



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 11-11959
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Alison O'Connell, Esq., Department Counsel  
For Applicant: William F. Savarino, Esq.

06/21/2013

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**Decision**

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MENDEZ, Francisco, Administrative Judge:

Applicant mitigated the personal conduct and sexual behavior security concerns. He did not falsify his security clearance application, nor mislead investigators during the course of his background investigation. He also established that he did not actively seek out child pornography, nor intentionally download or distribute such illicit material. His past internet use, which left him susceptible to receiving illicit material and unfounded allegations of illicit activity, no longer casts doubt on his current reliability, trustworthiness, and good judgment. Clearance is granted.

**Statement of the Case**

On February 11, 2013, the Department of Defense (DoD), in accordance with DoD Directive 5220.6, as amended (Directive), issued Applicant a Statement of Reasons (SOR), alleging security concerns under Guideline E (Personal Conduct) and Guideline D (Sexual Behavior). On March 13, 2013, Applicant answered the SOR and requested a hearing (Answer). On April 24, 2013, I was assigned Applicant's case and after coordinating with the parties, scheduled the hearing for June 4, 2013.

At hearing, Department Counsel offered Government Exhibits (Gx.) 1 through 9. Applicant objected to the admission to Gx. 6, a summary of Applicant's interview by another government agency (AGA). I overruled the objection and admitted Gx. 6,<sup>1</sup> as well as the other exhibits to which there was no objection.

Applicant appeared at the hearing, testified, and offered Applicant's Exhibits (Ax.) A – E, which were admitted without objection. At Applicant's request, I left the record open to allow him time to submit additional matters. He timely submitted Ax. F – H, which were also admitted without objection. The hearing transcript (Tr.) was received on June 11, 2013, and the record closed on June 14, 2013.

### **Findings of Fact**

Applicant, 29, is a network engineer for a federal contractor. He first applied for a security clearance in 2003, while in college and working as an intern for a defense contractor. He was granted a clearance in 2005. He graduated from college in 2006 and, shortly thereafter, began working for his current employer as a software engineer. His colleagues write that he is an outstanding, hardworking employee, who has made significant contributions to the security of his employer's information technology systems and networks. (Tr. at 25-27, 31-; Gx. 1; Gx. 3; Ax. E)

In 2001, while still in high school, Applicant and a few friends decided to purchase a used car. The car was burglarized and left inoperable. One of Applicant's high school friends then had the foolish idea to douse the car with gasoline and set it on fire to see if it would burn. Applicant tried to dissuade his friend but, seeing that his efforts were having no effect, left the scene. He did not realize his friend had actually set the car on fire until the police knocked on his parents' door and questioned him about the incident. Since he was a juvenile, Applicant and his parents were required to appear in family court to answer a misdemeanor charge of arson. He was required to take a fire safety course and, after successfully completing the course, the charge was dismissed. He was not convicted of any offense, nor placed on probation. He has not been in trouble with the law since this incident. (Tr. at 27-31, 37-41, 87-91, 103-106; Ax. A – C)

As previously noted, in February 2003, Applicant applied for a security clearance. None of the questions on this initial security clearance application (SCA) required him to disclose the juvenile charge, which by that point had been dismissed. (Gx. 7 at 25; Tr. at 31-32, 91-3) During the ensuing background interview, Applicant mistakenly told the investigator that he had been charged with a felony and spent a year on probation on the charge. (Tr. at 35-36, 93-94, 103; Gx. 8) Despite providing this erroneous information, which magnified the severity of the juvenile court matter, Applicant was still granted a security clearance and has continuously held a clearance to the present day. (Tr. at 32; Gx. 1)

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<sup>1</sup> See generally ISCR Case No. 11-12461 at 2-4 (App. Bd. Mar. 14, 2013) (holding that the admission of similar documents are admissible in DOHA proceedings).

Applicant did not become aware that he had been charged with only a misdemeanor until about 2006, when he was filling out another SCA for a position requiring access to sensitive compartmented information (SCI). His parents, who had primarily handled the juvenile court matter, provided him the court paperwork, including the charging document, a few days before his security clearance hearing. Throughout the hearing, it was apparent that Applicant was still confused about the juvenile court matter. (Tr. at 31-37, 41, 92-98, 102, 106; Ax. A)

Following the submission of his application for SCI access, Applicant was interviewed by AGA. (Tr. at 103) In response to an inquiry from the AGA investigators, Applicant did not inform them of being questioned by police regarding the incident that led to the misdemeanor charge. (Gx. 5; Tr. at 99-100, 104) However, prior to being confronted about this omission, Applicant voluntarily disclosed the information to a Government investigator in May 2010, who noted in his summary of interview “that this information was covered on the last investigation.” (Gx. 2, Personal Subject Interview on 5/5/10 at 1; Tr. at 35)

During the SCI interview, Applicant admitted to downloading music and games from the internet without paying for them. (Gx. 5 and 6) He also admitted that, starting at 15 years of age, he would search for, download, and view pornography from the internet – some of the pornography he viewed at that time involved minors like himself. He told the investigator that, after turning 18, he only sought out adult pornography on the internet. But, admitted that he had inadvertently downloaded and viewed what he suspected might be child pornography on several occasions. (Gx. 6) He continued to search for and download pornography from the internet knowing that he was exposing himself to the risk that some of the material he downloaded might contain suspected child pornography. (Tr. at 54-55, 85-86)<sup>2</sup>

Following the SCI interview, the AGA halted the processing of Applicant’s request for SCI access, but he retained his security clearance. (Tr. at 79, 86-87) Applicant changed his pornography-viewing habits after the SCI interview. He subscribed to pay-per-view sites that made sure “the people that were in videos, or pictures, were of age.” (Tr. at 55) Although none of the questions on his current SCA required him to reveal the information, Applicant voluntarily disclosed the fact that the AGA did not finalize the processing of his request for SCI access and the basis for their action. (Gx. 1 at 48)

At hearing, Applicant explained that, starting when he was a teenager, he would download pornography on his personal computer, while at home, using peer-to-peer file sharing networks or newsgroups. If upon reviewing the files he was planning to download, he suspected a file or files might contain child pornography, he would not download it. However, he could not always tell whether a file might contain child pornography from just reviewing the file name. He generally selected a batch of files to download, left while his computer downloaded the files overnight, and then viewed the

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<sup>2</sup> See also Ax. D (U.S. Government report notes that “users of peer-to-peer networks are at significant risk of inadvertent exposure to pornography, including child pornography.”).

files at a later time. Whenever he viewed a file that contained suspected child pornography, he would immediately delete it. (Tr. at 41-48, 66-67, 82-86) He did so because he finds such material “disgusting” and “revolting.” (Tr. at 47-48, 85)

Applicant only used his personal computer, while in the privacy of his own home, to search for, download, and view pornography. He was only interested in legal, adult pornography. He adamantly denies ever intentionally looking for, downloading, viewing, saving to his computer, or distributing child pornography. (Tr. at 48, 66, 76-78, 82; Gx. 3) I found his testimony credible.

Applicant revealed the Government’s security concerns to his parents, friends, co-workers, and facility security officer (FSO). He even told his neighbors, whose minor children he regularly babysits. All provided letters attesting to his character. They all voiced their opinions that Applicant did not exhibit any deviant sexual behavior, nor was interested in illicit sexual material. His neighbors and friends continue to trust him, and those with children have no hesitation in having him watch their children. (Tr. at 57-64, 70-76; Ax. E).

Applicant told his wife about the Government’s concerns while they were dating. They recently married. She disapproves of pornography and he respects her views on this issue. He has not looked for, viewed, or downloaded pornography for the past three years. He has no plans to do so in the future. He shares his home computer with his wife and she has full access to it, including his passwords. (Tr. at 25, 53-57, 80-81)

### **Policies**

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are only eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry*, § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant's eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a common sense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. Furthermore, "[o]nce a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance." ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (citing *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991)).

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. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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." E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

## **Analysis**

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

The security concern regarding personal conduct is set forth at 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 misdemeanor charge and Applicant's admission during his SCI interview that, from age 15 to 26, he inadvertently, on several occasions, downloaded suspected child pornography raise a concern about his judgment. Such evidence also raises the applicability of the following disqualifying conditions under AG ¶ 16:

(c) credible adverse information . . . 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 safeguard protected information; and

(e) personal 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 . . .

The evidence also raised the applicability of the following mitigating conditions under AG ¶ 17:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has . . . taken other positive steps to alleviate the . . . factors that caused the untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated . . .; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant's conduct when he was a teenager that led to the misdemeanor charge was clearly aberrant behavior at the time and has not been further repeated. AG ¶¶ 17(c) applies.<sup>3</sup>

Applicant's viewing and downloading of pornography on his personal computer, in the privacy of his own home, is *not* conduct that would normally rise to the level of a security concern. However, he repeatedly exposed himself to the risk of inadvertently downloading child pornography by searching on peer-to-peer networks and newsgroups, which he knew could contain such illicit material. Such repeated, risky conduct, over a number of years, calls into question his judgment.

Applicant mitigated the security concerns raised by his past risky internet use. Following his SCI interview, he took responsible steps to avoid the danger of downloading and viewing illicit material. In addition, as of the hearing, he had not

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<sup>3</sup> Although, apparently this issue was previously favorably adjudicated, the Government is not estopped from reexamining prior conduct, when such conduct, coupled with current information, may raise a security concern.

viewed any pornography for over three years. Moreover, he has not engaged in any other questionable activity over the internet since his SCI interview. For instance, he now pays for music and games he lawfully downloads from the internet.<sup>4</sup> In light of Applicant's more than three-year history of responsible internet use and change in personal circumstances, I find that it is unlikely he would engage in risky or questionable internet behavior in the future.

Furthermore, Applicant proved that he did not intentionally look for or download child pornography. He has consistently maintained that, after turning 18 years of age, he did not intentionally look for or download such illicit material.<sup>5</sup> Those who have lived and worked with him over the years, uniformly state that they have never known him to harbor such deviant sexual interest. By fully informing his family, friends, and employer about the Government's concerns, he has removed the potential threat that his past internet viewing habits could be used as a source of coercion or duress. AG ¶¶ 17(c) – (f) apply to the allegations arising from Applicant's past risky internet use.

Applicant's omission of the 2001 misdemeanor charge, in response to relevant questions regarding his criminal history, on both his 2006 and 2010 SCAs, was also alleged as a security concern under Guideline E.<sup>6</sup> The SOR further alleges that, when questioned by the other government agency, Applicant did not reveal his contact with police in 2001. The omission of material, adverse information standing alone is not enough to establish that an individual intentionally falsified his or her application or attempted to mislead investigators during the course of a background investigation. Instead, an administrative judge must examine the facts and circumstances surrounding the omission to determine an individual's true intent.<sup>7</sup>

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<sup>4</sup> Although not alleged, I considered this past conduct, admitted to during the SCI interview, in assessing Applicant's mitigation case.

<sup>5</sup> In reaching this conclusion, I have taken into account all the favorable and unfavorable evidence in the file, to include Applicant's statements during the SCI interview, as summarized in Gx. 6. See *generally* ISCR Case No. 10-07794 at 2 (App. Bd. Oct. 4, 2011) (discussing judge's obligation to determine the facts, after taking into account and resolving any discrepancies raised by the evidence).

<sup>6</sup> The SOR alleges in ¶¶ 1.d and 1.f that Applicant failed to disclose the 2001 misdemeanor charge in response to a question on his 2006 and 2010 SCA asking if he had ever been charged or convicted of a *felony* offense. At the close of the hearing, after Applicant had presented his case and both parties had made their respective closing arguments, Department Counsel moved to amend the SOR to allege that Applicant falsified a different question on his 2006 SCA. I denied the motion because no new evidence was presented at hearing to justify the amendment and it would have been unfair to Applicant. (Tr. at 149-155) However, I recognize limiting my review of Applicant's eligibility to the confines of an inartfully worded SOR allegation would be inconsistent with the overall purpose of the industrial clearance program. ISCR Case No. 04-08547 (App. Bd. Aug. 30, 2007). Accordingly, I have examined the entire record, to include Applicant's responses to all SCA questions, in assessing his credibility and case in mitigation. See ISCR Case No. 10-03732 (App. Bd. Jun. 14, 2013) (favorable decision reversed, in part, because judge did not consider other potential false statements not alleged in the SOR in assessing applicant's credibility). See *also* ISCR Case No. 07-16653 (App. Bd. May 1, 2012); Fed. R. Evid. 404(b).

<sup>7</sup> See *generally* ISCR Case No. 02-12586 (App. Bd. Jan. 25, 2005); ISCR Case No. 02-15935 (App. Bd. Oct. 15, 2003).

Applicant's omission of the misdemeanor charge in response to questions posed on his recent SCAs was not intentional. He honestly did not believe that disclosure of the misdemeanor charge was required. The charge had been dismissed more than seven years before he submitted his most recent SCA, and he had informed the Government of the charge and underlying conduct that resulted in the juvenile charge during his initial background investigation in 2003.<sup>8</sup>

Moreover, Applicant voluntarily disclosed on his current SCA the significant, potentially adverse information that led the other government agency to halt the processing of his application for SCI access. Such voluntary disclosure demonstrates that he can be trusted to reveal security significant information no matter the potential personal ramification. It is also strong circumstantial evidence that he was not trying to hide a juvenile charge for an incident that took place some 12 years ago.

Applicant also disclosed and discussed his contact with police and the resulting juvenile charge during his recent periodic reinvestigation in May 2010. This voluntary disclosure took place before he was ever confronted with his purported omission of this information on his SCAs and during his SCI interview.<sup>9</sup>

After having an opportunity to fully review the evidence and observe Applicant's demeanor while he testified, I find that he did not falsify his SCAs or attempt to mislead investigators during the course of an interview focused on his internet viewing habits, when he stated that he had no contact with police in the past. He has repeatedly exhibited the high level of integrity, candor, and honesty expected of those granted access to classified information. Accordingly, the falsification allegations, SOR ¶¶ 1.d – 1.f, are decided in his favor.

#### **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 can 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.

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<sup>8</sup> Applicant's confusion during his 2003 interview regarding whether he was charged with a misdemeanor and/or felony is understandable, as is the Government's initial reliance upon his statement. However, Ax. A and B, establish that Applicant was only charged with a misdemeanor.

<sup>9</sup> Cf. AG ¶ 17(a). Of note, Applicant's recent background interview, where he fully discussed the juvenile incident and other relevant issues, occurred three years before the SOR was issued.



Applicant's past internet pornography use, which resulted in the inadvertent downloading and viewing of suspected child pornography on a number of occasions, raises this concern and implicates the following disqualifying conditions under AG ¶ 13:

(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.

Applicant ceased viewing and downloading pornography from the internet three years ago and prior to that had taken steps to avoid the danger of inadvertently viewing or downloading suspected child pornography. He has told all those around him of the Government's concerns and in so doing eliminated the risk that his past conduct could be used to adversely influence him. He established the following mitigating conditions under 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; and

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

### **Whole-Person Concept**

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).<sup>10</sup> I hereby incorporate my comments under Guidelines D and E, and highlight some additional whole-person factors.

Applicant has held a security clearance since 2005 without once compromising or mishandling classified information. He has made significant contributions to his employer's information technology systems over the years. Security clearance adjudications entail a certain degree of predictive judgment, where an applicant's past history is the best indicator of future conduct. Applicant established that he has a history of properly safeguarding this nation's secrets and there is no reason to doubt his ability to do so going forward.

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<sup>10</sup> The non-exhaustive list of adjudicative factors are: (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.

Furthermore, he has matured greatly and changed his personal habits for the better since meeting his wife. These favorable whole-person factors, coupled with the mitigating conditions noted above, mitigate the remaining security concerns at issue. Overall, the record evidence leaves me with no questions or doubts about Applicant's continued eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct):	FOR APPLICANT
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Subparagraphs 1.a – 1.g:	For Applicant
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Paragraph 2, Guideline D (Sexual Behavior):	FOR APPLICANT
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Subparagraph 2.a:	For Applicant
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### **Conclusion**

In light of the record evidence and for the foregoing reasons, it is clearly consistent with the national interest to grant Applicant's request for continued access to classified information. Applicant's request for a security clearance is granted.

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Francisco Mendez  
Administrative Judge