



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



In the matter of:	)	
	)	
	)	ISCR Case No. 12-00609
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Philip J. Katauskas, Esquire, Department Counsel  
For Applicant: *Pro se*

01/03/2014

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**Decision**

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METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,<sup>1</sup> Applicant’s clearance is granted.

On 19 June 2013, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D (Sexual Behavior) and E, (Personal Conduct).<sup>2</sup> Applicant timely answered, requesting a hearing before the Defense Office of Hearings and Appeals (DOHA). DOHA assigned the case to me 23 August 2013, and I convened a hearing 17 September 2013. DOHA received the transcript (Tr.) 23 September 2013.

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<sup>1</sup>Consisting of the transcript (Tr.), Government exhibits (GE) 1-4, and Applicant exhibit (AE) A-C.

<sup>2</sup>DoD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on 1 September 2006.

## **Findings of Fact**

Applicant admitted the SOR allegations. He is a 31-year-old contracts administrator employed by a defense contractor since March 2007. He seeks to retain the clearance he has held since approximately June 2003.

Between May 2000 and at least June 2008, Applicant intentionally viewed nude images of underage females. Most of his pornography viewing occurred while he was in college between August 2000 and May 2004. His pornography viewing came to light in October 2008, when he failed a full scope polygraph examination.

When Applicant began viewing pornography in 2000, he was viewing photographs in the teen category on the website. He assumed at the time that the photographs were of teenagers 18 years old or older. When he underwent his polygraph examination in October 2008, he had an adverse response to questions regarding child pornography. Upon reflection, he realized that some of the teenagers in the pornographic photographs were wearing braces, which he automatically associated with age 13-14, the age at which he wore braces (GE 4). Another Government agency (AGA) disapproved his request for upgraded access and revoked his existing access because of these disclosures in October 2008 (GE 3). Applicant underwent a periodic reinvestigation in August 2010 and was granted the requested clearance in November 2010 by the Defense Industrial Security Clearance Office (DISCO)(AE A). Applicant underwent additional polygraph testing in May 2010 at a different Government agency. That agency denied his program access in June 2011 (GE 3).

Applicant has not viewed pornography since 2008. He married in 2009, and he and his wife are expecting their first child in April 2014.

Applicant's supervisor and coworkers consider him honest and trustworthy, and recommend him for his clearance (AE B). They are all aware of the circumstances that led to the revocation of his special access in October 2008 and the denial of his re-application for special access in June 2011. Similarly, his program manager, security manager, and wife commend his work ethic and adherence to company policies (Tr. 27-53).

## **Policies**

The adjudicative guidelines (AG) list factors to evaluate a person's suitability for access to classified information. Administrative judges must assess disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also show a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). The applicability of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific guidelines should be followed when a case can be measured against them, as they are policy guidance governing the grant or denial of a clearance. Considering the SOR allegations and the evidence as a whole,

the relevant adjudicative guideline is Guideline D (Sexual Behavior) and Guideline E (Personal Conduct),

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 applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the required judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels deciding any reasonable doubt about an Applicant's suitability for access in favor of the Government.<sup>3</sup>

### **Analysis**

The Government established a case for disqualification under Guidelines D and E. However, Applicant mitigated the security concerns.

At least some of the pornographic photographs Applicant viewed between May 2000 and June 2008 were of underage females, and thus contained criminal content.<sup>4</sup> Applicant's misconduct demonstrated immaturity and poor judgment, albeit not falling within several adjudicative areas.<sup>5</sup> Nevertheless, that conduct was adjudicated for special access in both October 2008 and June 2011. While those adjudications resulted in denials of special access, the underlying pornography issues were favorably adjudicated by the DISCO in November 2010, based on a background investigation that closed in August 2010. Moreover, the May 2010 polygraph examinations added no new facts of security significance, and DoD does not apply negative reciprocity to other agency determinations—particularly where those determinations deal with special access and not with the underlying collateral clearance. Consequently, there is some question whether DISCO should have revisited its favorable November 2010 determination, or reached a contrary conclusion by forwarding the case to the DoD adjudications facility in January 2012. However, now that the case is before DOHA, I

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<sup>3</sup>See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>4</sup>¶ 13(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

<sup>5</sup>¶ 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;

see nothing in the record, before or after the favorable November 2010 DISCO adjudication to warrant denial or revocation of Applicant's clearance.

Finally, Applicant's conduct occurred over five years ago, and has not been repeated. Applicant's personal life has changed significantly since he last viewed pornography. He has married and is expecting his first child in the new year. His work references remain uniformly excellent. The whole-person evidence in the record further supports my conclusion that Applicant has mitigated the adverse security significance of his misconduct. Accordingly, I resolve Guideline D and E for Applicant.

### **Formal Findings**

Paragraph 1. Guideline D:	FOR APPLICANT
Subparagraph a:	For Applicant
Paragraph 2. Guideline E:	FOR APPLICANT
Subparagraph a:	For Applicant

### **Conclusion**

Under the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance granted.

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JOHN GRATTAN METZ, JR  
Administrative Judge