



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-02777
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Francisco Mendez, Esq., Department Counsel
For Applicant: *Pro Se*

October 30, 2009

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant completed a security clearance application (SF-86) dated October 4, 2004. On March 11, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns arising under Guideline D (Sexual Behavior) and Guideline 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 revised Adjudicative Guidelines (AG) promulgated by the President on December 29, 2005, and effective for SORs issued after September 1, 2006.

In a response notarized on March 30, 2009, Applicant admitted all four allegations set forth under Guideline D. He denied one allegation and failed to answer the second allegation noted under Guideline E. In his response to the SOR, Applicant requested a determination without a hearing. Consequently, Department Counsel submitted a File of Relevant Material (FORM), dated August 17, 2009, that included six attached items. Applicant timely responded to the FORM on September 21, 2009. On September 30, 2009, the Director, DOHA, forwarded the case for assignment to an

administrative judge. I received the case on October 9, 2009. Based upon a review of the case file, submissions, and exhibits, I find Applicant failed to meet his burden regarding the security concerns raised. Security clearance is denied.

Findings of Fact

Applicant is a 45-year-old researcher who has worked for the same defense contractor since 2003. He earned degrees at both the bachelor's and master's level from well-regarded colleges. He subsequently served as an officer in the military reserves for approximately five years, during which time he married.¹

In choosing to have an administrative determination without a hearing, Applicant's facts and arguments are essentially limited to those put forth in the FORM, in his answer to the SOR, and in his response to the FORM. Consequently, the relevant facts of record are scant.

Applicant admitted to all four allegations arising under Guideline D, Sexual Behavior. Specifically, he admitted SOR allegation ¶ 1.a ("You visited an adult chat room on a website from about 1996 to at least March 2006 where on occasion child pornography would appear") and ¶ 1.b ("You viewed child pornography that appeared on your computer when you visited an adult website from 1996 to at least March 2006").² Applicant explained that "it is untrue to say that [he] knew illegal material would appear at the website in question," but conceded that "[i]n my experience, these were always rare events and eventually they stopped."³ After his first exposure to illegal imagery and with an underage sex chat participant, he sought "to identify by type of username the sorts of people most likely to post illegal materials" and to avoid on-line contact with them.⁴

Such instances were eventually repeated. Over time, the website instituted increasingly more rigorous attempts to keep participants and their postings at a legal level.⁵ By 2004, the web site specifically prohibited "Lolita Pics."⁶ Applicant admitted he saw illegal images six or eight times "over the years," but could only "specifically

¹ See SF-86 at 3-4.

² The adult website at issue is not limited to chat rooms or pictures in general, but has rooms organized by rating (G, R, and X), including others "labeled as intended for people interested in specific sexual themes, such as tattoos and piercings, bisexuality, nudism, and bondage." FORM at 11.

³ Response to SOR at 2. Elsewhere, Applicant stated that the government's insinuation that the web site's "criminal behavior is pervasive and unavoidable" is flawed. FORM at 10.

⁴ *Id.*

⁵ *Id.*

⁶ FORM at 12. See also FORM at 22, at which Applicant quotes a warning from the web site reminding patrons of a room named "Perverted Old Men" that the "room is about LEGAL girls," before proceeding to a perurle, if not sexually vulgar, "jest" of what violators of this warning might face in prison and in the hereafter.

remember two [instances or images],” occurring in 1996 and in “perhaps 1998.”⁷ Applicant is “unable to recall the last time” he saw “such an image.”⁸

In response to SOR allegation ¶ 1.c (“You joined phone sex lines and masturbated while on-line to at least March 2005”), Applicant admitted he used telephonic or on-line chat rooms of a sexual nature at various times. In 1996 he engaged in an on-line sex chat with a minor.⁹ Later, in 1999, he curtailed another on-line sexual conversation when he discovered the person with whom he was chatting identified herself as a minor. Applicant, however, had “no way of verifying” the sex or age of this person.¹⁰ Applicant’s “wife, boss, the security officer at [his] company, the President and Vice President of [his] company, and to a lesser degree several of [his] closest friends all know what has happened,” although there is no evidence as to the extent of their knowledge regarding these activities.¹¹ Applicant stated his use of on-line sex chat “manifestly would not” affect his personal, professional or community standing.¹² He argues that “sex chat” is “well within community standards and has been since the World Wide Web began to be popular.”¹³

Finally, Applicant admitted SOR allegation ¶ 1.d (“Your personal computer, laptop, and hard drive were surrendered to an Other Government Agency for inspection during an investigation pertaining to child pornography in about August 2005”). Applicant noted he voluntarily complied with the investigators’ requests. He also stated that no illegal materials were found. Applicant does not have a prurient interest in child pornography.¹⁴ Applicant argued that his statements to investigators prior to the examination of his computers and prior to this process were distorted.¹⁵

⁷ *Id.* at 3. Elsewhere, Applicant stated the number of times such images were viewed was closer to three or four. Response to FORM at 18.

⁸ Response to the SOR at 3.

⁹ Response to FORM at 6.

¹⁰ *Id.*

¹¹ *Id.* at 18. Applicant states he remains “married to the same woman and she has never raised the topic.” *Id.* at 7. Applicant further noted that he received training with regard to the appropriate procedures for reporting “encounters with foreign national prostitutes abroad.” *Id.* at 1. None of the allegations concern contact with prostitutes, foreign or domestic.

¹² *Id.* at 7.

¹³ *Id.* at 7. Applicant further explains the popularity of on-line sex chat rooms and sex-oriented role playing games while depicting the web site at issue, which features an extensive variety of sexual and nonsexual sub-domains, as “within the mainstream of this cultural phenomenon.” *Id.* at 7-8.

¹⁴ *Id.* at 4. There is similarly no evidence that Applicant has what is termed in the materials as a “reptilian brain.” See, e.g., *Id.* at 5.

¹⁵ FORM at 19. Consequently, Applicant feels Sexual Conduct Mitigating Condition 17(f) applies.

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. 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. An administrative judge's over-arching adjudicative goal is a fair, impartial and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole person concept." An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny 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.

The United States Government (Government) must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ¹⁶ The burden of proof is something less than a preponderance of evidence. ¹⁷ The ultimate burden of persuasion is on the applicant. ¹⁸

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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. 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.

Section 7 of Executive Order 10865 provides that decisions shall be "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). "The clearly consistent standard

¹⁶ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

¹⁷ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

¹⁸ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁹ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.²⁰ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant,²¹ nor does it reflect badly on that person’s character. It is merely an indication that an applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find Guideline D (Sexual Behavior) and Guideline E (Personal Conduct) to be the most pertinent to the case. Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

Analysis

Guideline D – Sexual Behavior

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.”²² It further states that “no adverse inference concerning the standards in this Guideline may be raised on the basis of sexual orientation of the individual.”²³ The Directive sets out several potentially disqualifying conditions under this Guideline.

For a decade, from 1996 until at least 2006, Applicant frequented a website featuring a wide variety of sexual components. He regularly visited the website, viewed its contents, and used it and telephonic technology to conduct sexual “chats.” These “chats” included a sex “chat” with a minor. He persisted with the “chat” function on the website and eventually had a second conversation of a sexual nature with an individual who was apparently underage. Through the website, he also viewed an image of child pornography. While continuing to use the website, he witnessed similar images. Such facts give rise to Sexual Behavior Disqualifying Conditions AG ¶ 13(a) (“sexual behavior of a criminal nature, whether or not the individual has been prosecuted”), ¶ 13(c) (“sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress”), and ¶ 13(d) (“sexual behavior of a public nature and/or that reflects lack of discretion or judgment”).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Executive Order 10865 § 7.

²² AG ¶ 12.

²³ *Id.*

Applicant's on-line activities with the adult website at issue occurred during his 30s and 40s. Consequently, Sexual Behavior Mitigating Condition (SB MC) AG ¶ 14(a) ("the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature") does not apply.

Applicant used the adult website from about 1996 until at least 2006.²⁴ As well, he sought sexual gratification through his use of phone sex lines and the website until at least 2005.²⁵ After he first discovered minors could and would actively use the adult website at issue and learned that illegal images were periodically available on the site, he continued to visit the site. He did so in the knowledge that he could not verify the age or sex of those with whom he had sex chats or predict when illegal imagery would be posted for access.²⁶

The government argues that Applicant returned to the website after he first discovered "crime was afoot." Applicant stressed that underage contacts and illegal imagery were not pervasive and that he tried avoid them, despite the fact he also acknowledged one could not discern a participant's true age or gender. Regardless, both the methods he used to avoid such content and the website's measures at censorship were imperfect. As a result, he had a subsequent conversation with a minor and he viewed more illegal images. While these incidents were intermittent, his initial experiences gave him sufficient warning that such content was sporadically available and relatively unavoidable.

Whether Applicant chooses to properly use adult websites or sex chats for his own personal entertainment is not the issue. The issue is his voluntary and continued use of an adult site he knew to be insufficiently censored and which he knew could intermittently or randomly feature illegal or inappropriate content. As noted above, a person seeking a security clearance enters into a fiduciary relationship with the Government based on trust and confidence. This relationship continues after working hours. It is founded on trust and the expectation that an applicant reliably and consistently demonstrates sound judgment. In continuing to revisit the website for nearly 10 years, Applicant did little more than repeatedly throw the dice in the hopes he could enjoy uncensored sex chat while avoiding illegal contacts. Such behavior demonstrates unreliable conduct and poor judgment that is not mitigated under SB MC AG ¶ 14(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").

At this point, Applicant's wife, professional superiors, and some close friends know of his adult activities. Now that they know of his use of what he depicts as

²⁴ Applicant's Response to the SOR. There is no evidence as to whether he has since resumed this behavior at the website at issue or any other websites.

²⁵ Applicant's Response to the SOR regarding SOR allegation ¶ 1(c).

²⁶ See, e.g., Response to FORM at 6.

“mainstream” entertainment, he feels he is no longer vulnerable to exploitation by anyone seeking details regarding any classified or sensitive information. To the extent his wife, his current employers, and some selected friends know of his activities, SB MC AG ¶ 14(c) (“the behavior no longer serves as a basis for coercion, exploitation, or duress”) applies in part.²⁷ With regard to telephonic or on-line sexual activities or content not involving minors, whether solitary or interactive, SB MC AG ¶ 14(d) (“the sexual behavior is strictly private, consensual, and discreet”) applies.

Guideline E – Personal Conduct

Under Guideline E “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.”²⁸ Here, Applicant repeatedly used modern technology to engage in sexual “chats” and view sexual images. He engaged in these activities in his pursuit of entertainment and, at times, for sexual gratification. His activities are now known by a handful of individuals, including his wife, workplace associates, and “to a lesser degree several of [his] closest friends.” While these individuals may know of Applicant’s activities, there are insufficient facts of record from which to discern whether this information has affected how these individuals view Applicant as an individual, colleague, or peer. Moreover, the selectivity of this finite circle of intimates is notable and fails to demonstrate that Applicant is actually comfortable with such knowledge being possessed by others within his personal, professional, or civic circles. Consequently, Personal Conduct Disqualifying Condition 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”) applies.

Applicant’s conduct continued for close to a decade, lasting through at least 2006. During that time, he was exposed to illegal content or compromising situations on multiple occasions. Therefore, Personal Conduct Mitigating Condition (PC MC) 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”) does not apply.

Moreover, while Applicant’s admissions note that he curtailed his use of telephonic sex lines in 2005 and his visits to the website at issue in 2006, and while

²⁷ This mitigating condition would not necessarily apply to friends, family, professional colleagues, or other social contacts, past or future, not explicitly enumerated above.

²⁸ AG ¶ 15.

there is no evidence he preserved illegal content on his computers, there is no affirmative commitment expressed that he will not again return to that website or to any similar website on which illegal or compromising materials may be a regular or randomly intermittent feature. Further, there is no evidence that he has disclosed, or is either prepared or willing to disclose, the facts of record to other individuals within his spheres of contact who have not already been informed of his activities. Consequently, PC MC AG ¶ 17(e) (“the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress”) does not apply. None of the other mitigating conditions under this guideline apply.

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 an applicant’s conduct and all the circumstances. 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.

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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the “whole person” factors. Multiple facts speak in Applicant’s favor. Applicant is a mature man with impressive educational and professional credentials. He devoted a significant period of his life to being a military reservist. When asked by investigators whether his computers could be examined, he voluntarily complied. In the end, apparently no illegal materials were discovered and Applicant was essentially vindicated of maintaining such materials on his computers. Although he chose an administrative determination in lieu of a hearing, his submissions demonstrate that he is a capable advocate. In foregoing a hearing, however, the record consists only of written documents, precluding the opportunity for inquiry to be made in those areas in which questions remain and concerns linger.

Multiple facts also exist which speak against Applicant. While he was fully within his rights to pursue adult entertainment in the privacy of his home, he chose to

repeatedly revisit an adult website on which he had engaged in sexual chatter with a minor and on which he had encountered an illegal image of a pornographic nature. Rather than avoid that site and move to a better monitored adult service, he regularly returned to the same website for a decade. During that time, he again encountered a presumably underage chat partner and more illegal images. While such illegal content was neither pervasive nor a regular feature on the site, he was aware that censorship of such material was imperfect and not foolproof. Each time he accessed the site, he voluntarily assumed the risk that he would again be compromised with similar material or contact. Trust and confidence, however, are not built on risk-taking. It is built on the demonstrated exercise of reliability, trustworthiness, and sound judgment. Given the facts and arguments submitted, such qualities were not sufficiently demonstrated so as to overcome lingering security concerns. Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information. Because Applicant's sexual behavior and personal conduct security concerns remain unmitigated, I conclude it is not clearly consistent with national security to grant Applicant a security clearance. Clearance is denied.

Formal Findings

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

Paragraph 1, Guideline D:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant a security clearance. Clearance is denied.

ARTHUR E. MARSHALL, JR.
Administrative Judge