



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



In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 17-01355
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: David Hayes, Esq., Department Counsel  
For Applicant: *Pro se*

08/31/2018

---

**Decision**

---

HESS, Stephanie C., Administrative Judge:

Although the sexual behavior and criminal conduct allegations arose from behavior that occurred between 2005 and 2008, Applicant's inconsistent statements and failure to accept any responsibility for his conduct remain concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (e-QIP) on February 6, 2015. On July 28, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline D (Sexual Behavior), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). The DOD acted under Executive Order (Ex. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD 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 June 8, 2017.

Applicant submitted his Answer to the SOR on August 16, 2017, and requested a decision on the record without a hearing before an administrative judge. Department

Counsel was ready to proceed on October 4, 2017, and the case was assigned to me on December 14, 2017. On February 13, 2018, DOHA notified Applicant that the hearing was scheduled for March 6, 2018. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted into evidence. Applicant testified and Applicant Exhibit (AX) A was admitted into evidence. DOHA received the transcript (Tr.) on March 14, 2018.

### **Findings of Fact**

Applicant is a 40-year-old software engineer currently employed by a defense contractor since October 2006. He was employed by another defense contractor from 2002 until 2006. He was previously employed as a university mathematics professor, and continues to work as a part-time online mathematics instructor. Applicant received a bachelor's degree in electrical engineering in 2000, a master's degree in electrical engineering in 2002, and a master's degree in mathematics in 2005. He and his wife married in 2000 and they have four minor children. Applicant was granted his first security clearance in 2004, and his access to classified information was revoked in 2011. (GX 1; GX 7.)

Under Guideline D, the SOR alleges that Applicant viewed child pornography from 2005 until 2007, and that he engaged in two acts of voyeurism of underage girls in 2008. Under Guideline J, the SOR cross-alleges the Guideline D allegations. Applicant admits occasionally viewing images of naked underage girls in 2005, but denies that the images constituted child pornography, and admits the two acts of voyeurism. Applicant denies the Guideline J allegation.

Under Guideline E, the SOR alleges that Applicant intentionally falsified his 2015 e-QIP by intentionally mischaracterizing the reasons his clearance was denied by another government agency in 2009, and that Applicant intentionally falsified statements during a personal subject interview in May 2015 by failing to disclose the denial of his 2009 clearance and the underlying conduct for that denial. The Guideline D allegations are also cross-alleged under Guideline E. Applicant denies these allegations.

Applicant intentionally viewed naked children on multiple occasions on the Internet between 2005 and 2007. (GX 3; GX 5; Tr. 47-48; GX 6.) In order to view the naked children, Applicant would go to a pornography website that contained thumbnail images portraying young legal-aged women as teenagers. He would then click on a thumbnail that would lead him to a link that went to another site. After clicking on four or five subsequent links, Applicant would link to a site with images of naked or partially clad children between the ages of 7 and 14. Applicant admits that, "there were times when I was curious and did view content from a site depicting minors." However, he also states that at the recommendation of a coworker, he researched state law and believes that the images of naked children that he viewed do not fit the definition of child pornography, but are instead child erotica. (Answer.) As a result of viewing naked children on the internet, he failed two lifestyle polygraphs conducted by another government agency in October 2007 and April 2008, and was scheduled for a third polygraph. (GX 6.)

In June 2008, while awaiting the third polygraph, Applicant committed two separate acts of voyeurism of underage girls. Applicant was on a mission trip to Ecuador with a group of people of various ages, including several girls aged 15 to 16, all staying as guests in the same house. From his bedroom, Applicant was able to look through cracks between boards that separated his bedroom from the bathroom. On the first occasion, Applicant heard two of the teenage girls enter the bathroom. He looked through a crack in the wall and was able to view the girls naked from the waist up. He watched them for approximately 30 seconds. He testified that after intentionally viewing the naked girls, he was concerned about the impact that his conduct would have during the upcoming polygraph and determined that he would not disclose his conduct. Despite his concern about the polygraph, two or three days later, Applicant was aware that the 15-year-old girl he had previously looked at had entered the bathroom. For approximately 30 seconds, he watched as the girl sat on the toilet and was able to see part of her buttocks as she stood up. (GX 6; Tr. 52-53.)

During his third lifestyle polygraph in September 2008, Applicant disclosed during the pretest interview, that during a single occasion, he looked through cracks in the boards in the bedroom wall into the bathroom and observed two high-school-aged girls naked from the waist up for about 30 seconds. On that same occasion, he also observed one of the girls use the toilet, and observed her kneecaps then part of her buttocks for approximately 15 to 30 seconds. He stated that he was embarrassed and ashamed about this incident, and denied any other involvement in voyeuristic or “peeping Tom” activities. He further stated that he had determined before entering the polygraph suite that he would not, under any circumstances disclose the information about this event. However, after he was instructed by the interviewer that the only way to pass the polygraph examination was to be fully forthcoming, Applicant described the event. (GX 6.)

After the polygraph concluded, Applicant was asked additional questions about participating in any serious crime by an interviewer. Applicant “clarified” that the shower incident occurred on the first day of the trip, and the second toilet incident occurred two or three days later. (GX 6.) As a result of concerns raised by Applicant’s viewing of child pornography and his acts of voyeurism, the other government agency issued a clearance decision statement in April 2009 denying Applicant’s eligibility for SCI access. (GX 6.) As a result of Applicant’s conduct, DOHA issued interrogatories to Applicant in March 2011. Applicant states that on the advice of a coworker, and because he did not fully understand the security clearance process, Applicant did not respond and DOHA revoked his clearance in June 2011. In August 2011, Applicant’s SCI access was revoked by a third government agency. Applicant stated that the reason he did not list the second and third revocations on his e-QIP was due to not paying enough attention. (GX 5; GX 7.)

On his e-QIP submitted by Applicant in February 2015, he stated that he had a clearance denied by another government agency in May 2009. His explanation for the denial was that he was scheduled for a follow-up lifestyle polygraph when his employer’s contract changed and required only a counterintelligence polygraph rather than a lifestyle polygraph. Applicant’s then-facility-security-officer (FSO) “requested adjudication based on previous polygraphs. As a result, my appointment for the upcoming lifestyle polygraph

was canceled, and the other government agency's adjudication process deemed me ineligible for access to their program." (GX 1.) Applicant did not offer any details about the basis of his failing three lifestyle polygraphs, or the April 2009 clearance decision statement from the other government agency denying Applicant SCI access.

Applicant denies that he intentionally falsified his statements during his May 2015 personal subject interview with the background investigator as alleged in the SOR. He specifically takes issue with the allegation that he told the investigator that the other government agency "canceled" Applicant's clearance as opposed to denying the clearance. While this language is used in the SOR allegation, the crux of the allegation is that when Applicant stated that the reason his clearance was not granted was because his FSO canceled the lifestyle polygraph because it was no longer required for the contract, and the other government agency thereby stopped the processing of Applicant's clearance, he made an intentional, material omission. Applicant did not disclose to the investigator that Applicant had failed three lifestyle polygraphs or that he had subsequently received a clearance decision statement wherein the basis for the denial of Applicant's SCI access was set forth, or that Applicant opted not to appeal that decision. Applicant further contends that the background investigator improperly summarized Applicant's statements. Specifically, Applicant states that he did not tell the investigator that he "never participated in any negative behavior," instead, the investigator drew this conclusion and included it in the summary. Applicant explains that the investigator did not ask Applicant why his SCI access was denied, and therefore he did not disclose the underlying conduct. (GX 2; GX 5; Tr. 61.)

Applicant underwent an enhanced subject interview under oath in September 2016, during which Applicant discussed the reasons for his SCI clearance denial in 2009 and signed a sworn affidavit regarding that information. Applicant stated that the information in the summary of the interview was accurate. (Tr. 29.) During this interview, Applicant told the investigator about the first voyeurism incident in June 2008, stating that he "did not deliberately attempt to be a peeping Tom." The summary also states that "this was an isolated incident and there is no likelihood that this kind of incident would occur again." The summary further states "the subject has had no other incidents involving voyeurism."

In his testimony and the 2016 affidavit, Applicant stated that he continued to view adult pornography on the Internet until late 2014. He further stated in the affidavit that his wife was aware of the timeframe of his last usage of pornography. In a February 2018 signed letter addressed to me, Applicant's wife stated that the birth of their first daughter nearly 12 years ago,

was a catalyst for [Applicant] to renounce his viewing of all pornographic images, and since that time he has matured and stepped away from that. We share our computers at home, and I know all the passwords and am able to check the viewer history and I have not found any questionable material in years. (AX A.)

Applicant testified that he and his wife installed a software program on their home computer to prevent access to pornographic websites. However, he further stated that:

after a few months of having [the software] I kind of figured out it didn't work in certain cases. And so, I would try to get around it. And even then you're kind of cautious because I don't know if she's really going to see it or not. And I would say that only happened for like a month or two and then we just did away with the [software]. (Tr. 51-52.)

Applicant denies the Guideline J allegation, stating: "To the best of my knowledge, I have not engaged in any criminal activity. While I admit to the behaviors described above, I do not believe them to be illegal or punishable by law in the jurisdictions where they occurred." However, Applicant also stated, I became conscious of the 'sickness' of some of my Internet usage." (Answer.)

### **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's 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 concern under this guideline is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual’s judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission.

The following disqualifying conditions apply:

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

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

The following mitigating conditions potentially apply:

AG ¶ 14(b): the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment; and

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

Although Applicant's viewing of child pornography and acts of voyeurism of underage girls happened more than 10 years ago, it is not mitigated by the passage of time. Applicant's inconsistent recounting of these events, his minimizing of the gravity of his actions, and his failure to accept responsibility for his behavior casts doubt on his current reliability, trustworthiness, and good judgment. None of the mitigating conditions applies.

### **Guideline J, Criminal Conduct**

The concern under Guideline J (Criminal Conduct) is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

The following disqualifying condition applies under this guideline:

AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.

The following mitigating condition is potentially applicable:

AG ¶ 32(a): so much time has elapsed since the criminal 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; and

AG ¶ 32(d): there is evidence of successful rehabilitation; including, but not limited to the passage of time without recurrence of criminal activity... good employment record, or constructive community involvement.

While Applicant's criminal conduct of viewing child pornography and committing acts of voyeurism occurred more than 10 years ago, his failure to accept responsibility for his conduct, evidenced by his completely inconsistent accounts of the events, his

minimizing of his actions, and his failure to accept responsibility for his conduct, continues to cast doubt on his reliability, trustworthiness, and good judgment. Specifically, Applicant equivocates by stating that he does not believe his actions were criminal in the jurisdictions in which he committed them. None of the mitigating conditions apply.

### **Guideline E, 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and
- (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

16. Conditions that could raise a security concern and may be disqualifying include:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;
- (b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;
- (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 individual may not properly safeguard classified or sensitive information;



(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 individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(2) any disruptive, violent, or other inappropriate behavior;  
and

(3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing;

(2) while in another country, engaging in any activity that is illegal in that country; and

(3) while in another country, engaging in any activity that, while legal there, is illegal in the United States.

17. Conditions that could mitigate security concerns include:

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

(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; and

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

An act of falsification has security significance independent of the underlying conduct. See ISCR Case No. 01-19278 at 7-8 (App. Bd. Apr. 22, 2003). The mitigation of the underlying conduct has little bearing on the security significance of the falsification, particularly where there are multiple falsifications. ISCR Case No. 08-11944 at 3 (App.

Bd. Aug 15, 2011). Previous inconsistent statements may be considered in assessing an applicant's credibility, evaluating evidence, and considering whether the applicant has demonstrated rehabilitation, even though they were not alleged in the SOR. ISCR Case No. 08-09232 at 3 (App. Bd. Sep. 9, 2010.) Falsification of a security clearance application "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.) An applicant's level of education and business experience are relevant to determining 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 intentionally falsified his recounting of his acts of voyeurism during his third lifestyle polygraph examination in September 2008 by stating that he committed only a single act of voyeurism. After additional questioning, Applicant admitted that he committed two acts of voyeurism. He deliberately omitted the underlying reasons for the 2009 denial of his SCI access when completing his e-QIP and while undergoing a personal subject interview in 2015. Applicant intentionally falsified his statements about his 2008 acts of voyeurism during his 2016 enhanced subject interview. Despite his equivocations, Applicant admits to having viewed child pornography on multiple occasions, which constitutes criminal conduct. He committed two separate acts of voyeurism, which is criminal activity in the United States. Applicant continues to change his story about his viewing of child pornography.

Applicant is highly educated and has held a security clearance since 2004. It is simply not plausible that Applicant did not understand that he was required to be forthcoming about his underlying conduct that resulted in his denial of all SCI access. His ongoing failure to accept responsibility for his actions, including his deliberate falsifications and omissions, and his overall lack of credibility, raise significant concerns about his ability to protect classified information. None of the mitigating conditions apply.

## **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(d):

- (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 Guidelines D, J, and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but I have also considered the following:

Applicant intentionally falsified statements during his 2016 enhanced subject interview, and continues to equivocate about his sexual behavior and criminal conduct. He has concealed his use of pornography from his wife by taking furtive actions. Applicant's ongoing lack of consistency and clarity in recounting the details of his conduct, his minimizing of the gravity of his conduct, and his failure to accept responsibility for his behavior remain concerns.

After weighing the applicable disqualifying and mitigating conditions under Guidelines D, J, 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, criminal conduct, and 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**

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline D (Sexual Behavior):	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Paragraph 2 Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a – 2.c:	Against Applicant
Paragraph 3, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

### **Conclusion**

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

Stephanie C. Hess  
Administrative Judge