



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ADP Case No. 08-09254  
SSN: ----- )  
 )  
Applicant for ADP II Position )

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel  
For Applicant: *Pro se*

March 30, 2010

**Decision**

CURRY, Marc E., Administrative Judge:

The vulnerability to coercion generated by Applicant’s 2004 possession of pornography and lingering doubts about whether he is no longer sexually aroused by underage girls make him an unacceptable candidate for access to sensitive information. Eligibility for access to a sensitive position is denied.

On September 15, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing concerns under Guidelines D, Sexual Behavior, and E, Personal Conduct related to Applicant’s eligibility for access to a sensitive position.<sup>1</sup> 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

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<sup>1</sup>The SOR’s case caption erroneously lists this case as an industrial security clearance case. After confirming that this was an error, I amended the SOR *sua sponte*.

(AG) effective within the Department of Defense for SORs issued after September 1, 2006.

DOHA received Applicant's SOR answer on October 19, 2009. He admitted the sole allegation, SOR subparagraph 1.a, alleged under the Sexual Behavior guideline, but denied it, as cross-alleged under the Personal Conduct guideline in Paragraph 2. Applicant requested a determination based on the record instead of a hearing.

On October 29, 2009, Department Counsel requested a hearing. On December 7, 2009, I received the case assignment. DOHA issued a notice of hearing on December 16, 2009, and I convened the hearing as scheduled on January 8, 2010. During the hearing, I received four Government exhibits and Applicant's testimony. DOHA received the hearing transcript (Tr.) on January 15, 2010.

### **Findings of Fact**

Applicant is a 37-year-old married man with no children. He has a bachelor's degree in political science. For the past four years, he has worked as a consultant and business analyst for a military health information system (Tr. 15). His tasks include, among other things, performing requirements analyses and evaluations supporting various health information management systems (Answer at 22). According to his supervisor, he is "an excellent team member [who is] knowledgeable, reliable, assertive, [and] prepared" (Answer at 10).

On October 20, 2004, while away on business travel, Applicant called his wife to ask her to retrieve some information from his password-protected, home desktop computer (Government Exhibit (GE) 4 at 1). When Applicant's wife logged onto his computer, she discovered multiple pornographic images. Ten to twelve of them depicted children (*Id.*).

Applicant's wife contacted the Federal Bureau of Investigation (FBI) who initiated an investigation the following week. On November 29, 2004, after Applicant returned home, FBI agents interviewed him. He acknowledged subscribing to an online program that downloaded pornographic images to his computer and using the word "teen" in the program's search engine (Tr. 24). He initially told the agent that the word "teen" when used in the search engine was "supposed to mean older than majority teen" (Tr. 24). He then told the agent he would view the child pornographic images then delete them (Tr. 28). Eventually, he admitted that he was interested in child pornography (Tr. 30).

Applicant stated that his interest was mainly of girls between the ages of 15 and 17 (Tr. 17). When Department Counsel, during cross-examination, asked him if he told the FBI agent that he was interested in prepubescent girls because of its taboo nature, Applicant responded, "I think I was more interested in the taboo nature than I was the nature" (Tr. 31).

After interviewing Applicant, the FBI confiscated his desktop computer (GE 3 at 7). The investigation concluded in the spring of 2005 (*Id.* at 8). Applicant was not subject to criminal prosecution.

Applicant coached girls' gymnastics for approximately ten years in the 1990s (Tr. 32). The girls ranged in age from 8 to 18 (GE 4 at 8).

The revelation of Applicant's interest in child pornography nearly destroyed his marriage (Answer at 3). Over the years, he has gradually repaired his marital relationship (*Id.*). No one other than his wife knows about this conduct (Tr. 32).

Applicant has not viewed any child pornography since 2004. Applicant has no intention of viewing any child pornography in the future. He continues to look at adult pornography occasionally (Tr. 34).

Applicant never received psychological counseling (Tr. 33). He spoke with some psychologists, but "[n]one of them would take [him] because [h]e was on the road all the time and couldn't find the schedule with them" (Tr. 33).

## **Policies**

When evaluating an applicant's suitability to have access to sensitive information, 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.

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. According to AG ¶ 2(c), the entire process is a 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.

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 as to obtaining a favorable decision.

## **Analysis**

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

Under this guideline, "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" (AG ¶ 12). Applicant's storage of child pornography on his personal computer for his sexual gratification triggers the application of AG ¶ 13(a), "sexual behavior of a criminal nature, whether or not the individual has been prosecuted," and AG ¶ 13(c), "sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress."

The following mitigating conditions as listed in AG ¶ 14 are potentially applicable:

(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; and

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

Applicant has neither downloaded nor viewed any child pornography in more than five years. However, I remain troubled that he never received psychological counseling to address his desire to view child pornography. Without a psychologist's evaluation, his reassurances that the problem will not recur are insufficient to trigger the application of any of the mitigating conditions.

### **Personal Conduct**

Under this guideline, "conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability [and] trustworthiness . . ." (AG ¶ 15). No one else other than Applicant's wife is aware of his conduct. If known, such behavior could adversely affect his professional or community standing. AG ¶ 16(e), "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing . . ." applies.

Applicant has not mitigated this Personal Conduct concern for the same reasons he did not mitigate the Sexual Behavior concern.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance or eligibility to work in a sensitive position 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 to work in a sensitive position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

Applicant deserves credit for his exceptional work performance. He has repaired the relationship with his wife that had been damaged by the revelation of his interest in child pornography, and has not viewed such material in more than five years. These positive factors are outweighed by his failure to attend counseling, his piecemeal disclosure to the FBI regarding his child pornography possession, and his effort at the hearing to retreat from an earlier statement that he was attracted to prepubescent girls because of its taboo nature. Under these circumstances, Applicant is an unacceptable candidate for occupying a sensitive position.

### **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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for occupying a sensitive position. Eligibility is denied.

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MARC E. CURRY  
Administrative Judge