DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 09-00568
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: James F. Duffy, Esq., Department Counsel
For Applicant: Shawn M. Cline, Esq.

August 17, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns under Guideline E (Personal Conduct), raised by Applicant's punishment for possessing child pornography and falsifications of security clearance applications. Eligibility for access to classified information is denied.

Statement of the Case

On March 10, 2010, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a Statement of Reasons (SOR) detailing the basis for its preliminary decision to revoke his security clearance, citing concerns under Guideline E. DOHA acted 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 (AG) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on March 26, 2010, and requested a hearing before an administrative judge. DOHA received the request on April 1, 2010. Department

Counsel amended the SOR on April 8, 2010, by adding two additional allegations. Department Counsel was ready to proceed on April 8, 2010, and the case was assigned to me on April 14, 2010. DOHA issued a notice of hearing on April 20, 2010, scheduling the hearing for May 11, 2010. Applicant responded to the amended SOR on April 21, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 16 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through W, which were admitted without objection. DOHA received the transcript (Tr.) on May 21, 2010.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶ 1.a, alleging that he received non-judicial punishment while on active duty in the U.S. Air Force for knowingly possessing child pornography on his computer. He denied intentionally falsifying his security clearance application, as alleged in SOR ¶¶ 1.b and 1.d, and making false statements to a security investigator, as alleged in SOR ¶ 1.c. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant served in the U.S. Air Force from July 1985 to October 2005, retiring as a master sergeant (pay grade E-7). (AX W.) He held a security clearance throughout his Air Force service. During his military service, he received numerous certificates of appreciation and certificates of recognition. (AX J through R.) He was awarded the Air Force Achievement Medal three times and the Air Force Commendation Medal once. (AX S through V.) A chief master sergeant (pay grade E-9), who has known Applicant since 1998 and was his military supervisor, described him as hard working, dependable, trustworthy, and a strong and caring leader. (AX I.)

Applicant married in March 1988. He and his wife became estranged in 2000, when he discovered that she was having an affair. They separated in February 2001, and divorced in May 2002. Three children were born during the marriage.

On July 21, 2000, local civilian police went to Applicant's home in response to a complaint from his estranged wife that he had left their children unattended for an extended time. He had been involved in a car accident and was unable to get home before the babysitter departed. (Tr. 44-46.) The police found pornographic materials in the house. His wife told police she had observed him viewing child pornography "too many times to count." The police seized his computer and numerous videocassettes, and they found 17 suspected images of child pornography and two text files about sexual acts with children. (GX 6; GX 8 at 5.)

In July 2000, Applicant consulted with a clinical psychologist at the base mental health clinic. Applicant's medical records reflect that he consulted with the psychologist on July 10, but he testified he consulted with the psychologist after his computer was seized on July 21. (GX 16 at 3; Tr. 86.) He testified that he went to the mental health clinic to find out if he had an addiction to pornography and needed treatment. He testified that the psychologist told him that viewing pornography was not an addiction,

but a conscious choice. (Tr. 52-53.) The psychologist's notes indicate that three additional sessions of supportive treatment were planned, but Applicant testified he consulted with this psychologist only one time. (GX 16 at 3; Tr. 56.)

Applicant visited a psychiatrist at the mental health clinic on October 10, 2000. The psychiatrist's notes indicate that he was interested in obtaining an anti-depressant. They also indicate that he described a "horrible year," in which he was going through a divorce from his wife, his father had committed suicide, and he was being investigated for suspected child abuse. (GX 16 at 1.)

Applicant testified he went to the mental health clinic in October 2000 because he was concerned about his weight and had been told that an anti-depressant could help him lose weight. He testified he was also concerned about everything that had gone wrong with his life. He received a prescription for an anti-depressant and tried using it for about three days, but his friends convinced him that he should stop using it because he could not safely consume alcohol while using it. (Tr. 54-55.)

In December 7, 2000, Applicant received non-judicial punishment under Article 15, Uniform Code of Military Justice, 10 U.S.C § 815, for knowingly possessing child pornography on his computer on divers occasions between February 1, 2000, and July 21, 2000. He was a technical sergeant (pay grade E-6) at the time. He denied intentionally downloading or possessing child pornography on his computer, but his commander found that he was guilty of the offense alleged. (GX 9.) His punishment was a reduction to staff sergeant (pay grade E-5), forfeiture of $500 pay per month for two months, 45 days of extra duty, and a reprimand. The reduction to staff sergeant was suspended for six months. (GX 15.) Notwithstanding his non-judicial punishment, Applicant was allowed to reenlist in November 2001, and he was promoted to master sergeant in September 2003. (Attachment to Answer to SOR; AX W.)

Applicant married his current spouse in July 2002. She has two children, ages 14 and 12, who live with them. The older child suffers from attention deficit hyperactive disorder and the younger child is autistic. (GX 1 at 5-6; GX 8 at 4; Tr. 67.)

In June 2003, Applicant submitted an application to continue his security clearance (SF 86). He answered "no" to question 19, which asks, "In the last 7 years, have you consulted a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health condition?" (GX 1 at 9.) He did not disclose his consultation with a clinical psychologist in July 2000 or his consultation with a psychiatrist in October 2003. He testified that he stopped reading the question at the word "psychiatrist" and skipped to words "mental health condition" at the end of the sentence. He answered "no" because he did not believe he had a "mental health condition" such as bipolar disorder, schizophrenia, alcoholism, or drug addiction. (Tr. 57-58.)

On the same SF 86, Applicant also answered "no" to question 25, which asks, "In the last 7 years, have you been subject to court-martial or other disciplinary proceedings

under the Uniform Code of Military Justice?" The parenthetical explanation following the question specifically tells applicants to "include non-judicial, Captain's mast, etc." Nevertheless, he did not disclose his non-judicial punishment in December 2000. He testified he saw the reference to a court-martial but overlooked the reference to non-judicial punishment. (Tr. 59-60.)

On December 23, 2003, Applicant scheduled an appointment for January 7, 2004, at the base mental health center. (GX 10.) He was evaluated by a staff psychologist, whose notes indicate that he denied having any mental disorders, but that he believed he had betrayed his wife by viewing on-line pornography, and his wife wanted him to be evaluated. The psychologist's notes also indicate that Applicant reported an 11-year period of addiction to pornography that resulted in the breakup of his first marriage, that he had been seen by a psychiatrist at an overseas base, and that he was given medication to control his compulsions. (GX 11.) In May 2004, Applicant informed the psychologist that he did not wish to receive any further services. The psychologist deferred making a diagnosis because she had insufficient information on which to make a diagnostic judgment. (GX 12; GX 14.)

Applicant testified that his second wife was very angry when she discovered that he had viewed pornography. His wife insisted that he seek counseling because he had reverted to his earlier involvement with pornography, which she considered unacceptable. Applicant admitted telling the psychologist that he had an 11-year history of viewing pornography on his computer and that he had received medication to deal with grief after the death of his father. (Answer to amended SOR; Tr. 63-64.) He denied telling the psychologist that he was addicted to pornography and had received medication to control his compulsions. He testified that he does not believe he is addicted to pornography. (Tr. 61-65.)

In April 2004, Applicant resubmitted his SF 86 from June 2003 to his local security manager, seeking a clearance to work on a new program. After his security manager pointed out his omissions of his non-judicial punishment and his consultations with mental health professionals, Applicant submitted a Standard Form 86 Certification (SF 86C), correcting his answers to questions 19 and 25 of his SF 86. In the SF 86C, he disclosed his non-judicial punishment and his consultations with mental health professionals on three occasions in 2000. Because of his non-judicial punishment, he was not selected for the new program. (Tr. 106.). He received a letter of admonishment from his first sergeant for failing to disclose his non-judicial punishment on his SF 86. (Tr. 59; Attachments to Answer to SOR.)

In June 2004, Applicant was interviewed by a security investigator. He described the circumstances surrounding his non-judicial punishment. He also told the investigator, "I talked with [a] mental health professional . . . once at the hospital . . . to see if I had a pornographic addiction, which I did not and they did not find that I did either; it all came down to being a choice on my part to access the pictures." (GX 8 at 5.)

In January or February 2005, in anticipation of retirement, Applicant applied for a position with the local city police department and for a correctional officer position. He passed all the tests, but he was rejected for both positions because he did not disclose his non-judicial punishment in his applications. The record of his non-judicial punishment was discovered in the criminal records maintained by the Federal Bureau of Investigation as a result of a criminal records check by his prospective employers. Applicant testified he did not disclose his non-judicial punishment to his prospective employers because it was not a court conviction. (Tr. 99-100.)

In September 2005, shortly before his retirement, Applicant sought and received a psychiatric evaluation at the base where he was stationed. The psychiatrist reviewed his record, including the treatment records from January through May 2004, and found no psychosis or other mental disorder. The psychiatrist commented that Applicant made some poor judgments in the past, but "the issues regarding child porn on his personal computer at home were never clearly substantiated by reviewing his records." (GX 13.)

Applicant was employed by a defense contractor immediately after his retirement from the Air Force. He began working as a metal fabricator for his current employer in April 2008. Seven coworkers who have known him since his retirement submitted letters on his behalf. They uniformly describe him as truthful, trustworthy, hard working, and dedicated to his family. (AX B through H.)

In September 2008, Applicant submitted another SF 86. He answered "no" to question 21, pertaining to consultation for mental health conditions during the last seven years. He did not disclose his consultations with mental health professionals in January 2004 and September 2005. He testified he answered this question in the negative because he did not have a mental health condition and because he visited the psychiatrist in connection with his security clearance application and not for treatment. (Tr. 70-71.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An

administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline E, Personal Conduct

The SOR alleges that Applicant received non-judicial punishment for knowingly possessing child pornography on his computer (¶ 1.a); and that he falsified his SF 86 in June 2003 by answering "no" to question 19 concerning consultation with a mental health professional ¶ 1.b(1)), and by answering "no" to question 25 concerning court-martial or other military disciplinary proceedings such as non-judicial punishment (¶ 1.b(2). The amended SOR alleges that he falsified material facts in a sworn statement to a security investigator by failing to disclose his 11-year history of addiction to pornography, his treatment by a psychiatrist for that addiction, and his receipt of

medications to control his compulsions (¶ 1.c). Finally, the amended SOR alleges that he falsified his SF 86 in September 2008 by answering "no" to question 21 concerning consultation with a mental health professional and deliberately failing to disclose his consultations with mental health professionals in January 2004 and September 2005 (¶ 1.d).

The concern under this guideline is set out in AG ¶ 15:

> 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.

The relevant disqualifying conditions pertaining to Applicant's alleged falsifications of security clearance applications and false sworn statement provided to a security investigator are AG ¶ 16(a) (deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire) and AG ¶ 16(b) (deliberately providing false or misleading information concerning relevant facts to an investigator).

The SOR does not allege Applicant's failure to disclose his non-judicial punishment to prospective employers in early 2005. Thus, this conduct may not be an independent basis for denying him a clearance. However, conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). I have considered the conduct that was not alleged in the SOR for these limited purposes.

When Applicant submitted his SF 86 in June 2003, he was not an inexperienced airman or a security neophyte. He was an experienced noncommissioned officer who had worked through the security process before and had held a clearance for about eight years. He sought mental health counseling because he was concerned that he might need treatment for an addiction to pornography, he was depressed because his world was falling apart, and he was concerned about being overweight. His testimony that he skimmed past the middle portion of the question about mental health consultation and overlooked the reference to non-judicial punishment in the question about courts-martial or other disciplinary proceedings is neither plausible nor credible.

Applicant's sworn statement in June 2004 does not reflect the questions asked by the investigator. Nevertheless, the topic headings within the statement make it clear that the discussion involved his non-judicial punishment for possessing child pornography and his consultation with mental health professionals to determine whether he was addicted to pornography. The allegation that Applicant falsified his statement by

failing to disclose addiction to pornography, psychiatric treatment for the addiction, and medication to control "compulsions" is based on the psychologist's notes. I am satisfied that Applicant was never diagnosed as addicted to pornography, treated for an addiction, or medicated to control "compulsions." Accordingly, I am satisfied that Applicant's discussion of his consultation with the psychiatrist in his sworn statement was not false.

Applicant was informed by his unit security manager in April 2004 that he should have listed his mental health consultations and non-judicial punishment when he submitted his SF 86 in June 2003. In early 2005, he was rejected for two civilian jobs because of his lack of candor on his applications. When he submitted his latest SF 86 in September 2008, he knew he had consulted with a mental health professional at his wife's insistence, and he knew he had consulted with a psychiatrist about coping with grief and received a prescription medication. When he saw a psychiatrist in September 2005, he was seeking a favorable medical diagnosis to overcome concerns raised by his involvement with child pornography. His explanation that he did not think these consultations in 2004 and 2005 were within the scope of the question is implausible and not credible.

On consideration of all the evidence, I conclude that the disqualifying condition in AG ¶ 16(a) is raised by Applicant's intentional omissions from his security clearance applications in June 2003 and September 2008. I also conclude that AG ¶ 16(b) is not raised because Applicant did not falsify material facts in his sworn statement to a security investigator. I conclude Applicant has rebutted the allegation in SOR ¶ 1.c, and it is resolved in his favor.

The relevant disqualifying conditions pertaining to Applicant's non-judicial punishment for knowing possession of child pornography are as follows:

> AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;
>
> AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; and

> 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.

Applicant has not denied that child pornography was found on his computer, but he has consistently denied that he knowingly and intentionally downloaded and kept it. The commander who imposed non-judicial punishment was not persuaded by his denials. I also am not persuaded. I have considered all the evidence, including the 17 images and two text files describing sexual acts with children that were found on his computer. I have also evaluated the credibility of Applicant's claim of innocence in light of his record of deception, discussed above. Finally, I have considered the relatively low evidentiary burden of proof required to raise a disqualifying condition ("more than a scintilla but less than a preponderance."). I conclude that Applicant's record of non-judicial punishment raises AG ¶¶ 16(c), (d), and (e).

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 16(a), (c), (d), and (e), the burden shifted to Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns raised by false or misleading answers on a security clearance application or during a security interview may be mitigated by showing that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." AG ¶ 17(a). This mitigating condition is not established because Applicant made no effort to correct his omissions from his 2003 application until he was confronted with the evidence by his security manager, and he made no effort to correct his omissions from his 2008 application until he received the amended SOR.

Security concerns raised by personal conduct may be mitigated if "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". AG ¶ 17(c). Applicant's involvement with child pornography and his multiple falsifications were not minor offenses. His last involvement with child pornography was ten years ago. Although he viewed pornography again in 2004, there is no evidence that it involved children. His current spouse strongly disapproves of pornography, and Applicant appears to be deeply devoted to his family.

On the other hand, Applicant's most recent falsification of his SF 86 was in September 2008 and involved his current application for a clearance. None of his falsifications occurred under unique circumstances. I conclude that Applicant's non-judicial punishment for involvement in child pornography in December 2000 is mitigated

by the passage of time without recurrence, but that AG ¶ 17(c) is not established for the falsifications of his SF 86 in June 2003 and September 2008.

Security concerns raised by personal conduct may be mitigated if "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." AG ¶ 17(d). Applicant has never acknowledged that he knowingly possessed child pornography. He sought counseling to determine if he was addicted to adult pornography and apparently was assured that he was not. His wife's strong views about pornography and his devotion to his family make further involvement in pornography unlikely. On the other hand, Applicant has acknowledged that his responses to the mental health and disciplinary record questions were incorrect, but he has not acknowledged his repeated and intentional falsifications. I conclude that AG ¶ 17(d) is established for SOR ¶ 1.a but not for SOR ¶¶ 1.b and 1.d.

Finally, security concerns under this guideline may be mitigated if "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." AG ¶ 17(e). Applicant has reduced his vulnerability related to pornography, but he has continued his pattern of intentional deception. I conclude that AG ¶ 17(e) is established for SOR ¶ 1.a but not for SOR ¶¶ 1.b and 1.d.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the relevant circumstances. An 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 have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a mature adult who served in the U.S. Air Force for more than 20 years. He appears to be highly regarded in his current employment. He is devoted to his

family. On the other hand, his continuing lack of candor raises serious doubts about his reliability, trustworthiness, and good judgment. After weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following findings on the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge