DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 11-03696
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Stephanie Hess, Esq., Department Counsel
For Applicant: *Pro se*

11/14/2013

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

From 1993 to 2009, Applicant illegally downloaded and, in some cases, copied and distributed software, movies, and video games. In 2006 or 2007, he illegally used Percocet once while holding a security clearance. After inadvertently viewing child pornography via an image-posting forum on the Internet on three occasions in 2008, he downloaded two images that were sexually exploitive of young women, whom he believed were of college age but could have been as young as 16. He drove a vehicle while intoxicated at least once annually between 2005 and October 2009. As of September 2013, Applicant was continuing to associate with persons who regularly smoke marijuana. Alleged misrepresentation of his past marijuana use was not established, and there has been no recurrence of access to child pornography, drunk driving, or illegal drug use in more than four years. Yet, criminal conduct and personal conduct concerns are not fully mitigated. Clearance denied.

Statement of the Case

On May 29, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security

concerns under Guideline E (Personal Conduct), Guideline D (Sexual Behavior), and Guideline J (Criminal Conduct), and explaining why it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action 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.

On June 26, 2013, Applicant responded to the SOR allegations. He requested a decision based on the written record without a hearing. Pursuant to E.3.17, the Government requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. (Tr. 15.) On August 22, 2013, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On August 29, 2013, I scheduled a hearing for September 26, 2013.

I convened the hearing as scheduled. Eight Government exhibits (GEs 1-8) were admitted without objection. Applicant testified, as reflected in a transcript (Tr.) received on October 18, 2013. Based on the Government's evidence, Department Counsel withdrew SOR allegation 1.c.

Summary of the Pleadings

The SOR as amended alleges under Guideline E (SOR 1.a), Guideline D (SOR 2.a), and Guideline J (SOR 3.a) that Applicant viewed and downloaded underage pornography between 2008 and October 2009. Under Guidelines E and J, the SOR alleges that Applicant illegally used Percocet while possessing a security clearance around October 2006 (SOR 1.b and 3.a); operated a motor vehicle under the influence of alcohol at least once a year from 2005 until 2009 (SOR 1.f and 3.a); left the scene of an accident involving property damage that he caused while driving under the influence in December 2008 (SOR 1.g and 3.a); and illegally downloaded and distributed software, movies, and video games from 1993 until January 2009 (SOR 1.h and 3.a). The SOR alleges solely under Guideline E, that Applicant allegedly falsified his March 2006 security clearance application by reporting a last use of marijuana in May 2004 when he smoked it to at least December 2005 (SOR 1.d), and that he frequently associates with friends and acquaintances who regularly smoke marijuana (SOR 1.e).

In his detailed Answer to the SOR, Applicant indicated that he accessed images of child pornography inadvertently. While he downloaded two pornographic images in December 2009, he believed the females were of college age. Applicant denied the alleged lack of candor about his marijuana involvement and explained, "I do not have any real idea on when [was] the last time I smoked marijuana." Applicant admitted that he had illegally used Percocet on one occasion while he held a security clearance; that he frequently associates with persons who regularly use marijuana; that he drove under the influence of alcohol at least once yearly from 2005 to 2009; that while driving under the influence of

alcohol around December 2008, he damaged a privately-owned fence, although he intended to report the damage the next morning; and that he illegally downloaded and distributed software, movies, and video games from 1993 until January 2009.

Findings of Fact

After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 32-year-old senior information systems engineer. He was granted a Secret clearance in or before February 2007. (GE 1.) Applicant's Secret clearance was apparently suspended after he was denied a Top Secret clearance and access to sensitive compartmented information (SCI) in May 2010. (GEs 3, 5, 6; Tr. 30-31.)

Applicant smoked marijuana with friends about 15 times total, starting in September 1996 while in high school and ending in 2004 or 2005. (GEs 1, 7, 8; Tr. 43-44, 58-59.) Applicant obtained the marijuana from his friends without cost to him, except for one occasion in 2003, when he paid $5 for the drug. (GE 7.)

Applicant was awarded his bachelor's degree in June 2003. (GE 8.) From June 2003 to September 2005, Applicant worked as a lab assistant at the university. In May 2004, Applicant left the college dormitory environment and moved back into his mother's home. (GEs 1, 8.) From September 2005 to December 2006, Applicant held a part-time research assistant position while pursuing his graduate degree at the university. Around March 2006, Applicant began working for his current employer as a student intern. (GEs 1, 8.)

On March 21, 2006, Applicant completed and certified to the accuracy of an Electronic Questionnaire for Investigations Processing (e-QIP) for a Secret clearance for his duties with the defense contractor. Applicant responded affirmatively to any illegal drug use in the last seven years. He indicated that he used marijuana less than 10 times from September 1999 to May 2004, and added, in part, "It was just a few times experimenting during college. I have no future plans to try it again." (GE 8.) Applicant was granted a Secret clearance, and in February 2007, he became a full-time computer programmer for the defense contractor. (GE 1.)

While at a party in October 2006 or October 2007,[1] Applicant took two Percocet pills not prescribed for him. Applicant was drinking at the time, and he gave no thought to

[1] Applicant provided discrepant information about the date of his use of Percocet. On his September 28, 2009 SF 86, he indicated that used Percocet in October 2006, but also that he responded affirmatively to having used an illegal drug while he held a security clearance because of that use of Percocet. He provided a date of February 2007 for his clearance grant. He would not have had a clearance when he abused Percocet, unless he was granted an interim clearance shortly after he completed his first security clearance application on March 2, 2006. The report of a March 2010 polygraph examination (admitted as GE 4 without objection) indicates that Applicant used Percocet in October 2007 rather than in October 2006, as he had previously reported. (GE 4.) On September 15, 2010, Applicant provided an affidavit to an Office of Personnel Management (OPM) investigator in which he indicated that he used Percocet in October 2007. (GE 6.)

his security clearance. (GE 2; Tr. 40.) The Percocet was given to him by a friend at no cost. (GE 6.)

On September 28, 2009, Applicant executed a Questionnaire for National Security Positions (SF 86) for an upgrade of his security clearance to Top Secret and access to SCI. Applicant responded affirmatively to questions 23a, concerning any illegal use of a controlled substance in the last seven years, and 23b, about whether he had ever illegally used a controlled substance while possessing a security clearance. He indicated that he used marijuana from September 1996 to December 2005, "a couple times in high school and a few times in college, about once or twice a year, 10-15 times total." In addition, Applicant indicated that he took two Percocet pills in October 2006 "Took two Percocets one night from a friend's prescription. It was a one-time recreational thing. I won't do it or anything like it again. Question 23B is in response to this incident." (GE 1.)

In conjunction with a polygraph examination for SCI access, Applicant was interviewed by a government representative on March 3, 2010. In response to questioning, Applicant disclosed several issues of potential adjudicative significance, as follows:

- Applicant indicated that he used marijuana no later than January 2007 instead of December 2005, as he had previously reported. Also, he used Percocet in October 2007 instead of October 2006.

- Once a month between 1993 and January 2009, he illegally downloaded games to his personal computer. He loaded 50 games onto computer disks (CDs) and gave 10 disks to friends free of charge. As of March 2010, Applicant had 10 CDs but had no illegally downloaded games on his personal computer. Between 1995 and January 2009, Applicant illegally downloaded 14-19 computer software programs with an estimated total value of $6,500. He put five of the programs on CDs and stored the rest on his personal computer. Applicant gave three persons operating software that he obtained illegally.[2] In 2009, he deleted the software from his

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Applicant now indicates that his use was in October 2006. In response to DOD interrogatories, Applicant indicated in March 2013 that he used Percocet in October 2006, six years ago while he was "mostly not working" and was finishing his master's degree:

> Although I held a clearance, I never actually used it to work on anything classified until the 10/2009 time frame. As stated above, I was taking time off from work to focus on school and the security clearance was not something that was in my mind at the time. I did not hold the pill in my hand, thinking about how I was going to take it, in spite of having a clearance. It was not a thought that ever came into my mind.

Applicant explained that he originally thought that he took the Percocet in 2007, but that he later learned that his friend had knee surgery and was prescribed Percocet in October 2006. (GE 2.) If I assume that he was mistaken and that his abuse of Percocet was in October 2006 rather than in October 2007, then Applicant has not explained why he indicated on his SF 86, in his DOD response to interrogatories, in his Answer, and at his security clearance hearing that he used Percocet while he held a clearance. Neither party attempted to clarify the inconsistency.

[2] Applicant testified that while most of his illegal downloading stopped around 2007, he downloaded for a friend's sister a program used to cut up music on the computer. "I was just helping her this one time, so I didn't

personal computer, but he still had five CDs as of March 2010. From February 2007 to summer 2008, he copied 20 movies from rented digital video disks (DVDs) onto his own DVDs.[3] Between 2000 and January 2009, Applicant downloaded six pornographic movies from a website to his personal computer. The movies were still on his computer as of March 2010. Applicant denied any intent to engage in any illegal downloading in the future.

- In late winter 2008, Applicant frequented a website that features comical content. While browsing a "random" sub-forum that allows for anonymous image postings, Applicant clicked on a thumbnail image with subtext inviting the viewer to take a look. Applicant expected to see something funny but the picture was pornographic and involved a young female. A month or so later, in April 2008, Applicant returned to the website where he clicked on a picture with a caption that again led him to think the image would be humorous. The image of underage girls was pornographic in nature. In April or May 2008, while scrolling in the sub-forum, he saw an image of a young, fully-clothed female about to perform oral sex on an adult male. Applicant did not click on that image, and he signed off the site. In October 2009, Applicant accessed two indecent images involving three teenage females. He viewed the images a second time on the website in December 2009, when he downloaded the images to his personal computer. Applicant believed that the teenagers were 18 years old because they appeared to be in a dormitory setting, although he told the interviewer that the girls could have been as young as 16. As of March 2010, the two pictures were still on his personal computer. Applicant denied any intent to engage in similar activity in the future.

- Applicant operated a vehicle while intoxicated once a year from 2005 until late summer or early fall 2009.[4] While he drank on average seven to eight beers on those occasions, he consumed 10 or 11 beers before driving in the last instance. In December 2008, Applicant consumed five pints of beer to intoxication at a local restaurant. He decided to spin his car ("did a donut") in the parking lot of his apartment complex. It was snowing, and he slid into a fence on the property. He left the scene, intending to notify the manager of the damage in the morning. A neighbor reported him to the police, who filed no charges against him. (GE 4.)

On May 20, 2010, Applicant was denied eligibility for SCI access because of his recent viewing of child pornography, illegal downloading, and "undetected" driving while

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want to shell out $600 for it." (Tr. 49-50, 74.)

[3] Applicant copied the movies because he "thought it would be cool to have a big movie library" like his friends. (Tr. 76.)

[4] Applicant testified that a couple of times he drove while intoxicated out of stupidity but also that he drove out of necessity a couple of times. (Tr. 46.) In the December 2008 incident, he hit a fence that belonged to his apartment complex around 12:30 a.m. He decided to park his car and report the damage to the management office in the morning. The police came to his apartment before he had a chance to do so. While he had been drinking, he does not believe that he was intoxicated at the time. (Tr. 47-48.)

intoxicated. (GE 3.) Applicant's Secret security clearance was suspended pending final adjudication of his clearance eligibility. (GE 5.)

On September 10, 2010, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM), partially about his Percocet abuse. He indicated that he used the drug experimentally without a prescription in October 2007. Applicant denied any intent of future abuse. He added that his Secret clearance was temporarily suspended on August 19, 2010, because his application for higher clearance had been denied by another agency "due to his failing the polygraph test." Applicant denied any current association with persons who use illegal drugs. (GE 2.) On September 15, 2010, Applicant provided the investigator with two affidavits. He detailed his use of Percocet in October 2007 and the suspension of his security clearance (GE 6.), and he reiterated that none of his current associates used illegal drugs on a regular basis. (GE 5.)

On October 1, 2010, Applicant was interviewed by an OPM investigator about his marijuana involvement. (GE 2.) Applicant executed an affidavit in which he indicated that he used marijuana with friends twice a year, 15 times total, between 1996 and spring 2005. He indicated that he did not recall the exact dates of his first and last use. Applicant explained that he stopped smoking marijuana when he moved out of the college dormitory, and he denied any intent to use marijuana in the future. (GE 7.)

Around February 2013, the DOD CAF asked Applicant about issues that surfaced during the investigation for a Top Secret clearance and SCI, including why he had not reported on his 2009 SF 86 that he had used marijuana while he held a security clearance in light of information that he smoked marijuana until January 2007. In his March 2013 response, Applicant explained that during his polygraph interview, he gave January 2007 as the date beyond which he could be sure of no marijuana use. He denied any recall of the last date on which he smoked marijuana. He made "a reasonable guess" of December 2005, because that is when he moved out of the college dormitory. Applicant admitted that since moving into the city 1.5 years ago, he has new friends and acquaintances who smoke marijuana, although he denied any intent of future marijuana use. He reported that he used marijuana in the past, on "rare" occasions, "probably 10-15 times total," between January 1996 and December 2005. Concerning his OPM interview report of a last use of marijuana in spring 2005, Applicant attributed the discrepancy to a lack of recall and not to intent to mislead. Applicant disclosed that he used Percocet in October 2006 while he held a security clearance. He gave no thought to his security clearance at the time because was off from work that semester while finishing his master's degree. About his alcohol use, Applicant described his current drinking pattern as two to three times per week. He consumed one to five pints of beer, although once a week he became intoxicated after drinking between five and eight pints of beers. Applicant denied driving while under the influence since "roughly September 2009." (GE 2.)

Applicant has never been charged with any criminal activity. He acknowledged at his September 2013 hearing that he had "made some poor decisions as far as drinking and driving, [his] Percocet use, [and] illegally downloading." (Tr. 52.) Applicant no longer has the software programs, but he still has about 20 movies that he illegally copied between

February 2007 and the summer of 2008. (Tr. 72-74.) Applicant denied any intent to access child pornography. While he admitted downloading a thousand pornographic images in his lifetime, he indicated that none of them involved child pornography. (Tr. 61) He downloaded the two pictures of three girls in a dorm room in December 2009 because he found them "funny." He had no reservations about the females being of age because of the dormitory setting. (Tr. 33-39.)

As for any illegal drug involvement, Applicant now believes that he ingested the Percocet in October 2006 instead of October 2007 as he initially recalled. (Tr. 40-41.) He last smoked marijuana sometime during the 2004-2005 timeframe. (Tr. 44.) Applicant has four or five friends who regularly smoke marijuana, and they have no problem "lighting up" when he is there (Tr. 67-68.), but he leaves the room when they smoke the drug. He has declined offers to smoke marijuana with them, and he is not pressured to join in. (Tr. 46, 68.) He tells his friends either that he doesn't smoke marijuana anymore or that he cannot use the drug because of his job. Applicant is not troubled by his friends' use and possession of marijuana because possession of less than an ounce has been decriminalized by the state. (Tr. 68-69.)

Applicant last drove a motor vehicle while intoxicated in October 2009. He drank with some friends while out celebrating a friend's birthday. When a friend became belligerent, Applicant chose to drive his friend home, even though he was in no condition to operate a vehicle safely. (Tr. 70.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). 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 required to be considered 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 overall 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, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. 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

The security concern for personal conduct is set out in AG ¶ 15:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. 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.

Applicant exercised questionable judgment in several different aspects since he was in high school. Approximately once a month from 1993 to January 2009, Applicant illegally downloaded computer games onto his personal computer (SOR 1.h). He copied about 50 of the games to CDs and distributed 10 CDs to friends. From 1995 to 2007, Applicant illegally downloaded 14-19 software programs for his personal use. In January 2009, he illegally downloaded and copied for a friend's sister a software program costing around $600. From February 2007 to the summer of 2008, Applicant illegally copied 20 movies from rented DVDs with the intent of building his own movie library.

In addition, in early 2008, while browsing an Internet website that allows for anonymous image postings, Applicant inadvertently accessed a pornographic image involving an underage female. Despite reportedly being "pretty, kind of traumatized" by the experience, Applicant returned to the website in April 2008, where he again viewed child

pornography (SOR 1.a). (Tr. 37.) Applicant had expected a humorous rather than a pornographic image on that occasion. In October 2009, he accessed two indecent images involving three females who appeared to be teenagers, albeit in college. In December 2009, he downloaded the indecent images to his personal computer. Applicant speculated during his interview for SCI access in March 2010 that the females could have been as young as 16, although he assumed they were of college age because of the dorm setting. The evidence does not prove that the females in the downloaded images were underage. Nonetheless, concerns about Applicant's judgment are raised by him browsing a website that either permitted child pornography or failed to adequately monitor postings for such illegal content.

Applicant abused mood-altering drugs under circumstances that create doubt about whether he can be counted on to follow rules and regulations. He operated a vehicle while intoxicated once a year from 2005 until October 2009 (SOR 1.f). In December 2008, after drinking five pints of beer, Applicant spun his vehicle around in the snow in the parking lot of his apartment complex, and he damaged a fence. He did not report the incident before he was confronted by the police (SOR 1.g), although he maintains that he intended to contact the apartments' manager. Applicant previously admitted he was intoxicated (GE 4.), although now he does not believe that he was that impaired. (Tr. 48.) In October 2009, Applicant was drunk when he drove a friend who had become belligerent after drinking.

Applicant abused Percocet once, and he provided conflicting dates about when that occurred. Whether he illegally used the drug in October 2006 or in October 2007, he admitted several times that he held a security clearance when he abused the Percocet (SOR 1.b). In addition, Applicant abused marijuana about 15 times while he was in high school and college. Presumably because of the passage of time, the abuse itself was not alleged in the SOR. However, Applicant is alleged to have misrepresented the extent of his marijuana use when he applied for a clearance in March 2006 (SOR 1.d). He is also alleged to currently associate with friends and associates known by him to be regular users of marijuana (SOR 1.e). The evidence shows that Applicant provided several different accounts of his marijuana abuse. On his March 2006 e-QIP, Applicant indicated that he used marijuana fewer than ten times from September 1999 to May 2004. (GE 8.) On his September 2009 SF 86, he reported use of marijuana 10-15 times from September 1996 to December 2005. (GE 1.) He indicated during a polygraph interview in March 2010 that he last used marijuana no later than January 2007 instead of December 2005 as previously reported. (GE 4.) In October 2010, he told an OPM investigator that he smoked marijuana twice a year from 1996 until the spring of 2005, when he moved out of the college dorms. (GE 2.) In response to DOD CAF interrogatories, Applicant indicated in March 2013 that he used marijuana "probably 10-15 times total" while in high school and college between January 1996 and December 2005. He explained that he stopped smoking marijuana because he moved back to his mother's house "in 12/2005." (GE 2.) At his hearing, he testified that the May 2004 date reported by him in March 2006 is likely accurate because of the contemporaneity of the account. Available address information on his March 2006 e-QIP and his September 2009 SF 86 indicates that he moved back home in May 2004 and not in December 2005. Applicant is the sole source of information about his marijuana use. His admitted association with known marijuana users bolsters his credibility. About January

2007 as the date beyond which Applicant was sure of no marijuana use, it suggests the possibility that he smoked the drug after college, but it would not prove that he falsified his March 2006 e-QIP. Applicant's reference to a December 2005 date for his last use was an estimate and possibly due to inaccurate recall of the date he moved out of the college dorm environment. The evidence falls short of proving that Applicant intentionally falsified his March 2006 e-QIP when he disclosed marijuana use only until May 2004. However, personal conduct concerns are raised by Applicant's friendships and associations with known marijuana abusers in light of the evidence that they have no trouble smoking the drug around him. Possession of marijuana remains a crime under federal law, even if possession of minor amounts has been decriminalized in Applicant's state.[5]

Among the seven personal conduct disqualifying concerns that could raise a security concern under AG ¶ 16, the following apply in this case:

> (c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other singe 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; and
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> (g) association with persons involved in criminal activity.

With the exception of maintaining friendships with marijuana users, Applicant has not engaged in any of the conduct of personal conduct concern since 2009. Applicant's access to child pornography was infrequent and apparently inadvertent. His Percocet abuse is aggravated by the fact that he held a security clearance at the time, but it occurred only once. Although he has consumed alcohol to intoxication as recently as March 2013, there is no evidence that he operated a motor vehicle on that occasion. AG ¶ 17(c), "the offense was 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," applies in part. However, Applicant's illegal downloading and distribution of software was to such an extent to make it difficult to mitigate under AG ¶ 17(c). He pirated computer games about once a month for 16 years. He essentially stole computer software worth an estimated $6,500 between 1995 and January 2009. He copied some 20 movies from rented DVDs. AG ¶ 17(c) also cannot reasonably mitigate the concerns raised by his association with marijuana users. As of September 2010, Applicant was not knowingly associating with marijuana users. Sometime before March 2013, while working for his

[5]Under § 94C:32L of the state's Controlled Substances Act, effective January 2, 2009, the state decriminalized possession of one ounce or less of marijuana, making possession of one ounce or less a civil offense subject to a $100 fine and forfeiture of the drug. Marijuana is a Schedule I controlled substance under the Controlled Substances Act (21 U.S.C. § 812). Under federal law, Schedule I controlled substances are those drugs or substances which have a high potential for abuse, no currently accepted medical use in treatment in the United States, and lack accepted safety for using the drug under medical supervision.

defense contractor employer, he established friendships with marijuana users. Since then, his friends have used marijuana while socializing with him.

Applicant testified that he leaves the room when his friends begin smoking marijuana, and he denies any social pressure to use marijuana. However, Applicant continues to justify these friendships on the basis that the state has decriminalized minor marijuana use. He is not going to tell his friends and acquaintances what to do. (Tr. 46.) The Government is not in the business of dictating a person's friends and associates. Yet, by choosing to associate with persons involved in activity that continues to be illegal under federal law, Applicant has not shown the reform required under AG ¶ 17(d) or AG ¶ 17(g), which provide as follows:

> (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and
>
> (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's illegal downloading, copying, and distribution of copyrighted material is not mitigated under AG ¶ 17(d). He showed an unacceptable tendency to justify his illegal downloading on the basis that everyone did it in college ("You know, all the way through college, I don't know one college student who doesn't illegally download movies or, or songs, or anything like that and give them to their friends."), and with respect to his downloading of the music-splicing software program in January 2009 when he could afford the cost, that he wasn't going to pay $600 for a program that he was only going to use once. As of his hearing in September 2013, he still possessed the 20 movies illegally downloaded from rented DVDs. Considerable personal conduct concerns persist because of his years of pirating copyrighted material and his association with marijuana users.

AG ¶ 17(d) has some applicability in that Applicant's abuse of Percocet was under a circumstance that is not likely to recur. Applicant was provided the drug by a friend who had a prescription following surgery. As of March 2013, Applicant was drinking alcohol to intoxication once a week, but there is no evidence that he has driven a vehicle after drinking since October 2009. About the likelihood of Applicant accessing child pornography, Applicant denied frequenting websites featuring child pornography or accessing the sub-form involved in his inappropriate access since 2009. (Tr. 62-63.) AG ¶ 17(f), "the information was unsubstantiated or from a source of questionable reliability," applies only in that access to child pornography was inadvertent.

Guideline D, Sexual Behavior

The security concerns about sexual behavior are set out in AG ¶ 12:

> 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.

As discussed under Guideline E, Applicant viewed images involving child pornography on a website that allowed for random image postings. After inadvertently viewing an image that involved a minor female in early 2008, Applicant returned to the website in April 2008 where he clicked on a thumbnail image of four young girls, at least one of whom had her genital area exposed. In April or May 2008, while scrolling in the sub-forum, Applicant saw an image of a young, fully-clothed female about to perform oral sex on an adult male. In October 2009, Applicant accessed two indecent images of three young women, whom be believed were of college age. Applicant downloaded the images to his personal computer in December 2009. Three disqualifying conditions under AG ¶ 13 apply:

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

Pornography involving minors is criminal, although Applicant's access to some of the images was inadvertent. Whether or not his initial access to the images of the three female teenagers in October 2009 was accidental, he knew after viewing them that they were pornographic in nature. His subsequent viewing and downloading of the images in December 2009 was intentional. Applicant continues to believe that the girls were at least 18 years old based on the dorm setting. Whether they were 18 or as young as 16, access to pornography, especially involving minors, is conduct that could adversely affect an individual's reputation and make one vulnerable to coercion, exploitation, or duress. His behavior also reflects a lack of discretion or judgment.

Mitigating condition AG ¶ 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," is implicated with regard to child pornography. While Applicant testified that he has downloaded about 1,000 pornographic images to his personal computer over the years, there is no evidence of recent access to child pornography. AG ¶ 14(c), "the behavior no longer serves as a basis for coercion, exploitation, or duress," is satisfied in that he made the Government aware of his involvement with pornography, albeit during a post-polygraph

interview and his security clearance hearing. AG ¶ 14(d), "the sexual behavior is strictly private, consensual, and discrete," is not pertinent to the facts of this case.

Guideline J, Criminal Conduct

The security concerns about criminal conduct are set out in AG ¶ 30:

> 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.

Applicant has a long history of criminal conduct starting in 1993, when he began illegally downloading copyrighted materials. It includes viewing of child pornography, the illegal use of a prescription narcotic, repeated drunk driving, and the distribution to friends of pirated computer games and software, as detailed above. Two disqualifying conditions, AG ¶ 31(a), "a single serious crime or multiple lesser offenses," and AG ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted," are firmly established.

As already discussed under Guideline E, the extent and duration of Applicant's illegal downloading, copying, and distribution of copyrighted materials makes it difficult to fully apply AG ¶ 32(a), "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstance that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," even if the other criminal conduct concerns are mitigated by the passage of time without recurrence and by no future intent. Applicant appears to have a good work record with the defense contractor. He started as a student intern, was hired as a computer programmer, and is now a senior information systems engineer. A good employment record is indicative of reform under AG ¶ 32(d), which provides as follows:

> (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

At the same time, Applicant's reform is incomplete without an appropriate expression of remorse or meaningful acknowledgement of its illegality. While he testified that he makes no excuses for the illegal downloading, he described it as "a lesser offense." (Tr. 93.) He still has 20 movies that he copied for his personal use between 2007 and the summer of 2008. A full appreciation of the seriousness of his behavior, and an attitude to put his past behind him would require at a minimum that he rid himself of the fruits of his illegal conduct. The criminal conduct concerns are not fully mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(a).[6]

Applicant has a long history of illegal behavior that did not stop once he started working for his defense contractor employer. He abused a narcotic while he held a security clearance. He continued to illegally download computer software for himself and friends. After he became a full-time employee, he illegally copied movies from rented DVDs in an effort to build his own movie library. In January 2009, he illegally downloaded and gave a friend's sister a computer program that cost around $600 because he didn't want to spend the money for a program of limited use to him. He operated a motor vehicle while intoxicated in October 2009. In December 2009, he downloaded two images that were sexually exploitive of young women, whom he speculated were around 18 years old. Applicant continues to socialize with friends who regularly use marijuana, including when he is around them. Applicant showed good judgment in removing himself from the immediate presence of these friends while they are abusing marijuana. However, it is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990.). Based on the facts before me and the adjudicative guidelines that I am required to consider, I am unable to conclude that it is clearly consistent with the national interest to continue Applicant's security clearance at this time.

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:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Withdrawn
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant

[6]The factors under AG ¶ 2(a) are as follows:

> (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.

Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Paragraph 2, Guideline D:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge