



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 10-06812

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: Amy Broderick, Esq.

07/18/2013

Decision

Harvey, Mark, Administrative Judge:

Applicant has a history of viewing internet pictures of nude children. He lied when he attempted to minimize the magnitude of the frequency of this conduct. Sexual behavior concerns are mitigated because the images were not sexually explicit; however, personal conduct concerns raised by his false statements are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On September 16, 2011, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) or SF 86. (GE 1) On February 22, 2013, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) the President promulgated on December 29, 2005.

The SOR alleged security concerns under Guidelines D (sexual behavior) and E (personal conduct). (Hearing Exhibit (HE) 2) The SOR detailed reasons why DOD was unable to find that it is clearly consistent with the national interest to continue a security

clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

On March 22, 2013, Applicant responded to the SOR. (HE 3) On April 22, 2013, Department Counsel requested a hearing. (Tr. 11; HE 4) On May 15, 2013, Department Counsel indicated he was ready to proceed on Applicant's case. On May 23, 2013, the case was assigned to me. On June 11, 2013, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for July 8, 2013. (HE 1) Applicant's hearing was held as scheduled. Department Counsel offered 4 exhibits, and Applicant offered 12 exhibits. (Tr. 17-22; GE 1-4; AE A-L) There were no objections, and I admitted GE 1-4 and AE A-L. (Tr. 19, 22) Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR. (HE 1-3) On July 16, 2013, I received the transcript of the hearing.

Findings of Fact¹

Applicant's SOR response admitted the allegation in SOR ¶ 1.c, and he denied the remaining SOR allegations. (HE 3) He made some partial admissions, and he provided extenuating and mitigating information. (HE 3) His admissions are accepted as findings of fact.

Applicant is a 52-year-old information technology and cyber warfare quantitative analyst and program manager employed by a defense contractor for the previous 11 years. (Tr. 59, 91-93; GE 1; AE G) In 2010, approximately 30 people worked for him. (Tr. 30) He honorably retired from the Navy after serving from 1982 to 2002. (Tr. 24-25, 59) His specialty in the Navy was nuclear engineering. (Tr. 24) He retired with the rank of lieutenant commander. (Tr. 59)

Applicant married in 1979 and divorced in 2007. (GE 1) He married his current spouse in 2009. (GE 1) His children were born in 1984, 1986, and 1990, and his stepchild was born in 2007. (GE 1) In 1982, he received a bachelor's degree in mathematics and chemistry with high honors. (AE G) In 1991, he was awarded a master's degree in operations research, and he was the top graduate in his master's degree program. (Tr. 59; AE G)

Applicant held a security clearance for 27 years, until it was revoked in 2010. (Tr. 24) He has never been investigated or punished for violating security rules or regulations. (Tr. 29) At times, he was granted access to sensitive compartmented information (SCI) and various special access programs (SAP). (Tr. 24)

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

False Statements Described as Personal Conduct Concerns in the SOR

In a June 28, 2010 affidavit, Applicant stated that over the last 20 years he visited pornographic websites about once or twice a week. (GE 2 at 5) In this affidavit, he said he visited an internet website containing images of nude minors on only two occasions around 1999. (SOR ¶ 2.b; GE 2 at 4-5)

On June 26, 2011, Applicant responded to DOHA interrogatories stating, “In the past 15 years, I have seen on approximately two occasions what appeared to be minors in partially or fully nude photos.” (SOR ¶ 2.c; GE 3 at 10)²

In November 2003 and December 2004, Applicant was polygraph tested and interviewed. (GE 4(b) and 4(c)) The polygrapher summarized the statements Applicant made. Those statements contradict Applicant’s statements that he only viewed nude or partially nude images of children on two occasions.

Applicant’s Descriptions of his Polygraphs

Applicant’s first full scope polygraph was in 2003. (Tr. 31) He went to five or six polygraph sessions. (Tr. 32) Each of them lasted three to five hours. (Tr. 37) The polygrapher was very aggressive during the second and third sessions, and he kept “getting in Applicant’s face” and accusing him of holding back information. (Tr. 36) The polygrapher threatened to “pull” Applicant’s clearance. (Tr. 36) He inferred that the polygraph results were not satisfactory. (Tr. 31, 35) After the polygraph, he was moved off of a sensitive contract, and his entry to a sensitive building was denied. (Tr. 32-33) He was informed his security clearance was revoked, and he was barred from a conference. (Tr. 34)

Applicant said he “was very afraid to deny anything [the polygrapher said due to] fear – because a lot of times [he] couldn’t really remember the whole situation. . . .” (Tr. 38) Even though the polygrapher pressured Applicant to admit illegal drug use, he was able to truthfully and consistently deny illegal drug use. (Tr. 40) He contended the polygraph summaries were not accurate, but conceded he “didn’t really remember very well. . . .” (Tr. 42) The polygrapher used the term “child pornography,” and Applicant “was afraid to correct him on that, and just kind of let him keep saying it.” (Tr. 44)

Applicant denied that he had ever seen or attempted to see child pornography. (Tr. 45) He denied that he ever downloaded or intentionally saved child pornography on his computer. (Tr. 46-47, 104-105) He told the polygrapher that he did not delete the temporary files, which are generated when a picture is viewed on a browser. (Tr. 46)

² In his March 22, 2013 response to SOR ¶¶ 2.b and 2.c, Applicant said, “To the best of my honest recollection today, it occurred only once or possibly twice. Again, what I am absolutely sure of is that it was not a routine occurrence over several years.” (SOR response at 4-5) He said he did not recall telling the polygrapher that it “happened twice a month over that period [2000 to 2003].” *Id.* at 5.

Applicant was unsure about when he began going to websites to view pornography, and he concluded it “was like in the mid to late [19]90s.” (Tr. 60) It could have been in 1999 or 2000. (Tr. 61, 83) He was unsure how he happened to view the pictures of children; however, he suggested about 15 years ago, he was “looking up something about nudist organizations or something along those lines . . . and then there was, you know, ‘Here’s a nude family.’” (Tr. 48) He tried to describe the pictures he viewed to the polygrapher. (Tr. 44) He denied that he enjoyed seeing or wanted to see the pictures, and he described them as “creepy.” (Tr. 48-49) He denied that he had any “strange desires” while coaching kids for many years. (Tr. 57) He denied that he would take advantage of children. (Tr. 57) He has never received counseling for his interest in children. (Tr. 57) He was not ashamed of his conduct, and he did not believe he was susceptible to coercion. (Tr. 58)

Use of his Employer’s Computer to View Pornography

From about 2000 to around 2009, Applicant used his company-issued laptop computer to visit pornographic internet websites to view images of pornography in violation of company policies prohibiting such activities. (SOR ¶ 1.c; GE 4(c)) The allegations in SOR ¶¶ 1.a to 1.c were cross-alleged as a personal conduct concern in SOR ¶ 2.a.

Applicant has worked with computers and other information technology equipment for many years. (Tr. 50) When Applicant first began working for his current employer, his employer provided a laptop computer to him for his use. (Tr. 50) He was authorized to use the laptop for some personal business such as email communications. (Tr. 51) He was not issued a user agreement or provided rules stipulating the extent of personal use he was authorized on his employer’s laptop computer. (Tr. 52) When he was off duty in the evenings, he used his employer’s laptop computer to view adult pornography. (Tr. 52) He told a DOD polygrapher in October 2003 to November 2003, he viewed approximately 100 images of adult pornography on his employer-issued laptop computer. (Tr. 72-73) He could not remember whether he told the polygrapher that there were possibly some images of child pornography on his assigned company-issued laptop computer. (Tr. 74)

Around 2007, he learned that his employer has a policy that prohibits use of the employer’s computer to view adult pornography. (Tr. 52-53, 92) He never investigated when the computer-use policy of his employer went into effect. (Tr. 91) There was no evidence of the actual computer-use policy or clarification on when that policy went into effect. He denied that he used his employer’s laptop computer to view adult pornography after learning about this policy. (Tr. 52-53) He is normally diligent and conscientious about compliance with computer-use limitations, and he conceded it was a mistake that he should not have made. (Tr. 54) He purchased a personal computer that he takes on trips so that he can comply with the personal use restrictions on his employer’s laptop computer. (Tr. 54)

Applicant's Claims about His Statements to DOD Polygraphers

Applicant repeatedly said that he could not remember details about what he said to the polygrapher in 2003 and 2004. (Tr. 61, 62, 64-67, 69, 74, 77, 79) For example, he said he could not remember whether or not he told the polygrapher that he masturbated while looking at pictures of children on nudist websites, and that he masturbated later when recalling children he viewed in the mall, as reported by the polygrapher. (Tr. 79-81) He conceded he may have told the polygrapher something about fantasizing about having sex with females age 14 to 16 years old that he coaches. (Tr. 76) He remembered telling the polygrapher: (1) he went to certain websites, including nudist websites on the internet; (2) he viewed nude images of adults and children walking or sitting on the beach; (3) he never had sexual contact with a minor; (4) he never deliberately saved any images of child pornography on his computer; (5) he never fantasized about having sex with his own children; and (6) he viewed the image of a 13-year-old child posing without a shirt on the internet. (Tr. 62-64, 69-70, 77, 79)

Applicant said he told the polygrapher that he viewed more than one nude image of a child (a person under the age of 18), even though it was not true because he was worried about losing his security clearance. (Tr. 65) He told the polygrapher that he viewed or downloaded "candid, nude pictures of females between the ages of 14 to 16 years old engaged in various non-sexual activities." (Tr. 68) He denied that he told the polygrapher that he remembered an image of nude females 14 to 16 years old playing volleyball; however, the polygrapher could have concluded that Applicant made this admission from his discussion about the non-sexual nature of the images. (Tr. 68-69) He viewed the images of nude or semi-nude children on his browser, but did not intentionally save them on the hard drive of his computer. (Tr. 70-71)

Applicant's Actual Statements to Polygraphers

From about 2000 to at least 2003, Applicant visited internet sites where he viewed females between the ages of 14 and 16 on multiple occasions. (SOR ¶ 1.a; GE 4(c) at 1-2) He also possessed and retained images of nude minors on his personal computer. (SOR ¶ 1.b; GE 4(c)) Applicant masturbated to images of nude adults and children in natural settings such as beaches. (GE 4(c) at 1)

Applicant denied that any of the pictures he viewed showed children engaged in sexual acts or in "sexually provocative poses." (GE 4(c) at 1) All the pictures involving children were from nudist websites and involved children in natural settings, such as walking or sitting on the beach. (GE 4(c) at 1)

Applicant stated in November 2003:

SUBJECT clarified that HE viewed a combination of adult and child pornography at these websites. SUBJECT was aware that the websites HE visited could possibly [contain] illegal images of children under the age of 18 years old. SUBJECT knowingly visited these websites that contained the illegal images and deliberately viewed the illegal images. . . . **Since**

2000, SUBJECT has deliberately searched for and viewed/downloaded images of child pornography from various nudist websites approximately twice per month. SUBJECT last viewed the aforementioned images the week prior to this report. SUBJECT advised the images HE viewed/downloaded contained candid nude pictures of females between the ages of 14-16 years old engaged in various non-sexual activities. SUBJECT indicated the images appear to have been taken at various nudist colonies. (Emphasis added; GE 4(b) at 1-2)

Applicant said that he “feels guilty about fantasizing having sex with females (14-16 years old) that HE coaches on a softball team. SUBJECT began having sexual fantasies about HIS female softball players in approximately 1998. SUBJECT’s last sexual fantasy with a minor occurred on 20 November 2003.” (GE 4(b) at 2)³

Applicant “peek[s] down the shirt, up the skirt or shorts of females between 10 and less than 18 years of age. SUBJECT does so out of curiosity to see if HE can see their breasts or underwear. SUBJECT will later recall these images and masturbate to them.” (GE 4(c) at 1)

Psychological evaluation

Applicant met with a psychological counselor on June 5, 2013, in preparation for his hearing. (Tr. 85; AE J) He met with the counselor for about 20 minutes. (Tr. 86) Applicant provided the facts used by the counselor for the evaluation. (Tr. 87) Applicant did not provide the reports of the polygraphers because he considered them to be inaccurate and biased. (Tr. 87) The evaluation determined that pedophilia was not a safety concern and that he was a low risk for offending. (AE J)

Character Evidence

Ten of Applicant’s colleagues and friends wrote letters supporting reinstatement of his security clearance. (AE A, K, L) They have known him as a Navy officer, coach, friend, and co-worker. (AE A, K, L) They described him as honest, reliable, professional,

³ Evidence of non-SOR allegations may only be considered for limited purposes. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

(a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See *also* ISCR Case No. 09-07219 at 4-5 (App. Bd. Sep. 27, 2012) (stating same). Consideration of any non-SOR allegations is strictly limited to these five circumstances.

rational, calm, conscientious about security and compliance with rules and policies, friendly, and trustworthy. (AE A, K, L)

Applicant's employer issued letters to Applicant lauding his hard work and successful endeavors on behalf of his employer. (AE B-D) His employer promoted him, gave him awards, and issued positive evaluations to him. (AE C, D, F) He received a letter of appreciation from an Air Force brigadier general for his contributions to an Air Force program. (AE E) He was awarded work-related certifications, indicating his efforts to improve his value to his employer. (AE H, I)

A colleague, who has known Applicant personally and worked with him professionally for nine years, described Applicant as intelligent, trustworthy, honest, dedicated, a good supervisor, helpful, generous, and detail oriented. (Tr. 98-101) Applicant is a mentor, who exercises good judgment. (Tr. 101)

Applicant's employer emphasized the core values of integrity and trustworthiness. (Tr. 26-27) Applicant believes mission accomplishment and emphasis on these values is crucial. (Tr. 27) Applicant is diligent and conscientious about security and protection of classified materials. (Tr. 28-29)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that, "no 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 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 meeting the criteria contained in the adjudicative guidelines (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 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. Adverse clearance decisions are made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision on any express or implied determination as to applicant’s allegiance, loyalty, or patriotism. It 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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

The relevant security concerns are under Guidelines D (sexual behavior) and E (personal conduct).

Sexual Behavior

AG ¶ 12 describes the security concern pertaining to 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 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.

AG ¶ 13 lists four conditions that could raise a security concern and may be disqualifying including:

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

(b) a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;

(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.

None of the disqualifying conditions apply. The SOR alleges that Applicant visited internet websites to view images of nude minors; he had images of nude minors on his personal computer; and he used his company-issued laptop computer to visit adult pornography websites, in violation of company policy. (SOR ¶¶ 1.a-1.c) The allegations in SOR ¶¶ 1.a to 1.c are established, except there is no evidence about when his company issued a policy prohibiting use of company-issued laptop computers to visit adult pornography websites. Essentially, SOR ¶¶ 1.a and 1.b do not allege conduct which causes a security concern because of the lack of evidence that the images of children he viewed were “sexually explicit.”

There is no evidence that the images of children he viewed on the internet were pornographic. “As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246-47 (2002). Pornography depicting actual children can be proscribed whether or not the images are obscene because of the State’s interest in protecting the children exploited by the production process. *New York v. Ferber*, 458 U.S. 747, 758, 761 (1982). “[W]here the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment. See *id.* at 764-765 (‘The distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection’).” *Ashcroft*, 535 U.S. at 421.

Title 18 U.S.C. § 2256 defines the pertinent terms for a child pornography offense under federal law.⁴ Applicant denied to the polygrapher that he observed minors

⁴ 18 U.S.C. § 2256 states:

(1) “minor” means any person under the age of eighteen years;

(2) (A) Except as provided in subparagraph (B), “sexually explicit conduct” means actual or simulated--

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

engaged in “sexually explicit conduct.” See 18 U.S.C. § 2256(2). The DOD polygrapher refers to the term, “child pornography,” but never describes any images meeting the

- (ii) bestiality;
- (iii) masturbation;
- (iv) sadistic or masochistic abuse; or
- (v) lascivious exhibition of the genitals or pubic area of any person;
- (B) For purposes of subsection 8(B) of this section, “sexually explicit conduct” means--
 - (i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;
 - (ii) graphic or lascivious simulated;
 - (I) bestiality;
 - (II) masturbation; or
 - (III) sadistic or masochistic abuse; or
 - (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person;
- (3) “producing” means producing, directing, manufacturing, issuing, publishing, or advertising;
- (4) “organization” means a person other than an individual;
- (5) “visual depiction” includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format;
- (6) “computer” has the meaning given that term in section 1030 of this title [18 USCS § 1030];
- (7) “custody or control” includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;
- (8) “child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--
 - (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
 - (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
 - (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.
- (9) “identifiable minor”--(A) means a person--(i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or (II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and
 - (ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and
- (B) shall not be construed to require proof of the actual identity of the identifiable minor.
- (10) “graphic”, when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and
- (11) the term “indistinguishable” used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

definition of “sexually explicit” conduct under 18 U.S.C. § 2256(2). Moreover, the polygraph reports state Applicant denied that any of the images Applicant viewed showed children engaged in sexual acts or in “sexually provocative poses.” Further, Applicant explicitly told the polygrapher that all pictures of children were from nudist websites and involved children in natural settings such as walking or sitting on the beach.

Applicant’s private viewing of adult pornography on a personal laptop computer or other privately owned media, and masturbation in private are protected conduct under the First Amendment and the liberty interest of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. See *Lawrence v. Texas*, 539 U.S. 558 (2003)(discussing right to engage in private, consensual sexual behavior); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (discussing adult pornography and First Amendment). His sexual conduct is not a basis for coercion or duress. His sexual behavior involving viewing adult pornography in the privacy of his home does not cast doubt on his current reliability, trustworthiness, and good judgment. There is insufficient evidence that the children’s images were “sexually explicit” as defined in 18 U.S.C. § 2256(2). Sexual behavior security concerns are refuted.

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.

Two personal conduct disqualifying conditions under AG ¶ 16 are potentially applicable to the SOR allegations. Those two disqualifying conditions provide:

- (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; and
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

SOR ¶ 2.a cross alleges the allegation in SOR ¶ 1.a that Applicant “intentionally visited internet websites to view images of nude minors on multiple occasions” as a personal conduct concern. As indicated in the Sexual Behavior section, *infra*, Applicant’s viewing images of nude minors on the internet is constitutionally protected

conduct unless the pictures are sexually explicit or otherwise prohibited by law. Applicant's descriptions of the images do not establish that they were sexually explicit. Accordingly, SOR ¶ 2.a does not allege a security concern.

Applicant stated in an affidavit that he visited an internet website containing images of nude minors on only two occasions around 1999. (SOR ¶ 2.b) On June 26, 2011, Applicant responded to DOHA interrogatories stating, "In the past 15 years, I have seen on approximately two occasions what appeared to be minors in partially or fully nude photos." (SOR ¶ 2.c) These two statements are not true. He visited nudist internet websites and viewed nude or partially nude children on the internet on numerous occasions (twice per month from 2000 to November 2003). He intentionally understated or minimized his viewing of such images. AG ¶¶ 16(a) and 16(b) apply.

Four mitigating conditions under AG ¶ 17 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;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and
- (f) the information was unsubstantiated or from a source of questionable reliability.

None of the mitigating conditions fully apply. Applicant disclosed his penchant for viewing nude or semi-nude children and adults on numerous occasions during or after a polygraph examination. I do not believe Applicant was coerced or pressured into lying to the polygrapher about the frequency he viewed these images. He was able to consistently deny abuse of illegal drugs even though he said the polygrapher pressured him to admit he was abusing illegal drugs. He also repeatedly denied that he intentionally downloaded or saved nude images of children onto his computer, and that the children were engaged in sexually explicit conduct. The polygraph reports are accurate statements of Applicants admissions about viewing adult pornography and the frequency he viewed images of children at nudist camps.

Applicant admitted to the polygrapher that he attempted to look under children's shirts, skirts, and shorts to see their breasts and whether they were wearing panties. He told the polygrapher that he fantasized about sex with the children he was coaching. However, at the hearing he denied that he had any "strange desires" while coaching kids for many years. He denied that he viewed nude or semi-nude children on the

internet more than twice. I do not believe he was honest at his hearing. See note 3, *supra*. Applicant has not fully come to terms with his proclivity to view adult pornography and nude children on the internet. At his hearing, he minimized his sexual interest in children. He repeatedly denied remembering facts and details. His memory lapses and outright denials of conduct previously admitted in the polygraph interviews were not credible. Personal conduct concerns are not mitigated.

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 have incorporated my comments under Guidelines D and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) warrant additional comment.

There are some facts supporting mitigation of security concerns under the whole-person concept; however, they are insufficient to fully mitigate security concerns. Applicant is a 52-year-old information technology and cyber warfare quantitative analyst and program manager employed by a defense contractor for the previous 11 years. He honorably retired from the Navy after serving 20 years, as a nuclear engineer. In 1982, he received a bachelor's degree in mathematics and chemistry (high honors), and in 1991, he was awarded a master's degree in operations research (top graduate). He held a security clearance for 27 years, and he has never been investigated or punished for violating security. At times he was granted access to SCI and various SAPs. Ten of Applicant's colleagues and friends wrote letters and one spoke on his behalf at his hearing. They strongly supported reinstatement of his security clearance. They described him as trustworthy, friendly, intelligent, honest, helpful, generous, reliable, professional, rational, calm, and conscientious about security and compliant with rules and policies, as well as having good judgment. His employer lauded Applicant's diligence and success by giving him awards, promotions, additional responsibility, and positive evaluations. He received a letter of appreciation from an Air Force brigadier general for his contributions to an Air Force program, and he earned work-related certifications, demonstrating his efforts to enhance with qualifications.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant has a long history of viewing adult pornography and nude or semi-nude children. His viewing of adult pornography and nude and semi-nude, non-sexually explicit images of children is constitutionally-protected conduct. There is a risk that he will view child pornography on those same websites and that he will violate federal law when he does so. Applicant visited nudist internet websites and viewed nude or partially nude children on the internet on numerous occasions (twice per month from 2000 to November 2003). He intentionally understated or minimized his viewing of such images. Applicant's June 28, 2010 and June 26, 2011 statements (SOR ¶¶ 2.b and 2.c), his March 22, 2013 response to SOR ¶¶ 2.b and 2.c, and his hearing statement contained false denials that he viewed nude or semi-nude images on more than two occasions. Accurate information in a security context is crucial to national security. His repeated and recent materially false statements show lack of judgment and raise unresolved questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See note 3, *infra*.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Sexual behavior concerns are mitigated; however, personal conduct concerns are not mitigated. Eligibility for access to classified information 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 D:	FOR APPLICANT
Subparagraphs 1.a to 1.c:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraphs 2.b and 2.c:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge