



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



In the matter of: )  
 )  
----- ) ISCR Case No. 12-00656  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Eric Borgstrom, Esq., Department Counsel  
For Applicant: *Pro se*

09/04/2014

**Decision**

Harvey, Mark, Administrative Judge:

Applicant said he inadvertently received child pornography over the Internet. In December 2008, he was arrested for endangering child welfare and issued a summons to appear in court. The charge was dismissed, and he did not actually appear in court. On September 30, 2011, he falsely denied that he had been arrested or issued a summons to appear in court on his Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (Item 1) On November 10, 2011, Applicant falsely told an Office of Personnel Management (OPM) investigator during his personal subject interview (PSI) that he had not been arrested or charged with a crime. Sexual behavior concerns are mitigated; however, personal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On September 30, 2011, Applicant submitted his SF 86. (Item 4) The Department of Defense Consolidated Adjudications Facility (DOD CAF) issued an undated statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) the President promulgated on December 29, 2005.

The SOR alleged security concerns under Guidelines D (sexual behavior) and E (personal conduct). (Item 2) The SOR detailed reasons why DOHA was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted, continued, denied, or revoked.

On December 10, 2013, Applicant responded to the SOR and waived his right to a hearing. (Item 3) A complete copy of the file of relevant material (FORM), dated February 24, 2014, was provided to him on August 6, 2014.<sup>1</sup> Applicant provided an undated response to the FORM. The case was assigned to me on August 27, 2014.

### **Findings of Fact**

Applicant's SOR response, admitted with explanations, the underlying factual predicate for all of the SOR allegations. (Item 3) He also provided extenuating and mitigating information. (Item 3) He denied that he intentionally made a false statement, that he intentionally downloaded child pornography from the Internet, and that the allegations established security concerns. (Item 3) His admissions are accepted as findings of fact.

Applicant is a 34-year-old security guard employed by a defense contractor.<sup>2</sup> He has never been married, and he does not have any children. He graduated from high school in 1998. He has never served in the military.

### **Sexual Behavior**

Applicant has consistently stated that his computer contracted a virus on the Internet. The virus caused his computer to download images of child pornography on his computer. There is no evidence in the file that contradicts his statements that child pornography was accidentally or inadvertently downloaded to his computer.

On April 24, 2009, the police arrested Applicant. He was charged by a grand jury indictment with endangering child welfare, a felony. The offense involves knowingly possessing or knowingly viewing any "computer file, video game or any other reproduction or reconstruction which depicts a child engaging in a prohibited sexual act or in the simulation of such an act, including on the Internet." (FORM at 3 (quoting state statute)).

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<sup>1</sup>The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated July 23, 2014, and Applicant's receipt is dated August 6, 2014. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

<sup>2</sup>The source for the facts in this paragraph is Applicant's September 30, 2011 SF 86. (Item 4)

## Personal Conduct

Before Applicant completed his SF 86, he paid for a background check, which did not discover his arrest and charge involving endangering child welfare.<sup>3</sup> He “thought the charge was completely removed from [his] record.” He concluded that if he disclosed the charge on his September 30, 2011 SF 86 it would cause confusion.

On September 30, 2011, Applicant completed and submitted his SF 86. (Items 3, 4) In Section 22, Police Record, his SF 86 asked:

### **Section 22 – Police Record**

For this section report information regardless of whether the record in your case has been sealed, expunged, or otherwise stricken from the record, or the charge was dismissed. . . . Be sure to include all incidents whether occurring in the U.S. or abroad.

#### **Police Record**

Have any of the following happened? (If ‘Yes’ you will be asked to provide details for each offense that pertains to the actions that are identified below.)

**In the past seven (7) years** have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you?

**In the past seven (7) years** have you been arrested by any police officer, sheriff, marshal, or other type of law enforcement official?

**In the past seven (7) years** have you been charged, convicted, or sentenced [for] a crime in any court? (Include all qualifying charges, convictions or sentences in any Federal, state, local, military, or non-U.S. court, even if previously listed on this form) (Item 4 (emphasis in original))

Applicant responded, “No” to all three questions. (Items 3, 4) The first two questions are listed in SOR ¶¶ 2.a and 2.b. The third question is not included in the SOR’s description of his false statements in his SF 86.<sup>4</sup>

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<sup>3</sup> The source for the facts in this paragraph and the next paragraph is Applicant’s FORM response.

<sup>4</sup> Applicant’s SOR does not allege that Applicant falsely denied on his SF 86 that he was charged with a crime. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of

On March 12, 2013, Applicant responded to interrogatories provided by the Defense Office of Hearings and Appeals (DOHA).<sup>5</sup> As part of the DOHA interrogatory process, Applicant swore that he read the OPM investigator's summary of his November 10, 2011 PSI, and he found the summary to be accurate, except for the correction he made about the location of the police station where he was taken when he was arrested.

Applicant's November 10, 2011 OPM PSI states, "He answered no to having been arrested by a police officer and no to having been charged with a crime in any court. When asked these questions he answered no." The OPM investigator confronted Applicant with his arrest record and Applicant "explained that he did not believe he had to list the incident because the incident only involved the police speaking to him. He did not have a court appearance and was told the information would be wiped clean from his record." He admitted to the OPM investigator that he was taken to the police station for questioning in April 2009. He was questioned about downloading various items onto his computer including child pornography and other videos. He thought that he inadvertently downloaded a virus. He was charged with endangering the welfare of children, processed, and released. He retained an attorney and was given a court date. His attorney told him he did not need to go to court because the charge was dismissed.

### **Character Evidence**

Applicant did not disclose any alcohol or drug abuse. He has no serious work-related disciplinary incidents. He apologized for his actions. He is a dedicated and diligent employee. He has provided excellent service to his employers.

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that, "no 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 eligibility for access to classified information "only upon a finding that it is clearly

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the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

*Id.* (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). This allegation will not be considered for any purpose except for these five enumerated purposes.

<sup>5</sup>The source for the facts in this paragraph and the next paragraph is Applicant's OPM PSI and response to DOHA interrogatories. (Item 5) OPM interviews are all capitalized; however, quotations in this decision from the OPM PSI are not capitalized. The arrest report or police report is not part of the file.

consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Adverse clearance decisions are made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision on any express or implied determination as to applicant’s allegiance, loyalty, or patriotism. It 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 (4<sup>th</sup> 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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

The relevant security concerns are under Guidelines D (sexual behavior) and E (personal conduct).

### Sexual Behavior

AG ¶ 12 describes the security concern pertaining to 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.

AG ¶ 13 lists four conditions that could raise a security concern and may be disqualifying including:

- (a) sexual behavior of a criminal nature, whether or not 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.

Applicant's computer had images of child pornography on it. On April 24, 2009, the police arrested Applicant. He was charged by a grand jury indictment with endangering child welfare, a felony. The charged offense involves knowingly possessing or knowingly viewing any "computer file, video game or any other reproduction or reconstruction which depicts a child engaging in a prohibited sexual act or in the simulation of such an act, including on the Internet." (FORM at 3 (quoting state statute)).

Applicant has consistently denied intentionally or knowingly obtaining child pornography. He has insisted that the child pornography was downloaded onto his computer from the Internet by a virus. There is no evidence in the file contradicting this account, and the charge was dismissed without Applicant attending a hearing. Although Applicant did not explain whether he viewed the child pornography and then retained it

on his computer, in light of the dismissal of the charge, there is insufficient evidence to support the charged offense. None of the disqualifying conditions are established.

## Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

Two personal conduct disqualifying conditions under AG ¶ 16 are potentially applicable. Those two disqualifying conditions provide:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to . . . determine security clearance eligibility or trustworthiness . . . ; and

(b) deliberately providing false or misleading information concerning relevant facts to an . . . investigator . . . .”<sup>6</sup>

AG ¶¶ 16(a) and 16(b) apply. In December 2008, Applicant was arrested for endangering child welfare and issued a summons to appear in court. On September 30, 2011, he falsely denied that he had been arrested or issued a summons to appear in court on his SF 86. On November 10, 2011, Applicant falsely told an OPM investigator during his PSI that he had not been arrested or charged with a crime. He paid for his own background investigation and was incorrectly advised that his arrest was not part of his record. He intentionally provided false information in an attempt to conceal his arrest record.

AG ¶ 17 lists seven conditions that could mitigate security concerns as follows:

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<sup>6</sup>The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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 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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; 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.

Although none of the mitigating conditions fully apply, Applicant has taken some positive steps to reduce or eliminate his vulnerability to exploitation, manipulation, or duress. He admitted his arrest and being charged with a felony, and he apologized for his misstatements. He explained that his charge was dismissed without his appearance in court. He is seeking to have the arrest and charge expunged. However, making false statements in a security context raises serious security concerns, and his actions are not sufficient to fully mitigate personal conduct concerns.

### **Whole-Person Concept**

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



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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines D and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) warrant additional comment.

There are some facts supporting mitigation of security concerns under the whole-person concept; however, they are insufficient to fully mitigate security concerns. Applicant is a 34-year-old security guard employed by a defense contractor. He graduated from high school in 1998. He has never been married, and he does not have any children. He has never served in the military. He did not disclose any alcohol or drug abuse. He has no serious work-related disciplinary incidents. He is a dedicated and diligent employee, who has provided excellent service to his employers. His acknowledgement of his arrest and charge of endangering child welfare (subsequently dismissed without a court appearance) and his evident remorse for making misstatements are important steps towards rehabilitation and mitigation of security concerns.

The evidence against approval of Applicant's clearance is more substantial at this time. In December 2008, Applicant was arrested for endangering child welfare and issued a summons to appear in court. On September 30, 2011, he falsely denied that he had been arrested or issued a summons to appear in court on his SF 86. On November 10, 2011, Applicant falsely told an OPM investigator that he had not been arrested or charged with a crime. There are unresolved questions about Applicant's reliability, trustworthiness, and ability to protect classified information because of his false statements on his SF 86 and to an OPM investigator. More time without such conduct is necessary to fully mitigate security concerns.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude sexual behavior concerns are mitigated; however, personal conduct concerns are not mitigated. For the reasons stated, I conclude he is not eligible for access to classified information.

## Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline D:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a to 2.c:	Against Applicant

## Conclusion

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

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Mark Harvey  
Administrative Judge