

DATE: April 11, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-16810

DECISION OF ADMINISTRATIVE JUDGE

ARTHUR E. MARSHALL, JR.

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Mark S. Zaid, Esq.

SYNOPSIS

Applicant is a 50 year-old male working for a defense contractor. In 1999, he found an Internet website with banners and pop-ups containing what appeared to be child pornography. He later returned to the site, then reported its content to his Internet provider and to a link on the Federal Bureau of Investigation's web page. Applicant visited the website a third and final time to ascertain whether the site had been altered or removed. In 2001, prior to a polygraph exam for access to sensitive compartmented information (SCI), he reported that he had been exposed to the site; SCI access was denied owing to a determination that his actions constituted criminal conduct, rather than, as here, a question of sexual behavior. Applicant mitigated security concerns. Clearance is granted.

STATEMENT OF THE CASE

On July 7, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive),

dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) detailing why, pursuant to Guideline D-Sexual Behavior, it could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Consequentially, DOHA recommended that the matter be referred to an Administrative Judge to determine whether a clearance should be granted.

In a written statement dated July 25, 2004, Applicant denied with explanation the allegation contained in the SOR. In that response, Applicant also elected to have a hearing on this matter. I was assigned this case on February 1, 2005 and, on February 9, 2004, a hearing was set February 28, 2004. At that hearing, the Government presented three exhibits and no witnesses; Applicant introduced two exhibits and Applicant's wife as a witness. I received the transcript of the proceeding on March 9, 2005.

FINDINGS OF FACT

Applicant has denied the factual allegation pertaining to sexual behavior under Guideline D. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 50-year-old male employed by a defense contractor. Sometime in 1999, while working on a graduate degree, Applicant sought information about a film recently in the news entitled *Lolita*.⁽¹⁾ While conducting a search engine query of the internet on his home computer, he instead was directed to a website of "bad pornography."⁽²⁾ When the site opened, Applicant noticed advertising banners and received pop-ups.⁽³⁾ Those advertisements included what he assumed was child pornography inasmuch as some contained sexually provocative pictures of apparently underage females.⁽⁴⁾ Applicant now only remembers one image - "a child that was with part of another person" - that he described as "ugly" and "bad news."⁽⁵⁾ He believes the age of some of the subjects could have been as young as 10.⁽⁶⁾ Knowledge that such content was available on the internet concerned him.⁽⁷⁾

A few months later, Applicant remained concerned about the content of the ads and its availability on the web. Bowing to curiosity and half expecting them to have been removed by some level of authority,⁽⁸⁾ Applicant reinitiated his web search and revisited the site. He found, however, that its content remained basically unchanged. He then reported it as child pornography to his Internet provider and to a site linked to a FBI web page. Applicant then cleaned his computer's cache files, deleted its temporary internet directory, and attempted to use better filter levels. A significant time later, Applicant revisited what he believed to be the same site for a third and final time in order to discover whether the site remained, had been altered, or whether its advertising had been removed.

In May 2001, during the process of seeking a sensitive compartmentalized information expansion of his security clearance, Applicant appeared for a lifestyle polygraph. He was concerned about his exposure to the *Lolita*-themed site and its related borders and pop-

ups. Having previously been subject to a lifestyle polygraph, Applicant was aware of the process. In an attempt to be candid during his pre-polygraph interview, he volunteered information as to what he had been exposed to on that one particular site.⁽⁹⁾ Applicant had concerns that discussion of that site would cause him to react.⁽¹⁰⁾ A second polygraph was administered that July. Subsequently, Applicant was denied access to NSA SCI, pursuant to Director of Central Intelligence Directive (DCID) 6/4, Annex C criteria for "Adjudicative Guidelines For Determining Eligibility For Access to Classified Information," Guideline J (Criminal Conduct)⁽¹¹⁾ based on his admission regarding the above internet activity.

On average, Applicant uses his computer for two or more hours per day. The three visits to what Applicant assumes were the same site were launched from his bedroom on his personal computer and via his Internet provider. He was not seeking to sate a sexual desire by viewing the site's advertising links. Moreover, Applicant's wife of 28 years was told of the site sometime prior to the time he reported it to his Internet provider and an FBI link. She has had full access to their personal computer and to her husband's email account, but has not seen or had reason to believe that he frequents any pornographic sites. There is no evidence of other visits to similar or related sites.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, these adjudicative guidelines are subdivided into those that may be considered in deciding whether to deny or revoke one's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to determine one could still be eligible for access to classified information (Mitigating Conditions).

In application, an Administrative Judge is not strictly bound to the adjudicative guidelines. They are guidelines. As such, they are but part of an amalgam of elements for the Administrative Judge to consider in assessing an applicant in light of the circumstances giving rise to the SOR, as well as in assessing the applicant as a whole. The concept of the "whole person"⁽¹²⁾ means that all available, reliable information about the person - whether it is good or bad, present or past - should be considered in making a fair, impartial, and meaningful decision as to his or her suitability to hold a security clearance. To that end, Enclosure 2 also sets forth factors to be considered during this part of the adjudicative process, including: (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 individuals age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Guideline D-Sexual Behavior. Sexual Behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress, or reflects lack of judgment or discretion.⁽¹³⁾ **Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance.**⁽¹⁴⁾

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to this adjudicative guideline are set forth and discussed in the Conclusions section below.

After a full and thorough examination, however, the final assessment must comport with the considerable gravity of the final decision. There is no right to a security clearance⁽¹⁵⁾ and one seeking access to classified information must be prepared to enter into a fiduciary relationship with the United States Government that is inherently predicated on trust and confidence. Therefore, when the facts proven by the Government raise doubts as to an applicant's judgment, reliability, or trustworthiness, the applicant has the heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁶⁾ Therefore, any doubts will be resolved in favor of the national security, not the applicant.

Finally, Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance 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." Therefore, nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all legal precepts, factors, and conditions, including those described briefly above, I find the following with respect to the allegation set forth in the SOR:

With respect to Guideline D, the Government has established its case. Applicant's two return visits to an adult, sex-oriented website that included advertising banners and pop-ups that he believed to contain child pornography raise concerns regarding his judgment and discretion. The Directive clearly expresses the Government's concern regarding a lack of judgment in provision E2.A4.1.1 (*Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress, or reflects lack of judgment or discretion*). Applicant's conduct and judgment in accessing this website on three occasions, given the potentially illegal content within its banners and pop-ups, thus raise a security concern and may be disqualifying under Sexual Behavior Disqualifying Condition (SB DC) E2.A4.1.2.4 (*Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment*).

In order to mitigate this concern, Applicant must turn to the Sexual Behavior Mitigating Conditions (SB MC) found at E2.A4.1.3. Applicant is currently 50 years of age and was well past adolescence when the conduct occurred. Therefore, there is no application of SB MC E2.4.1.3.1 (*The behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature*). Although not as remote as Applicant's adolescence, however, the incidents at issue are not recent. The last visit to the website was sometime in 2000 and there is no suggestion that he has since returned to it or otherwise been exposed to similarly prurient content either on the internet or through another medium. Therefore, I find

that SB MC E2.A4.1.3.2 (*The behavior was not recent and there is no evidence of subsequent conduct of a similar nature*) applies.

There is no other evidence of questionable judgment or irresponsibility, and no indication of emotional instability or immaturity. Indeed, given that Applicant first stumbled across the material at issue inadvertently, and only returned to act responsibly in reaction to what he had accidentally found, I am unconvinced Applicant ever truly demonstrated questionable judgment in the first place. Regardless, I find that SB MC E2.A4.1.3.3 (*There is no other evidence of questionable judgment, irresponsibility, or emotional instability*) applies.

Applicant's conduct with regard to this website does not serve as a basis for coercion, exploitation, or duress. His wife was told of his second site visit around the time it happened. On his own initiative, he detailed the incidents prior to his polygraph. Since then, the issue has been aired through two agencies and he is candid about the incident. Therefore, I also find that SB MC E2.A4.1.3.4 (*The behavior no longer serves as a basis for coercion, exploitation, or duress*) applies.

Apart from the matter at issue, the evidence reveals that Applicant, as a whole person, is a responsible, emotionally stable man of judgment. He had 20 years of military service, over 15 years of security access at the highest levels, and, while in his mid-'40s, had the diligence to return to school and earn a graduate degree. He has been married since 1976, raised two children, and has the trust and confidence of his wife. He has been forthcoming with regard to the *Lolita*-esque website from the beginning. His testimony on the stand was credible and comported with the evidence. There is no other evidence of questionable judgment in the record. Regardless of how he found this site or why he returned, there is no evidence that Applicant's behavior is prurient. Indeed, although the Government argues that to return to such a website demonstrates questionable judgment, the fact that he then followed that return by reporting the website is equally suggestive of responsibility and discretion. Given the totality of facts before me, I find no basis upon which to conclude that Applicant's downloading of, or exposure to, the material at issue is a valid example of poor judgment or a harbinger of future risk.

Sexual behavior is a security concern if it reflects a lack of discretion or judgment; and it carries along issues regarding reliability and trustworthiness that are central to an assessment as to whether one is security worthy. Here, Applicant has successfully mitigated concerns regarding his judgment and discretion. He has established his suitability by presenting sufficient evidence to refute, mitigate, or extenuate the disqualifying condition raised, and demonstrated that it is clearly consistent with the national interest to continue his security clearance. Therefore, I find Subparagraph 1.a. of the SOR in favor of Applicant. Clearance is granted.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.2.5 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline D: FOR THE APPLICANT

Subparagraph 1.a: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Appellant. Clearance is granted.

Arthur E. Marshall, Jr.
Administrative Judge

1. Transcript of Hearing of February 28, 2005 (Tr.), at 49-50. *Note:* Based on Vladimir Nabokov's controversial novel of the same name, a film version was remade in 1997 and released on DVD in 1998. Applicant was under the misimpression that it was a story about aristocratic young love, Tr. at 106, rather than a middle aged man's mounting obsession over his landlady's young daughter, the pet name of whom has come to connote a precociously seductive girl. The website clarified Applicant's understanding of the term. Tr. at 50.

2. Government Exhibit 2 (Applicant Statement, dated June 12, 2003), at 1.

3. The SOR alleges that Applicant "downloaded" images of child pornography. The parties agreed that the term "download" denotes the act of a site opening, and not requiring a proactive function by the viewer to capture or store the image. *See, e.g.*, Tr. at 63-65.

4. His visits were brief and he did not stay on the site long enough to determine whether the photos were genuine, digitally enhanced, graphically altered, or whether they were of young models made to appear underage. Tr. at 86-87.

5. *Id.*

6. *Id.*, at 107.

7. *Id.*, at 111.

8. *Id.*

9. Exhibit 2, *supra* note 2, at 2.

10. Tr., *supra* note 1, at 74.

11. Although an analogous basis exists within the Department of Defense Directive at § E2.A10, Attachment 10 to Enclosure 2, Guideline J (Criminal Conduct), the Government, here, chose to proceed under Guideline D (Sexual Behavior).

12. Directive, at ¶ E2.2.1.

13. **The adjudicator should also consider guidelines pertaining to criminal conduct (Guideline J) and mental, emotional, and personality disorders (Guideline I) in determining how to resolve the security concerns raised by sexual behavior. Based on the Applicant's testimony as noted, *supra*, at footnote 4, there is insufficient evidence as to whether the content at issue was, pursuant to 18 U.S.C. 2252(a), "child pornography"; therefore, criminal conduct is not here. Moreover, as noted, *infra*, I find no evidence of emotional, mental, or personality disorder.**

14. ⁰ Directive, Enclosure 2, Attachment 4, Guideline D, ¶ E2.A4.1.1.

15. ⁰ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

16. ⁰ *Id.*, at 531