



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



In the matter of:	)	
	)	
	)	ISCR Case No. 14-06100
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Andrew Henderson, Esquire, Department Counsel  
For Applicant: Brian Cruz, Esquire

February 3, 2016

\_\_\_\_\_  
**Decision**  
\_\_\_\_\_

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on November 14, 2012. On May 7, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines D, J and E for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), effective within the Department of Defense after September 1, 2006.

Applicant acknowledged receipt of the SOR on May 21, 2015. He answered the SOR in writing on June 8, 2015, and requested a hearing before an Administrative Judge. The Defense Office of Hearings and Appeals (DOHA) received the request soon thereafter, and I received the case assignment on September 1, 2015. I granted Applicant's request for a delay until November 10, 2015, in order for his counsel to be available. DOHA issued a notice of hearing on October 15, 2015, and I convened the hearing as scheduled on November 10, 2015. The Government offered Exhibits (GXs)

1 and 2, which were received without objection. Applicant testified on his own behalf and submitted Exhibits (AppXs) A through I, which were received without objection. DOHA received the transcript of the hearing (TR) on November 18, 2015. I granted Applicant's request to keep the record open until December 10, 2015, to submit additional matters. On December 4, 2015, he submitted Exhibit J, which was received without objection. The record closed on December 10, 2015. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the factual allegations in Subparagraphs 1.a., 1.b., 3.b., 3.c. and 3.e. of the SOR, with explanations. He denied the factual allegations in Subparagraphs 2.a., 3.a. and 3.d. of the SOR.

Applicant is 32 years old, has a Masters degree, and has been employed by his current employer, a "Federal Contractor," since February of 2009. (TR at page 10 line 25 to page 11 line 7, at page 13 line 1 to page 15 line 19, and GX 1 at page 13.)

### **Guideline D - Sexual Behavior & Guideline J - Criminal Conduct**

1.a. 1.b. and 2.a. In 2006, Applicant inadvertently downloaded child pornography. (TR at page 33 line 11 to page 35 line 21, at page 46 line 10 to page 51 line 18, and at page 53 line 25 to page 54 line 12.) He described the incident in the following terms: "It was probably in around 06. Like I didn't intend to view it. I was just looking at regular pornography. I downloaded like a file and it came up and it was child pornography. It was mislabeled." (TR at page 33 lines 14~17.) Once he realized what it was, he "deleted it immediately." (TR at page 34 lines 8~13, see *also* at page 50 lines 2~8.) This is the only time he viewed such pornography.

### **Guideline E - Personal Conduct**

3.a.~3.e. In October of 2006, Applicant took his first polygraph test. (TR at page 17 line 19 to page 18 line 9.) The test lasted "probably three to five hours," and he was informed he failed the test due to questions related to drugs. (TR at page 22 line 25 to page 26 line 8, and at page 54 lines 17~21, see *also* at page 43 lines 16~22.) He denies ever being involved with illegal drugs, and the Government does not allege any drug involvement. (*Id.*)

Applicant was "baffled" by this result; and as such, he "Googled [the] Polygraph Process." (TR at page 26 line 9 to page 28 line 2, see *also* at page 51 line 22 to page 52 line 20.) He explained his thought process in the following terms: "They said I couldn't get an accurate reading. So I was trying to see, well, if I could relax myself or something so they could get an **accurate** reading." (TR at page 27 lines 13~15, emphasis supplied.) This inquiry does not constitute an attempted wrongful manipulation of the polygraph process. It was merely a legitimate inquiry, in an attempt

to understand the polygraph process. Furthermore, those who know Applicant in the workplace aver that he is a credible individual. (AppXs A~C.)

In November of 2006, Applicant took a second polygraph test. (TR at page 18 lines 10~19, at page 28 line 3 to page 29 line 20, at page 44 line 7 to page 45 line 13, and at page 54 lines 22~25.) This test lasted “probably three or four hours,” and he again failed as “they couldn’t get an accurate reading.” (TR at page 28 lines 10~17, and at page 54 lines 22~25.)

In October of 2007, Applicant took a third polygraph test. (TR at page 18 line 20 to page 19 line 7, at page 29 line 22 to page 33 line 3, at page 36 lines 19~24, and at page 45 lines 14~18.) He describes this test in the following terms: “they said I did better this time; that they were able to get a better reading. Like they led me to believe that I passed at the end. But then I get a letter saying I didn’t pass.” (TR at page 32 lines 7~10.) During this polygraph test, as he did during the prior two tests, Applicant fully admitted his inadvertent viewing of child pornography back in 2006. (TR at page 32 line 15 to page 33 line 10.) Due to his three polygraph failures, Applicant was denied access to Sensitive Compartmental Information (SCI) in November of 2008, not due to his one-time inadvertent viewing of child pornography two years earlier, as alleged. (TR at page 36 line 25 to page 39 line 10.)

Applicant’s retired father held a security clearance for “over 30 years.” (AppX J.) He, like his son, “could not pass the polygraph based on inability to get accurate readings during the test.” (*Id.*, see also TR at page 11 line 10 to page 12 line 24.)

### **Policies**

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG Paragraph 2(c), 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 Paragraph 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph E3.1.15, the Applicant is responsible “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining 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 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.

Section 7 of Executive Order 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 D - Sexual Behavior**

The security concern relating to the guideline for Personal Conduct is set out in Paragraph 12:

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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 13(a), “*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*” may be disqualifying. Applicant inadvertently viewed child pornography, on one occasion in 2006. However, this is countered by the mitigating conditions in Subparagraph 14(b). Under 14(b) where “*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*” it may be mitigating. This one time, inadvertent occurrence happened nearly ten years ago. Sexual Behavior is found for Applicant.

## **Guideline J - Criminal Conduct**

Paragraph 30 of the adjudicative guidelines sets out the security concern relating to Criminal Conduct:

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 adjudicative guidelines set out certain conditions that could raise security concerns. Paragraph 31(c) provides that an "*allegation . . . of criminal conduct, regardless of whether the person was formally charged . . .*," may raise security concerns. Applicant inadvertently viewed child pornography. However, this is clearly countered by the mitigating condition in Subparagraph 32(a) as "*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.*" Even assuming that Applicant's one time, inadvertent viewing was criminal, this viewing occurred nearly ten years ago. I find that such criminal conduct is unlikely to recur, and that criminal conduct is found for Applicant.

## **Guideline E - Personal Conduct**

The security concern for Personal Conduct is set out in AG Paragraph 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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 16(c), "*credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any single guideline, but which, when considered as a whole, supports a whole-man assessment of questionable judgment, untrustworthiness, unreliability . . .*" However, I find the countervailing mitigating condition under Subparagraph 17(c) applicable here. Subparagraph 17(c), requires that "*the offense is so minor, or so much time has passed . . . 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.*" There is no showing that Applicant tried to manipulate the last two polygraph tests he was administered. Furthermore, the last test was administered more than seven years ago. Like his father, it appears he failed all three tests due to his physiology. Personal Conduct is found for Applicant.

## **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. Under AG Subparagraph 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.

The Administrative Judge should also consider the nine adjudicative process factors listed at AG Subparagraph 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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. Applicant is highly regarded in the work place. (AppXs A~C, H and I.) The record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his alleged Sexual Behavior, Criminal Conduct and Personal Conduct.

## **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 J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraphs 3.a.~3.e.:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Richard A. Cefola  
Administrative Judge