise prohibited from scanning.⁽¹³⁾ Applicant's suggestion that it is only illegal for a vendor to sell a scanner capable of scanning those frequencies, but not illegal for him to modify a scanner to scan those prohibited frequencies, is specious.

Applicant failed to mitigate the security concerns raised by his criminal conduct. His criminal conduct was both recent and not isolated.⁽¹⁴⁾ He claims clear evidence of successful rehabilitation,⁽¹⁵⁾ but there is no corroboration of his claims anywhere in the record. Similarly, he was not pressured or coerced into committing the criminal acts,⁽¹⁶⁾ and his conduct was entirely voluntary.⁽¹⁷⁾ Further, given that he continues to view on-line pornography 1-2 hours a week, I cannot conclude that the factors leading to the conduct are unlikely to recur. I resolve Guideline J against Applicant.

The government also established a case for disqualification under Guideline E and Applicant did not mitigate the security concerns. Even accepting that taking the Mardi Gras photographs and videos was legal, publishing them on his website and seeking to profit by them, demonstrates extraordinarily poor judgement inconsistent with access to classified information.⁽¹⁸⁾ By itself, this conduct might not warrant a negative clearance decision, but coupled with the misconduct in paragraph 1 and 2 above, most of which appears to be unknown outside the government, leaves Applicant potentially subject to coercion.⁽¹⁹⁾ Criminality aside, Applicant's voyeuristic behavior in a variety of venues is not consistent with the requirements for access to classified information. I resolve Guideline E against Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline D: AGAINST APPLICANT

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

Subparagraph d: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against 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 or continue a security clearance for Applicant. Clearance denied.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended (Directive).
2. Although not alleged in the SOR, Applicant admitted to "peeping tom" activity with binoculars, both in his neighborhood and while traveling on business.
3. His previous girlfriend knew about his interest in pornography, but did not approve. Applicant tried to make sure that he did not leave any obvious signs of his activity around his apartment.
4. *See, Department of the Navy v. Egan*, 484 U.S. 518 (1988).
5. E2.A4.1.2.1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
6. E2.A4.1.2.2. Compulsive 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;
7. E2.A4.1.2.3. Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;
8. E2.A4.1.2.4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.
9. E2.A4.1.3.1. The behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of

a similar nature;

10. E2.A4.1.3.2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;

11. E2.A4.1.3.3. There is no other evidence of questionable judgment, irresponsibility, or emotional instability;

12. E2.A4.1.3.4. The behavior no longer serves as a basis for coercion, exploitation, or duress.

13. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged; E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

14. E2.A10.1.3.1. The criminal behavior was not recent; E2.A10.1.3.2. The crime was an isolated incident;

15. E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

16. E2.A10.1.3.3. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;

17. E2.A10.1.3.4. The person did not commit the act and/or the factors leading to the violation are not likely to recur;

18. E2.A5.1.2.1. Reliable, unfavorable information . . .

19. E2.A5.1.2.4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community or render the person susceptible to blackmail;