



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



In the matter of: )  
)  
) ISCR Case No. 07-10485  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Robert E. Coacher, Esquire, Department Counsel

For Applicant: *Pro se*

March 10, 2009

**Decision**

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guidelines for sexual behavior, personal conduct, misuse of information technology systems, and criminal conduct. Accordingly, his request for a security clearance is denied.

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP), which he signed on February 8, 2007. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>1</sup> that it is clearly consistent with the national interest to grant Applicant's request.

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<sup>1</sup> Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

On August 13, 2008, DOHA issued to Applicant a Statement of Reasons (SOR), that specified the basis for its decision: security concerns addressed in the Directive under Guidelines D (Sexual Behavior), M (Use of Information Technology Systems), J (Criminal Conduct), and E (Personal Conduct) of the Revised Adjudicative Guidelines (AG).<sup>2</sup>

Applicant received the SOR on August 19, 2008. He signed his notarized Answer on August 28, 2008, in which he admitted all allegations in the Statement of Reasons except one element of allegation 1.d. He also requested an administrative decision based on the record; however, on September 25, 2008, the government requested a hearing before an administrative judge.<sup>3</sup> Department Counsel was prepared to proceed on November 13, 2008, and the case was assigned to me on November 17, 2008. DOHA issued a Notice of Hearing on November 19, 2008, and I convened the hearing as scheduled on December 11, 2008.

During the hearing, Department Counsel offered 5 exhibits. Government Exhibits (GE) 1, 2, 4, and 5 were admitted without objection. Applicant's objection to GE 3, based on inaccuracy, was overruled, and GE 3 was admitted.<sup>4</sup> Applicant offered three exhibits, which were admitted without objection as Applicant Exhibits (AE) A through C. DOHA received the transcript (Tr) on December 23, 2008.

### **Findings of Fact**

Applicant's admissions to the SOR allegations, as well as those in response to the DOHA interrogatories (GE 2), are admitted as fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant, 38 years old, attended college from 1988 to 1992, and earned a Bachelor's degree in Aerospace Engineering. He is married and the father of a 10-year-old son and two daughters aged eight and five. Applicant has worked for the same defense contractor since 1993. He has held a security clearance with access to Sensitive Compartmented Information (SCI) since 1990 (GE 1; Tr 6).

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<sup>2</sup> Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. The Revised Adjudicative Guidelines supersede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

<sup>3</sup> See DoD Directive 5220.6, ¶ E3.1.7.

<sup>4</sup> The inaccuracy to which Applicant objected will be considered in conjunction with AE B, in which Applicant provides his correction to the inaccuracy.

In 1984, when Applicant was 14 years old, he inappropriately touched and fondled a 6-year-old girl he was babysitting. He was not prosecuted. A few months later, while babysitting, he changed the diaper of a 6-month old infant girl and had inappropriate sexual thoughts, but did not act on them (GE 3). While in college, Applicant viewed pornographic video tapes (Tr 64). His frequent viewing of pornography led him to discover child pornography (Tr 37; 41), which gave him "more of a high" (GE 3). Between 1990 and 1992, he twice accessed sites that featured textual, non-pictorial stories involving minors engaged in sexual acts (GE 3; AE B). During the period 1998 through 2004, while employed at a defense contractor, he used his work computer to view child pornography sites that involved 12 to 15 year old girls. He accessed such sites approximately 12 times. Between 1996 and 2005, he used his work computer to view adult pornography approximately twice per month (GE 3; AE B). Applicant watched child and adult pornography on his employer's computer in an area where "you just hoped nobody looked over your shoulder and saw that you were doing it." (Tr 68).

Applicant did not use his home computer to access any type of pornography (Tr 75) and his wife had no knowledge of his involvement with pornography (Tr 55-56). Nor did his supervisor, coworkers, or friends know of his habit. He did talk with his pastor in 1997, but did not seek further counseling at that time (GE 3).

The Computer Ethics policy of Applicant's employer prohibits use of company computers to view inappropriate materials and requires that computer use conform with the law (GE 5, effective April 1, 2006). Applicant could not say at what point in time he became aware of his company's policy on pornography. However, he acknowledges that when he viewed pornography he knew it was "not in accord with how [company] wishes to do business." (Tr 67-69). He also knew, when he accessed child pornography, that it was illegal (Tr 54).

Applicant accessed child pornography sites because he enjoyed the thrill of engaging in forbidden behavior (GE 3):

As I stated to the investigator, my access to child pornography did not stem from sexual desire, but from rather a sense of looking at something or accessing something taboo that I shouldn't be accessing. The fact in doing so did not bring an immediate consequence to myself only helped to fuel the idea that I was getting away with something. (Tr 34).

In January 2005, a government agency administered a polygraph to Applicant, during which he disclosed his history of involvement with pornography. He stated that he believed he had a problem with pornography, and that "If I was locked in a room with a computer that had unrestricted access to the internet, I would eventually end up at a child porn site." (GE 3). The questions posed by the polygrapher awakened him to the gravity of his conduct:

And it was through his questioning that I was forced to confront exactly what it is that I was doing, what is said about me as a person, a husband and a father.

Whatever image I had of myself was broken apart, and what was left grieved and disgusted me. (Tr 34-35).

The government agency denied Applicant's access to SCI (GE 3). After the polygraph, Applicant confessed his involvement with pornography to his wife. A few days later, he purchased content-monitoring software that blocks access to pornography sites (AE A) and installed it on his work computer. In 2008, he purchased a later version because the original version interfered with his ability to run other software required by his job. Applicant can disable or remove the content-monitoring software at any time (Tr 81-82). In 2008, approximately six months before the hearing, Applicant disabled the software and again accessed adult pornography on his work computer (Tr 80-81).

In late 2006, Applicant began a series of sessions with the pastor of his church for counseling about his habit. They met for three to four months. During the summer of 2007, they talked informally. In 2008, he met with the pastor four times – in April, June, October and the day before the hearing in December (Tr 75-78). His pastor is aware that Applicant has viewed child pornography, but their focus has been on adult pornography (Tr 78).

Currently, only Applicant's wife and pastor know about his history of viewing child and adult pornography. His manager, coworkers and friends remain unaware of the underlying reason that his SCI access was denied after his polygraph (Tr 70-72). During the present investigation, Applicant informed the investigator that "the issue is no longer a problem" for him (GE 3). He also stated that "it is not something he was proud of and does not wish to tell many people." (GE 3). Applicant has no intent to view either child or adult pornography in the future (Tr 80).

### **Policies**

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).<sup>5</sup> Specific applicable 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.

However, the Guidelines are not inflexible rules of law. The presence or absence of a disqualifying or mitigating condition under a Guideline does not determine a conclusion for or against an Applicant. Instead, recognizing the complexities of human behavior, these Guidelines are applied in conjunction with an evaluation of the "whole person" factors listed in ¶2(a) of the Guidelines.

A security clearance decision is intended only to resolve the question of whether it is

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<sup>5</sup> Directive, 6.3

clearly consistent with the national interest<sup>6</sup> for an Applicant to either receive or continue to have access to 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.”<sup>7</sup> 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.

The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the Applicant to refute, extenuate or mitigate the government’s case. Because no one has a “right” to a security clearance, an Applicant bears a heavy burden of persuasion.<sup>8</sup> A person who has access to classified information enters 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 to protect the national interests as his or her 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.<sup>9</sup>

## Analysis

### Guideline D, Sexual Behavior

AG ¶ 12 expresses the security concern under Guideline D:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects 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 concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 13 includes the following relevant conditions that raise security concerns

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<sup>6</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>7</sup> See Executive Order 10865 §7.

<sup>8</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>9</sup> See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

and may be disqualifying:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress
- (d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

All three disqualifying conditions apply. Although Applicant was never prosecuted, his viewing of child pornography violated federal law (AG ¶ 13(a)).<sup>10</sup> Between 1998 and 2004, he accessed child pornography web sites 12 times, and he did so on a computer at his job, in a location that was sufficiently public that where other employees or his supervisor could have discovered him (AG ¶ 13(d)). Finally, Applicant disclosed his conduct only to his wife and his pastor. His supervisor, friends, and coworkers are unaware of his history of viewing adult and child pornography. The fact that he is not proud of his actions, and does not want others to know, indicates that he is vulnerable to exploitation (AG ¶ 13(c)).

Guideline D also contains conditions to mitigate security concerns. AG ¶14 provides the following relevant conditions:

- (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 good judgment;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress; and,

Although Applicant started viewing pornography in college, his behavior did not end in when he graduated. It continued during the years he worked, married and became a father. His most recent use of pornography occurred in approximately June 2008, when he was 38 years old. Applicant viewed pornography frequently – twice per month over a nine-year period – violating the law and company policy. His behavior casts serious doubt on his trustworthiness and neither AG 14 ¶ (a) nor AG 14 ¶ (b) apply. As Applicant's conduct is unknown to all but two people, and he does not wish it to be known, it remains

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<sup>10</sup> 18 U.S.C. § 2252 (GE 4 shows the versions in effect in 1992 and from 1996 to 2004). Applicant's actions from 1990 to 1992 do not appear to have violated the statute, as he accessed textual stories rather than the prohibited visual depictions.

a basis for coercion, and AG 14 ¶ (c) cannot be applied. I find against Applicant on Guideline D.

### **Guideline M, Misuse of Information Technology Systems**

AG ¶ 39 expresses the security concern pertaining to use of information technology systems:

Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

Although the disqualifying conditions do not specifically describe this situation, the facts do fall under the Concern raised by this Guideline. Applicant's conduct in using his work computer to access adult and child pornography was not in compliance with his employer's policy regarding the use of company computers. He viewed pornography in 2008, violating the policy in effect as of April 2006 (GE 5). His knowing violation of policy shows that he is willing to ignore rules to satisfy his own desires.

AG ¶ 41 provides two relevant mitigating conditions:

(a) so much time has elapsed since the 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;

(c) the conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification of supervisor

Mitigating condition AG ¶ 41(a) does not apply, as discussed previously, because Applicant's actions were frequent, recent, and untrustworthy. Moreover, AG ¶ 41(c) cannot be applied. Applicant's conduct was the opposite of inadvertent: he did it, in part, because he knew it was forbidden, and he enjoyed breaking the rules. This is most disturbing in one who seeks access to classified information. Applicants for security clearances enter into a relationship of trust with the government, one where they agree to follow rules, not to thwart them. I find against Applicant on Guideline M.

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern about personal conduct:

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.

The facts support application of two disqualifying conditions: AG ¶ 16(d):

credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;
- (2) disruptive, violent, or other inappropriate behavior in the workplace;
- (3) a pattern of dishonesty or rule violations; and,
- (4) evidence of significant misuse of Government or other employer's time or resources.

and AG 16(e):

personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

Applicant's behavior demonstrates a long-standing willingness to disregard rules and regulations. Applicant's criminal conduct in viewing child pornography between 1998 and 2004, indicates his willingness to place his own needs above the law. His viewing of adult pornography twice per month between 1996 and 2005, and his viewing of adult pornography only months ago, show his willingness, and even desire, to disregard his company's rules. The fact that he engaged in these activities while he held a security



clearance underscores his willingness to disregard the trust that the government had placed in him. A pattern emerges from these facts that demonstrates untrustworthiness. AG ¶ 16(d)(1) applies. Moreover, disqualifying condition AG ¶ 16(e) applies because Applicant's activities are unknown to his friends, coworkers and supervisor. His wish that they remain secret indicates that their disclosure would, in his eyes, affect his standing, and places him in a position of vulnerability to coercion.

Applicant's conduct under Guideline E is unmitigated by AG ¶ 17(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*). As discussed under Guidelines D and M, his conduct is frequent and recent. It also reflects negatively on his trustworthiness: he betrayed the trust of his wife and his employer not only by viewing pornography, but by concealing his actions over many years. I find against Applicant on Guideline E.

### **Guideline J, Criminal Conduct**

AG ¶ 30 expresses the security concern pertaining to 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.

The facts raise two disqualifying conditions: AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*); and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*). Applicant admits that he accessed child pornography on his employer's computer, that he did it numerous times, and that he knew it was illegal.<sup>11</sup> AG ¶ 31(a) and (c) apply.

Two mitigating conditions are relevant: AG ¶ 32(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*) and AG ¶ 32(d) (*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*).

Neither AG ¶ 32(a) nor AG ¶ 32(d) mitigate Applicant's conduct. Applicant accessed child pornography approximately six months before the hearing, which is recent. His illegal conduct did not occur under unusual circumstances; on the contrary, Applicant

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<sup>11</sup> Applicant notes that his accessing of textual child pornography in 1990 - 1992 did not violate the statute, which applies to "visual depictions." However, his conduct in 1996 - 2004, when he accessed web sites containing visual images, did violate the statute.

viewed child pornography while at work. As he will be working for many years into the future, the opportunity to access child pornography will present itself over and over, each day that he sits down at his computer. Even though he installed content-filtering software, Applicant can and has overridden it, so it does not prevent his illegal conduct. Applicant's desire to "get away with something" indicates a lack of trustworthiness and good judgment, which, when coupled with the recurring opportunity to access child pornography, undermines any claim to mitigation under AG ¶ 32(a).

As to AG ¶ 32(d), Applicant's realization of the gravity of his wrongdoing, as well as his confession to his wife, and his pastoral counseling, demonstrate some rehabilitation. However, three to four months of meetings in 2006-2007, and four times in 2008, appear insufficient when compared to his many years of viewing pornography. He has not sought professional counseling or therapy or even investigated whether or not it is appropriate in his case. The fact that, despite the counseling, he again viewed pornography only six months ago undermines a claim of rehabilitation. AG ¶ 32(d) cannot be applied. I find against Applicant on Guideline J.

### **Whole Person Analysis**

Under the whole person concept, an administrative judge must evaluate the Applicant's security eligibility 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) 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole person concept. Under each guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Although Applicant started viewing pornography in college, his conduct cannot be mitigated based on immaturity, because he has continued to access it, most recently at the age of 38. Each time he knowingly accessed a pornographic site at work, he placed his own desires above company policy. Moreover, Applicant's viewing of child pornography over many years constitutes a repeated violation of federal law. Each time he knowingly accessed a child pornography site, he placed his own desires above the law.

Applicant's questioning by the polygrapher in 2005 awakened Applicant to the gravity of his behavior. It is commendable that he confessed to his wife, that he installed software to bar him from entering pornography sites, and that he sought counseling from his pastor. However, on balance, these actions cannot outweigh his behavior. Applicant resolved to change after his January 2005 polygraph, yet he did not seek counseling until 2006, almost two years later. The software that he installed to block pornography can be disabled at any time, and so it failed to prevent him from viewing pornography again in 2008. The fact that Applicant has continued to engage in behavior that could destroy his livelihood, and that he viewed pornography again so recently, despite his counseling, his software, his intentions and his self-awareness, raises the question of whether or not he will be able to refrain from such behavior in the future.

Overall, the record evidence fails to satisfy the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guidelines.

### **Formal Findings**

Paragraph 1, Guideline D	Against Applicant
Subparagraph 1.a. - 1.f.	Against Applicant
Paragraph 2, Guideline E	Against Applicant
Subparagraph 2.a - 2.b.	Against Applicant
Paragraph 3, Guideline M	Against Applicant
Subparagraph 3.a.	Against Applicant
Paragraph 4, Guideline J	Against Applicant
Subparagraph 4.a.	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

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RITA C. O'BRIEN  
Administrative Judge

