



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



In the matter of: )  
 )  
 ) ISCR Case No. 17-02286  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Robert Blazewick, Esq., Department Counsel  
For Applicant: Francis J. Flanagan, Esq.

06/15/2018  
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**Decision**  
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MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant was investigated by the FBI in September 2009 for suspected Internet access to child pornography. Applicant was not prosecuted for any crime, and he denied any knowing access to child pornography. He engaged in online fantasy role-playing, and he continues to access adult-domination pornography. He has been open about the conduct and does not intend to access child pornography. Clearance is granted.

**Statement of the Case**

On October 18, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing a security concern under Guideline E, personal conduct. The SOR explained why the DOD CAF was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action under Executive Order (EO) 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 *National Security Adjudicative*

*Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position (AG)* effective within the DOD on June 8, 2017.

Applicant responded to the SOR on November 7, 2017, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). Counsel for Applicant entered his appearance on November 10, 2017. On January 9, 2018, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On January 11, 2018, I scheduled a hearing for February 6, 2018.

At the hearing, three Government exhibits (GEs 1-3) were admitted in evidence. A November 30, 2017 letter forwarding discovery of the GEs to Applicant's counsel was marked as a hearing exhibit (HE 1) but not admitted as an evidentiary exhibit. Applicant testified, as reflected in a transcript (Tr.) received on February 13, 2018.

I held the record open to February 23, 2018, for documentary exhibits from Applicant. Applicant submitted four character references (AEs A-D), which were accepted into the record without any objections.

### **Findings of Fact**

The SOR alleges under Guideline E (SOR ¶ 1.a) that the FBI seized Applicant's personal laptop computer in September 2009 and conducted a preliminary search that revealed one or more images or videos of potential child pornography. When Applicant responded to the SOR, he admitted that the FBI seized "a family laptop computer" in approximately September 2009. He denied the allegation in part, averring that he was not the only person who had access to the laptop. He did not dispute that the preliminary search revealed one or more questionable images "that may have been child pornography," but he was not arrested or criminally charged.

After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 58-year-old senior technical support engineer with a bachelor's degree awarded in December 1983. He served on active duty in the U.S. military at an enlisted rank for six months before being discharged into the inactive reserves. From September 1979 to December 1983, he attended a military institute on an athletic scholarship. He entered another branch of the U.S. military in May 1984 and completed officer candidate school. He held a top secret clearance from approximately July 1985 to September 1988, when he was honorably discharged. (GE 1; Tr. 15-21.)

On his discharge from the U.S. military, Applicant began employment with a security company, initially as an operations manager. He eventually transitioned to the personnel department and became regional security director. After the company won a contract to provide security for a defense contractor, Applicant became his branch's facility security

officer (FSO). He held a secret clearance granted to him in 1989 or 1990. His clearance was no longer needed after he left that employment in 1991 or 1992. (GE 1; Tr. 19-20.)

After a short employment with another security company, Applicant pursued a different career. He attended a community college from September 1993 to June 1995, and earned an associate's degree in engineering. (GE 1; Tr. 20.) Available information does not include any details about Applicant's subsequent employer(s) until May 2003, when he accepted a contract position as a tool designer. In June 2008, he began a new job where he again did not need a security clearance. (GE 1; Tr. 20-21.)

In September 2009, Applicant was contacted at work by his then wife to whom he had been married since August 1991. She informed him that three FBI agents were at their home. When he arrived home, he was met by the FBI agents, who wanted to speak with him about his computer access. Applicant advised the agents that he had four email addresses, one of which was primarily for online fantasy role-playing with others about the rise of black power, black domination, and white enslavement. He denied any plan to act on the fantasies. He expressed interest in adult-domination pornography but not child pornography. Applicant informed the FBI agents that he had a laptop computer; that no one else used it; and that there was adult pornography on it but no child pornography. Applicant gave the FBI consent to seize and search all computers used in his home, and to use image-scan software in conducting its searches. The FBI seized two computer towers and Applicant's laptop. (GEs 2, 3.)

The FBI's preliminary forensic examination of Applicant's laptop on October 1, 2009, reportedly revealed over 200 images and six video files of "investigative interest" (possible child pornography) on his computer. An FBI task force officer filed a complaint with the state's department of children and families (DCF) about Applicant's possible involvement with child pornography because of the images found on Applicant's computer. The FBI informed the DCF that its search revealed over 200 images and movies of child pornography. The report to the DCF was required by the state because Applicant's underage step-grandchild was living in his home at the time. (Tr. 28.) There is no evidence that anything ever came of that complaint to the DCF. On June 2, 2010, the U.S. Attorney declined to file charges against Applicant because of a lack of prosecutorial evidence. (GE 3; Tr. 25-26.)

In mid-October 2010, Applicant and his wife divorced after 19 years of marriage. In December 2012, Applicant began a cohabitant relationship with his current significant other. She has three sons now ages 20, 23, and 25. (GE 1.)

In February 2013, Applicant was laid off from his job as a tooling supervisor. He was unemployed until April 2014, when he accepted a short-term contract position as a process engineer. When he contract ended in June 2014, he was unemployed. He was a part-time engineering consultant from October 2014 to February 2015, when he began working for his current defense-contractor employer. (GE 1.)

On February 23, 2015, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86). He was granted an interim secret clearance for his duties working with engineering teams on design, manufacturing, and assembly issues. (Tr. 21.)

On March 29, 2017, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM) in part about whether he had been involved in online pornography. Applicant indicated that he had consented to the FBI's seizure of three computers in September 2009, which belonged to him, to his then spouse, and to his stepdaughter. A few months later, he was notified by the FBI that he could retrieve the computers, although his hard drive was retained by the FBI. He was told by an FBI agent that his hard drive contained several hundred pornographic images, one possibly of child pornography. Applicant denied to the OPM investigator that he had ever searched for or saved to his computer images containing child pornography or associated with child pornography. He acknowledged an interest in adult pornography and the domination-submissive lifestyle since his teenage years. Applicant described himself as dominant and admitted that he had engaged in this lifestyle with both his ex-wife and his current cohabitant. Applicant indicated that his employer was unaware of his preferences in this regard, but that his family and friends were aware. He admitted that he accesses adult pornographic websites to view images and videos with a preference for male-on-female pornography, lesbian pornography, and dominant-submissive pornography. He also related that he participates in online sexual fantasy (role-playing) at least once a week on sites like FetLife.com, but he denied any intention or plan to act out these fantasies. (GE 2.)

When asked at his security clearance hearing about why his laptop's hard drive was not returned to him, Applicant stated that he was told by the FBI that they found "two questionable images" on his laptop. As to how the images were downloaded to his laptop, Applicant responded, "I go to a website and just right mouse click and copy." (Tr. 41-42.) Regarding the discrepancy between his report to the FBI that he was the only person with access to his laptop and his SOR response where he described the computer as a family computer, he responded that his laptop was not password protected and sat on a table in his apartment at the time. (Tr. 34.)

Applicant testified that the online fantasy activity was between consenting adults and that no children were involved. (Tr. 28, 40.) Regarding what assurance Applicant had in that regard, he indicated that to access one of the sites (FetLife.com), he had to attest to being of legal age for access. (Tr. 33-34.) He relied in good faith that the other persons involved were not minors. He was not sure how he could have assured there was no child pornography associated with the websites he had accessed. (Tr. 40.)

Applicant maintains that he has changed his behavior in that, while he still enjoys pornography, he is "very, very careful of where [he is] going." He denied any current involvement in fantasy role-playing. (Tr. 38-39.) He acknowledged that his employer lacked any knowledge of his interests in the dominant-submissive lifestyle and adult pornography, Applicant does not believe it would cause him any problems at work because of the prevalence in books, television, and movies of the lifestyle. (Tr. 32.)

## Character references

Four character references authored letters for Applicant. They all think highly of Applicant. None of them spoke specifically about Applicant's interest in adult pornography or dominant-submissive role-playing, so it is unclear what they know.

A friend of Applicant's for the past four years expressed surprise that anyone could question Applicant's integrity or loyalty. She considers Applicant to be honorable and honest. (AE A.) Another friend, who has known Applicant for about 15 years, indicates that Applicant is generous with his time by driving veterans to their medical appointments; loyal to his partner, family, friends, and employer; and very patriotic. He was supportive of her youngest son's enlistment in the U.S. military in 2016. (AE B.)

Applicant's partner attests to him being very supportive as she copes with a debilitating disease. He has also been a good stepfather to her sons in facilitating their involvement in Scouting and another boys' group. He also volunteers his time to veterans' groups by driving veterans to their medical appointments, assisting with their food shopping, and buying dinners anonymously for veterans. She indicated that Applicant told her about the issues hindering his approval for a security clearance, although she did not elaborate. She wholeheartedly attests to Applicant's character. (AE C.)

Applicant's brother knows that Applicant had some issues "several years ago," and indicated that it might be difficult to believe that Applicant is a person of good character under the circumstances. He is convinced that Applicant "is a great person at the core." (AE D.)

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security

eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

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 and endures throughout off-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 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. Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline E: Personal Conduct**

The security concern about personal conduct is articulated in 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigations or adjudicative processes.

Applicant was suspected of accessing child pornography online in September 2009. When he was interviewed by the FBI, he denied that he knowingly accessed child pornography, but he admitted that there was adult pornography on his laptop computer. With his consent, the FBI seized his laptop and conducted a preliminary search, which according to the FBI revealed over 200 images and six video files of “investigative interest” on his computer. Applicant’s hard drive was retained by the FBI, reportedly because some images may have been of child pornography. Based on its preliminary findings, the FBI told the state’s DCF that over 200 images and movies of child pornography were detected on Applicant’s laptop computer. Applicant asserts that he was told by the FBI three months later that there was one (GE 2) or two (Tr. 41) questionable images of possible child pornography.

The U.S. Attorney's declination of prosecution for lack of evidence raises some doubt about whether the images on Applicant's computer were of child rather than adult pornography. It is possible that further forensic analysis of Applicant's hard drive confirmed the presence of only one or two images of "questionable" child pornography, which may not have been enough to justify the time and expense of federal prosecution. Applicant admitted to the FBI and testified at his hearing that he has indulged his interest in fantasy role-playing involving the dominant-submissive lifestyle. Fantasy content is factually and legally distinct from child pornography. Fantasy may depict sexually explicit conduct by someone who appears to be a minor but may not be underage. Applicant is not likely to have so readily consented to the FBI's seizure and search of his computer if he knew that his hard drive contained images of child pornography that could subject him to criminal prosecution. The FBI's preliminary findings are not enough to meet the Government's burden of establishing the controverted fact that he knowingly accessed child pornography or downloaded child pornography to his personal computer, especially given the absence of any criminal charges or DCF action against Applicant.

In evaluating the personal conduct security concerns, Applicant admits having had extensive access to adult pornography and downloading pornographic images to his home computer. He still enjoys pornography, although he testified that he is now much more careful about the websites he visits. Access to adult pornography may be viewed as morally repugnant by some, but the DOD is not in the position of passing judgment on such activities unless they are shown to be illegal or contrary to policy (e.g., using a government-issued computer, access during duty hours, in circumstances showing a lack of discretion), or present an unacceptable risk of exploitation, pressure, or duress.

By continuing to search for and download pornography from the Internet, Applicant risks that some material downloaded might contain child pornography. Regarding that potential concern, I asked Applicant if he previously looked for assurances that no children were involved in his sexual role-playing or in the downloaded images from adult pornography websites. Applicant indicated that to access some of the website like FetLife.com, he had to attest that he was over 18, and so he assumed that others online had done likewise. About assuring himself of no child pornography, Applicant responded, "I am not sure how you would, considering some of these sites have—places like Yahoo and things like this, I wouldn't think, would have child pornography on them."<sup>1</sup> Applicant took no steps to investigate the sites to ensure there was no child pornography and to exercise care in downloading images from such websites, but there is no proof that he engaged in

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<sup>1</sup> It is unclear whether Applicant is aware of 18 U.S.C. § 2257 (and § 2257A as to recordkeeping for simulated sexual conduct). That statute requires the producer of any book, magazine, periodical, film, videotape, digitally or computer-manipulated image of an actual human being, picture, or other matter which contains actual sexually explicit conduct and is produced, shipped, or intended for shipment or transport in interstate commerce to maintain individually identifiable records of every performer. The record keeping requirement imposes an obligation, subject to criminal prosecution for any violation, to ascertain the performer's name and date of birth and maintain a record of that identifying information to ensure that such persons are not minors being sexually exploited. Regarding the knowing access of child pornography with intent to view, which is punishable under 18 U.S.C. § 2252A, it is an affirmative defense if the alleged child pornography was produced using no minors or if the person had less than three images of child pornography, and promptly and in good faith took reasonable steps to destroy the image or reported the matter to a law enforcement agency and afforded the agency access to the image.

illegal activity. The producer of a pornographic image is legally required to ensure that the participants are not minors, and companies like Yahoo are not likely to allow illegal content. Applicant has taken steps to minimize the risk of inadvertent access to child pornography by being more careful about the adult pornography sites that he visits and by no longer engaging in online fantasy role-playing. AG ¶ 17(d) applies. It provides:

(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Access to adult pornography is personal conduct that could trigger disqualifying AG ¶ 16(e), which provides:

(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.

Applicant does not believe that viewing adult pornography, which he still enjoys, is a potential source of exploitation for him. He was largely candid with the FBI about his online fantasy role-playing, his interest in adult-domination pornography; and the presence of adult pornography on his personal laptop computer. During his OPM interview, Applicant acknowledged that he had an interest in pornography since he was a teenager; that he visits pornographic websites to view images and videos with preference for male-on-female pornography, lesbian pornography, and dominant-submissive pornography; that he visits FetLife.com and participated in fantasies with other online personalities at least once a week; and that he has participated in a dominant-submissive lifestyle with his ex-wife and his current cohabitant. At his hearing, Applicant testified without embarrassment about his pornography viewing habits. He indicated that he has "nothing to hide."

Applicant admitted that his employer is still unaware of his sexual interests. He does not believe that it would not cause him issues at work if his employer was to become aware because movies and books have largely removed the stigma about the lifestyle. Given Applicant was never prosecuted, he had no obligation to inform his employer. Applicant testified that his family and friends are aware of his interests. His character references, which include his life partner and his brother, indicate that they are aware of the reasons why his security clearance eligibility is being questioned. Applicant's partner expressed that she understands "the complexities of this investigation." Applicant's brother referenced "some issues [Applicant] had several years ago." He mentioned that Applicant has gone through "ups and downs" in his life and that it might be hard to believe that Applicant is "a good person" given the circumstances. It is unclear what they know about Applicant's access to adult pornography and fantasy role-playing, and I cannot speculate in that regard. Even so, Applicant took significant steps under AG ¶ 17(e), "the individual has



taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress,” by candidly responding to the FBI and OPM investigators’ inquiries and volunteering information about his fantasy role-playing and his access to adult pornography. Any concerns of vulnerability are sufficiently mitigated.

### **Whole-Person Concept**

In the whole-person evaluation, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d).<sup>2</sup> Some of the factors in AG ¶ 2(d) were addressed under Guideline E, but some warrant additional comment.

The FBI’s investigation of Applicant’s computer in 2009 did not result in criminal prosecution. The U.S. Attorney, who likely had the FBI’s forensic investigation, declined to pursue federal prosecution because of a lack of prosecutorial evidence. Conduct may present a security concern regardless of whether an individual has been formally charged or prosecuted. However, the decision about Applicant’s security clearance eligibility must be based on facts and not speculation or improper inference. Applicant provided a reasonable explanation for the pornographic images on his computer in that he enjoys adult pornography.

Applicant’s patriotism is unassailable. He served honorably in the U.S. military, volunteered his time and talents to Scouting, and continues to help local veterans by driving them to medical appointments and buying meals for them. His family and friends describe him as supportive and honorable. He is not likely to jeopardize his employment by intentionally accessing child pornography in the future. He has taken steps to minimize the risk of possible inadvertent access to child pornography. After considering all the circumstances, I find that it is clearly consistent with the national interest to grant Applicant access to classified information.

### **Formal Finding**

Formal finding for or against Applicant on the allegation set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, is:

Paragraph 1, Guideline E:                   FOR APPLICANT

Subparagraph 1.a:                         For Applicant

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<sup>2</sup> The factors under AG ¶ 2(d) are as follows:

(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.

## **Conclusion**

In light of all of the circumstances, it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

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Elizabeth M. Matchinski  
Administrative Judge