



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



In the matter of: )  
 )  
----- ) ISCR Case No. 07-18324  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government:  
Jennifer I. Goldstein, Esq., Department Counsel

For Applicant:  
B. Daniel Lynch, Esquire

October 28, 2010

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**DECISION**

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ROSS, Wilford H., Administrative Judge:

Applicant submitted his Questionnaire for National Security Positions on October 5, 2006. (Government Exhibit 1.) On June 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines D (Sexual Behavior) and E (Personal Conduct). 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on August 27, 2009, and requested a hearing . Department Counsel was prepared to proceed on September 25, 2009. This case was assigned to me on September 28, 2009. DOHA issued a notice of hearing on October 19, 2009, setting the hearing for November 6, 2009. Applicant’s counsel requested a

continuance, with which Department Counsel concurred. A second notice of hearing was issued on November 3, 2009. I convened the hearing as scheduled on December 18, 2009. The Government offered Government Exhibits 1 through 9, which were admitted.<sup>1</sup> Applicant testified, called three additional witnesses, and submitted Applicant Exhibits A through E, which were admitted without objection. DOHA received the transcript of the hearing on January 4, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

### **Findings of Fact**

Applicant is 55 and married. He is employed by a defense contractor and seeks to retain a security clearance in connection with his employment.

#### **Paragraph 1 (Guideline D, Sexual Behavior)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in sexual behavior that is illegal, reflects a lack of judgment or discretion, or may subject Applicant to undue influence or coercion. Applicant denied all the allegations under this paragraph. Several of the allegations refer to Government Exhibit 7, which is the Decision Letter (DL) of Another Government Agency (AGA) concerning the Applicant's access to classified information, dated February 2004. This letter was signed by a Senior Adjudication Officer, who was not the interviewer or polygrapher of the Applicant. In pertinent part the DL says:

During your most recent security testing, you divulged information regarding your viewing pornography of underage girls around 14 to 16 years old. You mentioned you had seen some pornography of girls as young as 11 years old, which you had found on foreign web sites. You admitted that, although you believe your actions are illegal, you have deliberately sought and viewed pornographic images of underage girls for several years, and you continue to do so on an average of twice weekly; you look at pornographic thumbnails of underage girls that appear interesting and download them to a temporary file in your computer. You also admitted that you actively seek and view what you believe to be rapes of 15 or 16-year-old girls (in some cases by multiple persons), and teenage females involved in sexual acts or being molested; and, you sexually gratify yourself while viewing these images. Additionally, you admitted that you have recurring rape fantasies and your greatest interest involves the rape of 12-year-old girls. You stated that during a work related overseas trip your were involved in two sexual encounters with

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<sup>1</sup>Applicant's counsel objected to the admission of Government Exhibits 2, 3, 5 and 8. Those objections were overruled and the exhibits admitted. (Transcript at 12-20.)

girls you believed to be 15 or 16 years old;<sup>2</sup> that it was your intention to do so prior to your trip; and, the encounters enabled you to live out part of your sexual/rape fantasies with young girls in a more permissive environment. (Government Exhibit 7 at 1-2.)<sup>3</sup>

1.a. Applicant denied that during two interviews with AGA in 2003 he admitted that he deliberately sought and viewed child pornography on an average of twice weekly. As stated above, Government Exhibit 7 is the only support for this allegation. Applicant admits that he has accidentally viewed child pornography on several occasions. This was in relation to his working with use net newsgroups on the internet, or when looking at what he thought was legal pornography.

In a letter he sent in response to Government Exhibit 7, dated March 16, 2004, Applicant stated:

When your representatives asked me whether or not I had viewed this type of material, I had to answer "yes". However, I have not deliberately sought out the type of material in question. The two questions in my mind are still: How do I report this type of inappropriate information to the proper authorities, and if I do, will I some how become a "guilty" person while trying to do the right thing? I have also stated my concerns on this issue during both of my interviews with your representatives. (Government Exhibit 2 at 1.) (See Government Exhibit 4 at 2, 8, and Exhibit 6 at 1-2.)

In his testimony, Applicant specifically denied deliberately seeking child pornography on the internet up to twice weekly for several years. He additionally said that he accidentally looked at pornographic pictures of children only once or twice, several years before 2003. He further stated that he has not viewed any type of child pornography in over six years. (Government Exhibit 4 at 10.) Finally, Applicant stated that he has offered to the AGA and the Defense Department the opportunity to examine all of his computers, with or without a warrant. (Transcript at 95-99, 118-119, 135-136, 138-141.)

1.b. Applicant denied this allegation, which states he specifically sought and viewed pornography involving the rapes of 15 and/or 16-year-old girls, as well as teenage girls being molested. Once again, Government Exhibit 7 is the only support for the statement.

1.c. Applicant also denied this allegation, which alleges that he admitted to the AGA that he had recurring rape fantasies involving underage girls.

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<sup>2</sup>The phrase "sexual encounters" is not defined anywhere in the DL.

<sup>3</sup>Applicant stated that no written statement was made after any of his interviews with the AGA. (Transcript at 145-146.) No other evidence was submitted concerning the content of these interviews.

Regarding these allegations, the Applicant admits that he and his wife looked into ways to enhance the marital relationship. He stated, "So, we looked at role playing, whether it was rape fantasies, body submission, master/slave, whatever. We tried it a couple of times, and said it's not for us and just didn't do it anymore." (Transcript at 86-87.) (See Transcript at 99, 114-117.)<sup>4</sup> He specifically denied saying anything to the AGA about looking for rapes of 14 to 16 year-old-children on the internet, or ever doing such a thing. (Transcript at 142-143.)

1.d. Applicant denied having sexual encounters in January 1999 with two prostitutes in an Asian nation who he believed to be 15 or 16 years old. As before, Government Exhibit 7 is the sole support for this statement.

Applicant testified extensively about these incidents. He states that the prostitutes approached him, one each on two different nights. Their advances to him were rebuffed. In his testimony, Applicant admits that his written statement to the AGA about these incidents was confusing. (Government Exhibit 2 at 2.) Applicant states, "I did not have sexual relations with anybody. I have never been unfaithful to my wife in 27 years of marriage." (Transcript at 88-90, 119-125.) He had specifically denied the statements in the Interrogatories presented to him by DOHA that he had sexual intercourse with the prostitutes. (Government Exhibit 4 at 4, 9.)<sup>5</sup>

1.e. Applicant denied becoming physically aroused when one of his daughter's swim team members rubbed against him.

This allegation comes from Applicant's answer to question 11 of the July 2, 2009 interrogatories. He was asked whether it was true that, "During your April 2003 interview, you further stated that on occasion you became physically aroused when one of the female teenage swimmers would rub against you. You further stated that you believed the girls (who were 16 to 17 years old) were flirtly and dressed provocatively." He answered, "Yes. Further explanation: The swimmers in question approached me on the swim deck - I did not approach them. In hind sight, I should have either confronted them myself or had the team captains talk to them about the situation." (Government Exhibit 4 at 5, 10.) In his testimony, Applicant clarified this statement to say that it was one swimmer on a single occasion. (Transcript at 90-92, 126-130.)

1.f. Applicant denied this allegation, which stated that, when his daughter's high school friends would stay overnight, that he could identify which of the girls wore bras.

This particular allegation comes from the Applicant's answer to question 12 of the July 2, 2009 interrogatories. After admitting that this statement was true, he further stated, "They flaunted their bodies as a tease. I did not make any type of move or

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<sup>4</sup>This included looking at videos of rape scenarios involving women who were at or above legal age. (Government Exhibit 4 at 2-3, 8-9.)

<sup>5</sup>There is no evidentiary support in the record for the conclusionary statements made in Government Exhibit 4, questions 7 and 8.

approach them in any way. In fact, I isolated myself from them to avoid being placed in a compromising situation. I knew my daughter valued their friendship and I did not want to hurt her in any way.” (See Transcript at 92-93, 130-132.)

1.g. Applicant denied this allegation, which states that at the age of 17, he masturbated himself in front of his nephews, who were 5 and 6 at the time.<sup>6</sup>

This particular allegation comes from the Applicant’s answer to question 9 of the July 2, 2009 interrogatories. He stated:

This occurred one time only approximately 40 years ago and has not happened again. In fact, I did not touch them nor did they touch me. I simply showed them on myself. They had asked questions about sex and masturbation after they had looked at several of their father’s men’s magazines. I did feel extreme guilt afterward and still feel this guilt to this day as I realized it was totally inappropriate. I intended to clarify this issue with the OGA during the next interview which did not take place. (Government Exhibit 4 at 5, 9-10.) (See Transcript at 93-95, 132-135.)

## **Paragraph 2 (Guideline E, Personal Conduct)**

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in conduct which displays questionable judgment, dishonesty, or unwillingness to comply with rules and regulations.

2.a. and 2.b. Applicant admitted that the AGA disapproved his request for access for additional classified information, and revoked his current access, in January 2004. He appealed this decision, but the decision was reaffirmed on November 27, 2006. The reasons for this action are the factual allegations set forth in subparagraphs 1.a. through 1.d. of the SOR. (Government Exhibits 7, 8 and 9.)

2.c. Applicant denied this allegation, which regards statements executed by him and presented to an investigator with the Office of Personnel Management. He states in that affidavit that he “accidentally came across an inappropriate image” and “immediately left the site.” (Government Exhibit 6 at 1-2.) The veracity of this statement will be discussed under “Analysis,” below.

2.d. Applicant denied this allegation, which refers to alleged statements in a set of interrogatories executed by him on October 17, 2008. This set of interrogatories was not presented as an exhibit at the hearing. Based on his denial, and the lack of any corroborating evidence, this allegation is found for the Applicant.

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<sup>6</sup>The security significance of this particular conduct, which occurred almost 40 years ago, is minimal. (Transcript at 134-135.)

2.e. and 2.f. Applicant denied these allegations, which refer to questions in the July 2, 2009 interrogatories. Specifically, questions concerning the incidents with the two prostitutes in Asia and whether he intentionally viewed child pornography. (Government Exhibit 4.) The Government alleges that his answers were false when he denied these allegations. The veracity of his statements will be discussed in "Analysis," below.

## **Mitigation**

Two retired police officers, and a friend of the Applicant, testified for him. Each of these witnesses knew about the allegations involving the Applicant's alleged viewing of child pornography. Each of the witnesses finds the Applicant to be trustworthy and recommend that he retain his security clearance. (Transcript at 31-67.) (See Applicant Exhibit A at 11.)

Applicant submitted letters of recommendation from his wife, son and daughter. (Applicant Exhibit A at 2, 5-8, Exhibit B.) In addition, he also submitted letters of recommendation from work associates, including a Captain in the US Air Force. They describe the Applicant as "professional and diligent," "a real asset," and to be of "high moral character." (Applicant Exhibit A at 3-4, 9-10, 12-13.)

## **Policies**

Security clearance decisions are not made in a vacuum. When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used as appropriate in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based

on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Paragraph 1 (Guideline D, Sexual Behavior)**

The security concern for Sexual Behavior is set out in AG ¶ 12:

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.

The Government has presented enough evidence to barely meet their burden of proof, which is minimal. The following disqualifying conditions are arguably applicable based on this finding:

13.a. sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

13.b. a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;

13.c. sexual behavior that causes an individual to be vulnerable to coercion, exploitation or duress;

13.d. sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

Under the particular facts of this case, all of the mitigating conditions have some application. They are:

14.a. the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;

14.b. the sexual behavior happened so long ago, so infrequently, or under such circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

14.c. the behavior no longer serves as a basis for coercion, exploitation, or duress;

14.d. the sexual behavior is strictly private, consensual, and discreet.

The first question to be asked in this case is what exactly did the Applicant do? Two government documents declare that, before the year 2003, he engaged in a serious, and possibly illegal, course of conduct regarding underage girls. This conduct consisted of looking at graphic and violent pornography involving underage girls, and on two occasions engaging in sexual intercourse with underage prostitutes while overseas. As stated, now that this finding has been made, the burden falls to the Applicant to refute or mitigate it.

The problem in this case is that the documents supporting the factual allegations are third hand statements. Government Exhibits 4 and 7, the DOHA interrogatories and the DL by the AGA, are statements of fact, evidently drawn from other documents. These other documents were prepared by unknown third parties, which are presumed to be based on alleged statements of the Applicant. These documents were not presented to me. In fact, no evidence was presented to me containing any supporting documentation from the interviews where the Applicant was alleged to have made these



statements. Any fair evaluation of the evidence must take into account the Applicant's absolute denials, as opposed to the dearth of supporting documentation.<sup>7</sup>

Applicant has admitted that on a few occasions he accidentally looked at child pornography on the internet at least six years ago. He further admitted that he and his wife experimented with enhancements to their sex life, which included rape fantasies and other bondage and discipline games. He admits to looking at legal pornography. Applicant further admits that he was approached by two prostitutes, who may have been underage, in Asia.

Applicant further admitted that, on one occasion, a teenage swimmer stood too close to him at a swim meet. He also stated that sometimes his daughter's friends wore provocative clothes while sleeping over at their house. Finally, he admits showing his penis to his two nephews when he was 17 and they were 5 and 6.

Applicant's credibility is essential to the decision in this case. The allegations are serious, and possibly criminal. He was cross-examined extensively by Department Counsel. His testimony was credible and consistent with his written responses, including the ones he made in response to the DL. As discussed above, Applicant freely admitted an involvement in legal pornography, and marital sexual conduct, that other people would find difficult to reveal. The credibility finding about the Applicant is supported by the fact that two retired police officers, who are married to each other and have female children, find the Applicant to be a truthful person.

I have carefully considered the serious allegations contained in Government Exhibits 4 and 7, along with the statements the Applicant has made, both in writing and during his testimony. I have looked at all the allegations to see if there is a pattern of behavior towards young girls or women that arises to the deviancy alleged in the SOR. This includes the allegations about the swim team and girls sleeping over. Based on my analysis of the available evidence, I find that he has not engaged in sexual behavior of a criminal nature, that reflects a lack of judgment or discretion, or may subject him to undue influence or duress. Paragraph 1 is found for the Applicant.

## **Paragraph 2 (Guideline E, Personal Conduct)**

The security concern for Personal Conduct is set out in AG ¶ 15:

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 in any failure to provide

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<sup>7</sup>While I have no information that Government Exhibits 4 and 7 were improperly prepared, they are the factual conclusions of third parties based on second hand information about what the Applicant allegedly told other people, and were not provided to me. As an independent trier of fact, I am not bound by their findings, which I have no way of knowing are correct. Accordingly, I have given these exhibits the weight which I believe is appropriate.

truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Regarding all the allegations, the following Disqualifying Conditions are arguably applicable:

16.a. deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

16.c. credible adverse information in several adjudicative areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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; and

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.

Turning first to the alleged falsifications committed by the Applicant. Once again we are faced with the situation where the alleged false statements of the Applicant are where he disagrees with factual conclusions in Government Exhibits 4 and 7. Since, as discussed above, I cannot find with any degree of confidence that the conclusions in the documents are accurate, the Applicant's denials cannot be seen as false.

I have also examined all of the Applicant's admitted conduct under this Guideline. Some people may disagree with his looking at legal pornography, or how he and his wife engaged in sexual relations during marriage. They may think that he behaved inappropriately with regards to his daughter's friends, even though there is no allegation of improper conduct. However, these facts are not the kind that support the denial of the Applicant's security clearance.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the relevant circumstances. Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense

judgment based upon careful consideration of the guidelines and the whole-person concept. The 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.

I considered the potentially disqualifying and mitigating conditions in light of all the relevant facts and circumstances surrounding this case. I specifically find that the Applicant has mitigated the Government's security concerns under the whole-person concept, independently of Guidelines D and E.

The AGA denied the Applicant's security clearance. They did so making factual conclusions, about which I do not have supporting evidence. The nature of his admitted conduct was legal or accidental. The admitted conduct occurred at least six years ago and has not been repeated. Under the particular facts of this case, I find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is no likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his alleged Sexual Behavior and Personal Conduct. On balance, I conclude that Applicant has successfully overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports granting his request for a security clearance.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline D:	FOR APPLICANT
Subparagraphs 1.a. through 1.f.:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a. through 2.f.:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS  
Administrative Judge