



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



In the matter of: )  
)  
) ISCR Case No. 08-05222  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Gregg A. Cervi, Esq., Department Counsel  
For Applicant: *Pro Se*

November 12, 2009

**Decision**

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the government's security concerns under Guidelines D, Sexual Behavior, E, Personal Conduct, and J, Criminal Conduct. Applicant's eligibility for a security clearance is denied.

On May 8, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines D, Sexual Behavior, E, Personal Conduct, and J, Criminal 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 within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on May 18, 2009, and elected to have his case decided on the written record. Department Counsel submitted the government's file of relevant material (FORM) on July 21, 2009. The FORM was mailed to Applicant on July 22, 2009, and it was received on July 28, 2009. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not provide additional information. The case was assigned to me on October 8, 2009.

### **Findings of Fact**

Applicant admitted all of the allegations in the SOR. After a thorough and careful review of the pleadings, exhibits, and statements submitted, I make the following findings of fact.

Applicant is a 47-year-old engineer who has held a Secret security clearance since 1989, and he briefly held a Top Secret security clearance in 2000. In late 2006, as part of the background investigation process to be considered for access to Sensitive Compartment Information (SCI), Applicant was interviewed by a government investigator.

During his interview, Applicant admitted viewing pornography since he was a child. He intentionally searched for and accessed child pornography online a couple of times per week from the mid 1990s to at least September 2006. The frequency varied. At times he viewed it every night and then stopped for awhile. He stopped because he felt guilty about his conduct and he feared legal repercussions. He was concerned that it would put his security clearance in jeopardy and would make him vulnerable if his actions were known.<sup>1</sup>

Applicant visited online newsgroups and Usenet sites that contained pornographic images featuring children. He specifically searched these sites for child pornography. He was cautious about searching the World Wide Web, and did so only occasionally, because it was more risky.<sup>2</sup>

Applicant "burned" up to 1,000 CD's and DVD's containing exclusively graphic still photos and videos depicting sexually explicitly images of children and adults engaged in sexual activity. Applicant collected images of children as young as infants and as old as 17. He intentionally sought out "hardcore" pornographic images of children. Applicant masturbated when viewing child pornography.<sup>3</sup>

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<sup>1</sup> Items 6, 7.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

In September 2006, after his background interview, Applicant made a decision to stop viewing child pornography. He admits to being tempted, but diverts himself to adult pornography.<sup>4</sup>

Applicant met with a psychologist five times from September 2006 to November 2006, to discuss his pornography addiction. His psychologist wanted him to give up all forms of pornography, but he was reluctant because it was his lone outlet for sexual release. He was referred to another psychologist. He did not contact this psychologist until March 2007, because he wanted to see if he could stop the behavior on his own. His behavior decreased, but he could not stop it, so he contacted the psychologist. He attends sex addicts anonymous (SAA). He realizes he has a problem with viewing pornography. He intends to continue attending SAA and seeing his psychologist. He has not disclosed his pornography addiction to his family, friends, or coworkers.<sup>5</sup>

Since January 2007, Applicant avoids situations where he is alone with a child and situations that might tempt him to act out.<sup>6</sup>

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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.

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.

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

Directive ¶ E3.1.14 requires the government to present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. 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).

## **Analysis**

### **Guideline D, Sexual Behavior**

AG ¶ 12 expresses the security concern pertaining to sexual behavior:

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.

I have considered all of the disqualifying conditions under AG ¶13 that could raise a security concern and especially considered the following:

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

Appellant has been viewing and collecting child pornography since the mid-1990s until September 2006. Possession of child pornography is illegal. His behavior occurred several times a week and sometimes daily, indicating a pattern of compulsive and self-destructive behavior. He attempted to stop but was unable. He has sought assistance from a psychologist. He is aware that his conduct is illegal and is concerned about the legal ramifications and security concerns. His family, friends, and coworkers are unaware of his conduct, which makes him vulnerable to coercion. I find all of the above disqualifying conditions apply.

I have considered all of the mitigating conditions under AG ¶14. I have especially considered the following:

- (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
- (d) the sexual behavior is strictly private, consensual, and discreet.

After considering all of the evidence, I find none of the above mitigating conditions apply.

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

AG ¶ 15 expresses the security concern pertaining to 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.

I have considered all of the disqualifying conditions under AG ¶16 that could raise a security concern and have especially considered the following:

- (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.

Applicant viewed and collected explicit and graphic child pornography. His conduct began in the mid-1990s and continued until at least September 2006. He sometimes masturbated while viewing the child pornography. None of his family or friends are aware of his conduct. He admitted that his behavior makes him vulnerable to legal action. I find the above disqualifying condition applies.

I have considered all of the personal conduct mitigating conditions under AG ¶17 including:

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant has sought counseling from a psychologist and attends SAA to help change his behavior. He has been viewing and collecting “hardcore” child pornography for years. He did not seek counseling until he became aware that his security clearance was in jeopardy. No information was provided about the progress of his recovery. No information was provided regarding the diagnosis or prognosis about his apparent addiction. Based on the evidence, I conclude his actions are likely to recur. Applicant’s actions are illegal and potentially subject to prosecution. His family, friends, and coworkers are unaware of his conduct. He is concerned about his behavior becoming public. I find none of the mitigating conditions apply.

### **Criminal Conduct**

AG ¶ 30 sets out the security concern relating 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.

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and especially considered the following:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant has been viewing and collecting, including “burning” CDs and DVDs, of graphic, sexually explicit, child pornography since the mid-1990s. His actions are illegal and subject to prosecution.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 23 and especially considered the following:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and
- (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.

I have considered all of the evidence in the record and conclude none of the above mitigating conditions 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 the 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has held a security clearance since 1989. He has been viewing pornography since he was young. In the mid 1990s he began viewing, downloading, and copying on to CDs and DVDs sexually explicit child pornography. It is illegal to possess child pornography and Applicant is

potentially subject to criminal prosecution. He is concerned about the legal ramifications of his actions. His family, friends, and coworkers are unaware of his conduct. He sought counseling after he was interviewed by the government and learned that his behavior became a security issue. Viewing adult pornography is not illegal. It is not disqualifying to make a decision to stop viewing child pornography or to seek assistance from a psychologist or avoid situations that might be tempting. Therefore, I find for Applicant on these allegations. Applicant failed to provide any independent evidence to corroborate his assertions that he is in therapy or that he has control over his sexual addiction. He has a long history of illegal sexual behavior. There is significant potential for vulnerability, coercion, and exploitation. Overall, the record evidence leaves me with serious questions about Appellant's eligibility and suitability for a security clearance. For all these reasons, I conclude Appellant has failed to mitigate the security concerns arising under the guidelines for Sexual Behavior, Personal Conduct, and Criminal Conduct.

### **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:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant



## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Carol G. Ricciardello  
Administrative Judge