



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



In the matter of:)
)
) ISCR Case No. 24-00196
)
Applicant for Security Clearance)

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: Daniel Gebhardt, Esq.

06/11/2025

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines D (Sexual Behavior), J (Criminal Conduct), H (Drug Involvement and Substance Misuse), and E (Personal Conduct). Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 27, 2023. On July 16, 2024, the Defense Counterintelligence and Security Agency (DCSA) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines D, J, H, and E. The DCSA acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), which became effective on June 8, 2017.

Applicant answered the SOR on July 17, 2024, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on August 29, 2024. The case was assigned to me on March 11, 2025. On April 1, 2025, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted on May 5, 2025. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Department Counsel requested that I take administrative notice of 18 U.S.C. § 1466A, a Department of Justice publication on child pornography; and a Drug Enforcement Administration letter about Delta-9-THCO and Delta-8-THCO. I took administrative notice as requested, without objection by Applicant.

Applicant testified and submitted Applicant's Exhibits (AX) A through G, which were admitted without objection. The record closed upon adjournment of the hearing on May 5, 2025. DOHA received the transcript on May 19, 2025.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations in the SOR, with explanations. His admissions are incorporated in my findings of fact.

Applicant is a 24-year-old associate engineer employed by a defense contractor since November 2022. He attended college from 2018 to 2023 and received a bachelor's degree. (Tr. 17) He has never married and has no children. He has never held a security clearance. The evidence related to each of the guidelines is summarized below.

Guideline D, Sexual Behavior

Applicant underwent two polygraph examinations on August 12 and 17, 2020. During a pretest interview before the first polygraph, he admitted watching Hentai (anime) pornography from 2015 until the date of the polygraph, in which the characters depicted appeared to be 11 to 15 years old based on their physical features, and they were engaged in sexual acts. He also admitted that in 2018, he watched bestiality pornography displaying a female engaged in sexual activity with a horse. (GX 2 at 7, 10)

After Applicant failed to successfully complete the first examination on August 12, he told the examiner that he had fleeting suicidal thoughts. After failing the second examination on August 17, he was asked if he had thoughts of harming himself, and he replied "yes." He was asked the same question a few minutes later, and he said he had no intention of harming himself. A medical doctor was summoned and advised of Applicant's statements. After Applicant was given additional time to speak with the doctor, he stated that he had no intention to harm himself. (GX 2 at 11)

In August 2023, Applicant was interviewed by a security investigator about watching bestiality pornography, fake rape pornography, and Hentai (cartoon) pornography. He told the investigator that he watched bestiality pornography only once, when he was on a pornography website, saw a clip, and watched it once or twice out of curiosity. He told the investigator that he did not like it and has not watched it again. He

told the investigator that he has watched Hentai pornography for enjoyment a couple times a month since 2015. He was then confronted with evidence of 40 pictures of underage nude females and one or two videos that were found on his personal cellphone. The record does not reflect how or by whom they were found. He explained to the security investigator that the photographs on his cellphone were from an ex-girlfriend who was 17 years old at the time he received them. He told the investigator that he deleted the photographs and videos after he and his girlfriend broke up. (GX 3 at 11-12)

At the hearing, Applicant testified that he opened the 40 images of underage nude females accidentally on a pornography website, using an application that supposedly prohibits such images. He testified that he found them disgusting, and that he blocked them and reported them. (Tr. 21)

Applicant also testified that in 2018, he accidentally “stumbled across” a video of a female human engaged in a sexual act with a horse. He watched the video because he was young and stupid and out of morbid curiosity. (Tr. 24-25) He testified that he visited the pornography site with the intention of viewing only legal content, and that any viewing of illegal pornography was accidental. (Tr. 32) He has not viewed images of naked people who appeared to be younger than 18 years old since 2019. (Tr. 56)

At the hearing, Applicant admitted that between 2015 and August 2020, he watched Hentai cartoons of children who appeared to be between ages 11 and 15 engaged in sexually explicit conduct. He testified that he did not intentionally seek out Hentai cartoons of underage children, but that he “stumbled upon it,” and he sometimes masturbated to it. (Tr. 58)

I have taken administrative notice of 18 U.S.C. § 1466(A), which criminalizes “a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting that . . . depicts a minor engaged in sexually explicit conduct” and “is obscene.” This statute encompasses Hentai cartoons.

Applicant currently views pornography once or twice a week. The website he visits does not permit content involving underage children. (Tr. 61) The website is required by federal law to maintain records of the names and ages of performers and to certify that performers are 18 years old or older. (AX F) Applicant testified that he never has received therapy for addiction to pornography, and he does not believe that he is addicted to it. (Tr. 63)

Guideline J, Criminal Conduct

During the pretest interview with a polygraph examiner on August 12, 2020, Applicant admitted that in the summer of 2019, he stole a pen worth about \$20 from an office supply store and stole a magnet and three key chains from a souvenir shop, each item being worth \$7-10. (GX 2 at 7) He admitted that during the fall of 2019, he stole four or five packages of guitar strings, each worth about \$15, from a music store. He admitted that during the spring of 2020, he stole four or five face and hair products from a department store, each worth between \$5 and \$15. He admitted that in the summer of

2020, he stole four bracelets and a cup of unknown value. (GX 3 at 7-10) During an interview with a security investigator on August 28, 2023, he admitted the same criminal activity and stated that he stole the items because of lack of income. (GX 3 at 12-15) At the hearing, Applicant testified that the last shoplifting was in 2021, while he was a 20-year-old full-time student and working a part-time job. At the time of this shoplifting, his father had been laid off due to the COVID-19 pandemic, and the family was financially struggling. (Tr. 21) He testified that his last shoplift in 2021 was after his application for a security clearance was denied. (Tr. 65)

During the pretest interview, Applicant also admitted that between 2015 and 2019 he illegally downloaded about 40 video games, movies, and television shows from the internet. He estimated that the games were worth about \$30 each and the movies were worth about \$20 each. (GX 2 at 10)

During the same pretest interview, Applicant admitted that, while employed as a web developer in 2018, he falsified his time sheets, claiming about 30-40 hours of employment for times that he did not work, worth between \$300 and \$450. He fabricated his work hours by rounding up partial hours to a whole number and fabricating hours when he did not work at all. (GX 2 at 10) At the hearing, he blamed the fabrication on financial needs and pressure from his employer to work more hours. (Tr. 30)

Guideline H, Drug Involvement and Substance Misuse

During the pretest interview on August 12, 2020, Applicant admitted that he was prescribed a narcotic painkiller after having his tonsils removed in August 2015, and that he misused the narcotic about 10 times in August and September 2019 to get high. When the polygraph examiner asked him about future use of the narcotic, he said that he was not sure whether he would use it again if he had the opportunity, and he explained that he was not sure because it made him feel good. (GX 2 at 10)

When Applicant was interviewed by a security investigator on August 8, 2023, he claimed that he misunderstood the question during the pretest interview and that he did not misuse the narcotic painkiller. (GX 3 at 15) At the hearing, he claimed that he admitted to the polygraph examiner that he misused the Oxycodone, because he could have used an over-the-counter pain killer instead of the more powerful Oxycodone. (Tr. 38)

At the hearing, Applicant admitted using Delta-9 edibles in May 2023 to treat his medically diagnosed anxiety. He has been seeing a therapist for anxiety every two weeks for two or three years. He testified that he has struggled with self-esteem issues. (Tr. 34) Medical marijuana is legal in the jurisdiction where he lives. He testified that he has never smoked marijuana. (Tr. 33-34)

On one occasion, Applicant went to a store that sold vapes and marijuana edibles. He purchased some marijuana edibles after asking the store clerk if they were "federally legal" and receiving an affirmative response. After consuming an edible, he read the label on the package and discovered that the edibles contained THC, which he knew was federally illegal. He disposed of the remaining edibles without consuming them. I have

taken administrative notice that the Drug Enforcement Administration considers Delta-8 THCO and Delta-9 THCO to be tetrahydrocannabinols and Schedule I controlled substances. Applicant testified that when he found out that the product he purchased contained THC, he did not use it and threw it away. (Tr. 35-36)

Guideline E, Personal Conduct

During the pretest interview in August 2020, he told the polygraph examiner that his last shoplifting was in 2016 and his last alcohol consumption was in 2018. Both statements were untrue. He later admitted that his last shoplifting was in 2021, and that his last alcohol consumption was in 2020. When he was interviewed by the security investigator in August 2023, he told the investigator that he was not prepared for the pretest interview and could not recall all the information. (GX 3 at 16) In his answer to the SOR, he admitted giving the polygraph examiner false information, because he was ashamed of his conduct because it was so recent. At the hearing, he recanted this admission and testified that he misspoke during the interview with the polygraph examiner due to anxiety, and that he did not correct his misspoken answer immediately due to a "lapse of judgment." (Tr. 43-44)

Whole-Person Evidence

The president of the company that employed Applicant from June 2017 to September 2019 states that Applicant "quickly established himself as a reliable team member, consistently delivering high-quality work on time and exceeding expectations." He considers Applicant "not only a skilled software developer, but also a person of integrity and excellent character." (AX C)

An associate director for student programs at the university where Applicant received his bachelor's degree submitted a letter attesting to Applicant's good character. She has known him since the summer of 2018. She described him as "among the quieter students" she worked with. She considers him kind, compassionate, thoughtful, trustworthy, and ethical. She believes that he "understands the importance of following processes, procedures, and guidelines." (AX D)

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 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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." 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* at 531. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." See ISCR Case No. 17-04166 at 3 (App. Bd. Mar. 21, 2019). It is "less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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. ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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* at 531.

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 under this guideline are relevant:

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

AG ¶ 13(c): sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

Both disqualifying conditions are established. Applicant's intentional viewing of pornography involving underage children violated 18 U.S.C §1466A, which applies to both actual images and illustrated Hentai images, and it caused him to be vulnerable to coercion, exploitation, or duress.

The following mitigating conditions are potentially applicable:

AG ¶ 14(b): 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 judgment;

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

AG ¶ 14(d): the sexual behavior is strictly private, consensual, and discreet; and

AG 14(e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

AG ¶ 14(b) is not established. The first prong of AG ¶ 14(a) ("so long ago") focuses on whether the criminal conduct was recent. There are no bright line rules for determining when conduct is recent. The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without any evidence of misconduct, then an administrative judge must determine whether that period of time demonstrates changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant's last viewing of anime depicting underage children was in August 2020, more than four years ago, which is a "significant period of time." However, I am not satisfied that he is rehabilitated. He has been seeking federal employment for several years and still aspires to work for a federal contractor and hold a security clearance. He has been engaged in deceptive and illegal conduct since he was a child, and it continued even after he first sought a security clearance. His long track record of criminal and deceptive conduct leaves me with doubt about his rehabilitation. I am not satisfied that he will carefully limit his viewing of anime pornography depicting children once the pressure of qualifying for a security clearance is removed. Thus, I conclude that his conduct was recent, frequent, and did not occur under unusual circumstances making recurrence unlikely.

AG ¶ 14(c) is not established. Viewing of any kind of pornography involving children is abhorrent conduct. Applicant's personality makes him vulnerable to pressure. He was embarrassed when he was questioned about his involvement with this type of pornography. He had suicidal thoughts after the first polygraph examination. He has been under treatment for anxiety for two or three years. He admitted at the hearing that he suffers from issues of self-esteem. His disclosures were limited. When he disclosed his involvement in illegal pornography during the current investigation, his disclosure occurred in situations where the information is closely protected from public knowledge. The university official and a former employer who submitted testimonials to his good character were apparently not aware of his conduct.

AG ¶ 14(d) is not established. Applicant's viewing of images of child pornography may have been private, but it was not discreet.

AG ¶ 14(e) is not established. Applicant is being treated for anxiety, but he denied at the hearing that he was addicted to pornography, and he has not sought or received treatment.

Guideline J, Criminal Conduct

The following disqualifying conditions are relevant:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

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

Both disqualifying conditions are established by Applicant's viewing of illegal pornography and long history of shoplifting.

The following mitigating conditions are 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, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶¶ 32(a) and 32(d) are not established for Applicant's viewing of illegal pornography, for the reasons set out in the above discussion of Guideline D. They are not established for Applicant's long history of shoplifting, which continued until 2021, when he was a 20-year-old student. He has consistently attempted to justify his shoplifting on the basis of financial need, even though the products he stole were unrelated to the needs of daily living. His refusal to accept responsibility for his conduct undercuts the mitigating value of explanations he provided for his petty thievery and the evidence of good character provided by a former employer and a university official. See ISCR Case No. 22-00761 (App. Bd.Jun.13, 2024)

Guideline H, Drug Involvement and Substance Misuse

The concern under this guideline is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

Applicant's admissions and the evidence in the record establish the disqualifying condition in AG ¶ 25(a): "any substance misuse (see above definition)." Applicant has

given inconsistent statements about his use of Oxycodone. He admitted to the polygraph examiner that he misused the Oxycodone to get high about 10 times in August and September 2019. When the polygraph examiner asked him if he would misuse Oxycodone again, he was equivocal, stating that he was not sure if he would do it again, because it made him feel good. He then attempted to retract his admission during his security interview in August 2023 and at the hearing. I found his attempted retractions unpersuasive and not credible.

However, more than five years have passed since Applicant misused Oxycodone, and there is no evidence of further substance misuse. Based on the passage of time, I conclude that the mitigating condition in AG 26(a) is applicable: “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.”

Applicant admitted consuming one edible containing THC, which he knew was federally illegal. However, he credibly testified that he did not know that he consumed THC until he read the label after consuming the one edible. Unknowing consumption of THC does not establish AG ¶ 25(a).

Guideline E, Personal Conduct

The security concern under this guideline is set out 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 investigative or adjudicative processes. . . .

The relevant disqualifying condition is AG ¶ 16(b):

[D]eliberately 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 representative.

This disqualifying condition is established by Applicant’s admission in his answer to the SOR that he lied to the polygraph examiner about his last shoplifting and alcohol consumption because he was ashamed of his more recent shoplifting and alcohol consumption. He attempted to recant his admission in the SOR at the hearing, claiming that his misspoke during the interview with the polygraph examiner due to anxiety. I found his recantation not credible.

The following mitigating conditions are potentially applicable:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(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.

AG ¶ 17(a) is not established. Applicant had an opportunity to be truthful at the hearing, but instead he persisted in his attempted recantation.

AG ¶ 17(c) is not established. Applicant persisted in his falsification up to and including at the hearing. It was not infrequent and did not happen under unusual circumstances. His falsification was not "minor," because it adversely affected the adjudicative process. See ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.)

Whole-Person Analysis

Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. An administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the 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, H, and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under those guidelines and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his misuse of Oxycodone and use of a THC product, but he has not mitigated the security concerns raised by his sexual behavior, criminal conduct, and personal conduct.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline D (Sexual Behavior):	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a-2.d:	Against Applicant
Paragraph 3, Guideline H (Drug Involvement and Substance Abuse)	FOR APPLICANT
Subparagraph 3.a	For Applicant
Subparagraph 3.b:	For Applicant
Paragraph 4, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 4.a:	Against Applicant
Subparagraph 4.b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge