



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 10-04741
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Julie R. Mendez, Esquire, Department Counsel  
For Applicant: Alan V. Edmunds, Esquire

July 27, 2011

**Decision**

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MARSHALL, Jr., Arthur E., Administrative Judge:

On January 31, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns arising under Guideline E (Personal Conduct), Guideline D (Sexual Behavior), and Guideline J (Criminal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In a February 17, 2011, response, Applicant admitted one of the three allegations set forth in the SOR under Guideline E and denied all allegations under Guideline D and Guideline J. He also requested a hearing. DOHA assigned the case to me on May 20, 2011. The parties proposed a hearing date of June 29, 2011. A notice setting that date for the hearing was issued on June 3, 2011. I convened the hearing as scheduled.

Applicant gave testimony and introduced four witnesses. He also presented 15 documents that were accepted into the record without objection as exhibits (Exs.) A-O Department Counsel offered five documents, which were admitted as Exs. 1-5. Ex. 5

was accepted into the record over Applicant's objection concerning issues regarding foundation and hearsay.<sup>1</sup> The parties were given until July 5, 2011, to submit any additional materials. The transcript (Tr.) of the proceeding was received on July 9, 2011. In the absence of supplementary submissions, the record was closed on July 5, 2011. Based on a review of the testimony, submissions, and exhibits, I find Applicant failed to meet his burden of mitigating security concerns related to personal conduct, sexual behavior, and criminal conduct. Clearance denied.

### Findings of Fact

Applicant is a 40-year-old administrator who has worked for the same defense contractor for approximately six years. He has earned a bachelor's degree. Applicant is married and has two minor children.

Central to the issue in this case is whether Applicant, during security testing for another agency, reported searching the Internet for images of sexually explicit material, including images of underage females. The testing took the form of interviews and lifestyle polygraph testing by another Government entity between August and December 2007, when Applicant was applying for a special access clearance.<sup>2</sup> The source of this information is a redacted summary report from that organization.<sup>3</sup> Full text copies of the report were available, but not offered into evidence.<sup>4</sup> The summary notes a processing initiation date of August 20, 2007, and a polygraph date of December 3, 2007. A negative final recommendation is shown as having been made on July 29, 2008, on the basis of personal conduct and criminal conduct.

Applicant stated he had searched the Internet for the term "child pornography" to see what materials would be returned. He stated he was unsure of the term's true meaning and that he had told his wife the same thing when she asked him about the search. The summary notes that he stated that he used specific search engines and search terms to find provocative images of school girls, who were apparently between the ages of 13 and 18. It notes that he revised his statement to say the girls were about 16, then again revised his statement to say they were between 13 and 18.<sup>5</sup> The summary notes other variations on the age range at issue. It includes a summation of Applicant's depiction of the developmental stage of "the 13 year old females."<sup>6</sup> Near the

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<sup>1</sup> Tr. 12-15. With regard to redactions appearing in the business record at issue, their inclusion and effect were given appropriate weight in consideration of the document as a whole.

<sup>2</sup> Ex. 5 (Archived record, cover letter dated Jun. 27, 2011). Applicant already had a security clearance. Tr. 40.

<sup>3</sup> Ex. 5 is redacted. The unredacted section, however, includes accurate reference to Applicant's date of marriage and the age of his children, thus providing a persuasive nexus between the summary and Applicant. *Compare* Ex. 1 (Security Clearance Application, dated Aug. 12, 2008).

<sup>4</sup> Ex. 5, note 2, *supra*.

<sup>5</sup> Ex. 5, *supra*, note 2 at 4.

<sup>6</sup> *Id.*

end of the summary, it is noted that “subject reiterated that he searched the various Internet websites in an attempt to view images of young women, using the term ‘young teens.’ Subject advised that he was not seeking images of females under 18 years of age.”<sup>7</sup> It concludes by stating, “Subject affirmed that he searched the Internet utilizing the term “child pornography” out of curiosity, and not in an attempt to view videos of child pornography. Subject finally advised that the more he thinks about it, the images he viewed depicted females 13 years of age.”<sup>8</sup> No other interviews or polygraph tests are mentioned.

Between November 11, 2008, and December 1, 2008, Applicant was interviewed by DOD investigators. It was noted in an unsworn declaration that Applicant had a security clearance issued by another agency.<sup>9</sup> It stated that he did not have any other background investigations. There is no indication Applicant addressed the child pornography issues.

During an unsworn interview in April 2010, Applicant related facts about his 2007 interviews and polygraph tests at the other agency. In the summary of that interview, it is noted that in 2007, Applicant “was asked to interpret photographs of young persons and state which were underage. The subject found certain images borderline, among 16 and 17 year old young persons. The [other agency] rated the test failed, stating that the subject should have identified that images as underage minors. The subject did not agree that there was room for doubt.”<sup>10</sup> He did not disclose that he had admitted to interviewers in 2007 that he had accessed and viewed child pornography on the Internet. The interview summary noted that a year later, Applicant was advised that, based on the polygraph testing, a special access clearance had been denied.<sup>11</sup> It also noted that Applicant had declined to appeal the decision because he had a pending job offer elsewhere that did not require special access.

In November 2010, Applicant was given the opportunity to review, make comments, and affirm the investigator’s summaries of the statements made during the 2008 and 2010 interviews.<sup>12</sup> Applicant made comments regarding the notes about his April 2010 statements. He wrote, “[o]n the second day of the [2007] polygraph I was unable to successfully pass the test because of the question have you ever viewed underage pornography. After the second test was completed they interrogated me for around two hours. After [that,] I admitted that I could have viewed young persons from

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Ex. 2 (Interrogatories) at 7 (2008 Testimonies at 3).

<sup>10</sup> Ex. 2 (Interrogatories) at 3 (2010 Testimonies at 1).

<sup>11</sup> The special access clearance apparently was separate and distinct from Applicant’s then-current security clearance. *See id.* (2010 Testimonies at 1-2); Tr. 40-42. It was denied on Nov. 10, 2008. *See* Ex. 3 (Interrogatories) at 4 (Dec. 17, 2009, notice of disapproval).

<sup>12</sup> Ex. 2 (Interrogatories) at 8-10 (Nov. 2010 comments).

the ages of 17-13 years old.”<sup>13</sup> Consequently, Applicant effectively amended the prior, unsworn statements earlier attributed to him. Applicant also noted that when he returned for his third polygraph, he stated that he wanted to “take back my previous statement and I did not view young persons from the age of 17-13 years old.”<sup>14</sup> Applicant then noted that “due to me taking back my statement they did not test me on viewing young persons from the age of 17-13 years old. They asked me the question if I had ever viewed underage pornography. All three of my polygraphs came back inconclusive.”<sup>15</sup>

In his response to the January 31, 2011, SOR, Applicant wrote that during his first polygraph in August 2007, he did not pass the test due to his response to the question “have you ever commented [sic] a crime over the age of 18.”<sup>16</sup> He stated that he next day, the 2007 interviewers queried about pornography. He wrote that they asked him to explain the differences in body types of females between the ages of 18 and 13. He stated that he answered the questions and “they tried to pressure [him] to say that [he had] viewed underage females. [He] did not agree with the agency and stated [he] only viewed females 18 years of age and older.”<sup>17</sup> After the second 2007 polygraph test, he said he “could had [sic] viewed underage pornography if the females lied about their age.”<sup>18</sup> He noted that on the third 2007 polygraph attempt, he explained that he told the interviewers that he wanted to withdraw his previous concession, noting that he “felt like they led [him] down this path and [he did not] agree with it.”<sup>19</sup> In his SOR response, Applicant stated that he has never actively searched for underage pornography and has never viewed any images of 13-year-old females. Regarding his April 2010 interview, he stated that he was too focused on the specific questions asked at the time to go to his car, retrieve documents related to the 2007 tests, and delve into that topic. “I was really focused on the investigation at the time . . . . After the investigation I was very satisfied that I answered all of the questions that were asked.”<sup>20</sup> There is no indication whether the documents allegedly in his car were either exculpatory or explanatory in nature.

During the June 2011 hearing, Applicant testified that he had felt pressured during the 2007 interviews and tests, and that he did not feel free to leave.<sup>21</sup> He agreed

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<sup>13</sup> *Id.* at 8.

<sup>14</sup> *Id.* at 9.

<sup>15</sup> *Id.* at 8.

<sup>16</sup> Answer to the SOR, dated Feb. 17, 2011.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Tr. 41.

that the general statements attributed to him in the redacted 2007 summary were made, including those regarding the general Internet search engine inquiries.<sup>22</sup> He admitted to looking for “porn” or “free porn,” but denied making some of the more specific and provocative Internet search queries noted in the report.<sup>23</sup> He also denied those aspects of his attributed comments regarding the models’ ages, noting that he had never inquired about their ages.<sup>24</sup> To him, the models seemed to be 18 or over. He stated that his use of adjectives regarding the models were taken out of context.<sup>25</sup> In addition, he explained that he did a search or searches for “child pornography” for “information purposes,” not for images.<sup>26</sup> He confirmed that he chose not to appeal the denial of special access.

Applicant understands that viewing sexually explicit images of underage subjects could constitute a criminal act. He denies ever knowingly viewing such material.<sup>27</sup> Applicant’s wife knows that he has viewed pornography, but does not know the nature of the content.<sup>28</sup> When she asked her husband whether he had viewed child pornography, he denied it.<sup>29</sup> She has never noted any indication that their home computer has been used to access pornography. His best friend and former work peers describe him in glowing terms, such as a being a “stellar” performer and a man of “impeccable” character.<sup>30</sup> His witnesses were generally aware of the allegations. At work, he is a highly regarded employee.

## Policies

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the “whole-

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<sup>22</sup> Tr. 41-42.

<sup>23</sup> Tr. 44.

<sup>24</sup> Tr. 43-44. Applicant stated that the commentator attributed ages to the models at issue based on their separate discussion about the appearance and attributes of females during their developmental stages.

<sup>25</sup> Tr. 45.

<sup>26</sup> Tr. 42.

<sup>27</sup> Tr. 37.

<sup>28</sup> Tr. 32.

<sup>29</sup> Tr. 33-34.

<sup>30</sup> Tr. 17-28. See *also* Exs. C-H (Recommendations).

person concept.” The administrative judge must consider all 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.

The Government must present evidence to establish controverted facts alleged in the SOR. 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. . . .”<sup>31</sup> The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.<sup>32</sup>

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 the 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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>33</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>34</sup>

Based upon consideration of the evidence, Guideline E (Personal Conduct), Guideline D (Sexual Behavior), and Guideline J (Criminal Conduct) are the most pertinent to this case. Conditions pertaining to those AGs that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

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<sup>31</sup> *See also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>32</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

## Analysis

### Guideline E – Personal Conduct

Security concerns arise from matters of personal conduct because 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.<sup>35</sup> In addition, any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process is of special interest.<sup>36</sup>

Here, Applicant reported to interviewers in 2007 that he had accessed and viewed underage pornography via the Internet. He was denied a special access clearance by another agency in 2008 due to that admission. Such facts are sufficient to raise Personal Conduct Disqualifying Conditions AG ¶ 16(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. . . .*).

In 2007, Applicant informed interviewers that he had researched child pornography via Internet. He stated that he subsequently told the interviewers that he recanted this admission in another session, but there is insufficient evidence regarding his recantation to raise Personal Conduct Mitigating Condition (PC MC) AG ¶ 17 (a) (*the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*).

Applicant stated that his admission of accessing and viewing underage pornography was followed by a retraction. However, the Government's evidence, while excerpted and redacted, does not confirm this. It only references the single December 2007 meeting. Its form, content, and conclusion seem self-contained. Applicant offered no evidence in rebuttal or any documents tending to show the results of other interviews or polygraphs during the investigatory period. Similarly, he failed to provide a plausible explanation as to why or how the Government's exhibit, which is both contemporaneous and highly detailed in its depiction of 2007 statements attributed to Applicant, is at odds with his subsequent version of the facts. Moreover, Applicant admits that he was denied a special access clearance in November 2008, less than three years ago, based on the information elicited during the 2007 interview. To date, the competing versions of what happened in December 2008 remain unreconciled. In light of these facts, and given the gravity of the type of material at issue, none of the other mitigating conditions apply.

### Guideline D – Sexual Behavior

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the

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<sup>35</sup> AG ¶ 15.

<sup>36</sup> *Id.*

individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.<sup>37</sup> Here, Applicant admitted that he searched for underage pornography on the Internet. This is sufficient to raise Sexual Behavior Disqualifying Conditions (SB DC) AG ¶ 13(a) (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*), AG ¶ 13(c) (*sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*), and AG ¶ 13(d) (*sexual behavior of a public nature and/or that reflects lack of discretion or judgment*). With a disqualifying condition raised, the burden moves to Applicant to mitigate security concerns.

Given Applicant's age and the use of the Internet, it may be assumed that the conduct at issue occurred during Applicant's adulthood. Therefore, Sexual Behavior Mitigating Condition (SB MC) AG ¶ 14(a) (*the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature*) does not apply. In addition, due to the lack of a date for the admitted conduct and Applicant's alleged recantation of the claim that he accessed underage pornography, there are insufficient facts to raise ¶ 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*).

Applicant's initial admission that he searched, accessed, and viewed Internet images of child pornography constituted a disturbing revelation. He has since stated that he recanted this admission in a subsequent interview and polygraph session, although there is no evidence to that effect. Ultimately, that admission and testing constituted the basis of his special access denial by another agency. To date, no documentary evidence has been introduced supporting his assertion that a recantation was effectively made, nor has a plausible explanation been made as to how such a detailed summation was incorrectly comprised by another entity. Applicant continues to dispute the other agency's depiction of the 2007 interview, and denied having searched for images of child pornography. Today, the issue remains unclarified. Given the nature of the allegation, AG ¶14(c) (*the behavior no longer serves as a basis for coercion, exploitation, or duress*) does not apply. None of the other mitigating conditions apply.

## **Guideline J – Criminal Conduct**

The concern under this guideline is that criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.<sup>38</sup> Here, before his alleged recantation, Applicant reported to the Government that he had accessed and viewed underage pornography. Such an incident is sufficient to raise Criminal Conduct Disqualifying Condition AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless*

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<sup>37</sup> AG ¶ 12. The concern described further notes that "no adverse inference concerning the standards in this Guideline may be raised solely on the basis of sexual orientation of the individual."

<sup>38</sup> AG ¶ 30.



*of whether the person was formally charged, formally prosecuted or convicted).* Consequently, it is Applicant's burden to mitigate the security concerns raised.

The underlying interview and testing process occurred in late 2007. It was then documented by a Government agency in the normal conduct of business. Applicant's full version of what transpired in late 2007 was first offered last year. There is no evidence that Applicant was coerced into taking a lifestyle polygraph, only that he was seeking a special access clearance. Applicant failed to provide an explanation or interpretation of that facts that would reconcile his version of what happened in 2007 with the summary made by another agency at that time. Neither Criminal Conduct Mitigating Condition AG ¶ 32(a) (*so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*) nor AG ¶ 32(c) (*evidence that the person did not commit the offense*) applies. None of the other mitigating conditions apply.

### **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 an applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). Under AG ¶ 2(c), the ultimate determination of whether to grant 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, as well as the whole-person factors. Applicant is an educated, 40-year-old man who is married and has two minor children. He is a highly regarded employee and has won the admiration of his peers.

In his late 30s, Applicant applied for a special access clearance with another governmental entity. During that process, he admitted to searching for and accessing child pornography on the Internet. In the face of a highly detailed Government summation of his interview which detailed his admission and related comments, Applicant failed to substantiate his claim that he later effectively recanted this admission. Moreover, he failed to provide a plausible explanation as to why that contemporaneous Government document would purposefully, and with great detail, misrepresent his interview statements. Lacking some tangible evidence that the Government document is false or intentionally misleading, or that only his rendition of the facts is true, Applicant's admission – which he agrees was at least initially made – remains at issue. This is not to say that Applicant's entire rendition of the facts is patently false. Rather, Applicant failed to meet his burden, which, in these proceedings, is placed squarely on an applicant. Given that any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information, I find that Applicant failed to mitigate security concerns arising under personal conduct, sexual behavior, and criminal conduct. Clearance is denied.

### **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
Subparagraphs 1.b-1.c:	For Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant a security clearance. Clearance denied.

ARTHUR E. MARSHALL, JR.  
Administrative Judge