



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



In the matter of:	)	
	)	
	)	ISCR Case No. 09-05720
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Julie Mendez, Esquire, Department Counsel  
For Applicant: Mark Zaid, Esquire

July 20, 2011

**Decision**

LYNCH, Noreen A., Administrative Judge:

After a review of the pleadings, exhibits, and testimony, I have questions and doubts as to Applicant’s eligibility and suitability for a security clearance, as he has not mitigated the Government’s security concerns under the personal conduct guideline. Applicant’s eligibility for access to classified information is denied.

**Statement of the Case**

Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application (SF-86) on April 31, 2009. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on October 7, 2010, detailing security concerns under Guideline E (Personal Conduct), that provided the basis for its preliminary decision to deny him a security clearance. 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 For*

*Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant answered the SOR in writing on November 1, 2010, and requested a hearing before an administrative judge. I received the case assignment on April 19, 2011. DOHA issued a notice of hearing on April 28, 2011, and I convened the hearing as scheduled on May 27, 2011. The Government offered nine exhibits marked as GE 1 through GE 9, which were admitted into evidence without objection. Applicant testified, presented four witnesses, and submitted exhibits marked as AE A through AE G, which were admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on June 7, 2011.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.c, 1.d, and 1.f of the SOR. His admissions are incorporated herein as findings of fact. He denied the remaining allegations.<sup>1</sup> 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 is 37 years old. He received his undergraduate degree in 1986, and his master's degree in 1994. (AE A) He served in the U.S. Air Force from April 1986 until August 1995. Applicant is married and has three children (ages 10, 8, and 6). He has been with his current employer since March 2008. He held a security clearance from 1986 until it was revoked in December 2002. (GE 1)

Applicant worked for a federal agency from 1990 until 2003, with a break in service from 1995 until 1998, when he worked as a contractor. In 2001, he was required to take a lifestyle polygraph. According to 2001 official file records, during that polygraph, Applicant stated that since 1997, he downloaded thousands of pornographic pictures from the Internet of "prepubescent" girls engaged in sexual activities. (GE 2) He acknowledged that he viewed teen sites and entered into teen chat rooms. Applicant elaborated that on one occasion in 1995, he entered a chat room identifying himself as a "teacher looking for young student." (GE 2) He denied meeting any individuals. Applicant also admitted that he exchanged pornographic pictures of teens with other unknown adults on the Internet. (GE 2)

The 2001 official file records also contained information that Applicant admitted to engaging in voyeurism for the past eight years. According to Applicant, he watched his neighbors, hoping to see them undressed or engaged in sexual activities. On several occasions, he exposed himself to one of the teenage girls he had been watching in his former neighborhood. (GE 2)

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<sup>1</sup>The Government withdrew allegations in the SOR ¶¶ 1.g and 1.h at the hearing. An amended SOR, dated January 2011 included a new allegation 1.g alleging voyeurism from 1994 until 2001.

Applicant acknowledged that he was unable to successfully pass the 2001 lifestyle polygraph. He appealed a termination decision and was placed on one year probation. A disciplinary letter was placed in his file. In 2002, at the end of the probation, Applicant was required to take another polygraph. He did not pass the polygraph based on the same issues, and his clearance was revoked. He was unsuccessful in an appeal. He resigned in 2003. (Tr. 86)

In November 2002, after the second polygraph, the FBI interviewed Applicant about the alleged child pornography. Applicant admitted viewing pornography on-line. The report of the interview revealed that Applicant told the investigators he had not viewed child pornography for approximately 18 months. (GE 7) He elaborated that he utilized "alt.binaries" newsgroups that focused on 14 to 16 year old subjects and cheerleaders. He also received images from people in chat rooms, such as "teacher for students and young teen rooms." He acknowledged that this occurred from 1995 until 1997. He masturbated to the images he downloaded. (GE 7; Tr. 105) An on-line investigation produced negative results. (GE 3) A later search of Applicant's personal computer by the FBI revealed 20 images of child pornography. (GE 4)

In 2005, Applicant applied for a position and noted on his security clearance application that he "flunked a second series of lifestyle polygraphs," and his clearance was revoked in 2002. (GE 8) Applicant indicated during a security interview that he was unable to disclose why he had not passed the second lifestyle polygraph in 2002. When the interviewer questioned Applicant about criminal conduct as recent as 2001, including child pornography and voyeurism, Applicant chose not to expand on the issue because he did not feel he was in a private environment. (Tr. 108) He also said he did not want to talk about some of the issues, but he later stated issues of pornography and voyeurism were of concern. (GE 5) During a subsequent interview in 2006, Applicant stated that he should not have disclosed all that he did. He reported that he denied viewing child pornography after 2002. He elaborated that it was a result of an FBI visit to his home in 2002. (GE 4)

In April 2009, Applicant was given the opportunity to review, make comments, and affirm the investigator's summaries of the statements made in interviews on May 12, 2006 and April 22, 2009. (GE 8) Applicant made comments regarding his 2006 statements. He wrote, "[the contract interviewer met me in my shared office. To be perfectly honest, she made me feel extremely uncomfortable. She asked me questions that I believed required classified responses involving my employment history. To the extent that any information was withheld, it was solely because the responses would have, I believe, required the disclosure of classified information to an individual who, as far as I know, did not have a need-to-know. None of the information in question, is I believe, relevant to the background issues that are of interest now (or were then)."

In response to DOHA 2010 interrogatories, Applicant disputed the accuracy of the reports from the FBI and his former employer in 2001 and 2002. He stated that his former employer forwarded inaccurate information. He admitted downloading adult pornographic images on his home computer. He explained that he occasionally searched for "teen" images. He stated that he was referring to images of 18 and 19 year

olds. He also stated that he inadvertently downloaded some images of minors. (GE 7) He went on to say that while the individuals were under the age of 18 and at times nude, even the attorney on the case concluded on more than one occasion that the photographs did not meet the legal definition of child porn. He then acknowledged that there were a few images that they determined might meet the threshold.

At the hearing, Applicant testified that he was looking for college cheerleaders, blonde, 18 and 19-year-old women. (Tr. 92) He testified that he never intentionally downloaded child porn. He did not dispute the fact that 20 images of child porn were found on his computer. Applicant now admits downloading images where he thought the models were less than 18 years of age or where he could not determine the age of the model. (Tr. 96).

At the hearing, Applicant denied intentionally looking for child porn, but he did acknowledge that he viewed teen sites and entered into chat rooms. (Tr. 96) He noted that they are legal sites where women can appear to be in high school but appear to be 18. He admitted that he had a fantasy that he was a college professor looking for college students. He explained that in the early days of the internet (1990's), he downloaded images that appeared to be possible child pornography, but he deleted the image immediately. (Tr. 101)

As to voyeurism, Applicant testified at the hearing that in 1994, he observed his female neighbors undress from his apartment balcony. (Tr. 113) He noted that three women changed clothes with the light on while he was ironing. He said they gave shows at 9pm on Sunday by turning on the lights and pulling up the shades. (Tr. 114) He never met them. He said they flaunted their bodies and touched themselves in a provocative way. On one occasion, he dropped his boxer shorts. (Tr. 126) At the hearing, he acknowledged that he also watched from inside his apartment from a window. (Tr.39) Applicant kept a journal and noted his activities. (AE G) He also admitted looking at another neighbor undress on an upstairs floor. (Tr. 141)

As to allegations concerning prostitutes prior to 1996, Applicant admitted that the issue had been raised in a 1998 polygraph with his former employer. (Tr. 87) It was not discussed in 2001 because his employer already knew about his conduct. He acknowledged using escort services approximately six times. (Tr. 127) He also admitted that he told his former employer that he had thoughts about viewing women undressing when he was on travel. (Tr. 87)

At the hearing, Applicant revised his earlier statements. He could recall answers to certain questions that were raised in 2001 by the FBI or his former employer, but he was vague and evasive with others. As mitigation, he consistently emphasized that he turned everything over to the FBI and cooperated with them. He blamed the earlier Internet technology for any possible child pornography images that were found on his computer. In response to his counsel's question, Applicant denied that he told the former employer that he had downloaded thousands of pornographic pictures from the Internet of prepubescent girls engaged in sexual activities. (Tr. 95) Later in the hearing, in response to my questions, Applicant admitted that he told the investigators that he

had downloaded the above referenced child pornography. (Tr. 166) When asked why he would do that, he said "he felt guilty about the porn he was looking at." He later minimized the fact that only 20 images of child pornography were found from approximately 20,000 images. (Tr. 132)

At one point during the hearing when asked if he had counseling, he replied "no". (Tr. 146). Later, he said during his probation, he complied with EAP counseling. He could not recall why he told the earlier investigators that he focused on the 14 to 16-year-old subject in alt.binary groups. (Tr. 105) He remembered that he told the investigators that he received images from people in chat rooms, such as teach for students and young teen rooms. (Tr. 105) However, he insisted they were "legal teens."

At the hearing, Applicant agreed that he told his former employer that he had downloaded images of children engaged in sexual acts. Upon further questioning, he said he told them because he felt guilty. (Tr. 166) He said he admitted to things he did not do to pass the polygraph. (Tr. 167) Applicant stated that he just told the polygrapher the second time every guilty thought that he had. (Tr. 176) He told them everything he did wrong. He told the FBI he knew what he was doing was wrong but it was not illegal. He stated that he "was coached" to not change his earlier story from the first 2001 polygraph.

Applicant submitted a packet of documents to include awards, letters of appreciation and commendations from 2002 until 2006. (AE B) They attest to the fact that Applicant is a person of integrity, honesty and character. He is a role model in his community. (AE C)

A former military official-coworker, who has known Applicant since 1998, testified that Applicant is trustworthy and recommends him for a security clearance. He and Applicant have remained friends and socialize with their respective families. (Tr. 25) He is aware of the SOR allegations. (Tr. 27)

Another former colleague attests to Applicant's forthrightness and character. He is someone who can be trusted. (Tr. 36) He knows that Applicant disclosed information to the FBI. He believes that the issues are in the past. He recommends Applicant for a security clearance.

Applicant's wife testified that he is great father and husband, who is involved in school, church and community activities. She also noted that she learned about the alleged behaviors in 2001 when her husband was investigated by his former employer. (Tr. 60) She noted that he is honest to a fault.

Applicant's director testified at the hearing that Applicant is a strong leader. He is respected in the organization. Applicant's supervisor is aware of the issues alleged in the SOR. He has the highest regard for Applicant and recommends him for a security clearance. (Tr. 54)

A defense contractor, who has known Applicant for more than ten years, testified at the hearing that Applicant was very helpful to him in his work as an industrial security specialist. He described Applicant as helpful, thoughtful, and professional. (Tr. 54) He knew about the personal difficulties that Applicant had with his family. He has recommended Applicant for various positions. (Tr. 62)

### **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 mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for 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.

AG ¶ 16 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and especially the following:

(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;

(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;

(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:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information,

unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources;

(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

(f) violation of a written or recorded commitment made by the individual to the employee as a condition of employment.

Before revising his statements, Applicant admitted to viewing child pornography in interviews with his former employer during a polygraph in 2001. He last viewed child pornography in 2002. He admitted that he downloaded pictures of children engaged in sexual activity. He stated he focused on teen chat rooms and rooms which focused on 14 to 16 year olds, as early as 1995. A search of his personal computer revealed 20 images of child pornography. He masturbated to pornography. As a result of his conduct, he resigned from employment. When he met with DoD investigators in 2010, he failed to fully disclose the facts relating to the 2001 and 2002 polygraph testing. It is not in dispute that he viewed women undress from his room in 1994. He admitted that he used escort services for prostitution before 1996. He admitted to voyeurism in the mid 1990's. AG ¶¶ 16(c), 16(d), and 16(e) apply.

AG ¶ 17 provides conditions that could mitigate security concerns:

(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.

Applicant informed interviewers in 2001 and 2002 that he downloaded and viewed thousands of pictures of prepubescent girls engaged in sexual activities on the Internet. He admitted entering teen chat rooms. He held a security clearance, and he resigned before termination. He later recanted his story. He failed to fully disclose the reason he failed a second polygraph when he was interviewed for another job in 2006. He revised his story in 2010 and again at the hearing to say that he only viewed legal teen sites. He stated that he had no intention of viewing child pornography. He stated that he only told the investigators in 2002 that he downloaded child pornography because he was coached to say the same thing that he did in 2001.

Applicant failed to provide a plausible basis for refuting the 2001 and 2002 statements during his polygraphs. Personal conduct, as noted, involves questions about questionable judgment, lack of candor, or dishonesty that raise questions about an individual's reliability and trustworthiness. Applicant's admissions, subsequent retractions, and later inconsistent statements reflect dubious judgment and reliability, especially since Applicant, who held a security clearance for many years, must have known that this issue would eventually be revisited. In light of these considerations, I find that none of the mitigating conditions are applicable under AG ¶ 17(c),(d), and (e).

### **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.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has worked for the federal government for many years. He served in the military. He held a security clearance for many years before it was revoked in 2003. He is married and has three children. He is involved in many community activities. Several witnesses recommended him for a security clearance. He has received many awards during his career. He is a highly regarded employee who has won the admiration of his peers.

Applicant admitted to a former employer during a polygraph that he downloaded images of child pornography. He later denied that he intentionally downloaded child pornography even though approximately 20 such images were found on his computer in 2002. He admitted entering teen chat rooms. In subsequent interviews, Applicant told various versions of his conduct, and recanted that he intentionally viewed child pornography. He did not present plausible reasons for refuting the admission in 2001 and 2002. He did not appear truthful at the hearing and gave different answers to the same questions. Government documents and agency interviews confirm that Applicant admitted to child pornography. Despite the fact that he claims that he has not done so since 2002, I do not find him credible. As to the prostitution and voyeurism, Applicant has mitigated any concerns due to the age and nature of these issues. I have doubts about his overall reliability and trustworthiness and judgement. In light of these facts, his personal security clearance concerns remain unmitigated. Clearance is denied.

Overall, the record evidence leaves me with questions and 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 for personal conduct under Guideline E.

### **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
Subparagraphs 1.c-1.g:	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.

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Noreen A. Lynch  
Administrative Judge