



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



In the matter of:)
)
-----) ISCR Case No. 11-05850
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro se*

12/26/2012

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding sexual behavior and personal conduct. Eligibility for a security clearance and access to classified information is granted.

Statement of the Case

On December 29, 2009, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).¹ On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to the interrogatories on March 12, 2012.² DOHA issued a Statement of Reasons (SOR) to him on May 16, 2012, under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative*

¹ Item 5 (SF 86, dated December 29, 2009).

² Item 6 (Applicant’s Answers to Interrogatories, dated March 12, 2012).

Guidelines for Determining Eligibility For Access to Classified Information (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guidelines D (Sexual Behavior) and E (Personal Conduct), and detailed reasons why DOHA was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant received the SOR on May 25, 2012. In a sworn statement, dated June 8, 2012,³ Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was provided to Applicant on November 1, 2012, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on November 9, 2012. He timely submitted a response to which there was no objection. The case was assigned to me on December 18, 2012.

Findings of Fact

In his Answer to the SOR, Applicant admitted a portion of one of the factual allegations pertaining to sexual behavior (§ 1.a.) as well as two other factual allegations pertaining to personal conduct (§§ 2.b. and 2.c.). Applicant's admissions are incorporated herein as findings of fact. He denied the remaining allegations or portions thereof. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 53-year-old employee of a defense contractor who, since October 2008, has been serving as a strategy consultant.⁴ He had previously been a program and project manager with another employer from June 1999 until October 2008. He has never served in the U.S. military.⁵ He was apparently granted a secret security clearance in June 1986,⁶ but a subsequent application for a top secret security clearance with access to sensitive compartmented information (SCI) with another agency or department was denied in April 2008.⁷

³ Item 4 (Applicant's Answer to the SOR, dated June 8, 2012).

⁴ Item 5, *supra* note 1, at 13-14.

⁵ Item 5, *supra* note 1, at 18.

⁶ Item 5, *supra* note 1, at 38.

⁷ Item 7 (Letter from Senior Adjudication Officer, dated June 20, 2008). A clearance decision statement (CDS) was previously issued against Applicant alleging criminal conduct pertaining to his previous downloading and viewing of nude images of underage females. No mitigation was found, and he was deemed ineligible for access to SCI. He never filed an appeal of that decision.

Applicant attended a university from September 1977 until June 1981, and received a bachelor's degree in in June 1981. He attended another university from January 1982 until May 1984, and received a master's degree in May 1984.⁸ Applicant was married in 1988 and divorced in 2000.⁹ He has two sons (born in 1990 and 1993).

Sexual Behavior

(SOR ¶ 2.b.): In approximately October or November 1991, while testing a new Internet connection on a company computer, Applicant deliberately misused the information technology system (IT system) by downloading a series of pornographic images onto the company computer in the office.¹⁰ **(SOR ¶ 2.c.):** Four years later, in approximately September 1995, he again misused the IT system on two separate occasions within days of each other by downloading erotic stories onto a company computer.¹¹ There were no adverse consequences of his actions, and as far as he is aware, no one else was aware of what had occurred. There is no evidence that Applicant misused employer IT systems since the last incident 17 years ago.

(SOR ¶ 1.a.): There is some controversy regarding Applicant's next involvement with pornography. At one point he stated that two years after that latest misuse of the company IT system, during an evening at home in the summer of 1997, Applicant decided to see for himself how bad and easily accessible child pornography actually was.¹² He subsequently corrected himself, blaming a faulty recollection, and stated the next involvement with pornography was actually "probably in 2001."¹³ Regardless of the actual date, he used a news reader to navigate to a specific Internet location and downloaded about six pictures at random.¹⁴ He described his experience as follows:

Except for one, the pictures I saw were of pre-pubescent girls, dressed but in poses similar to fashion magazine poses. One picture was of a group of undressed and partially dressed children in a room. These children were not posed and looked like refugees. None of the pictures showed genitalia and none of the pictures I saw included any sex acts of any kind. It is not clear to me that any individual picture would actually count as pornographic outside the context in which I found them. I looked no further. That was the only time I deliberately looked for child pornography.

⁸ Item 5, *supra* note 1, at 12-13.

⁹ Item 5, *supra* note 1, at 21.

¹⁰ Item 4 (Applicant's Answer to the SOR, dated June 8, 2012), at 1; Item 6, *supra* note 2, at 4.

¹¹ Item 4, *supra* note 10, at 1; Item 6, *supra* note 2, at 4.

¹² Item 6, *supra* note 2, at 3; Item 9 (Applicant's Affidavit, dated December 17, 2010), at 1.

¹³ Applicant's Response to the FORM, dated December 7, 2012, at 2.

¹⁴ Item 6, *supra* note 2, at 3.

I do not have a sexual preference for underaged individuals, and have not seen any pornographic pictures of particularly young individuals since that one occasion.¹⁵

Applicant also noted:

The only other content I've seen that might be considered child pornography has been while viewing Internet pornography at home, principally by downloading pictures from [erotic] newsgroups. I have occasionally stumbled upon images of women (all clearly post pubescent) who could possibly have been as young as 16, but could also have been in their 20s and made up to look younger. In all cases the files were either mislabeled or ambiguously labeled and I couldn't have known what the image was until it was decoded. The frequency was perhaps once or twice a month at first, then with decreasing frequency as I mastered the filtering functions on my newsreader. Since 2008, I have virtually eliminated all borderline pictures due to my use of improved filtering on my newsreader and my less frequent viewing of Internet pornography.¹⁶

During his routine security processing performed by another government agency in 2008, Applicant purportedly stated that since 2001:

he actively searched for, and downloaded, child pornography onto his personal computer approximately once every three months. . . . [H]e actively searches for pornographic images of prepubescent females on newsgroups forums. In these sites [Applicant] stated that there are titles such as "younger women." [Applicant] stated he views images of girls as young as twelve or sixteen engaged in sexually provocative poses or engaged in sexual intercourse. . . . [F]rom 2004 – 2006 he viewed Japanese anime and Hen Tai pre-pubescent images. . . . [M]any of these images are elementary school ages and are sexual in nature. . . . [H]e also saw comic book style Japanese anime that contained approximately 200 pages. . . . [H]e has received SPAM mail of pictures of underdeveloped girls engaged in sex.¹⁷

¹⁵ Item 6, *supra* note 2, at 3; Item 4, *supra* note 10, at 1.

¹⁶ Item 6, *supra* note 2, at 3.

¹⁷ Item 8 (Written Crimes Report Referral, undated, attached to Letter from Office of General Counsel (of another government agency), dated May 3, 2012. The narrative presented in Item 8 is an undated and unsigned version of statements purportedly made by Applicant during his security processing. The cover letter, seemingly addressing Fed. R. Evid. 803 (6), *Records of Regularly Conducted Activity*, stated that it is a true copy "from the original record" maintained by the Office of Security in the regular course of business, made by personnel with knowledge of the act or event recorded to make a record to be maintained. A signed, written, and authenticated statement by Applicant or the interviewer/drafter of the entire statement or record was not included in the Item submitted. Furthermore, while the summary may be a true copy of a portion of the original record, there is no evidence reflecting the accuracy of the original record, or how the "personnel with knowledge of the act or event

It should be noted that “Japanese anime” is a shortened version of what is normally characterized as Japanese cartoon animation figures. They are not photographs of actual human figures. “Hentai,” or “Hen Tai,” is a pornographic version of Japanese anime. E-mail “SPAM” is actually junk e-mail or unsolicited bulk e-mail.

That same other government agency denied Applicant’s eligibility for a security clearance, with access to SCI, based on Applicant’s alleged criminal conduct, as described below:

During your security processing, you reported that you have been viewing images of underage individuals since approximately 2001. The last time was in March 2007. You reported you intentionally sought out sexually developing underage females but could not always determine their age. You did this via numerous newsgroups and websites on the internet containing these images among the adult pornography. You also revealed that you have masturbated while viewing these images. You mentioned you first viewed nude photos of children at a New York bookstore in 1986/1987.¹⁸

Applicant was not given access to the other government agency’s report. As to the accuracy of what he purportedly said during that 2008 investigation, Applicant denied several of those statements. As to the Written Crimes Report Referral (Item 8), Applicant contends there was miscommunication with the investigators that apparently resulted in the erroneous rendition of his comments:

The first sentence conflates two separate responses. First is the one event on which I deliberately sought out examples of child pornography and second is the frequency in which I inadvertently encountered it as a result of mislabeled files.

I believe a significant source of the miscommunication with the . . . investigators was what I perceived as their lack of familiarity with difference between the Internet and the World Wide Web. I repeatedly tried to explain that I was principally getting my pornography from usenet newsgroups and not web sites. Thus, it would be more accurate to say that I used “usenet newsgroups.”

Unlike a web interface which delivers complete pictures to the browser, to view a picture from a newsgroup involves downloading the file segments, then decompressing and reassembling the segments. The user cannot know what the file contains until the processing is complete. Newsgroup spammers post files to multiple newsgroups at once with ambiguous or

recorded” obtained such knowledge. Accordingly, in the absence of the “best evidence,” which was purportedly made following the interview, it is difficult to test the reliability or trustworthiness of the documents submitted.

¹⁸ Item 7, *supra* note 7, at 1.

non-informative names. Consequently, I would download a mislabeled file from a group such as . . . that turned out to be younger women engaged in some sexual act along with a reference to the spammers web site. In those pictures, the women would sometimes be slender and made up to look like a teenager (e.g., wearing a cheerleader uniform). It was in reference to these images that the investigators asked me to speculate about the age of the models. My recollection is that I stated they were clearly post-pubescent and agreed, after some prompting, that they could have been as young as twelve (on the basis that about when puberty starts) but looked closer to eighteen. In any case, these images were not what I was expecting, but I did not know that until after I had downloaded, decoded, and processed them.

I do not recall receiving SPAM mail with pornographic pictures. I think this is a reference to the spam newsgroup postings mentioned above. The mention of “underdeveloped girls” refers to the use of slender models with small breasts and shaved pubic regions.¹⁹

As to the Letter from the Senior Adjudication Officer (Item 7), Applicant contends that his mention of March 2007 referred to inadvertent material included among the adult pornography he received, not something he deliberately sought.²⁰ He also denied ever being sexually stimulated by, or masturbating to, images of children. He did mention during his interview that he had touched himself briefly to see if his body had any reaction to the images, but he had no sexual response at all.²¹ Applicant contends he does not have “a prurient interest in child pornography,” as follows:

while I occasionally enjoy adult heterosexual pornography, once and only once in my life I searched out child pornography on the web out of curiosity. I did not like it and it does not arouse me. Any other instances in which I may have seen underaged women on the web, was purely inadvertent and unintentional.²²

Aside from the appearance of the women in the images, Applicant did not know if they were underage. Furthermore, in the absence of copies of the images in issue, there is no evidence other than mere speculation that the images downloaded or viewed by Applicant were, in fact, of underage children. Applicant has never been charged by the police with possession of child pornography.

¹⁹ Applicant’s Response to the FORM, *supra* note 13, at 2-3.

²⁰ Applicant’s Response to the FORM, *supra* note 13, at 2.

²¹ Applicant’s Response to the FORM, *supra* note 13, at 2.

²² Applicant’s Response to the FORM, *supra* note 13, at 4.

Personal Conduct

In addition to the personal conduct issues related to Applicant's misuse of IT systems in 1991 and 1995, the SOR alleged that Applicant falsified material facts during an interview conducted by an investigator from the Office of Personnel Management (OPM) and memorialized in an Affidavit signed by Applicant on December 17, 2010. **(SOR ¶ 2.d.)** During the interview, and in the Affidavit, Applicant stated that he had deliberately sought out child pornography on only one occasion, and that occasion occurred in the summer of 1997. It is also alleged that he falsified material facts in his Response to DOHA Interrogatories, dated March 12, 2012, when he made the same statement regarding child pornography. **(SOR ¶ 2.e.)** The basis, and sole source, of the evidence supporting the falsification allegations are the two documents submitted by the other government agency.

It was reported that Applicant had stated during interviews conducted by that other government agency in about 2007, that from 2001 until at least March 2007, Applicant had actively searched for sexually developing underage females and downloaded child pornography onto his personal computer. He purportedly did so approximately once every three months. The summary also indicated that Applicant had admitted that he actively searched for pornographic images of prepubescent females and viewed images of girls as young as twelve or sixteen engaged in sexually provocative poses or engaged in sexual intercourse.

Based on the contents of the summary, Department Counsel contends that since his 2007 interview, Applicant "repeatedly lied about the full extent of his experience with child pornography, claiming that he deliberately searched for child pornography on only one occasion during the summer of 1997."

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, "no one has a 'right' to a security clearance."²³ 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."²⁴

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating

²³ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

²⁴ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."²⁵ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.²⁶

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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. Furthermore, "security clearance determinations should err, if they must, on the side of denials."²⁷

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."²⁸ Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict

²⁵ "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "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).

²⁶ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

²⁷ *Egan*, 484 U.S. at 531

²⁸ See Exec. Or. 10865 § 7.

guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline D, Sexual Behavior

The security concern for Sexual Behavior is 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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 13(a), *sexual behavior of a criminal nature, whether the individual has been prosecuted* is potentially disqualifying. Similarly, under AG ¶ 13(c), *sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress* may raise security concerns. In addition, *sexual behavior of a public nature and/or that reflects lack of discretion or judgment* is potentially disqualifying under AG ¶ 13(d). Applicant's history of downloading and viewing nude and pornographic images of what he believed to be prepubescent girls in provocative poses in 1997 or 2001 (as stated by Applicant), or between 2001 and 2007 (as stated by the other government agency), is documented in his statements, affidavit, answer to the SOR, his answers to interrogatories, and the evidence submitted by the other government agency. Applicant's behavior, whether it occurred on one occasion or on several occasions, would appear to be of a criminal nature, it reflected a lack of discretion or judgment, and it made him vulnerable to coercion, exploitation, or duress. AG ¶¶ 13(a), 13(c), and 13(d), apply.

The guidelines also include examples of conditions that could mitigate security concerns arising from sexual behavior. Under AG ¶ 14(b), the disqualifying condition may be mitigated where *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*. If *the behavior no longer serves as a basis for coercion, exploitation, or duress*, it is potentially mitigating under AG ¶ 14(c). Similarly, if *the sexual behavior is strictly private, consensual, and discreet*, AG ¶ 14(d) may apply.

AG ¶ 14(b) partially applies. The sole source of the evidence related to Applicant's sexual behavior is himself, as there were no second parties, identified victims, or arrests. Unfortunately, Applicant's statements pinpointing the period of his downloading or viewing of images of underage females are inconsistent. Those actions,

according to him, either occurred in 1997 or in 2001. The memoranda submitted by the other government agency offer different facts and dates commencing in 2001 and continuing until 2007. The deliberate downloading and viewing of the images either occurred 15 years ago or 11 years ago if Applicant is correct. That behavior last occurred 5 years ago if the other government agency is correct. Applicant has offered several sworn statements describing in detail his sexual behavior over the years. He is steadfast in his denial that the deliberate downloading of the images of prepubescent females occurred on more than one occasion. He has acknowledged that, on occasion, when he was merely viewing adult pornography in the privacy of his home, several images of underdeveloped women did appear.

Applicant explained that the females shown were either mislabeled or ambiguously labeled, and they appeared to be underdeveloped girls. With prompting from interviewers, he conceded the women could “possibly” have been as young as 16, but he believed they were older women made up to look younger. There is no conclusive evidence that the images downloaded and viewed by Applicant were, in fact, of prepubescent girls, and mere speculation leading to a conclusion to the contrary is rejected. The information from the other government agency disputes Applicant’s explanations.

As noted above, there is no signed, written, and authenticated statement by Applicant or the interviewer/drafter of the entire statement. While the summary submitted may be a true copy of a portion of the original record, there is no evidence reflecting the accuracy of the original record, or how the “personnel with knowledge of the act or event recorded” obtained such knowledge. In the absence of the “best evidence” which was purportedly made following the interview, it is difficult to test the reliability or trustworthiness of the documents submitted, and after considering all of the conflicting evidence, I conclude that the sworn statements are more reliable than unsigned, undated, summaries.

The other government agency also referred to Applicant’s viewing adult pornography, Japanese cartoon animations, and Hentai in the privacy of his own home. That activity does not involve criminal behavior, and does not indicate a personality or emotional disorder, or reflect a lack of judgment or discretion. Nevertheless, Applicant did, at least on one occasion, deliberately download and view pornographic images of prepubescent females. That activity did involve criminal behavior. Since there is no evidence to indicate such behavior has continued since 1997 or 2001 (as contended by Applicant), or 2007 (as alleged in the SOR), considering either of the periods, it appears that it is unlikely to recur, and no longer casts doubt on Applicant’s current reliability, trustworthiness, or good judgment.

AG ¶ 14(c) applies. Two government agencies are aware of Applicant’s sexual behavior from his past solely because he informed them of it. That sexual behavior no longer serves as a basis for coercion, exploitation, or duress.

AG ¶ 14(d) does not apply. While Applicant’s sole incident of downloading and viewing of the images of the prepubescent females took place in a private and discreet

location – his home – and was not openly broadcast to others, and no criminal action was ever proposed or taken against Applicant for his actions, prepubescent children – essentially exploited victims – cannot, under the law, consent to such behavior.

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.

The guideline notes conditions that could raise security concerns. Under AG ¶ 16(b), security concerns may be raised by: *deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.*

Similarly, security concerns may be raised under AG ¶ 16(c) if there is:

credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

Also, it is potentially disqualifying under AG ¶ 16(e) when there is:

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. . . .

On one occasion in 1991 and again on two occasions in 1995, Applicant downloaded pornographic images or erotic stories onto the company computer in his office. In doing so he misused the IT system. In 1997 or 2001, he deliberately downloaded and viewed nude and pornographic images of what he believed to be prepubescent girls in provocative poses. As recently as 2007, he downloaded and viewed adult pornography as well as Japanese cartoon images and animations and Hentai images and animations. While there is evidence of credible adverse information provided by Applicant regarding his downloading and viewing of pornographic images of prepubescent females, as well as evidence of his downloading and viewing adult pornography and cartoon pornography, there is insufficient evidence to conclude that

Applicant deliberately provided false or misleading information concerning the issue of child pornography. To the contrary, with the exception of the actual year in issue (1997 or 2001), Applicant has been consistent in his rendition of the facts. Disagreeing with summarized unverified information in the record does not establish that he deliberately lied. A summary of an interview prepared by an unknown person does not have the same indicia of reliability as an affidavit. Accordingly, AG ¶¶ 16(c) and 16(e) have been established, but AG ¶ 16(b) has not.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. AG ¶ 17(c) may apply if *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.*

Similarly, AG ¶ 17(d) may apply if:

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.

Also, if *the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*, AG ¶ 17(e) may apply. In addition, AG ¶ 17(f) may apply if *the information was unsubstantiated or from a source of questionable reliability.*

As to Applicant's self-reported misuse of his employer's IT system in 1991 and 1995, as noted above, there were no adverse consequences of his actions, and there is no evidence that Applicant misused employer IT systems since the last incident 17 years ago. Notwithstanding Department Counsel's position that Applicant has had a problem following rules and regulations dating back to include those incidents, that issue is no longer of current security significance.

As to the child pornography issue, the deliberate downloading and viewing of the images either occurred 15 years ago or 11 years ago if Applicant is correct, or 5 years ago if the other government agency is to be believed. Applicant is steadfast in his denial that the deliberate downloading of the images of prepubescent females occurred on more than one occasion. He has acknowledged that, on occasion, when he was merely viewing adult pornography in the privacy of his home, several images of underdeveloped women did appear. He no longer seeks out child pornography, and it has never caused him to experience a sexual response.

As noted above, the Government concluded that since Applicant's statements disagree with the information submitted by the other government agency, Applicant must now be lying. The summary of an interview prepared by unknown persons at some unspecified time after the interview, without any indication that the contents were verified as accurate by Applicant or the drafter of the summary, when the original

transcript of the interview – the best evidence of what was actually said – is still available, is essentially unsubstantiated, and does not have the same indicia of reliability as an affidavit. An unsubstantiated or unverified summary may contain inaccuracies such as those stated by Applicant. Slight variations of words or responses, as well as the selected portions of an entire document, may convey entirely different impressions and may lead to substantial misinterpretation. Applicant has consistently refuted the contents of the summary of an existing file submitted by the other government agency. Applicant has taken positive steps to both alleviate the circumstances or factors that caused his untrustworthy, unreliable, or other inappropriate behavior, and reduce or eliminate his vulnerability to exploitation, and such behavior is unlikely to recur. AG ¶¶ 17(c), 17(d), 17(e), and 17(f) apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.²⁹

There is some evidence against mitigating Applicant's sexual behavior and personal conduct. Applicant misused his employer's IT system in 1991 and 1995. He subsequently downloaded to his own computer and viewed selected images of what he believed to be prepubescent girls in provocative poses. He contends he did so on only one occasion. There is some information that he may have done so more frequently, but that information is not entirely reliable. Applicant routinely viewed adult pornography.

The mitigating evidence under the whole-person concept is more substantial. Applicant's sexual behavior and personal conduct occurred some time ago, and there is no evidence of subsequent conduct of a similar nature. There is no evidence of a

²⁹ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

personality disorder. The conduct was not openly or indiscreetly engaged in. No criminal action was ever proposed or taken against him for his actions. The sexual behavior is unlikely to recur. Under the evidence presented, I have no questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

ROBERT ROBINSON GALES
Administrative Judge