



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



In the matter of: )  
)  
) ISCR Case No. 11-07390  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Julie R. Mendez, Esquire, Department Counsel  
For Applicant: *Pro se*

05/31/2012

**Decision**

RIVERA, Juan J., Administrative Judge:

In 2005-2006, Applicant admitted to viewing nude pictures of children, girls under 18, and adult pornography, and to violating his employer’s policy restricting the use of the Internet during work hours. He continued to view nude pictures of children, girls under 18, and adult pornography, and to violate his employer’s policy until 2011. His sexual behavior and personal conduct continue to cast doubt on his judgment and on his ability to comply with the law and regulations. Clearance is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on August 24, 2010. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) (undated), listing security concerns under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct).<sup>1</sup> Applicant answered the SOR on

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<sup>1</sup> DOHA acted 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* (Directive) (January 2, 1992), as amended; and the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

February 29, 2012, and requested a decision based on the record. On March 19, 2012, the Government requested a hearing before an administrative judge. (Appellate Exhibit 1, Tr. 18) The case was assigned to me on April 3, 2012.

DOHA issued a notice of hearing on April 3, 2012, convening a hearing for May 7, 2012. At the hearing, the Government offered exhibits (GE) 1 through 4. Applicant testified and submitted exhibits (AE) 1 through 7. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on May 15, 2012.

### **Findings of Fact**

Applicant denied all the factual allegations in the SOR. After a thorough review of all the evidence, and having observed Applicant's demeanor and considered his testimony, I make the following findings of fact.

Applicant is a 34-year-old technical lead software engineer working for a government contractor. He was awarded a bachelor's degree in computer engineering in 2000, and a master's degree in information technology in 2005. Applicant married his wife in August 2003, and they have a three year-old son and a one year-old daughter.

Applicant has been working in the same division, although for two different government contractors, since he was hired in May 2000. Applicant submitted his first SCA in 2000, and he was granted a secret security clearance in 2001, which he has held to present. There is no evidence to show that he has compromised or caused others to compromise classified information.

In April 2005, Applicant submitted another SCA, and his employer requested an upgrade of his clearance. During the investigation process, Applicant participated in three interviews, two of which were polygraph assisted interviews. During his March and April 2006 interviews, Applicant disclosed that, from 2002 until days before his March 2006 interview, he used his employer's Internet connection and computer for personal use during work hours. Initially, his use was infrequent, but by the summer of 2005, he was spending between four hours per day of an eight hour day, to six hours per day of a ten hour day, using the Internet for personal use.

Applicant knew his employer had a policy against the use of the Internet and company computer for personal use.<sup>2</sup> He explained that he felt bad about his extensive use of the Internet, but as a software tester, he had significant downtime, primarily while the computer was testing the software and he had nothing to do but to wait for the results of the test. Applicant also averred that his job does not involve a linear thinking

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<sup>2</sup> Applicant's employer's Internet use policy states: "employees must adhere to copyright policies and corporate procedure. The Internet is provided to assist employees in the conduct of company business, or work-related activities that promote the company's interest. Usage may not conflict or disrupt company business, or compromise employee's productivity." (AE 7)

process, and that he had to distract his mind from his job to then approach the problem again with a fresh mind.

Applicant noted, and his performance reviews confirmed, that he has been consistently rated as meeting or exceeding performance expectations. His performance reviews noted his commitment to his employer and to accomplishing his mission. (AE 2 and AE 3) Although he was spending a lot of time on the Internet for personal reasons, his work was getting done on time. Applicant continued to access the Internet and used his employer's computer for personal use during work hours up to at least November 2010. (Tr. 71)

Applicant disclosed that between 1996 and 2001, he downloaded between 500 and 1,000 songs from the Internet, copied these files into CDs, and on about 10 occasions, he sold the CDs for \$15 each. Applicant explained that most of his downloads were from Napster, before such behavior was ruled illegal. He stopped downloading music from the Internet when he purchased an Ipod around 2001-2002. He now downloads his music from Itunes.

Additionally, Applicant disclosed that he had viewed images of people ages five to adult on nudist colony websites. The interviewer noted that Applicant described his preference for females between the ages of 14 and 16. Applicant also visited teen model websites depicting girls ages 14 to 18 wearing bathing suites and posed in sexually suggestive ways. Applicant told the interviewer that he masturbated while viewing these images up to one month before his June 2006 interview.

In February 2007, the other government agency denied Applicant's clearance upgrade based on the security concerns raised by his admissions during the interviews. In March 2007, Applicant appealed the denial of his clearance. In his appeal letter, Applicant stated that confessing his sexual behavior was difficult to do, but it was a great relief and helpful to him. (GE 2)

In his August 2010 SCA, Applicant disclosed he was denied a clearance upgrade in 2007, by another government agency. In November 2011, he was interviewed by an Office of Personnel Management (OPM) investigator about his 2007 clearance upgrade denial. Applicant told the OPM investigator that he was controlling his use of the Internet and company computer for personal use during work hours, but that he was still doing it when he had down time at work. Applicant denied any intentional viewing of pornography at work.

Concerning his viewing of nude pictures of children, Applicant stated that the last time he visited a nudist colony website was in 2007. He always used his personal computer to view these sites or adult pornography sites. Applicant averred that his viewing of children in these websites was accidental, and the pictures were not of a sexual nature. He claimed he was not looking for pictures of nude children, or pornographic children's pictures. He averred he is not sexually attracted to children.

At his hearing, Applicant admitted that he has been addicted to pornography since high school. He admitted he viewed pictures of naked children while searching nudist colony websites; however, he denied he was targeting children, or that the children's and teenagers' pictures he viewed were of a pornographic nature. He viewed pictures of nude girls he believed were under the age of 18, but the pictures did not involve sexual behavior. He also viewed teen model websites where girls between the ages of 14 and 18 were wearing bathing suits in sexually suggestive poses. Applicant admitted to viewing adult pornography sites and to masturbating while viewing such sites. He repeatedly denied; however, to masturbating while viewing nude pictures of children. Applicant also denied that he has a sexual preference for girls between the ages of 14 and 18 over a normal, healthy, adult relationship.

Between his 2006 interviews and his hearing date, Applicant continued to view adult pornography websites and nudist colony websites. He visited nudist websites depicting pictures of nude children "one or two times" during the period of "a few months ago to a year ago." (Tr. 46-50). He visited adult pornographic websites approximately every six months from his 2006 interview until his hearing date. Applicant claimed he has not been aroused by any pornographic material since 2006. Although he visited the adult pornographic websites, Applicant denies ever masturbating to such material since 2006.

Applicant's wife knows that he has watched pornographic websites, but she does not know the extent of Applicant's visits to these websites, nor does she know that he has viewed nudist websites with nude pictures of children.

Applicant believes he is an introvert. He has difficulty putting his thoughts together quickly, and takes time to verbalize his responses. He believes that the other agency's investigators believed he was lying, and took it out against him, because he delayed responding to their questions. Applicant is a devout, religious man. He attends church frequently, and volunteers to work for his church on a regular basis. He served as a deacon at his church for several years, attended church planning committees, and was trusted with his church's keys, financial matters, and other sensitive information. He volunteered to rebuild homes for people affected by hurricane Katrina.

Applicant is considered to be an excellent employee. He performs high-quality work, and has consistently received excellent ratings for his values, customer satisfaction, ethics, and his commitment to results. He currently is in charge of a team of co-workers as the technical lead for the group. He expects he will receive a cycle pay raise this year. Applicant repeatedly apologized for his past behavior, and expressed regret and remorse for his past behavior.

## **Policies**

Eligibility for access to classified information may be granted "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.

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).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## **Analysis**

### **Guideline D, Sexual Behavior,**

AG ¶ 12 describes the concern about 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.

Applicant has been addicted to pornography since he was in high school. From around 2000 until at least one month before his hearing, Applicant viewed nude images of children in nudist colony websites. He claimed he is not sexually attracted to children and his viewing of the children's pictures was incidental to his search for adult pornography. He sought nude images of females ages 14 through 18, and accessed teen model web sites where girls, ages 14 to 18, were wearing swimming suits in sexually suggestive poses. Applicant masturbated while viewing pictures of what he believed were girls between the ages of 14 and 18. Applicant also viewed adult pornographic material on the Internet from around 2000 until at least one month before his hearing. He masturbated while viewing such material. Applicant's wife is aware that he has viewed pornographic material on the Internet. She is not aware of the details and the extent of his behavior, nor is she aware of his viewing nude pictures of children.

AG ¶ 13 provides four disqualifying conditions relating to sexual behavior that could raise a security concern and may be disqualifying in this case:

- (a) sexual behavior of a criminal nature, whether 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.

All of the sexual behavior disqualifying conditions apply. Applicant's viewing of nude pictures of minors (people younger than 18 years old) for his sexual pleasure (to masturbate) could be a criminal offense. Even if it is not a criminal offense, it is such a repulsive behavior that it would make him vulnerable to possible coercion and exploitation. He has been viewing pornographic material since he was in high school, and considers himself addicted to pornography. Applicant continued to seek out material involving nude minors after his three interviews with another government agency in 2005-2006, and after the denial of his clearance upgrade. He continued to view material involving nude minors and adult pornographic material up to 2011. He has been unable to stop his compulsive, self-destructive, and risky sexual behavior. His actions reflect a lack of judgment and may be symptomatic of a personality disorder.

AG ¶ 14 lists conditions that could mitigate the sexual behavior security concerns.

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;

(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;

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress; and

(d) the sexual behavior is strictly private, consensual, and discreet.

AG ¶¶ 14(a), (b), and (c) are not applicable to this case. Applicant was a mature adult when he engaged in the questionable behavior. Applicant claimed he decreased his behavior after his 2005-2006 interviews and the resulting denial of his clearance upgrade. Notwithstanding, he did not completely stop viewing material depicting nude minors. Applicant visited nudist colony websites and viewed nude pictures of children up to 2011. He also sought pictures of nude girls and adult pornography. Applicant's wife is not aware of the extent of his behavior. Considering the seriousness of his behavior, and the adverse social stigma associated with it, Applicant's behavior is currently a basis for coercion and exploitation.

In light of the period during which Applicant engaged in his questionable behavior, it is too soon for me to conclude that his high risk sexual behavior is unlikely to recur. Considering Applicant's circumstances (his age, education, work experience, and period possessing a security clearance), his actions continue to cast doubt on his judgment. I find that the sexual behavior concerns are not mitigated. I conclude Guideline D against Applicant.

### **Guideline E, Personal Conduct**

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

From around 2000 until 2011, Applicant viewed nude images of children in nudist colony websites. He sought nude images of females ages 14 through 18, and accessed teen model web sites where girls, ages 14 to 18, were wearing swimming suits in sexually suggestive poses. Applicant masturbated while viewing pictures of what he believed were girls between the ages of 14 and 18. Applicant also viewed adult pornographic material in the Internet from 2000 until 2011. He masturbated while viewing such material. Applicant's wife is aware that he has viewed pornographic

material on the Internet. She is not aware of the details and the extent of his behavior, nor is she aware of his viewing nude pictures of children.

From 2001 until at least November 2010, against his employer's policy, Applicant accessed the Internet and used his employer's computer for personal use during work hours. During the summer of 2005, his improper use of the equipment extended to four hours in an eight-hour work day, and six hours during a 10-hour work day. Applicant's viewing of nude minors and his use of his employer's Internet and computer for personal use during work hours show questionable judgment and an unwillingness to comply with the law.

Applicant's behavior triggers the applicability of the following disqualifying conditions under AG ¶ 16:

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

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant disclosed his viewing of nude pictures of minors and his violation of his company's Internet policy during his 2005-2006 interviews with another government agency. He has been candid and forthcoming through the security clearance process from 2005 up to the day of his hearing. He admitted his transgressions and expressed remorse for his actions. Had Applicant stopped his questionable behavior in 2006, likely he would have been able to mitigate the current security concerns.

Notwithstanding, Applicant has continued to use his employer's resources for personal use during work hours against his employer's Internet policy. More disturbing is Applicant's continued accessing websites depicting nude pictures of children, girls under the age of 18, and adult pornography. Applicant claimed that he no longer masturbates while viewing pictures of minors or any adult pornography. Considering the evidence as a whole, his claim is not credible.

Applicant was made aware in 2006-2007, that his questionable behavior raised security concerns to the other government agency, and resulted in the denial of his clearance upgrade. Nevertheless, he continued with his questionable behavior between 2006 and 2011. His disclosures to the government investigators, and at his hearing, eliminate some possible vulnerability to exploitation. However, Applicant's wife is not



aware of the extent of his behavior. Considering the seriousness of his behavior, and the adverse social stigma associated with it, Applicant's behavior is currently a basis for coercion, exploitation, manipulation, or duress.

Considering the record as a whole, I find that none of the Guideline E mitigating conditions apply. Viewing nude pictures of children and girls under 18 for his sexual pleasure shows Applicant lacks judgment. It is also the type of behavior that could subject Applicant to undue coercion and exploitation. His questionable behavior continued after his 2006 interviews up to at least 2011, and it continues to raise serious questions about Applicant's judgment and his ability to comply with the law and regulations. He failed to take positive steps to reduce or eliminate his vulnerability to exploitation, manipulation, and duress.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. (AG ¶ 2(c)) Applicant is a devout Christian and spends a substantial amount of his time working for his church, his community, and taking care of his family. He is considered to be a valuable employee with exceptional performance ratings. He has held a security clearance since 2001. There is no evidence that he has compromised or caused others to compromise classified information.

Notwithstanding, in light of Applicant's age, education, work experience, and his years holding a security clearance, his sexual behavior and personal conduct continue to raise doubts about Applicant's judgment and his ability to comply with the law and regulations. Applicant failed to present convincing evidence that he modified his behavior and that he has established permanent lifestyle changes to ensure that his questionable behavior is unlikely to recur.

### **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:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.c:	Against Applicant

## **Conclusion**

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

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JUAN J. RIVERA  
Administrative Judge