DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 08-06969
SSN:	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Kathryn D. MacKinnon, Esquire, Department Counsel
For Applicant: *Pro se*

April 13, 2010

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I deny Applicant's eligibility for access to classified information.

Applicant prepared and signed Security Clearance Applications (SF 86) on June 10, 2004 and August 10, 2007.[1] He also prepared and signed an Electronic Questionnaire for Investigations Processing (e-QIP) on May 31, 2005.[2] The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E on October 10, 2008. 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

[1]GE 1; GE 3; AE E.

[2]GE 2.

amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant received the SOR and submitted an answer in writing on November 6, 2008. He requested a hearing before an administrative judge. On June 19, 2009, Department Counsel submitted an Amended Statement of Reasons, which Applicant answered on July 23, 2009. DOHA received his answer on July 24, 2009. Department Counsel was prepared to proceed on August 31, 2009, and I received the case assignment on October 23, 2009. DOHA issued a notice of hearing on October 28, 2009, and I convened the hearing as scheduled on November 17, 2009. The Government offered twelve exhibits (GE) 1 through 12, which were received and admitted into evidence without objection. Applicant testified on his own behalf. He submitted three exhibits (AE) A through C, which were received and admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on November 25, 2009. I held the record open until December 2, 2009, for Applicant and Department Counsel to submit additional matters. On December 1, 2009, Applicant submitted seven exhibits, AE D through AE J. Department Counsel submitted a written response to Applicant's new evidence and one additional exhibit, GE 13, on December 8, 2009. Department Counsel objected to AE D as irrelevant. Department Counsel did not object to Applicant's remaining submissions. The record closed on December 8, 2009.

Procedural and Evidentiary Rulings

Notice

Applicant received the hearing notice on November 9, 2009. (Tr. 10.) At the hearing, I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice. (*Id*.)

Evidence

Applicant submitted a copy of the Supreme Court docket sheet (AE D[3]) on a case submitted into evidence at the hearing by the Government (GE 9 - GE 11). The Government objected to the admission of AE D, arguing that this evidence is not relevant to the decision in this case. Because the Government submitted the initial trial court decision and partial transcript, I will admit AE D and assign it what weight, if any, is appropriate.

[3]Department Counsel identified AE D as Applicant's Post Hearing Exhibit 1 in its response to Applicant's submission.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a, and 1.b, of the SOR, with explanations. His admissions are incorporated herein as findings of fact. He denied the factual allegation in ¶ 1.c.

The Government revised the SOR with new allegations 1.a through 1.f. The new allegations 1.e and 1.f are the same as allegations 1.b and 1.c in the original SOR. In his response to the Amended SOR, Applicant admitted the factual allegations in ¶¶ 1.a, 1.b and 1.e. He denied the remaining Amended SOR allegations.[4] He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 34 years old, works as a network architect for a Department of Justice contractor. He began his employment in September 2007, after being recruited by his employer. Applicant has a high school diploma and many certificates for computer networking skills, including network technology and information security. He operated his own consulting business before accepting his current position. Besides his job, he continues to be active in "the open source, an[d] information security communities" and operates a free open source security project that is used around the world.[5]

In April 2002, Applicant purchased a residence for his parents and himself. In that same year, Applicant met his future wife through an on-line chat room. They began dating and became engaged in 2004. After becoming engaged, he did not move into her house and she did not move into his house. They, however, spent significant time with each other at each other's homes. They married in January 2006, now reside together in a house in another location, and have a daughter, born in December 2006. His wife is a stay-at-home mother.[6]

Applicant's wife listed her business as web designer. She developed websites for herself, her business, *see discussion infra.* and websites for others. She received $323 from her web designer business in 2006. Tax returns for the years 2007 and 2008 reflected that she has not received income from her web design business or any other business. Neither Applicant nor his wife has been accused, arrested, charged, or

---

[4]When SOR allegations are controverted, the government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the government must establish a nexus between the existence of the established facts and events and a legitimate security concern." *See* ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted).

[5]GE 1; AE E; AE J; Tr. 34-35.

[6]GE 3; AE E; Tr. 36, 49, 64-65.

convicted of any criminal activity under federal or state law. Applicant does not have financial issues.[7]

In the middle 1990's, Applicant's wife became involved in alternative sexual lifestyles. In 1997, she began a voluntary bondage, discipline or dominant submissive, sado masochistic (BDSM) relationship with a vile and brutally dominant man. In 1998, a second woman moved in with her at the request of this man and was involved in a similar relationship with the man. During this relationship and at the direction of her dominant man, Applicant's wife developed a pornography website. She and her roommate regularly placed pictures and written descriptions of their sexual relationship with this man on this website. Applicant's wife terminated this relationship in 1999, but the other woman continued the relationship until 2003 at another location. Applicant denies the dominant man threatened his wife; but, according to the other woman in a later court proceeding, the man threatened harm to Applicant's wife's godson and to expose his wife's activities to her elderly father, when his wife was terminating the relationship.[8]

When she ended her relationship with her dominant man, Applicant's wife shutdown the pornography website. Within two years, she opened a new adult website (website 1), using materials from this relationship, including pictures, videos, diaries, and written commentary. Applicant's wife described her website as a chronicle of her journey into BDSM, without mentioning her own name. Website 1 contained a link to her hardcore pornography website, which she created using a pseudonym. She opened another pornography website (website 2), which is not specifically identified as a chronicle of her journey into BDSM, but contained information of a similar vein. Again, her actual identify is not mentioned. Websites 1 and 2 continue to exist on a web server and can be accessed by those who seek it. She registered the domain name for these websites and continued to hold the domain name and registration.[9]

Applicant's wife told him about her BDSM relationships and her website shortly after they began dating in 2002. He knows about her websites, which he described as her stories about alternative sexual lifestyles. He supports her right to continue these websites, arguing that the websites are protected free speech under the First Amendment because the websites are her stories, which have literary value.[10]

Applicant's wife also developed a personal, social website (website 3) under her own name. Through this website, she discussed her personal life, marriage, and birth of her daughter. She posted pictures of her wedding, which show Applicant. A computer search under his wife's maiden name revealed many references to her with some using

---

[7]GE 1; GE 2; GE 3; GE 5; GE 7; AE F; AE G; AE H; AE I.

[8]GE 5; GE 11; Tr. 51-60

[9]GE 5; GE 6; GE 7; Tr. 94-95.

[10]Tr. 59, 65.

her married name. Applicant acknowledged that anyone with competent computer skills could follow her website 3 to website 1 and website 2, making the connection between his wife's name and her pseudonym. His wife developed another website (website 4), which offers web design for small businesses. The domain registration for website 4 referenced a technical contact, which shows a possible connection to the pornography websites 1 and 2.[11]

Websites 1 and 2

Applicant's wife developed website 1 in 2001. The website had copyright protection in the same year. Applicant described this website as his wife's fictionalized stories based on her own experiences and second-hand information obtained from others. After meeting people at a benefit for sex workers (date is unknown), his wife decided to write about alternative sexual lifestyles through her website. She is currently writing a novel on this subject[12]

Website 1 provides access from page one to additional written information and some pictures about its contents by a "click here" direction. Website 1 includes a "Members, Please Click Here to Enter" point of access to specific details of her alternative sexual lifestyle, which, by her description, involves hardcore pornography. The contents of the hardcore pornography site are not of record. Page 1 of website 1 includes advertisements for access to other BDSM pornography sites, including hardcore pornography.[13]

Applicant's wife is not actively working website 1 and has not done so for three years. However, individuals can access this website by searching the web. When an individual accesses the website, written material which is a lengthy discussion prepared and published by Applicant's wife on her personal views on BDSM and nude pictures with some bondage pictures of Applicant's wife can be viewed simply by clicking on the "click here" point. To view her hardcore pornography materials, membership is required. How an individual obtains the necessary membership is not explained. Likewise, membership costs, income earned from these memberships, and costs for the website operations are not explained or shown, nor does the record contain evidence showing that Applicant's wife has sent her pornography materials to a member of the public. If someone clicks on one of the ads for other BDSM pornography sites, the link transfers the individual to that pornography website. While she provides access, his wife has no control over the content of these websites, does not actually provide the pornography materials requested, and has not provided information, including her website materials, for these websites. The other pornography websites have an open enrollment for advertising their sites. By posting their advertisements and giving an individual access

[11]GE 5; GE 7; Tr. 77-80.

[12]Tr. 52-53.

[13]GE 5.

to these sites by way of a click, Applicant's wife may receive a small amount of money, although Applicant's tax returns do not show any income from this. The record lacks any evidence that Applicant's wife is distributing materials from these websites.[14]

The website 2 access page shows two suggestive pictures of Applicant's wife and two pages of written materials. If someone is interested in more information or materials, website 2 provides a link to website 1. One page of this website contains advertisements providing linkage to other BDSM pornography sites.[15]

In SOR ¶ 1.b, the government alleges that Applicant's wife solicits clients and maintains an escort posting that advertises her availability for adult entertainment. Applicant strongly denied that his wife is or was available for adult entertainment. GE 5 contains a page which lists sources for escorts for adult entertainment in cities all over the United States and several cities in Canada and one European city. This particular document lacks any specific reference to Applicant's wife. No other information in the record specifically identifies his wife as being available as an escort for adult entertainment. However, a summary of a federal investigation, *see infra*, indicates that as of May 2007, if one enters the escort website, one can find a profile for his wife under her pseudonym, indicating her availability for "in Call - - Out Call" "Escort" services. [16]

Court case

Applicant's wife terminated the BDSM relationship with her dominant man in 1999. She also ceased contacts with the other woman living with her and involved in a BDSM relationship with the same dominant man. In November 1999, Applicant's wife filed a complaint in a state court requesting a peace order, which is a civil order, against the other woman.[17] The State court issued a temporary peace order the same day. The record contains no other evidence that Applicant's wife maintained any further contact with the other woman after the fall of 1999.[18]

The other woman continued her BDSM relationship with the dominant man in another location several hundred miles from where Applicant's wife lived. This woman severed her BDSM relationship with the dominant man in 2003. At some point, the other woman's BDSM relationship changed from a voluntary relationship to an involuntary relationship because of the threats of harm made if she did not stay with him. She filed a criminal complaint in another state against the dominant man. The federal grand jury

---

[14]GE 5; AE F; AE G; AE H; Tr. 52-56.

[15]GE 5.

[16]*Id*.; GE 6; GE 8; Tr. 53.

[17]Under the laws of this State, a civil Protective Order will be issued in a domestic relationship. All other relationships seeking protection file for a peace order. GE 12.

[18]GE 12.

indicted the dominant man on three counts under 18 U.S.C. §§ 1589 (1), 1589 (2), 1590, 1591(a)(1), 1591(a)(2), 1594(a), 2 and 3551 et seq, and one count under 18 U.S.C. §1462(a). Federal authorities arrested him on May 12, 2005 on this indictment. The jury in his trial found him guilty of sex trafficking and forced labor under 18 U.S.C. §§ 1589 and 1591 (Trafficking Victims Protection Act), and not guilty under 18 U.S.C. § 1462(a) of dissemination through an interactive computer device of obscene materials, which included images of bound and tortured women engaged in sexually explicit conduct. The dominant man appealed his case to the federal appellate court, which overturned the conviction on Ex Post Facto constitutional grounds. The Government appealed the reversal to the United States Supreme Court, which granted the Government's Petition for Certiorari on October 13, 2009. The case is currently pending before the United States Supreme Court.[19]

Federal law enforcement authorities interviewed Applicant's wife in May 2004 and conducted a brief telephone interview in May 2005 as part of their investigation into the criminal conduct of the dominant man. They conducted a personal interview in January 2007 in preparation for her possibly testifying at trial. The federal investigators indicated that they had knowledge of the BDSM relationship between Applicant's wife and the dominant man, of website 1, and of website 2. Their report indicated that websites 1 and 2 were active as of the May 11, 2007, as well as the profile on the escort website. Finally, the report noted that Applicant's wife was not charged in the dominant man matter and did not testify. It also indicated that Applicant's wife was not charged with a crime related to her images on her website.[20]

Security Clearance Applications

Applicant completed his first SF-86 on June 10, 2004. He listed his personal residence as the property purchased on April 2002. In response to Question 7, he listed his wife as a person who knew him well and two other individuals. He completed an e-QIP on May 31, 2005 and again listed as his personal residence the property he purchased in April 2002. He did not list his wife as a person who knew him well under Section 12 or her home address as his. He listed the same two individuals listed in 2004 plus one other. He also did not list his wife as an adult currently living with him under Section 14/15. Applicant submitted his second SF-86 on August 10, 2007, where he indicated that he had married. He identified his wife and listed her address as his residence from January 2006. In 2005, under Section 12, he named two of the individuals previously named as knowing him, one of whom he also named in 2004, and a third person. His listed his personal property as his address from April 2002 until January 2006. He explained that he did not list his wife's address as his prior to their marriage because his legal address and where he received his mail was the property he

[19]GE 9; GE 10; GE 13; AE D. The legal basis for the criminal conviction of the dominant man, for the reversal by the appellate court, and before the United States Supreme Court is not relevant to this case.

[20]GE 8.

owned and because he lived at both his house and hers. He did not provide an explanation for the omission of his wife's name in 2005.[21]

Applicant's project manager describes Applicant as a very experienced network and security engineer who holds difficult-to-obtain certifications related to the work done in their office. He works with Applicant on a daily basis and has spent time with Applicant in social settings. Applicant behaves in a totally professional and trustworthy manner at all times. Applicant complies with all security processes and procedures, and does not take shortcuts. Applicant is highly regarded by his co-workers and management for his skills and work ethic. The principal systems engineer holds a similar opinion of Applicant. Applicant acknowledged that he does not discuss sexual lifestyle issues or his wife's websites at work. He believes such discussions are inappropriate in the workplace. His employer is not aware of his wife's websites.[22]

Applicant does not discuss his sex life with his parents nor has he discussed his wife's website with them as conversations about his personal sex life are not conversations he has with his parents. If necessary, he would tell his parents about the website. He indicated his brother knows about her website. Her parents are deceased.[23]

Applicant denied that his wife's past relationship with the dominant man poses a current threat to him or his family although the dominant man threatened to send pictures to Applicant's wife's father or harm her godson in 1999. Applicant strongly disagreed with Department Counsel's position that the BDSM community is more dangerous than the general population or community-at-large. The Government provided no evidence to support this view and Applicant provided no evidence to contradict the Government's argument. Applicant strongly denied that his wife's past relationship with the dominant man, her pornography websites, and contacts with the BDSM community create a security risk for him.[24]

At the hearing, Applicant strongly supported his wife's right to publish "her stories" about her BDSM lifestyle. He does not believe her work meets the legal test for obscenity and he does not believe her websites violate the law. There is no evidence that Applicant and his wife are embarrassed or ashamed of her website or her past lifestyle. Applicant's demeanor at the hearing did not reflect any sense of embarrassment or humiliation about his wife's website or past lifestyle.

[21]Response to SOR; GE 1; GE 2; GE 3; AE E; Tr. 66-67.

[22]AE J; Tr. 89.

[23]GE 3; Tr. 119.

[24]GE 11; Tr. 86-90.

Legal issues

Applicant argues that his wife's work is protected by the first amendment because it does not meet the obscenity test articulated by the Supreme Court in *Miller v California*, 413 U.S. 15 (1973). He contends that it is inappropriate to bypass the criminal justice system and find his wife guilty of criminal conduct without being charged with a crime and having a trial.

Department Counsel argues that Applicant's wife is engaged in criminal activity because her internet websites meet the obscenity definition and thus, violate federal and state law because she is distributing hardcore pornography.[25] Department Counsel contends that Applicant's long-standing relationship with his wife, who is engaged in an activity which is criminal in nature, raises questions about his judgment. Finally, Department Counsel argues that Applicant didn't list his wife on his 2005 e-QIP in order to hide her activities.

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 used 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

[25]In its pre-hearing brief, the Government cites to *United States v. Ragsdale*, 426 F.3d 765 (5th Cir. 2005) and *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996) to show that individuals distributing sexually explicit materials can be prosecuted in any jurisdiction. In both cases, the defendants placed sexually explicit materials on personal computers. The defendants then solicited sales, transferred the sexually explicit materials to tapes, and distributed the tapes through the mail or common carrier. While the Government is correct that Applicant's wife could be prosecuted for selling her sexually explicit materials in a jurisdiction where the materials are delivered, there is no evidence in the record that materials from her websites have been sold and then delivered through the mails or by common carrier to the purchasers, nor does the record contain evidence of any distribution of her materials in any manner.

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, 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. . . ." An applicant has the ultimate burden of persuasion as to 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. Decisions include, by necessity, consideration of the possible risk an 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 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.

Under AG ¶ 16, the following conditions that could raise a security concern and may disqualify Applicant for a security clearance:

> (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;

(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; and,

(g) association with persons involved in criminal activity.

For AG ¶ 16(a) to apply, Applicant's omission, concealment or falsification in his answer must be deliberate. The government established that Applicant omitted a material fact from his 2005 e-QIP when he failed to list his wife as a person who knew him well. This information is material to the evaluation of Applicant's trustworthiness to hold a security clearance and to his honesty. In his response, he denies, however, that he had an intent to hide this information from the government. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.[26]

Applicant made the Government aware of a close personal friend on his SF-86 in 2004. After he married this friend in 2006, he listed her in his 2007 SF-86. On his first two security clearance applications, he listed, as his residence, the property he purchased in 2002, and on his 2007 SF-86, as his residence from April 2002 until January 2006. He used this address for receipt of all personal matters, such as voting registration, car registration, bills, and other relevant materials because he did live at this address, but not all of the time. He considered this address as his home and legal address, although he spent significant time at his wife's home when they were dating. She also spent time at his home. His list of individuals who knew him well changed with each application. Because the Government knew about his wife in 2004, his failure to list her in 2005 cannot be viewed as intent to hide information about her pornography websites. The Government has not established a security concern. Allegation 1.f of the amended SOR is found in favor of Applicant.

The Government argues that Applicant 's wife is engaged in criminal conduct because through websites 1 and 2, she distributes obscene material in violation of federal laws, specifically 18 U.S.C. §§ 1462, 1465 and 47 U.S.C. § 231. 47 U.S.C §

[26] *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov.17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

231, the Child Online Protection Act (COPA), has been the subject of litigation in the federal courts since its effective date in October 1998.[27]

In an early challenge to the constitutionality of 47 U.S.C. § 231, the United States District Court for the Eastern District of Pennsylvania granted a preliminary injunction in *American Civil Liberties Union v. Reno*, 31 F.2d 473 (E.D. Pa. 1999), on the grounds the ACLU would likely prevail on its First Amendment constitutional challenge that there were less restrictive alternatives to COPA for controlling a website dissemination of material "harmful to minors." The United States Court of Appeals for the Third Circuit affirmed this finding on the contemporary community standards provision in the statute, reasoning that was not the basis for the issuance of a preliminary injunction. *See American Civil Liberties Union v. Reno*, 217 F.3d 162 (3d Cir. 2000). The United States Supreme Court vacated the Court of Appeals finding, holding that COPA's reliance on community standards did not by itself render the statute substantially overbroad for First Amendment purposes, but declined to express a view as to whether COPA suffered from substantial overbreadth for reasons other than community standards. *See Ashcroft v. American Civil liberties Union*, 535 U.S. 564 (2002).[28] The Supreme Court ruled on one constitutional issue only and made it clear that its decision was a narrow one.

The United States Supreme Court remanded the case to the United States Court of Appeals for the Third Circuit to reconsider the reasons given by the District Court for granting the preliminary injunction. *Id*. On remand, the appellate court affirmed the decision of the District Court, concluding that COPA was not the least restrictive means available for the Government to serve the interest of preventing minors from gaining access to harmful materials on the Internet and that the ACLU would most likely succeed on its constitutional challenge. *See American Civil Liberties Union v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003). Not only did the United States Supreme Court affirm the decision of the United States Court of Appeals in *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004) on this narrow issue, Justice Stevens, in his concurring opinion, also raised concerns about several other constitutional defects in COPA, concerns expressed by other justices. Following remand from the United States Supreme Court, the District Court granted a permanent injunction, holding that the statute was not narrowly tailored to Congress's compelling interest of protecting minors, that the statute was unconstitutionally vague, and that the statute was unconstitutionally

---

[27]The United States Supreme Court held its predecessor law, 47 U.S.C. §§ 223(a)(1) and 223(d), unconstitutional in *Reno v. American Civil Liberties Union, et al*, 521 U.S. 844 (1997).

[28]The United States Court of Appeals for the Ninth Circuit, in *United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009), discussed the Supreme Court's decision at length, then held that a national contemporary community standard applied in cases involving transmission of obscene images over the internet. The United States District Court for the District of Columbia disagreed with the holding in *Kilbride*. *See United States v. Stagliano*, ___ F.Supp.2d ___, 2010 WL 617364 (D.D.C. Feb. 19, 2010). *Stagliano* involves a constitutional challenge to the statues at issue in this case. The decision of the trial court provides a discussion on the issues now being presented to the federal courts concerning internet distribution of pornography. Likewise, in *United States v. Little*, 2010 WL 357933 (11th Cir. 2010)(unpublished), the United States Court of Appeals for the Fifth Circuit declined to apply the national standard articulated in *Kilbride*.

overbroad. *See American Civil Liberities Union v. Gonzales,* 478 F. Supp.2d 775 (E.D. Pa. 2007). The United States Court of Appeals for the Third Circuit affirmed the decision of the District Court that this statute was unconstitutional in *American Civil Liberties Union v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), aff'd sub nom. *Mukasey v. American Civil Liberties Union*, 129 S. Ct. 1032 (2009). Given the decision of the United States Supreme Court, the allegations of criminal activity by Applicant's wife under 47 U.S.C. § 231 cannot be substantiated.

The Government argues that pornography websites 1 and 2 of Applicant's wife are obscene, and that through her website, she is distributing obscene materials in violation of 18 U.S.C. §§ 1462 and 1465 and the laws of one state. Applicant argues that her websites do not meet the obscenity test articulated in *Miller*, 413 U.S. at 24-25. The Government has not raised a security concern for Applicant under Adjudicative Guideline J, Criminal Conduct, because of his wife's websites and her personal conduct. An allegation of criminal conduct is enough to raise a security concern under Guideline J, but would be insufficient under federal law for a criminal court prosecution. For a federal court to consider whether an individual committed a crime under any federal law, an indictment must be issued, charging her with an offense. Applicant's wife has never been arrested or charged with a crime related to her website or any other crime. If she had been charged with a violation of 18 U.S.C. §§ 1462 and 1465, a federal court or jury would first evaluate, as a whole, all the materials on websites 1 and 2, and make a determination under the obscenity test enunciated in *Miller* as to whether the materials on websites 1 and 2, including the content of her members only site, are obscene. Should the materials provided in this record meet the *Miller* test, the federal court would look at the evidence and decide if it is sufficient to show that the materials have been distributed. The ultimate determination that websites 1 and 2 involve criminal activity would be based on the criminal standard of beyond a reasonable doubt, which is a much higher standard than the substantial evidence standard of proof used for security clearance determinations. The record evidence does not include a copy of the materials contained in the members only site, which is acknowledged to be hardcore pornography but argued as not obscene, for an independent assessment under the *Miller* test. In addition, the evidence of record fails to reflect any income earned by Applicant's wife from her website. The record evidence is insufficient to establish that Applicant's wife is involved in the distribution of obscenity.[29] The Government has not established a security concern under AG ¶16(g).

In the instant case, the Government did not allege in the SOR that Applicant's failure to inform his employer and the Government about his wife's pornographic websites as a security concern. However, conduct not alleged in the SOR may be considered:

---

[29] *United States of America v. Reilly*, 2003 WL 1878308 (S.D.N.Y. 2003)(unreported) involves a constitutional challenge under the First Amendment to 18 U.S.C. § 1462 by a federal employee who downloaded pornography onto his office computer. The court disagreed with the employee's contention that he had a constitutional right to receive pornography under the First Amendment. While this case does not involve distribution of pornography to members of the public, it provides guidance into how the courts are viewing the use of interactive devices.

> (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3. ISCR Case No. 03-20327 at 4 (App. Bd. Oct 26, 2006) (citations omitted).

I have considered the non-SOR misconduct for the above purposes. Additionally, the Appeal Board has determined that even though crucial security concerns are not alleged in the SOR, the Judge may consider those security concerns when they are relevant and factually related to a disqualifying condition that was alleged in the SOR.[30]

Applicant acknowledged that he has not discussed his wife's pornography websites at work, saying the discussion of sexual issues in the work place is inappropriate. While true, his statement begs the issue of whether his employer has knowledge of her pornography websites. His supervisors gave no hint in their letters of recommendation that they are aware of his wife's pornography websites or the reason for the problems with Applicant's security clearance. Applicant agreed that individuals with competent computer skills could trace through his wife's personal website, which contains pictures of him, her pornography websites. He is aware that others can easily find information on the Internet about his wife's pornography websites. Individuals seeking access to classified information could try to exploit, manipulate, or subject him to duress because he has not told his employer about the websites. His failure to share this information about his wife's pornography websites with his employer creates a concern that if this information is known, it may affect his personal, professional, or community standing. While Applicant denies his wife is involved in an escort service, he failed to provide information which shows she is no longer listed in the escort service website. The Government has established a security concern under AG ¶ 16(e).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the facts. Directive § E3.1.15. An Applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance" ISCR Case No. 01-20700 at # (App. Bd. Dec. 19, 2002) The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Having concluded that the Government has raised a security concern under AG ¶ 16(e), AG ¶ 17 provides the following conditions by which the Applicant could mitigate security concerns:

---

[30]ISCR Case No. 05-01820 at 3 n.4 (App. Bd. Dec. 14, 2006)(citing ISCR Case No. 01-18860 at 8 (App. Bd. Mar. 17, 2003) and ISCR Case No. 02-00305 at 4 (App. Bd. Feb. 12, 2003)).

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After reviewing the above mitigating conditions, I find that Applicant has not mitigated the Government's security concerns because he has not provided information that indicates his employer is aware of his wife's websites. Even though federal investigators know about his wife's websites, he has not shown that this information has been shared with his immediate employer. He did not provide proof of his positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress. Individuals interested in obtaining classified information could pressure him because his employer does not know about the websites. Thus, he remains vulnerable to exploitation, manipulation, or duress because of these websites. The other mitigating conditions are not applicable to this case.

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 relevant 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

The evidence in support of granting a security clearance to applicant under the whole person concept is less substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is highly respected by his employer for his computer skills, particularly in cyber security. He does not have financial problems nor has he been arrested for any reason. He works hard and provides for his family.

Applicant's security issues arise from his wife's decision to continue to maintain two pornography websites which she developed and which directly concern her. While she has never been arrested and charged with any criminal conduct related to her websites, Applicant made a decision not to tell his employer about these websites. His decision places his employer and the Government at risk because he has opened himself up to possible pressure or coercion from individuals seeking access to classified information. His failure to advise his employer about these websites causes concern that he is worried about his standing at work and in the community should people learn about these websites. Additionally, his failure to inform his employer of his wife's pornographic websites suggests that he fears a negative reaction by his employer and the community should they be told about the websites, thus placing himself in a position to be exploited, coerced, or pressured to provide classified or sensitive information to those who are not allowed access to the information.

Overall, the record evidence leaves me with questions or doubts as to Applicant's

eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his personal 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 E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant

Conclusion

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

MARY E. HENRY
Administrative Judge