

KEYWORD: Sexual Behavior; Personal Conduct

DIGEST: Applicant has a 20-plus year history of engaging in Peeping Tom activities, although it ended in about 1997. He admits he has an addiction to Internet pornography. In March 2003, he was fired from his job when he accessed and viewed adult pornography on a company computer. Eligibility for a security clearance is denied.

CASENO: 06-24990.h1

DATE: 05/31/2007

DATE: May 31, 2007

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In re:	)	
	)	
-----	)	ISCR Case No. 06-24990
SSN: -----	)	
	)	
Applicant for Security Clearance	)	
_____	)	

**DECISION OF ADMINISTRATIVE JUDGE
MICHAEL H. LEONARD**

APPEARANCES

FOR GOVERNMENT

James F. Duffy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a 20-plus year history of engaging in Peeping Tom activities, although it ended in about 1997. He admits he has an addiction to Internet pornography. In March 2003, he was fired

from his job when he accessed and viewed adult pornography on a company computer. Eligibility for a security clearance is denied.

STATEMENT OF THE CASE

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on February 1, 2007. The SOR—which is equivalent to an administrative complaint—details the factual basis for the action and alleges security concerns under Guideline D for sexual behavior and Guideline E for personal conduct. Applicant timely replied to the SOR and requested a hearing.

In addition to the Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive and Appendix 8 to DoD Regulation 5200.2-R, and they apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.² Both the Directive and the Regulation are pending formal amendment. The Revised Guidelines apply to this case because the SOR is dated February 1, 2007. This matter was noted on the record at the start of the hearing (R. 15).

The case was assigned to me March 29, 2007. A notice of hearing was issued scheduling the hearing for April 24, 2007. The hearing took place as scheduled. DOHA received the hearing transcript May 8, 2007.

FINDINGS OF FACT

Applicant's written answer to the SOR allegations was mixed. He admitted the allegations in SOR subparagraphs 1.a, 1.c, and 1.d, and he denied the allegations in SOR subparagraphs 1.b, 1.e, and 2.a. Based on his hearing testimony, his answer was amended to admit SOR subparagraphs 1.b and 1.e (R. 39–40, 54–55). His admissions are incorporated herein. I make the following findings of fact set forth below.

¹ Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).

² See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

1. Applicant is a 51-year-old security officer for a company that provides security services. He has worked for this company since July 2004. According to his current manager, Applicant has been the “proverbial straight arrow” at work (Exhibit A). His manager views Applicant as a person of high character, ethics, and behavior, and that he is one of the most responsible security officers on the team.
2. To obtain an industrial security clearance for his current employment, Applicant completed a security-clearance application in November 2005 (Exhibit 1). In response to Question 22 about his employment record, he disclosed that in March 2003 he was fired from his job as a film inspector for an information-solutions company.
3. Applicant’s employment history includes a 20-year period of military service in the U.S. Air Force. He enlisted in September 1975, and was promoted up the ranks to tech sergeant (pay grade E-6). Initially, he was trained in the field of aircraft refueling. He was then trained and worked in the field of weather observing and forecasting. He was working as a weather forecaster when he retired in September 1995. While in the Air Force, he held a security clearance at the secret and top-secret levels.
4. About two months later, Applicant started working as a film inspector and did so until he was terminated in March 2003. Sometime in 2002, Applicant realized he was being drawn to viewing adult pornography via the Internet while at work. He accessed pornography two to three times per week, and he would sometimes spend a couple of hours looking at the material (R. 35). Applicant went to his supervisor and asked to be banned from the Internet at work. Nevertheless, Applicant went on to use a company computer to view adult pornography on the Internet. His actions were discovered by another employee, and the company determined that Applicant had accessed the material. The company referred Applicant to their employee-assistance program (EAP) in lieu of terminating him for violating company rules.
5. Applicant attended about six counseling sessions with a counselor through the EAP program. He then requested to change to a Christian counselor. He established a patient–counselor relationship with a licensed mental-health practitioner/certified counselor.
6. In March 2003, Applicant relapsed when he viewed adult pornographic material by using a company computer during work. He admitted the conduct to management and he was fired the same day. The resulting period of unemployment caused Applicant other problems, including a home foreclosure when he was unable to keep up with the required mortgage payments.
7. From about January 2003 to about August 2006, Applicant received treatment from a medical doctor engaged in the general practice of medicine, sometimes called a family practitioner. During this time, Applicant was diagnosed as dysthymia with compulsive behavior, i.e., pornography. Dysthymia disorder is a mood disorder, the essential feature of which is a chronically depressed mood that occurs for most of the day more days than not for at least two years (Exhibit 2). As a result, Applicant was prescribed various medications, and he is currently taking Zoloft (R. 46). It is commonly prescribed for depression (Exhibit 3).
8. In addition to the counseling in 2002–2003, Applicant has continued to see the same mental-health practitioner, and does so currently at a frequency of about twice a month. The mental-health

practitioner testified on Applicant's behalf at the hearing. Her educational background includes a master's degree in counseling. That was followed by a two-year internship and a licensing examination. She has been a licensed mental-health practitioner since 2001, and she is also a certified professional counselor. Her treatment plan for Applicant involves talk therapy. She has seen a dramatic change or improvement in Applicant during the counseling. In her opinion, Applicant's depression is in remission and his addiction to Internet pornography is in recovery (meaning he is not participating). Her current treatment plan for Applicant will continue to be talk therapy about every two weeks or so. Her prognosis for Applicant for both the depression and the addiction to pornography is very good (R. 85). She is of the opinion that Applicant has developed coping skills to control his addiction that he previously did not have (R. 80).

9. In addition to the Internet pornography, Applicant has a 20-plus year history of engaging in Peeping Tom³ activities. It started when he was in his teens. It continued during his 20 years of military service. It tapered off after he retired from the Air Force in 1995, and Applicant believes it ended sometime around 1997. During this period, Applicant estimates he engaged in Peeping Tomism about once or twice a week. He was never caught or apprehended. He disclosed these matters when he went into counseling for his addiction to Internet pornography.

10. Applicant has engaged in no workplace misconduct at his current employer, including viewing Internet pornography while at work. On occasion, Applicant views Internet pornography in private. On average, he does so once a week or less (R. 51). And that has taken place as recently as within the past month.

POLICIES

The Revised Guidelines sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.⁴ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

BURDEN OF PROOF

³ According to the dictionary, Peeping Tom was a legendary citizen of Coventry who watched Lady Godiva riding naked. *Merriam-Webster's Collegiate Dictionary* 855 (10th ed., 2002). The term is commonly understood to mean voyeurism.

⁴ Executive Order 10865, § 7.

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁵ There is no presumption in favor of granting or continuing access to classified information.⁶ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁷ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁸ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁹

No one has a right to a security clearance.¹⁰ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹¹ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Under Guideline D of the Revised Guidelines, sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects a lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information. No adverse inference may be raised solely on the basis of the sexual orientation of the individual.

Here, based on the record evidence as a whole, a security concern is raised by Applicant’s history of sexual behavior. His 20-plus year history of Peeping Tomism and his workplace misconduct by accessing and viewing Internet pornography constitute a well-established history of sexual behavior that calls into question his security suitability. Of particular concern is his addiction to Internet pornography, which appears to be a serious and ongoing long-term problem. I reviewed the DC under the guideline and conclude several apply. Each DC is briefly summarized and discussed below.

⁵ ISCR Case No. 96-0277 (App. Bd. Jul. 11, 1997).

⁶ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁷ Directive, Enclosure 3, ¶ E3.1.14.

⁸ Directive, Enclosure 3, ¶ E3.1.15.

⁹ Directive, Enclosure 3, ¶ E3.1.15.

¹⁰ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (“It is likewise plain that there is no ‘right’ to a security clearance, so that full-scale due process standards do not apply to cases such as Duane’s.”).

¹¹ *Egan*, 484 U.S. at 531.

The first DC—sexual behavior of a criminal nature—applies in part. Applicant’s Peeping Tomism was criminal in nature, regardless that neither civil nor military authorities arrested, charged, or prosecuted Applicant.

The second DC—a pattern of compulsive, self-destructive, or high-risk sexual behavior—applies. Both his Peeping Tomism and his addiction to Internet pornography were ingrained patterns of behavior as opposed to an isolated incident or aberrational behavior. Both activities were compulsive, self-destructive, or high-risk behavior that Applicant was unable to stop at the time. His Peeping Tomism was high-risk behavior because he put himself in jeopardy of criminal sanctions if caught. His Internet addiction to pornography was self-destructive, as demonstrated by his job termination in 2003 followed by a period of unemployment and financial problems.

The third DC—sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress—does not apply. Although this may have been a concern in the past, it is not a current concern given that Applicant has disclosed these matters through his counseling and to the government through the security-clearance process. The likelihood of Applicant’s history of sexual behavior being used against him to “cause” him to be vulnerable in a security context is relatively remote and unlikely.

The fourth DC—sexual behavior of a public nature and/or that reflects a lack of discretion or judgment—applies. Both his Peeping Tomism and using the Internet at work to view pornography reflect a gross lack of discretion or judgment. This is especially so considering Applicant’s multiple violations of company rules that led to his termination in 2003.

I reviewed the MC under the guideline and conclude he receives credit in mitigation. Each MC is briefly summarized and discussed below.

The first MC—the behavior occurred before or during adolescence and there is no evidence of subsequent conduct of a similar nature—does not apply. Although his Peeping Tomism started when he was a teenager, the record evidence is that the sexual behavior under review is not limited to his adolescence. His Peeping Tomism continued for years until about 1997, and his Internet addiction to pornography was a more recent development and continues.

The second MC—the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances that it is unlikely to recur—does not apply. His behavior was recent, as shown by his termination in March 2003, which is less than five years ago. His behavior was frequent, as shown by the once a week Peeping Tomism. And his sexual behavior was not an aberrational or situational event.

The third MC—the behavior no longer serves as a basis for coercion, exploitation, or duress—applies. As discussed above, the likelihood of Applicant’s history of sexual behavior being used against him to “cause” him to be vulnerable in a security context is relatively remote and unlikely.

The fourth MC—the sexual behavior is strictly private, consensual, and discreet—is inapplicable to this case.

I have also considered this case in light of the whole-person concept. Applicant is 51 years old, and he was an adult for the vast majority of the time he engaged in the sexual behavior under review. In addition to the MC discussed above, Applicant receives credit in mitigation for his willingness to participate in counseling in the past and for his current counseling program. After having a chance to listen to and observe him discuss his situation, I was impressed by his insight into his behavior and his efforts to overcome his problems.

Of concern is the seriousness of his addiction to Internet pornography and the recency of the workplace misconduct that led to his termination in March 2003. When he was working as a film inspector, he used the company computer to access and view Internet pornography as frequently as two to three times weekly, and he spent considerable time doing so. He was caught and required to obtain counseling or be fired. But he was unable to stay away, which eventually led to his termination. His workplace misconduct is not ancient history, as it took place less than five years ago. Although he has not accessed Internet pornography in his current employment, he has done so in private. His continued viewing of Internet pornography in private means that it is possible that he could relapse at the workplace. This circumstance, coupled with his current counselor's unawareness of his recent viewing of Internet pornography in private, lessen the weight that I give to the counselor's favorable prognosis. All these circumstances militate against a favorable decision for Applicant.

After weighing the favorable and unfavorable evidence, I conclude that Applicant has not presented sufficient information to explain, extenuate, or mitigate the security concerns. Likewise, he has not met his ultimate burden of persuasion to obtain a favorable clearance decision.

FORMAL FINDINGS

_____ Here are my conclusions for each allegation in the SOR:

_____ SOR ¶ 1–Guideline D:	Against Applicant
_____ Subparagraphs a–e:	Against Applicant
_____ SOR ¶ 2–Guideline E:	For Applicant
_____ Subparagraph a:	For Applicant ¹²

¹² The allegation in SOR subparagraph 2.a is merely a cross-reference to the allegations in SOR subparagraphs 1.a, 1.b, and 1.c. In my view, an analysis of these matters under Guideline E does not result in any additional or independent security concerns. Because these matters are explicitly covered under Guideline D and are sufficient for an adverse determination under Guideline D, it is unnecessary to rehash it a second time. For these reasons, Guideline E is decided for Applicant.

DECISION

 In light of all the facts and circumstances, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Eligibility for a security clearance is denied.

Michael H. Leonard
Administrative Judge