DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 21-00321
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Brittany C. White, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

07/05/2022

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Decision

____

HARVEY, Mark, Administrative Judge:

The allegations in the statement of reasons (SOR) made under Guidelines D (sexual behavior) and J (criminal conduct) are not mitigated. Access to classified information is denied.

Statement of the Case

On March 1, 2020, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On July 13, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DCSA CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guidelines D and J.

On August 4, 2021, Applicant responded to the SOR and requested a hearing. (HE 3) On November 8, 2021, Department Counsel was ready to proceed. On December 2, 2021, the case was assigned to me. On December 22, 2021, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for January 21, 2022. (HE 1) The hearing was held as scheduled.

During the hearing, Department Counsel offered six exhibits, and Applicant offered 44 exhibits. (Transcript (Tr.) 14-16, 46-47; GE 1-6; Applicant Exhibit (AE) A-AE RR) There were no objections and all proffered exhibits admitted into evidence. (Tr. 16, 47; GE 1-GE 6; AE A-AE RR) On January 28, 2022, DOHA received a transcript of the hearing. Applicant provided one exhibit after the hearing, which was admitted without objection. (AE SS composed of 386 pages (handwritten markings on exhibit Applicant provided)) The record closed on March 25, 2022. (Tr. 86, 97)

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Findings of Fact

In Applicant's SOR response, he admitted all of the SOR allegations. (HE 3) He also provided clarifying, extenuating, and mitigating information. (HE 3)

Applicant is a 52-year-old senior strategic manager employed by a defense contractor. (Tr. 47-48) He provided a detailed resume of his employment history and accomplishments. (AE BB) His current annual salary is about $200,000, and he needs a security clearance for his continued employment. (Tr. 48) He was married from July 2010 to December 2012. (Tr. 47; GE 1) His children are ages 15 and 18. (Tr. 48) In 1992, he received a bachelor's degree in electronics and electrical engineering. (SOR response at 3; AE T) In 2004, he received a master's degree in telecommunications management, and he is currently seeking a master's degree in business administration. (Tr. 28; SOR response at 4; AE U) He received several work-related technical certifications. (AE O, AE S, AE V; AE W)

Applicant attended ROTC in college, and he was commissioned as a second lieutenant in 1992. (SOR response at 3) His Air Force specialty was communications computer electronics engineer. (AE D) He served in Bosnia and Herzegovina from 1995 to 1997. He served in the Air Force for six years on active duty and for two years in the inactive Reserve. (Tr. 48) He received an honorable discharge as a captain in 2001. (Tr. 49; AE P; SOR response at 3)

Criminal Conduct and Sexual Behavior

SOR ¶ 1.a alleges in October 2007, Applicant was arrested and charged with Enticement of Child by Adult and Furnishing Pornographic Material to a Minor. In February 2012, he was convicted of Attempted Enticement of a Child, a felony, and sentenced to five years in prison. He was incarcerated from February 2012 to January

2017. He was required to register as a sex offender. SOR ¶ 2.a cross alleges the same information as in SOR ¶ 1.a.

Applicant admitted that he was convicted and sentenced as alleged in SOR ¶ 1.a; however, he asserted he was factually innocent of the charge of Attempted Enticement of Child by Adult because he believed the alleged victim, Kiki (not her actual name), was over the age of 18. The age of a child in the State statute is defined as being under the age of 15 years. The person Applicant attempted to entice for sex was an undercover police officer posing as a child.

The police report states that Applicant viewed Kiki's profile on the Internet, and her profile indicates she is 12 years old.[1] Applicant looked for her picture on her profile, but claimed he did not notice her age on the profile. (Tr. 67; GE 5 at 18) There was no picture on her profile. On October 28, 2007, Applicant contacted Kiki, who informed him that she was 12 years old. After she sent him a picture of her face, Applicant said she looked like she was 18 years old, and Kiki responded that she is 12 and will be 13 in March.[2] (GE 5 at 14; AE SS at .pdf 44) Applicant told Kiki that she was 18 years old, and Kiki agreed with him. *Id.* at .pdf 17, 44. The police officer posing as Kiki "repeated several more times throughout the chat that [Kiki] was twelve-years-old." (GE 5 at 15) Applicant told Kiki that he could see her as long as she is 18 years old, and Kiki responded "12 going on 18, right." (AE SS at 19, 44) Applicant responded "Eighteen right? So if [you're] eighteen, would, could have all kinds of fun." (*Id.*) Kiki responded "Yep." (*Id.*) Applicant said, "Is that what you want?", and Kiki said, "Yep." (*Id.*)

Applicant said Kiki was gorgeous and asked if she liked older men. He asked for pictures of her, and he called her again on October 29, 2007. The State appellate court reviewing the case for factual sufficiency noted, "When [Applicant] talked about sexual intercourse with [Kiki], she expressed concern that he would tell her mother and she would get into trouble. Such references could lead a reasonable juror to conclude that [Applicant] believed he was communicating with a twelve-year-old girl." (GE 5 at 15)

Applicant agreed over the telephone to meet Kiki at a bowling alley. When the police arrested Applicant, they asked him why he was at the bowling alley, and he responded, "I think you know why I am here."[3] When the police officer asked him if he was there to meet Kiki for sex, he responded by nodding his head up and down and

[1] Unless stated otherwise, the information in this paragraph and the next paragraph is from the police report pertaining to Applicant's arrest on October 29, 2007. (GE 4 at 6) Under Federal Rule of Evidence 803(8), "court records and police reports, are presumed to be reliable by virtue of the government agency's duty for accuracy and the high probability that it has satisfied that duty." ISCR Case No. 16-03603 at 4 (citing *United States v. Carter*, 591 F.3d 656, 659 (D.C. Cir. 2010); ISCR Case No. 11-075095, n.3 (App. Bd. Jun. 25, 2013)). Of course, the documents can still be challenged for accuracy, and other reasons, and such challenges go to their weight not their admissibility.

[2] Applicant agreed that the police report in this instance accurately reflected his question and her response. (Tr. 66-67)

[3] Applicant agreed that the police report accurately reflected his conversation with the police when he was arrested, except for the part about his disclosure that he had condoms in his vehicle. (Tr. 74-75)

stating "Yeah. And I'm going to lose my job over this. I work for DOD and my work is going to kill me." Applicant informed the police that he brought condoms for the meeting, and they were in his vehicle.

At his DOHA hearing, Applicant said he went to chat rooms for companionship because he was having difficulties in his marriage. (Tr. 61-62) He met Kiki in an adult chat room. (Tr. 51) He said Kiki sent him a picture, and she looked like she was 26 to 28 years old. (Tr. 53) They discussed oral sex, and he believed this conversation was an indication Kiki was over 18. (Tr. 68) For example, he asked her if she ever swallowed semen because he suspected she was lying to him. (Tr. 68) He said he sent her a picture of his penis and asked her to send pictures of her genitals once he was convinced she was over the age of 18 because he was upset that she was lying to him. (Tr. 69-70; GE 5 at 17) He said he believed she was over the age of 18. (Tr. 64) The first phone call was brief because she said her mom was coming. (Tr. 53) He said she gave her age as 12, 13, 14, and 15. (Tr. 53) He did not cite a page in the record of chats showing she said she was 15. He pursued the relationship because he was curious and wanted to "figure out who [she] was." (Tr. 54) He said that when he got to the bowling alley, he received a phone call and he asked her "I just want to confirm you're over 18, correct?" (Tr. 54) He claimed that she replied "yes" and hung up the phone. (Tr. 54) Seconds later the police arrested him. (Tr. 54)

Applicant was convicted by a jury, contrary to his pleas, of Attempted Enticement of a Child, a felony, and sentenced by the judge to five years in prison. (Tr. 50, 59) To establish Attempted Enticement of a Child, "the State was required to prove [Applicant] took a substantial step towards enticing [Kiki] for the purpose of engaging in sexual conduct with her." (GE 5 at 17) He was acquitted of Furnishing Pornographic Material to a Minor (Tr. 50), possibly because the police officer who was posing was a child was not a minor. He did not testify at his trial based on advice of his counsel. (Tr. 55-56) He appealed his conviction based on ineffective assistance of counsel, instructional error, factual sufficiency, and other issues. (Tr. 56; GE 5 at 14) He provided statements from experts on sex offenses, chat rooms, and people posing as others on the Internet. (AE SS) He also provided evidence from mental-health practitioners about pedophilia. (AE SS) The State appellate court addressed several allegations of error, and concluded, "the State was not required to prove that [Applicant] knew or reasonably believed that [Kiki] was under the age of fifteen." (GE 5 at 14) Nevertheless, "If the instruction had required the jury to find that [Applicant] knew, or reasonably believed, that the person he was communicating with was younger than fifteen, there was ample evidence for the jury to make that finding. [Applicant] was therefore not prejudiced by the omission of that requirement, even if it was an element of the offense." *Id.* at 15.

The State appellate court noted that the jury could infer that Applicant believed he was communicating with a 12-year-old girl because of Applicant's

> continued requests to have [Kiki] state that she was eighteen, his acknowledgement on at least one occasion that she had stated her age as younger than eighteen, his concerns about [Kiki] being an undercover officer, his attempt to leave the bowling alley when police officers

> approached his car, and by his statements made after he was arrested that evidenced a consciousness that he had been caught engaging in illegal activity. (GE 5 at 15)

Applicant registered as a sex offender, and he is not on probation. (Tr. 51, 60) He denied that he intended to have sex with a child. (Tr. 57) He denied that he had other instances where he sex-related conversations with minors. (Tr. 78)

The State appellate court addressed several assignments of error, including a claim the evidence was insufficient to prove that Applicant is guilty of Attempted Enticement of a Child. The State appellate court assessed the evidence "in the light most favorable to the verdict," concluded that evidence showed Applicant believed he was communicating with a child under the age of 15, and denied Applicant's appeal. (GE 5 at 6, 19) Next, Applicant filed for habeas relief as he was incarcerated. A U.S. magistrate wrote a memorandum on behalf of a U.S. district court, reviewed the case "in the light most favorable to the verdict," agreed with the State appellate court's discussion of knowledge of the age of the victim, and denied his writ of habeas corpus. (AE SS at 127, 141-142, 192)

Dr. David W. Cline is board certified in psychiatry and neurology and a retired Army colonel with service in Desert Shield and Storm. (Tr. 18, 21) He has practiced psychiatry for 52 years. (Tr. 24) He provided reports dated January 30, 2017, and January 19, 2022, and his resume. (Tr. 18; AE X; AE QQ; AE RR) He reviewed Applicant's exhibits, the SOR, the record of trial, medical and psychiatric records, and he interviewed Applicant four times. (Tr. 20-21, 28; AE X at 1-2) He did not interview Applicant after 2017, and he did not review the police reports concerning Applicant's arrest in October 2007. (Tr. 28, 32)

Applicant told Dr. Cline that he was suspicious that Kiki was not really a 12-year-old, and the reason he communicated with her was "to expose her to the fact that she was misrepresenting herself." (Tr. 36) He is or was a curious person, and he wanted to confront her about the truth about being "so knowledgeable about adult life and adult sexual behavior that she is trying to harass [him] or pull [him] into this." (Tr. 26, 45) He planned to see an adult woman later the evening he was arrested. (Tr. 37)

Dr. Cline concluded that Applicant is credible and truthful. (Tr. 24) Applicant "did not have evil intent towards performing sexual activity with a 12-year-old girl." (Tr. 21; AE X) He did not believe the person he was meeting was a child. (Tr. 21; AE X) He concluded Applicant was really not guilty of the charge of enticement of a child. (Tr. 24) In 2017, Dr. Cline diagnosed Applicant as suffering from post-traumatic stress disorder (PTSD), anxiety, and depression. Applicant described "five distinctive near-death experiences" that could have been the source of his PTSD while Applicant was in the Air Force: (1) a plane crash landing in which Applicant was not injured and one person received a head injury; (2) one of his subordinates discovered an unexploded mine in Bosnia; (3) Applicant was in the vicinity of an explosion which killed one person and injured another in Bosnia; (4) a plane crash in his vicinity in Bosnia resulted in a death, and (5) someone discovered an unexploded roadside bomb in Bosnia. (AE X at 8-9) The most recent incident was in

1996. *Id*. Dr. Cline believed Applicant did not meet the diagnostic criteria for pedophile, and he concluded PTSD caused Applicant to act as he did with Kiki on October 30, 2007. (Tr. 22-23; AE X at 13; AE QQ) He said there was no recurrence of the incident of October 30, 2007, and he predicted it would not recur in the future. (Tr. 23-24) Dr. Cline did not discuss with Applicant details of Applicant's interaction with the police officer posing as a 12-year-old child as described in the police report. (Tr. 35) Dr. Cline recommended approval of Applicant's access to classified information. (Tr. 45)

In 2017, Dr. Cline recommended that Applicant seek counseling for PTSD. (Tr. 75; AE X at 13) Applicant had a couple of telephone conversations with Dr. Cline over the last five years; however, he has not received any counseling for mental-health issues since meeting with Dr. Cline in 2017. (Tr. 58, 75) He decided to seek counseling at the Department of Veterans Affairs (VA); however, he had not received any counseling. (Tr. 75-76)

Character Evidence

Applicant received excellent performance evaluations while serving in the Air Force from 1992 to 1996 and working for a government contractor. (Tr. 49; AE A-AE E, R, AE CC-AE FF) He received a Joint Service Commendation Medal, Defense Meritorious Service Medal, and NATO Medal for service in Operation Endeavor in Bosnia. (AE G-AE I) He received a cash bonus and five percent increase in pay in 2018 and 2019, a cash bonus and three percent increase in pay in 2020, and a 5.7 percent pay increase and a cash bonus in 2021. (AE CC, AE DD; AE EE, AE FF)

Applicant received 11 letters of recommendation from coworkers and friends. (AE GG-AE LL; AE PP) The general sense of the recommendations is that Applicant shows professionalism, honesty, integrity, sincerity, trustworthiness, diligence, reliability, and humility. He is thoughtful, patriotic, courteous, and gracious. Their letters support approval of his access to classified information. He is in a long-term relationship with a woman he has known since high school. (AE HH) She has reviewed the legal documents in his case and is aware of the allegations against him. *Id*. She has employment assisting victims of sexual assault. *Id*.

Applicant said:

> I had an impeccable career for mostly 30 years. I've been a true patriot. I've always tried to do the right thing. I've loved my country. I've been put in situations where I almost lost my life for my country. I want to continue to contribute to the success of my company in supporting our federal Department of Defense clients that we have. (Tr. 86)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant's 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.

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, these guidelines are applied 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, 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 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 "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, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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). The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[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

Criminal Conduct

AG ¶ 30 describes the security concern about 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."

AG ¶ 31 lists one condition that could raise a security concern and may be disqualifying in this case: "(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."

In October 2007, Applicant was arrested and charged with Enticement of Child by Adult and Furnishing Pornographic Material to a Minor. In February 2012, he was convicted of Attempted Enticement of a Child, a felony, and acquitted of Furnishing Pornographic Material to a Minor. He was sentenced to five years in prison. He was incarcerated from February 2012 to January 2017. He was required to register as a sex offender. AG ¶ 31(b) is established.

AG ¶ 32 describes four conditions that could mitigate security concerns including:

> (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;
>
> (b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
>
> (c) no reliable evidence to support that the individual committed the offense; and
>
> (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.

The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

> Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government

> presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan*, *supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Applicant presented some important mitigating information. The criminal offense is not recent. Almost fifteen years have elapsed without evidence of recurrence of criminal activity. He complied with the terms of his confinement, and he registered as a sex offender. He received job training, obtained higher education, and has an excellent employment record.

The findings of the State trial court, State appellate court, and U.S. district court concerning Appellant's commission of the offense of Enticement of Child by Adult are not binding on my security clearance determination. I had evidence available to me that the trial court did not have, such as Applicant's statement, and statements of subject matter experts and mental-health experts. Applicant's appellate briefs discussed how his trial attorney failed to make objections, failed to ask for a mistrial, and failed to present exculpatory evidence from expert witnesses. His trial attorney advised him not to testify on his own behalf. The State appellate court considered the record "in the light most favorable to the verdict," and the U.S. district court reviewed the case "in the light most favorable to the verdict." The security clearance process has a different standard of review and different burdens of proof than these entities.

Security clearance proceedings employ the "substantial evidence" evidentiary standard, which 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). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). *See* ISCR Case No. 15-05049 at 4 (App. Bd. July 12, 2017) ("A Judge's material findings must be based on substantial evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence.") (citing ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014)). The substantial evidence standard is more rigorous than the probable cause standard. *TVA v. Whitman*, 336 F.3d 1236, 1240 n. 6 (11th Cir. 2003). I independently considered all relevant evidence the Government and Applicant presented, and then made my own credibility determination.

After careful assessment of Applicant's case in mitigation, I conclude there is substantial reliable evidence of record that in October 2007, Applicant committed the offense of Attempted Enticement of Child by Adult. He attempted to entice Kiki to engage in a sex act with him. I am satisfied that Applicant believed Kiki was under the age of 15 when he solicited her to join him at the bowling alley, and he intended to have sex with her.

I am not persuaded that Applicant believed Kiki was 15 years old or older. His claimed goal to unmask her or to discover why she was falsely claiming that she was 12 or 13 years old is not credible. Because he was not truthful at his hearing about his mental state in October 2007 when he committed the offense, Applicant has not successfully rehabilitated himself. ISCR Case No. 20-01577 at 3 (App. Bd. June 6, 2022) (citing ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (listing the purposes for which non-alleged conduct can be considered)).

While his offense in October 2007 is not recent, Applicant's lack of rehabilitation as shown by his false statement at his hearing shows lack of rehabilitation and continues to cast doubt on his reliability, trustworthiness, and good judgment. Criminal conduct security concerns are not mitigated.

Sexual Behavior

AG ¶ 12 describes the security concern arising from sexual behavior as follows:

> 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. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 13 lists conditions that could raise a security concern and may be disqualifying as follows:

> (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
>
> (b) pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;
>
> (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and
>
> (d) sexual behavior of a public nature or that reflects lack of discretion or judgment.

SOR ¶ 2.a cross-alleged the allegation in SOR ¶ 1.a that in October 2007, Applicant was arrested and charged with Enticement of Child by Adult and Furnishing Pornographic Material to a Minor. In February 2012, he was convicted of Attempted Enticement of a Child, a felony. AG ¶¶ 13(a), 13(c), and 13(d) are established, and consideration of the applicability of mitigating conditions is required.

AG ¶ 14 lists conditions that could mitigate security concerns including:

(a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;

(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;

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress; and

(d) the sexual behavior is strictly private, consensual, and discreet; and

(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.

Applicant presented some mitigating information and AG ¶¶ 14(b), 14(c), and 14(e) partially apply. The sexual offense in October 2007 occurred on a single occasion and is infrequent. There is no evidence that he has sought sex from minors in almost 15 years, and the offense is not recent. He received some counseling, and Dr. Cline provided a favorable prognosis when he predicted Applicant would not commit future sexual offenses.

The evidence against mitigation is more persuasive. As indicated in the Criminal Conduct section, *supra*, Applicant was not truthful about his conduct at his hearing, and he is not rehabilitated. His felonious sexual offense in October 2007 and his false denial of the requisite belief that Kiki was a child continue to cast doubt on his reliability, trustworthiness, and good judgment. Sexual behavior security concerns are not mitigated.

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. The 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.

Under AG ¶ 2(c), "[t]he 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. My comments under Guidelines J and D are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 52-year-old senior strategic manager employed by a defense contractor. He provided a detailed resume of his employment history and accomplishments. In 1992, he received a bachelor's degree in electronics and electrical engineering. In 2004, he received a master's degree in telecommunications management, and he is currently seeking a master's degree in business administration. He received several work-related technical certifications. He served in Bosnia and Herzegovina from 1995 to 1997. He served in the Air Force for six years on active duty and for two years in the inactive Reserve. He received an honorable discharge as a captain in 2001. Some of his Air Force experiences caused him to have PTSD.

Applicant received excellent performance evaluations while serving in the Air Force and working for a government contractor. He received a Joint Service Commendation Medal, Defense Meritorious Service Medal, and NATO Medal for service in Operation Endeavor. He received cash bonuses and increases in pay from 2018 through 2021. The general sense of his 11 letters of recommendation is that Applicant shows professionalism, honesty, integrity, sincerity, trustworthiness, diligence, reliability, and humility. He is thoughtful, patriotic, courteous, and gracious. Their letters support approval of his access to classified information. Applicant described himself as a true patriot, who tries to do the right thing, loves his country, and has risked his life for his country. He wants to continue to contribute to the success of his company in supporting the DOD.

The evidence against mitigation is more convincing. In October 2007, Applicant attempted to entice a police officer posing as a 12-year-old child into committing a sex act. He was convicted of a felony; he was incarcerated for five years; and he is a registered sex offender. He falsely denied that he believed Kiki was a child and instead claimed he believed she was 18 years old or older when he solicited a sex act from her. At his personal appearance, he exhibited no remorse or insight into his past behavior. He continues to strongly assert his innocence and refuses to assume any responsibility for soliciting sex from someone he believed was under the age of 15. He is not rehabilitated.

I have carefully applied the law, as set forth in *Egan,* Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Criminal conduct and sexual behavior security concerns are not mitigated.

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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Mark Harvey
Administrative Judge