



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



In the matter of: )  
)  
) ISCR Case No. 09-03279  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Francisco J. Mendez, Jr., Esq., Department Counsel  
For Applicant: Joseph V. Kaplan, Esq.

March 21, 2011

**Decision**

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COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline D, Sexual Behavior and Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

**Statement of the Case**

On September 22, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline D, Sexual Behavior and Guideline E, Personal Conduct. 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) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on October 21, 2009, and requested a hearing before an administrative judge. The case was assigned to me on June 15, 2010. DOHA issued a notice of hearing on June 30, 2010. The case was continued twice because of requests by both parties. The hearing was convened on September 14, 2010. The Government offered Exhibits (GE) 1 through 3, which were admitted into evidence without objection. The Government's exhibit list was marked as Hearing Exhibit (HE) I. Applicant testified and offered exhibits (AE) A-J, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on September 21, 2010.

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted all the allegations except for SOR ¶¶ 1.b. and 2.a. I have adopted these admissions in my findings of fact, and after a thorough and careful review of the pleadings and exhibits, I make the following findings of fact.

Applicant is 41 years old. He is single, never been married, and has no children. Since May 2005, he has worked as a program director for a federal contractor. He has master's degree. He has no prior military service and has not previously held a security clearance.<sup>1</sup>

Applicant's conduct raised in the SOR includes: (1) viewing underage/teen pornography from about 1998 through about 2004 (admitted); (2) going into teen chat rooms pretending to be a teenage girl, engaging in sexual talk in the teen chat rooms, and providing a picture of a topless teenage girl (denied); (3) in 2003 and 2004, going to sex clubs and engaging in illegal sex acts for money on three occasions (admitted). The same conduct was alleged under both guidelines D and E.

In 2004, Applicant applied for a position with another government agency (OGA). Because the position required a security clearance with access to sensitive information, a background polygraph examination was required. It was at this time the information underlying the current allegations first came to light. As a result of Applicant's disclosure to the OGA, the job offer was rescinded.<sup>2</sup>

Applicant has been treated for depression since 1987 when he was 18 years old. He was not initially prescribed medicine for depression. At some point, a doctor diagnosed Applicant as having Bipolar Disorder. In 2000, he was prescribed medicine to treat the Bipolar Disorder. He did not feel any relief from this medicine. In 2005, Applicant saw a new psychiatrist and she diagnosed him as having depression, not Bipolar Disorder. Consequently, she changed his medication to treat depression. He is

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<sup>1</sup> Tr. at 26-27, 41; GE 1.

<sup>2</sup> AE H; Tr. at 60.

still using this medication and he believes it has significantly decreased his depression. His dosage has remained the same for the last five years.<sup>3</sup>

From 1998 through 2004, Applicant used his computer to search for female teenage models. He intentionally searched for “scantily-clad teen models.” While viewing such searches on-line, he came across child pornography sites depicting nude teenage girls. He occasionally viewed these sites even though he knew it was wrong and illegal to do so. He claims he has not viewed any of these types of on-line sites since 2004.<sup>4</sup>

During the time frame of approximately 2003 to 2004, Applicant also used his computer to go on-line to engage in chats with teenage girls. He entered what are referred to as teenage chat rooms that are designed to facilitate social conversation between teenagers. Applicant was aware that these chats rooms were for teenagers, not adults. Nevertheless, he entered these chat rooms and posed as a teenage girl. He even posted a picture of a topless teenager and misrepresented to others that the picture was of him. He wanted the other teenage girls in the chat room to believe he also was a teenage girl. His purpose was to engage in sexual talk with teenage girls.<sup>5</sup>

In 2003 to 2004, Applicant went to local area sex clubs where he paid for sexual activity with adult females. Applicant stated the reason he engaged in this activity was because he was depressed and was looking for an escape. He has not engaged in similar behavior since 2004.<sup>6</sup>

When Applicant interviewed with the OGA in 2004 he admitted that he had an addiction to pornography. He was spending hours searching and viewing pornography on the internet. He sought treatment for this addiction from two different sources. Between 2000 and 2004, he attended sexaholic anonymous meetings. He attended meeting several times a week. Even though he attended these meetings, he still viewed teenage pornography on-line. Additionally, his church sponsored a faith based six-week course for people dealing with sexual issues. Applicant attended the course, but still viewed teen-related pornography after he completed the course. He did not list either of these counseling activities in section 21 of his security clearance application which asked him to list any mental health counseling he received in the last seven years because he did not believe this was a mental health-related issue. He has not attended any sex-based therapy groups since 2003. He currently views about 15 to 30 minutes worth of adult pornography per week.<sup>7</sup>

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<sup>3</sup> Tr. at 44-47.

<sup>4</sup> Tr. at 49-51, 82.

<sup>5</sup> Tr. at 65-67; AE H.

<sup>6</sup> Tr. at 52-53, AE H.

<sup>7</sup> Tr. at 57-58, 69, 82-84; AE H.

Beginning in 1987, when he was first treated for depression, Applicant has seen several psychologists and psychiatrists for his condition. He failed to tell any of them about his viewing of teen pornography sites. After the issuance of the SOR, Applicant saw a psychiatrist who interviewed him and prepared a report. This psychiatrist was aware Applicant viewed teen pornography, as well as all the allegations listed in the SOR. He diagnosed Applicant as depressed, but with no personality disorders.<sup>8</sup>

Applicant presented job performance reports for several years showing superior or above average ratings for those time periods. He also presented two letters from co-workers complimenting him on particular work or projects that he completed and his promotion announcement. Finally, he presented a character letter from his supervisor who wrote about Applicant's dedication, work ethic, leadership and overall trustworthiness. Applicant admitted both his supervisor and his co-workers were unaware of the allegations against him.<sup>9</sup>

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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 on the evidence contained in the record.

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

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<sup>8</sup> Tr. at 96-97, GE 2; AE H.

<sup>9</sup> AE A-G; Tr. at 39.

mitigate facts admitted by or proven by Department Counsel, and has the ultimate burden of persuasion to obtain 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

AG ¶ 12 expresses the security concern:

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. No adverse inference concerning the standards in this guideline may be raised solely on the basis of the sexual orientation of the individual.

I have considered all of the Sexual Behavior disqualifying conditions under AG ¶ 13 and the following are potentially applicable:

(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and,

(d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

Applicant viewed underage girls on-line using the internet from 1998 through at least 2004. He also paid for sex at sex clubs on several occasions. Both activities are of

a criminal nature. He also posed as a teenage girl and chatted about sexual subjects on the internet with other teenage girls. These actions reflect a lack of judgment. Some are of a criminal nature and all make him vulnerable to exploitation, coercion, and duress. AG ¶¶ 13(a), 13(c), and 13(d) apply.

I have considered all of the Sexual Behavior mitigating conditions under AG ¶ 14 and the following 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;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress; and,
- (d) the sexual behavior is strictly private, consensual, and discreet.

Applicant's conduct regarding teenage girls last occurred in 2004; however, considering that he continued to view teenage pornography and visit chat rooms after he received specific sex-related counseling recurrence cannot be ruled out. The circumstances were not unique and cast doubt on his trustworthiness and good judgment. He failed to disclose this information to his previous psychologists and psychiatrists. His most recent evaluation in contemplation of this hearing found he did not have a personality disorder. Applicant's supervisor and co-workers are unaware of his past behavior. He engaged in this behavior over several years. All this behavior made him vulnerable to coercion. Although Applicant's on-line activity took place in the privacy of his home, some of it was illegal and his use of prostitutes was in public. I find none of the mitigating conditions apply.

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

AG ¶ 15 expresses the security concern for 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying conditions are potentially applicable:

(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.

Applicant's conduct including viewing teenage girls on the internet, posing as a teenage girl, using a nude girl's photo to misrepresent him in a teenage internet chat room, and participating in illegal sex acts for money in local sex clubs makes him vulnerable to exploitation, manipulation, or duress and affects his professional standing in the community. AG ¶ 16(e) applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and the following are potentially applicable:

(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, and

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

Applicant engaged in unlawful and inappropriate sexual behavior for six years that calls into question his good judgment. Although the last reported behavior was in 2004, the nature of his sexual activities and the lack of insight he shows regarding his past actions rule out this mitigating condition. Applicant's actions continue to make him vulnerable to exploitation, manipulation or duress. AG ¶¶ 17(c) and (e) do not apply. While Applicant has seen medical professionals for his depression, he failed to advise them of his sexual activity, up until the time he was specifically evaluated in preparation for his hearing. Applicant failed to meet his burden of persuasion that this behavior is unlikely to recur. AG ¶ 17(d) does not apply.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's

conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines D and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I have considered Applicant's outstanding service in his current job, including the opinions of his supervisor and co-workers. These views are somewhat diluted because none of them were aware of the current allegations against him. I also considered that the last reported sexual action by him occurred in 2004. I am troubled by the fact that Applicant admitted to a pornography addiction, but never revealed this information to his treating mental health professionals. He finally disclosed this information to the psychiatrist who prepared a report specifically related to this case. The only evidence showing Applicant received treatment for his sexual proclivities was his participation in a sexaholics anonymous group and a church group between 2000 and 2004. Both groups were ineffective since he continued his sexual activity after participating in the groups. Applicant did not convince me that he has gained the insight to know why his behavior occurred. As such, I am not convinced the behavior is not likely to recur. Applicant's actions raise questions about his judgment, reliability, and trustworthiness.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the concerns raised under both the Sexual Behavior and the Personal Conduct guidelines.



## Formal Findings

Formal findings for or against 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
Subparagraphs 1.a – 1.c:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

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Robert E. Coacher  
Administrative Judge