DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No.07-03920
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom. Esq., Department Counsel
For Applicant: Thomas Albin, Esq.

September 17, 2008

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Decision

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline J (Criminal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his security clearance application on August 16, 2006. On May 8, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline J. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on May 16, 2008; answered it on May 20, 2008; and requested a hearing before an administrative judge. DOHA received the request on May 27, 2008. Department Counsel was ready to proceed on June 30, 2008, and the case was assigned to me on July 2, 2008. DOHA issued a notice of hearing on July 2, 2008, scheduling the hearing for July 24, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. The record closed upon adjournment of the hearing. DOHA received the transcript (Tr.) on August 8, 2008.

Administrative Notice

At the request of Department Counsel and without objection from Applicant, I took administrative notice of the state statute that was the basis of Applicant's arrest, conviction, and sentencing (Tr. 21; Hearing Exhibit I).

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 49-year-old ship fitter employed by a defense contractor. He has been a first class ship fitter, the highest grade within his specialty, for more than six years (Tr. 58). He has worked for his current employer since January 2001 and held a clearance since August 2001 (GX 1 at 11 and 25).

In late 2003, Applicant began a 10-month period of downloading music and child pornography from a file-sharing website (Tr. 29). Local police identified him as a suspect during a child pornography investigation, and they executed a search warrant at his home on March 3, 2004. They found numerous images of children engaged in sexual activity on his home computer (GX 5 at 24-26).

Applicant testified he visited the website four or five times a week, looking for both adult pornography and child pornography. He knew child pornography was illegal but was attracted to the "outlaw" aspect of viewing it, as well as its content (Tr. 78). During the 10-month period he viewed about 1,000 images and downloaded about 100 images (Tr. 79). He kept some of the images of young sexually-developed girls because he was aroused by them (Tr. 81, 86). He testified he was not attracted by images of sexually immature children (Tr. 87).

On October 6, 2005, Applicant was charged with illegal possession of child pornography, a felony. He pleaded guilty on June 9, 2006, and was sentenced to five years in jail, suspended, and placed on supervised probation for five years. The terms of his probation required him to register as a sex offender for ten years, and undergo sex offender evaluation and treatment. He is prohibited from possessing a computer, accessing the internet, residing near a school, leaving the state, consuming alcohol,

having any contact with minors, and numerous other related activities (GX 4 at 4; GX 6 at 5-7; Tr. 83-85).

At the hearing, Applicant was upbeat and positive about the conditions of probation (Tr. 73). He did not describe the restrictions on his activities as particularly onerous. He testified he began his therapy with the attitude that "everybody can benefit from therapy," and he described his group sessions as interesting, stimulating, and insightful (Tr. 48).

Applicant has never been married. He was in a committed relationship with a woman at the time of his arrest, but they broke up, largely because of his arrest. He now lives alone (Tr. 38-39).

A psychologist who is the regional supervisor for the state's Center for the Treatment of Problem Sexual Behavior provided a progress report dated July 15, 2008. He reported that Applicant "has appeared genuinely involved both in gaining insight into his specific offense behavior as well as learning about risk reduction in general." Applicant has been granted approval for limited pre-approved contact with minors, with his sister acting as his approved supervisor. The psychologist opined that Applicant "does not raise significant concern regarding criminality in general and sexual re-offending more specifically." Applicant has done well in treatment and he is moving toward treatment completion, although the end date has not yet been determined (AX A).

Applicant informed his family and his employer of his conviction. His coworkers are aware of his conviction, and they sometimes tease him about it (GX 4 at 5). He was named "Civilian Craftsman of the Quarter" by his employer in September 2005, and his award was signed in December 2005, after his arrest but before his conviction and sentencing (AX B; Tr. 50).

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 have 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 criteria contained in the revised adjudicative guidelines (AG). 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 over-arching adjudicative goal is a fair, impartial and common

sense 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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 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 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* AG ¶ 2(b).

Analysis

Guideline J, Criminal Conduct

The SOR contains a single paragraph alleging that Applicant's home was searched; he was arrested for illegal possession of child pornography, a felony; and he pleaded guilty and was sentenced to a suspended five-year jail sentence and five years of supervised probation. The concern raised by criminal conduct is that it "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 ¶ 30.

A disqualifying condition may arise from "a single serious crime" or if an applicant "is currently on parole or probation." AG ¶¶ 31(a) and (d). Applicant was convicted of a felony and is currently on probation, thereby raising both disqualifying conditions.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 31(a) and (d), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated by evidence that "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." AG ¶ 32(a). The first prong of ¶ 32(a) ("happened so long ago") focuses on the recency of the criminal conduct. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id*.

Applicant's last offense was in March 2004, more than four years ago, which is a significant period of time. His criminal conduct ended in March 2004 because of police action, not because he voluntarily decided to desist. Since that date his personal freedom has been sharply curtailed and he has been on supervised probation. It is too soon to determine whether he will revert to his former behavior when the restrictions on his lifestyle are lifted. Under these circumstances, I conclude the first prong of AG ¶ 32(a) is not established.

With respect to the remaining prongs of AG ¶ 32(a), I conclude his conduct did not occur under unusual circumstances, it is too soon to determine the likelihood of recurrence, and his conduct casts doubt on his reliability, trustworthiness, and good judgment. I conclude AG ¶ 32(a) is not established.

Security concerns under this guideline also may be mitigated if "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement." AG ¶ 32(d). Applicant apparently has continued to perform well on the job and he has cooperated fully with the conditions of his probation. On the other hand, he has not expressed remorse for the victims of child pornography. As noted above, too little time has passed to determine if Applicant is rehabilitated. He will be on probation for at least three more

years. The supervisor of his mandatory treatment program observed only that Applicant is "moving toward" treatment completion, but no end date has been established. I conclude AG ¶ 32(d) is not established.

Whole Person Concept

Under the whole person concept, an 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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant is a mature, intelligent adult. He is an experienced, talented ship fitter. He has worked for defense contractors and held a clearance for many years without incident. He was open and candid at the hearing, and he was upbeat and positive about the conditions of his probation. On the other hand, he was attracted to the "outlaw" aspect of downloading child pornography. Although the SOR alleges only a single conviction, it was based on a 10-month course of conduct in which he downloaded images four or five times a week, downloading a total of about 1,000 images and keeping about 100. He kept images of young but sexually developed girls because he found them sexually stimulating. Although he has complied with all the conditions of his probation, it is too soon to tell if he is rehabilitated.

After weighing the disqualifying and mitigating conditions under Guideline J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on criminal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1. Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

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

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LeRoy F. Foreman
Administrative Judge