



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 11-09859
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

04/25/2013

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines D (Sexual Behavior), M (Use of Information Technology Systems), and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on November 16, 2010. On June 1, 2012, the Defense of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guidelines D, M, and E. DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant received the SOR on June 7, 2012, and answered it on June 29, 2012. He did not request a hearing before an administrative judge. He subsequently retained counsel and requested a hearing. On January 4, 2013, Department Counsel amended

the SOR, completely replacing the original SOR, and the case was assigned to an administrative judge on January 11, 2013. On March 20, 2013, Applicant answered the amended SOR. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 20, 2013, scheduling the hearing for March 27, 2013.¹ The case was reassigned to me on March 26, 2013, and I convened the hearing as scheduled. Government Exhibits (GX) 1 through 15 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through L, which were admitted without objection. DOHA received the transcript (Tr.) on April 3, 2013.

Findings of Fact

In his answer to the original SOR, Applicant admitted the conduct alleged in SOR ¶ 1.a and cross-alleged in SOR ¶ 2.a, but denied the frequency of the conduct alleged. He denied the remaining allegations. In his answer to the amended SOR, he denied all the allegations. His admissions in his answers to the original SOR and at the hearing are incorporated in my findings of fact.

Applicant is a 57-year-old systems engineer employed by a defense contractor since April 2010. He previously worked for another defense contractor from August 1993 to March 2010. He received a security clearance in 1985 and eligibility for access to sensitive compartmented information (SCI) in 1987. (Tr. 31; GX 1 at 40.)

Applicant earned a bachelor's degree in May 1984 and a master's degree in May 1991. Both degrees were in electrical engineering. (Tr. 32.) He married in September 1987. He and his wife have three children, ages 22, 19, and 16. They separated around March 2011, but they see each other at least once a week and are co-parenting their children. (Tr. 38, 57.)

When Applicant submitted an SCA in November 1997, he answered "No" to Question 32, asking if he ever had a clearance or access authorization denied, suspended, or revoked. (GX 14 at 7.) He did not disclose that another government agency (AGA) had denied his application for access to SCI in January 1985. (GX 15.) The letter from the AGA, dated January 21, 1985, states that it is in response to two letters from Applicant in September 1984, in which he requested "the facts which supported the decision to deny [him] access to [AGA] Sensitive Compartmented Information (SCI)." At the hearing, he denied intentional falsification. He testified that his clearance was under review, and he did not consider it denied or revoked. (Tr. 45.) Upon reviewing the AGA's decision at the hearing, he admitted that his application was denied. He testified that he later reapplied for SCI access and it was granted. (Tr. 53.)

Applicant was interviewed by a security investigator from an AGA on March 6, 2008, in preparation for a counterintelligence polygraph examination. The investigator's

¹ Applicant, represented by an experienced attorney, agreed to the hearing date, thereby waiving the 15-day notice requirement in Directive ¶ E3.1.8. The correspondence about scheduling the hearing and related matters is attached to the record as Hearing Exhibit I.

summary of the interview reflects that Applicant admitted that he viewed adult pornography during the preceding ten years, using an unclassified computer in his office, which was located in a sensitive compartmented information facility (SCIF). He admitted that viewing pornography on the company computer in his office violated company policy. He also admitted masturbating in his office about one time every two weeks, early in the workday before his coworkers arrived. He admitted that he visited adult bookstores, viewed pornographic movies, and masturbated while viewing the movies. He denied having any sexual contact with other persons at the adult bookstores. (GX 3.) He testified that he and his wife had not been sexually intimate for about five or six years when he first started viewing pornography. (Tr. 39.)

At the hearing, Applicant admitted that he viewed pornography “on occasion,” but that it was “very infrequent.” He denied that the duration of his pornography viewing was about ten years. He admitted that he told the interviewer that it was ten years, but he explained that the number was “off the top of [his] head.” (Tr. 61-62.) He admitted telling the interviewer that he viewed pornography at work every day, but he testified that he exaggerated the number to take away his anxieties and enable him to successfully complete the polygraph. (Tr. 63-64.)

Applicant denied that he “continued” to view pornography until March 2010, as alleged in the amended SOR, but he admitted that he viewed it on one occasion in March 2010. He testified that he no longer views pornography. He believes that pornography has destroyed his life. He feels guilty about viewing it and does not intend to view it in the future. (Tr. 35-37.)

Applicant also admitted telling an investigator that he masturbated in his office about once every two weeks, but he denied doing it “regularly” as alleged in the amended SOR. He testified that he exaggerated the frequency of his masturbation to overcome his feelings of guilt and enable him to successfully complete the counter-intelligence polygraph. (Tr. 69.)

After the March 2008 interview, Applicant disclosed his viewing of pornography to his security officer. He made the disclosure because he wanted his security officer to know that he had not successfully completed a polygraph examination. (Tr. 72-74.)

Applicant underwent a post-polygraph interview on May 19, 2008. The investigator’s summary of this interview reflects that Applicant admitted viewing pornographic movies at an adult bookstore. He also admitted that he performed oral sex on unidentified males about four times at the bookstore and that unknown males performed oral sex on him about six times. He told the investigator that the viewing rooms at the bookstore had an opening in the wall that enabled occupants of adjoining rooms to perform oral sex on each other. (GX 4.) At the hearing, he admitted telling the investigator that he engaged in anonymous oral sex, but he denied that it was true. He testified that after the investigator asked him several times if he had engaged in oral sex, he answered “Yes,” because he thought the investigator wanted to get him past his feelings of guilt and anything else unrelated to counterintelligence. (Tr. 74-76.)

Based on the interviews in March and May 2008, the AGA suspended Applicant's eligibility for SCI access in June 2008. His eligibility for access to SCI and top secret information was revoked in July 2008. (GX 5.)

On September 11, 2008, Applicant requested a review of the AGA's decision to revoke his SCI eligibility. In his request, he admitted viewing pornography, but he recanted his admission that he viewed it daily. He stated that he viewed it "in spurts" during the past two years. He stated that he would view adult pornography for several days in a row and then regret his actions and abstain for several weeks. He denied that he engaged in oral sex at an adult bookstore. He explained that he fantasized about the oral sex and admitted engaging in oral sex because he felt guilty about thinking about it and thought that admitting it would enable him to successfully complete a polygraph test. (GX 6.) The AGA sustained the decision to revoke his SCI eligibility on September 29, 2008. (GX 7.)

On December 27, 2008, Applicant sent a letter to the AGA, outlining his progress in controlling his "pornography problem." Applicant stated that he disclosed his problem to his wife, a behavioral health counselor, and his priest. He described a "daily ritual" that he performs every morning in front of his computer workstation to help him overcome the temptation to view pornography, and he stated that his "compulsion to view porn has diminished greatly." (GX 10.)

Applicant received therapy from a behavioral health counselor from November 17, 2008, to May 9, 2009. (GX 13). His therapist described the treatment as follows:

[Applicant] was coming to treatment for job stress and by the end of therapy he had adjusted very well to the demands of the work place. He also had a minor marital problem that we examined and this too was resolved prior to ending therapy. Because of the infrequent sex that he was having with his wife he would on occasion, very infrequently, watch pornography at work. This stopped immediately when we focused on how to improve the marital relations between him and his wife.

At the hearing, Applicant denied deliberately providing false information to his counselor regarding the frequency of his viewing of pornography at work. (Tr. 43.) He has not received any further treatment or counseling for his involvement with pornography. (Tr. 84.)

On July 8, 2009, Applicant wrote another follow-up letter to the AGA, stating that he had continued his sessions with his counselor, that his behavioral health was improving, that his relationship with his wife was improving, and that he had been able to control his "destructive compulsive behavior of viewing porn." He asked the AGA to reconsider the "suspension" of his clearances. (GX 11.)

At the hearing, Applicant recanted his references to compulsive behavior in his December 2008 and July 2009 letters to the AGA. He testified that he viewed

pornography “at a moment of weakness,” when he was tired, lonely, and depressed. He stated that he did not know what it means to be compulsive. (Tr. 68.) He testified that he sought treatment because he was worried that he might have a compulsion regarding pornography, but his counselor did not tell him that he had a compulsion. Instead, his counselor taught him techniques designed to avoid destructive behavior. (Tr. 82-83.)

In March 2010, Applicant was caught viewing pornography on a company computer. He was not disciplined or terminated, but he resigned. He began working for his current employer in April 2010.

During a personal subject interview (PSI) in December 2010, Applicant told an investigator that he lost his clearance in 2008 because he viewed pornographic material. The investigator’s summary recites: “The incident occurred in 08. He can’t recall the exact month. He had a [TS/SCI] clearance at the time of the incident.” Applicant told the investigator and testified at the hearing that he resigned from his previous job because he felt he needed a fresh start. (GX 2 at 9; Tr. 88.) Applicant verified the accuracy of the PSI summary in response to DOHA interrogatories on February 22, 2012. (GX 2 at 8.)

The amended SOR alleges that Applicant gave false or misleading answers during the PSI by telling the investigator that he viewed pornography only twice, once in 2008 and once in March 2010. At the hearing, he denied the allegation and testified that he tried to be as accurate and truthful as possible during this interview. (Tr. 42, 91-92.)

Applicant testified that he viewed pornography in March 2010 because he was tired and depressed. He stated that he has refrained from viewing pornography since March 2010. (Tr. 48.) He admitted that he sometimes exercises poor judgment when he is tired and depressed. (Tr. 87.)

On February 28, 2013, Applicant’s attorney referred him to a licensed psychologist for evaluation. (AX J.) The psychologist administered an extensive battery of tests as part of his evaluation. The psychologist’s conclusions included the following:

[Applicant’s] range of sexual experiences is above average relative to the average male. His overall sexual drive was similar to the average male, and he engages in fantasy with similar frequency. With regard to attitudes relative to sexuality, [Applicant] demonstrated a healthy range of sexual attitudes and behaviors.

* * *

[Applicant’s] sexual obsession score . . . reflected average sexual interest, motivation, and desires. [Applicant’s] responses indicated that he is unlikely to be preoccupied by thoughts of sex and is not prone to engage

in impulsive, high-risk sexual acts or to be preoccupied with or distracted by sexual stimuli. . . .

The psychologist's diagnosis was as follows:

Axis I (clinical disorders or other conditions that may be a focus of clinical attention): No diagnosis.

Axis II (personality disorders or mental retardation): No diagnosis.

Axis III (general medical conditions): None.

Axis IV (psychosocial and environmental problems): Work-related and family stressors.

Axis V (global assessment of functioning (GAF)): 70.²

The psychologist's narrative evaluation included the following comments:

Test findings indicated [Applicant] may have some difficulties with rigidity in his thinking and discomfort with novel situations. He is an individual who generally maintains stringent control over his emotion and avoids displaying psychological weakness. Personality testing indicated that [Applicant] is fearful of disapproval and rejection from others, resulting in his avoidance of expressing negative emotion. He tends to be self-punitive and self-condemning, often experiencing extreme guilt and punishing himself as a result. [Applicant] shapes his life in terms of rule, regulations, and structure, and tends to become disorganized by novel situations. His thoughts relative to sexuality and viewing of pornography are not consistent with his image of himself, his strong conscience, and his sense of morality. This may result in [Applicant's] self-infliction of punishment by admitting to sexual acts that have not actually occurred; rather, they are fantasies and/or thoughts that are guilt-producing and anxiety-provoking. Consequently, internalized guilt demands punishment resulting in his overstating inappropriate thoughts or actions (that may not have occurred).

The psychologist concluded his evaluation with the following comments:

Test findings indicated that [Applicant] tends to be self-condemning and guilt-ridden in general, with underlying deep-seated fears of disapproval

² The parenthetical descriptions of each axis were not included in the psychologist's report. They have been added, using the descriptions in the Diagnostic and Statistical Manual of Mental Disorders (4th edition) Text Revision (DSM-IV-TR). DSM-IV-TR defines a GAF score of 70 as reflecting that an individual has some mild symptoms or some difficulty in social, occupational, or school functioning, but is generally functioning well.

and rejection. Sexuality, by nature, is often shame and guilt-producing in individuals. For [Applicant], engaging in such behaviors is ego-dystonic in that it directly violates how he views himself and how he constructs the world around him. The guilt and shame it produced for him was of such a magnitude that it was too painful to face. In view of his very superior intellectual abilities, his level of impulse control, and the fact that his diagnostic profile clearly indicates his ability and tendency to be compliant with respect to rules and guidelines, consideration for security clearance is recommended.

Applicant has disclosed his viewing of pornography to his wife, his priest, his children, and his supervisor. He told his wife that he viewed pornography infrequently. He has not disclosed his conduct to coworkers or anyone else. (Tr. 102-03.)

Four friends and neighbors of Applicant submitted letters attesting to his honesty, dependability, and integrity. He is actively involved in his community and volunteered to serve as treasurer of a charitable organization. (AX A, C, D, and E.) A coworker, who has known Applicant for more than three years, considers him a very capable engineer who has become a “go-to” team member. (AX B.) Applicant’s program manager describes him as trustworthy, hardworking, dependable, and a leader with sound judgment (AX L.) Based on his outstanding duty performance, Applicant received a \$2,000 award in October 2012 and a \$1,000 award in December 2012. (AX I.)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline D, Sexual Behavior

The amended SOR alleges that, between approximately 1998 and at least May 2008, Applicant deliberately searched for and viewed pornography with varying frequency, using an unclassified work computer located in a SCIF, and knew that he was violating company policy (SOR ¶ 1.a). It also alleges that, for a period of time until at least May 2008, he regularly masturbated in his private office in the SCIF (SOR ¶ 1.b). It further alleges that he engaged in oral sex with unidentified males at an adult bookstore on at least ten occasions (SOR ¶ 1.c). Finally, it alleges that, as a result of the conduct alleged in SOR ¶¶ 1.a-1.c, his SCI access was revoked in about August 2008, and that he continued to view pornography on his work computer until at least March 2010 (SOR ¶ 1.d).

Applicant admitted SOR ¶¶ 1.a and 1.b in his March 2008 interview with an AGA investigator and at the hearing, but he testified that he exaggerated the frequency of his conduct in the March 2008 interview. He admitted SOR ¶ 1.c in his May 2008 interview with an AGA investigator, but he recanted his admission at the hearing. In his December 2010 PSI, he admitted viewing pornography on his work computer on one occasion in March 2010. At the hearing he denied that he viewed pornography continuously after his SCI access was revoked, as SOR ¶ 1.d suggests.

The following disqualifying conditions under this guideline are potentially applicable:

AG ¶ 13(a): sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

AG ¶ 13(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;

AG ¶ 13(c): sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

AG ¶ 13(d): sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

AG ¶ 13(a) is not established. Applicant confined his viewing to adult pornography. While indecent exposure is a crime in many jurisdictions, Department Counsel presented no evidence that his sexual activity in the adult bookstore and his masturbation in his office with no one else present violated the law of the jurisdiction where it occurred.

AG ¶ 13(b) is not established. Although Applicant described his behavior as compulsive and self-destructive in his appeals of the AGA decision to revoke his SCI eligibility, he recanted that description at the hearing, and his recantation is supported by the evaluation from his psychologist. Furthermore, he testified that he was able to stop his behavior from March 2008 to March 2010 and from March 2010 until his hearing in March 2013.

AG ¶ 13(c) is established. Applicant's conduct, combined with his strong sense of guilt and shame, made him vulnerable to coercion, exploitation, or duress.

AG ¶ 13(d) is established. Applicant admitted that his conduct constituted bad judgment that occurred "at a moment of weakness" when he was tired, lonely, and depressed.

The following mitigating conditions are potentially relevant:

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;

AG ¶ 14(c): the behavior no longer serves as a basis for coercion, exploitation, or duress; and

AG ¶ 14(d): the sexual behavior is strictly private, consensual, and discreet.

The first prong of AG ¶ 14(b) ("so long ago") focuses on whether the conduct was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.*

Applicant has refrained from viewing pornography for about three years, which is "a significant period of time." However, this three-year period must be weighed in the context of many years of involvement with pornography and a relapse after a two-year period of abstinence. Applicant has been under pressure to have his security clearance reinstated for the past three years. He is still separated from his wife. He has not sought or received any further therapy. He admitted at the hearing that he is prone to exercise bad judgment when he is tired, lonely, and depressed. His demeanor at the hearing was that of a depressed, guilt-ridden man. His testimony was vague about the frequency of his conduct, and he tried repeatedly to minimize the frequency of his behavior. I have doubts about his credibility for the reasons set out in the discussion of Guideline E below. I am not satisfied that he will refrain from viewing pornography at work when the pressure of obtaining a clearance is lifted. Thus, I conclude that the first prong of AG ¶ 14(a) is not established.

The second and third prongs of AG ¶ 14(b) are likewise not established, because his behavior was frequent and did not occur under unusual circumstances. Thus, I conclude that AG ¶ 14(b) is not established.

AG 14(c) is not established. Applicant has disclosed his behavior to his wife, children, priest, a therapist and his supervisor, but he understated the frequency of his conduct to his therapist in 2009, and he has not disclosed his behavior to his coworkers or anyone else.

AG ¶ 14(d) is not established. Applicant admitted that he viewed pornography and masturbated in his office. While he did so early in the day, before the arrival of his

coworkers, he risked discovery by coworkers or other authorized personnel in the SCIF. His viewing of pornography and masturbation at work was not discreet.

Guideline M, Use of Information Technology Systems

The amended SOR cross-alleges the conduct alleged in amended SOR ¶¶ 1.a and 1.d under this guideline. The concern under this guideline set out in AG ¶ 39:

Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information.

The relevant disqualifying condition is AG ¶ 40(e) (“unauthorized use of a government or other information technology system”). The reference to “other” information systems indicates that this disqualifying condition applies to privately-owned systems as well as government systems. This disqualifying condition is established by Applicant’s admission that he used his employer’s computer to view pornography, in violation of company rules.

The relevant mitigating condition is AG ¶ 41(a): “so much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” For the reasons set out in the above discussion of AG ¶ 14(b), I conclude that this mitigating condition is not established.

Guideline E, Personal Conduct

A summary of the allegations in the amended SOR under this guideline is as follows:

SOR ¶ 3.a: Applicant falsified material facts during his December 2010 PSI by indicating that the AGA revoked his SCI access because he viewed pornography on his work computer on two occasions, once in 2008 and once in 2010 and failing to disclose that his SCI access was revoked due in part to the fact that he viewed pornographic materials on his work computer for ten years.

SOR ¶ 3.b: Applicant deliberately misrepresented to a treating psychologist between November 2008 and May 2009 that he had viewed pornography “on occasion” and “very infrequently,” and deliberately failed to disclose the conduct alleged in amended SOR ¶¶ 1.a and 1.d.

SOR ¶ 3.c: Withdrawn.

SOR ¶ 3.d: Applicant deliberately falsified material facts during the March 2008 interview by an AGA investigator by denying any sexual contact while patronizing pornography shops and deliberately failing to disclose the conduct alleged in amended SOR ¶ 1.c.

SOR ¶ 3.e: Applicant falsified material facts in an SCA in November 1997 by answering “No” to the question whether he had ever had a clearance or access authorization denied, suspended, or revoked and deliberately failed to disclose that he was denied SCI access by an AGA in about January 1985.

SOR ¶ 3.f: Cross-alleges the allegations in amended SOR ¶¶ 1 and 2.

The concern under this guideline is set out in AG ¶ 15 as follows:

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 disqualifying condition relevant to the alleged falsification of the November 1997 SCA is AG ¶ 16(a) (“deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . .”). The disqualifying condition relevant to the alleged falsifications to investigators and the therapist is AG ¶ 16(b) (“deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative”). It is not clear whether a privately-retained non-government therapist is a “competent medical authority” within the meaning of AG ¶ 16(b). However, if an applicant provides false or misleading information to obtain a favorable diagnosis or prognosis from a private practitioner and uses it to support a security clearance application, the security concerns under this guideline are triggered.

The disqualifying conditions relevant to the conduct alleged in amended SOR ¶¶ 1 and 2 that are cross-alleged under this guideline are:

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;

AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's level of education and business experience are relevant to the determination whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010). Applicant is a mature, well-educated adult who has worked for defense contractors for many years and held a clearance since 1985.

The summary of the December 2010 PSI describes a single "incident" in 2008, and Applicant verified the accuracy of the summary. Applicant admitted multiple instances of viewing of pornography in his AGA appeal. He was vague about the frequency of his pornography viewing at the hearing, but he eventually admitted multiple incidents. He denied intentional falsification at the hearing, but his only explanation was that he tried to be as accurate and truthful as possible. I find his explanation implausible and not credible, and I conclude that amended SOR ¶ 3.a is established by substantial evidence.

Applicant's therapist from November 2008 to May 2009 recited in his report that Applicant viewed pornography "on occasion, very infrequently." Applicant did not dispute the accuracy of the therapist's report, but he denied deliberate falsification. I conclude that amended SOR ¶ 3.b is established by substantial evidence.

Applicant told an AGA investigator in March 2008 that he visited adult bookstores, viewed pornographic movies at the bookstores, and masturbated while watching the movies. He denied having sexual contact with other persons at the bookstores. In May 2008, he told an AGA investigator that he had engaged in oral sex with unidentified males on multiple occasions. At the hearing, he admitted that he made the statement about oral sex in the May 2008 interview, but he recanted it and said it

was false. I find his recantation implausible and not credible. I conclude that amended SOR ¶ 3.d is established by substantial evidence.

Applicant explained his failure to disclose a previous revocation of a clearance in his November 1997 SCA by claiming that he thought it was under review. However, he admitted that the January 1985 letter from the AGA, which was in response to his request for an explanation of the denial of SCI access, unequivocally denied his application. He also admitted that he reapplied for SCI access and his application was granted. I conclude that amended SOR ¶ 3.e is established by substantial evidence.

Although not alleged in the SOR or the amended SOR, the evidence establishes that Applicant answered “No” to Question 21 on his November 2010 SCA, which asks, “In the last 7 years, have you consulted with a health care professional regarding an emotional or mental health condition or were you hospitalized for such a condition?” The instructions tell applicants to answer “No” to this question if the counseling was for “strictly marital, family, or grief not related to violence by you” and was not court-ordered. (GX 1 at 37.) Applicant did not disclose the counseling he received from November 2008 to May 2009. His only explanation at the hearing was, “I thought I answered the form correctly.” The report from the therapist reflects that Applicant’s marital problems were a significant aspect of the counseling, but that it was not “strictly” limited to marital counseling. In his December 2008 letter, Applicant urged the AGA to restore his SCI access, relying in part on his counseling about his “pornography problem.” I conclude that he deliberately failed to disclose the counseling he received regarding his pornography involvement.

Conduct not alleged in the SOR may not be an independent basis for denying a clearance, but it may be considered to assess an applicant’s credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). I have considered Applicant’s failure to disclose his counseling related to pornography involvement for these limited purposes.

Based on all the evidence, I conclude that Applicant’s falsifications of his SCA and false statements to investigators establish the disqualifying conditions in AG ¶¶ 16(a) and (b). Applicant repeatedly violated the rules for using his employer’s computer, gave false and misleading information during the security clearance process, and engaged in conduct that, if known, would adversely affect his personal, professional, and community standing. Thus, I conclude that the conduct alleged in amended SOR ¶¶ 1 and 2 and cross-alleged under this guideline establishes the disqualifying conditions in AG ¶¶ 16(c), (d), and (e).

Under AG ¶ 17(a), security concerns raised by false or misleading answers on a security clearance application or during a security interview may be mitigated by showing that “the individual made prompt, good-faith efforts to correct the omission,

concealment, or falsification before being confronted with the facts.” This mitigating condition is not established. Applicant recanted some of his admissions, claiming that they were false, but he did so only upon further interrogation. He made no effort to correct his 1997 SCA. He made no effort to correct his misleading statements during his December 2010 PSI.

Under AG ¶ 17(c), personal conduct concerns may be mitigated 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.” Applicant's falsifications during the security clearance process were not minor, because they undermined the integrity of the process. For this reason and the reasons set out in the above discussions of AG ¶¶ 14(b) and 41(a), this mitigating condition is not established.

Under AG ¶ 17(d), personal conduct concerns may be mitigated 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.” This mitigating condition is partially established because Applicant acknowledged his involvement with pornography and obtained counseling. However, for the reasons set out in the above discussion of AG ¶ 14(b), I am not convinced that his behavior is unlikely to recur.

Under AG ¶ 17(e), personal conduct concerns may be mitigated if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” This mitigating condition is partially established, because Applicant has disclosed his involvement with pornography to his wife, children, priest, and his supervisor. However, this mitigating condition is not fully established, because he admitted that he has not disclosed his conduct to coworkers, and there is no evidence that he has disclosed it to neighbors and friends.

Whole-Person Concept

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. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An 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.

I have incorporated my comments under Guideline D, M, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a well-educated and skilled engineer. He has worked for defense contractors and held a security clearance for many years. He is a devoted father and actively involved in his community. His current supervisor, who is aware of the allegations against him, supports his application for a clearance. On the other hand, Applicant lived a secret life for many years. His pattern of deception, equivocation, and falsification raises grave doubts about his trustworthiness, reliability, and good judgment.

After weighing the disqualifying and mitigating conditions under Guidelines D, M, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his sexual behavior, use of information technology systems, or personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the amended SOR:

Paragraph 1, Guideline D (Sexual Behavior):	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline M (Information Technology):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 3.a-3.b:	Against Applicant
Subparagraph 3.c:	Withdrawn
Subparagraphs 3.d-3.f:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge