



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



In the matter of:)) -----) SSN: -----)) Applicant for Security Clearance)	ISCR Case No. 08-10924
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Appearances

For Government: Julie Mendez, Esquire, Department Counsel
For Applicant: Pro Se

February 4, 2010

Decision

LYNCH, Noreen, Administrative Judge:

On May 29, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to request a security clearance for his employment with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request. On October 9, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the Revised Adjudicative Guidelines (AG)² under Guideline E (personal conduct), and Guideline D (sexual behavior).

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

² Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, the Revised Adjudicative Guidelines supercede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

Applicant timely responded to the SOR, and admitted the factual allegation in ¶ 1.a and ¶¶ 2.a through 2.c of the SOR. He elected to have his case decided on the record in lieu of a hearing. Department Counsel submitted the government's written case on December 15, 2009.³ Applicant received a complete file of relevant material (FORM) on December 28, 2009, and was provided an opportunity to file objections and submit material to refute, extenuate, or mitigate the government's case. Applicant submitted additional information in a timely manner. The case was assigned to me on January 29, 2010. Based upon a review of the case file, pleadings, and exhibits Applicant's request for a security clearance is denied.

Findings of Fact

Applicant is 43 years old. He graduated from high school and attended college from September 1986 until July 1987 (Item 4). Since January 1997, Applicant has worked as an engineering technician for a defense contractor. He held a security clearance during his civilian employment, including access to Sensitive Compartmented Information (SCI) (Item 6).

From 1990 until April 2008, Applicant accessed an internet website to view child pornography. He also read sexual fantasy stories involving children on the website five to seven times per week (Item 3). When he viewed pictures of children engaging in sexual activity, he masturbated (Item 7).

On November 7, 2007, as part of a security investigation conducted by another agency, Applicant was interviewed. He admitted viewing an internet website that contains pictures of children between the ages of 12 and 18 engaged in intercourse, oral sex, and anal sex (Item 5). He also admitted viewing "pop up" pictures of children engaging in sexual activities two to three times per week.

Applicant admitted in an interview in May 2008, that he withheld the full extent of his access to the child pornography because he was afraid it would affect his job. He originally stated in an April interview that he viewed the site approximately two to three times per week rather than five to seven times per week. Applicant also admitted that he visited the website from 1990 not 1998. He further admitted that the child pornography images did not just "pop up." He accessed and opened image files to view the child pornography. Applicant told the investigator that he enjoyed visiting the site because "it fed into his ability to imagine himself in the stories" (Item 5). He elaborated that he likes to pretend that he was more sexually active in high school. He has never married. Applicant acknowledged that he intentionally provided false information to the investigators. In August 2008, Applicant's eligibility for SCI was revoked as a result of the sexual behavior and personal conduct (Item 6). He did not appeal that decision.

In August 2008, DoD investigators interviewed Applicant as part of his security clearance investigation. He stated that he began accessing the website in 2004. He acknowledged that he visited the site daily for 10 to 15 minutes. He explained that the

³The Government submitted ten items to support its case.

website had images and stories about sexual fantasies with underage girls. He visited the website at home and not at work (Item 9).

Applicant believes he suffers from depression. His elderly parents are ill. His sister and nephew depend on Applicant financially. He regrets his lapse in judgment. He does not intend to access any underage pornography in the future. He hopes to obtain medical help for his depression in the future (Response to Form).

Applicant acknowledged that this was not a responsible thing to do and that he realized that he used poor judgment. He believes his misleading information to the government was prompted by extreme shame and humiliation. He also feared the loss of his job.

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).⁴ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines.⁵ The presence or absence of a disqualifying or mitigating conditions is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines must be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of a clearance. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline E (personal conduct) at AG ¶ 15, and Guideline D (sexual behavior) at AG ¶ 12.

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁶ for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, an applicant bears a heavy burden

⁴ Directive. 6.3.

⁵ Commonly referred to as the "whole person" concept, these factor are: (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.

⁶ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

of persuasion.⁷ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the government.⁸

Analysis

Sexual Behavior.

The security concerns about Applicant’s sexual behavior, as expressed in the AG ¶ 12, is that “sexual behavior that involves a criminal offense, indicated a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual’s reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this Guideline may be raised solely on the sexual orientation of the individual.”

The following disqualifications are relevant. AG ¶ 13(a) “sexual behavior of a criminal nature, whether or not the individual has been prosecuted” is an applicable disqualifying condition. Applicant viewed child pornography on a website for many years. This is sexual behavior of a criminal nature.

AG ¶ 13(b) “a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder” is also an applicable disqualifying condition. Applicant viewed the website five to seven times per week for many years. He deliberately sought and viewed child pornography on the internet and masturbated as a form of sexual gratification while viewing the child pornography. He admits enjoying it, and claims it allows him to pretend he was sexually active in high school.

AG ¶ 13(c) “sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress” is an applicable disqualifying condition. Applicant admits he was ashamed and humiliated by his conduct. He did not fully disclose this behavior to his employer during an interview during a security investigation for fear of losing his job.

AG ¶ 13(d) “sexual behavior of a public nature and/or that reflects lack of discretion or judgment” is an applicable disqualifying condition. Applicant’s decision to view the website at home reflects lack of judgment and discretion.

An applicant might be able to mitigate Guideline D security concerns. AG ¶ 14(a) “the behavior occurred prior to or during adolescence and there is no evidence of

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

subsequent conduct of a similar nature” does not apply. Applicant was at least 20 years old when he began his viewing. He continued this behavior for almost 18 years. Likewise, 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” does not apply. Applicant viewed the child pornography from the 1990’s until at least April 2008. He stated that he viewed the website five to seven times a week.

One mitigating condition “the behavior no longer serves as a basis for coercion, exploitation, or duress,” AG ¶ 14(c) may apply. Applicant finally disclosed the full extent of his behavior during his May 2008 interview. The government is aware of the full extent of his conduct. However, it does not fully apply because members of his family or coworkers are not aware of this behavior.

Applicant has not mitigated the security concerns raised by Guideline D (Sexual Behavior) given the recency and long term adult criminal sexual misbehavior.

Personal Conduct.

The security concern about Applicant’s personal conduct, as expressed in the AG ¶ 15, is that “[c]onduct 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.”

As to SOR ¶ 2 available information requires consideration of the disqualifying conditions listed in AG ¶ 16(b) “deliberately providing false or misleading information concerning relevant facts to an employer, investigator security official, competent government representative” and AG ¶ 16(e) “personal conduct, or concealment of information about ones’ 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 admitted that he intentionally misled an investigator during an interview by not fully disclosing the exact years and frequency of his viewing child pornography on the internet. He gave another version in a later interview in August 2008, and minimized his conduct by stating that he began accessing the site in 2004. Certainly his behavior and concealment of such would affect his professional and community standing. His questionable judgment, lack of candor and admitted actions casts doubt on his trustworthiness.

The mitigating condition outlined in 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. Applicant admitted that he last viewed an internet site containing child pornography in April 2008. However, he previously lied about the exact dates of his viewing. AG ¶ 17(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” does not apply for the reasons given above. Applicant has

not obtained any counseling, although he believes he may do so in the future. AG ¶ 17(e) “the individual has taken positive steps to reduce or eliminate vulnerability, to exploitation, manipulation, or duress” does not apply.

AG ¶ 17(a) “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts” is not a mitigating condition due to the fact that Applicant only provided further and more truthful information during a third interview with the other agency investigators. In his 2008 interview with DoD investigators, Applicant again minimized his involvement by stating that he began viewing sites in 2004.

For the same reasons described above regarding sexual behavior under Guideline D, Applicant has not demonstrated honesty, good judgment, or trustworthiness under Guideline E to mitigate security concerns.

Whole Person Concept.

I have evaluated the facts presented in this record and have applied the appropriate adjudicative factors, for and against, under Guidelines E, and D. I have also reviewed the record before me in the context of the whole person factors listed in ¶ AG 2(a).⁹ Applicant is a mature adult who held an SCI clearance since 1997. However, he engaged in viewing child pornography from 1990's until at least April 2008. He admits this happened five to seven times a week. He claimed he enjoyed the activity as it helped him have a better image of his sexual self. He believes he may be depressed, but has not sought any counseling.

Applicant lied about the frequency and the time span of his conduct with investigators. He did not fully disclose the information until a third interview. He lost his SCI access as a result. In 2008, when speaking to DoD investigators, he changed the time frame for his behavior to 2004. His poor judgment, and his minimalization of his behavior when responding to the SOR, and in his 2008 interview leave me with doubts as to his judgment. He regrets his mistake and is sorry for the incident. The positive information about Applicant is insufficient to overcome the adverse information about his conduct under Guideline D and Guideline E. This raises serious doubts about his reliability and trustworthiness. Applicant's recent conduct does not mitigate the security concerns under these guidelines. As protection of the national interest is paramount in these determinations, my doubts must be resolved in favor of the national interest.

Formal Findings

Formal findings 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

⁹ See footnote 5, *supra*.

Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to grant Applicant access to classified information. Clearance is denied

NOREEN A. LYNCH
Administrative Judge