DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 21-00122
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: Brittany D. Forrester, Esq.

12/06/2022

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Decision

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LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the security concerns under Guidelines D (sexual behavior), E (personal conduct), and J (criminal conduct). Eligibility for access to classified information is denied.

Statement of the Case

On July 23, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D, E, and J. Applicant responded to the SOR on December 17, 2021, and requested a hearing before an administrative judge. The case was assigned to me on August 24, 2022.

The hearing was convened as scheduled on November 9, 2022. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through G (AE A through E were submitted with the response to the SOR), which were admitted without objection.

Findings of Fact

Applicant is a 32-year-old employee of a defense contractor. He has worked for his current employer or a predecessor company on the same defense contract since about July 2015. He served on active duty in the U.S. military from 2010 until he was discharged with an under other than honorable conditions discharge in 2015. He seeks to retain a security clearance, which he has held, with the exception of the short period between his discharge and his civilian employment, since his time in the military. He is attending college in pursuit of a bachelor's degree. He is divorced without children. (Transcript (Tr.) at 11-13, 23, 30-31, 50, 60; Applicant's response to SOR; GE 1; AE B, D)

Applicant was stationed in Germany from 2010 to 2012. In about the summer of 2011, he had sexual intercourse on two occasions with a dependent daughter (AB) of a U.S. service member. AB was 15 or had just turned 16 at the time. Applicant told investigators that she was 15 years old, but she told him that she was 19 years old. He stated that they remained friends after he found out how old she was, but they did not engage in any additional sexual activity. AB later told military investigators that she was 16 years old at the time of the sexual encounters.[1] (Tr. at 44-46, 51; GE 3)

Applicant had sexual relations in about 2012 with a female who was about 18 or older. She introduced him on Facebook to her friend (XY) who was 15 years old at the time. She turned 16 in early August 2013. Applicant stated that because the first woman was of age, he assumed XY was about the same age. XY lived in the Republic of Korea (Korea) as the dependent daughter of a civilian employee of the U.S. military. From about January 2013 to March 2013, Applicant and XY exchanged naked photographs of each other. She also sent him a video of her masturbating. (Tr. at 15-17, 31-34; Applicant's response to SOR; GE 3) The photographs of XY and the video constituted child pornography under 18 U.S.C. §§ 2252 and 2256. Under the statutes, a child or "minor" means any person under the age of 18 years.

Applicant transferred to Korea in March 2013. He met XY and her friend at a concert in June 2013. He stated that entrants to the concert had to be 19 years old. XY said she was 18. Her friend said that XY was not 18, and XY quickly said she was 17. Applicant and XY met the following weekend in late June 2013, and ended up in a hotel, where they performed oral sex on each other and had sexual intercourse. Applicant took a picture of her performing oral sex on him. By doing so, Applicant produced child pornography in violation of 18 U.S.C. §§ 2251 and 2252 and the Uniform Code of Military Justice (UCMJ). (Tr. at 13-17, 33-35; Applicant's response to SOR; GE 3) The fact that he might have thought that she was 17 is not a defense because the statute covers minors 17 years of age and younger.

[1] This conduct was not alleged in the SOR. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be considered in assessing Applicant's credibility, in judging whether he has an affirmative defense, in the application of mitigating conditions, and in the whole-person analysis.

Applicant and XY engaged in a series of graphic sexual messages in July and early August, before XY turned 16. At one point he wrote: "I wanted you!! You were sexy. I don't care how old you are," and "You are a complete exception. Even if you were 13, I'd seriously have to consider still doing you." You're just to[o] sexy!" (Tr. at 18, 37; Applicant's response to SOR; GE 3)

Applicant met XY in a club in late July or August 2013, when XY was 15 or had recently turned 16. XY performed oral sex on him behind a pillar on the dance floor, and they had sexual intercourse in the ladies' room. Applicant told investigators that it occurred in July 2013, and that he still thought she was 17 at the time. He told investigators that he found out XY's age when her friend told him in late August or early September that XY "was turning 16." XY later told investigators that the incident at the club happened in August 2013 after she turned 16. He testified that he knew XY was 16 years old during the incident at the club. (Tr. at 37-40, 49-52; Applicant's response to SOR; GE 3)

The only evidence that the sexual activity at the club occurred when XY was 15 is Applicant's statement to investigators that it was "late July, I believe." (GE 3) I am unable to find by substantial evidence that XY was 15 during the second incident. However, Applicant knew XY was turning 16. If the sex occurred after XY turned 16, then Applicant had to know she was 16 years old at the time, and his statement to the investigators that he did not know her age and still thought she was 17 was false.

Applicant had a married female first cousin who lived in the United States. They engaged in a series of graphic sexual messages from about June 2013 to September 2013. They discussed sending naked pictures to each other. Applicant sent his cousin the picture of XY performing oral sex on him. When he did so, he transmitted child pornography into the United States in violation of 18 U.S.C. §§ 2252 and 2260. (Tr. at 17-19, 40; Applicant's response to SOR; GE 3)

Applicant stated that he was unaware of his cousin's existence until around 2010, when he was almost 20 years old and she was almost 28 years old. He stated that "the confusions of adolescence" contributed to his conduct with his cousin. Applicant was 22 years old when he sent his cousin the picture of XY. He has not had any contact with his cousin since he came under investigation by the military. (Tr. at 18-19, 40-42; Applicant's response to SOR; GE 1, 3)

A military criminal investigation was initiated in September 2013 after a service member reported that Applicant had a sexual relationship with XY when she was 15 years old. The investigators reviewed Applicant's text messages. XY never revealed her true age in the messages. On different occasions, she said she was 18, 17, and 16. (GE 3)

In a September 2013 message to his cousin, Applicant stated that since he turned 18, he had sexual intercourse with two 15-year-olds and was masturbated by a 13-year-old. In the same message, he self-identified himself as a pedophile. Applicant testified that he did not know why he wrote those messages. He stated that it could

have been a typo or he added it in for shock value. He thinks that he was "plain lying to [his cousin]." He relayed in messages to AB and XY that he could only get in trouble if either of them told military investigators that he knew they were 15 years old when he had sexual intercourse with them. (Tr. at 36; GE 3)

On Applicant's iPad or laptop computer, the investigators found a picture of XY performing oral sex on him, a picture of XY performing a sex act on herself, and a video of her performing the same sex act. Applicant was in possession of child pornography in violation of 18 U.S.C. §§ 2252. He told investigators that it did not click in his mind that he had child pornography, and if he had remembered, he would have deleted the files. (GE 3)

Applicant was issued a military protective order (MPO), also known as a no contact order, directing him to have no contact with XY. He violated that order on several occasions. He stated in his SOR response that he communicated with XY via messenger app, when he asked her what was going on with the case. He testified that he did not intend to violate the order, and he "messaged her just to tell her that [they] had a No Contact Order." In other words, he contacted her to tell her that they could not contact each other. (Tr. at 20-21, 47-49; Applicant's response to SOR; GE 3)

Applicant was charged with multiple offenses under the UCMJ, including violating the MPO; committing sexual acts and lewd acts on a child under the age of 16; producing, distributing, and possessing child pornography involving XY; indecent language to XY, a child under the age of 16; indecent exposure to XY in the nightclub; and indecent language to his cousin. (Tr. at 13-14; Applicant's response to SOR; GE 3)

Applicant was arraigned on the charges before a general court-martial. He stated that XY refused to testify against him and they are still friends. The charges were dismissed in January 2015 when Applicant accepted an under other than honorable conditions discharge in lieu of trial by court-martial. The General Court-Martial Order (GCMO) promulgating those actions was issued in April 2015. The SOR incorrectly alleged that Applicant was charged on the date of the GCMO. (Tr. at 13-16, 20, 43, 44; Applicant's response to SOR; GE 3; AE B)

Applicant asserted that he did not know XY's true age, and he would not have committed the sexual acts with her if he knew that she was under 16. He stated that the age of consent in the military is 16, it was 13 at the time in Korea, and he thought she was 17 or 18. He stated that he shared the sexually explicit picture of XY with his cousin before he learned she was 15. However, federal child pornography statutes cover children 17 years and younger, and Applicant admitted that he thought that she was 17. (Tr. at 13-15, 50-52; Applicant's response to SOR)

Applicant stated that alcohol contributed to some of the allegations. He stopped drinking while he was awaiting the resolution of the military charges. He asserted that he has learned from the experience, he has matured, and there has been no additional misconduct since the military. (Tr. at 26-29, 42-43; Applicant's response to SOR)

Applicant was evaluated at his own expense by a licensed psychologist in September 2022. Applicant described his military charges as follows:

> I submitted a Chapter 4 during the hearing which is a request to get a discharge rather than a court martial. The case had been going on for 20 months. I had to switch lawyers. I had like 20 minor charges against me. Most were dropped or recommended to be dropped. I had won the first case because she wouldn't testify and it was proven that I didn't know she was a minor, but after I won that case, they piled a bunch of other charges on me so my lawyers advised me to just get out because they felt the JAG would keep coming after me until they won. My lawyer said get out before I become a sex offender or something like that.

Applicant never told the psychologist that he had sex with a 15-year-old girl under similar circumstances about a year before XY. The psychologist determined that Applicant did not have a mental health condition. He concluded:

> I did not find [Applicant] to suffer from any of the sexual dysfunctions or paraphilic disorders described in the DSM-5-TR [Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition]. Likewise, I did not find any of the indicators in [Applicant] that are seen in people at high risk for sexual offending. I do not believe, based on his personality disposition and behavioral history, that [Applicant] would have engaged in sexual activity with the young lady in 2013 had he known she was underage. He is not considered to be at heightened risk for criminal sexual behavior in the future. (AE G)

Applicant submitted documents and letters attesting to his excellent job performance and strong moral character. He is praised for his reliability, dependability, trustworthiness, loyalty to the United States, honesty, work ethic, intelligence, and responsibility. His girlfriend wrote, "Within the first month of our relationship, [Applicant] had an honest conversation with me and told me about the unfortunate situation he had in Korea. I knew from the start just from his persona that he was wronged." (AE C)

Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 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 ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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 for sexual behavior 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. 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 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

(d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

The SOR alleges Applicant's sexual activities with XY from June to July 2013, when she was 15 years old; that he "produced, possessed, and distributed sexually explicit videos and/or photos of a 15-year-old girl"; that he "electronically communicated indecent sexually explicit language to a 15-year-old girl"; and that he "electronically communicated indecent sexually explicit language to [his] married first cousin." While he was charged under the UCMJ with indecent exposure to XY in the nightclub, that was not alleged in the SOR.

Applicant's sexual behavior reflected a severe lack of judgment and made him vulnerable to coercion, exploitation, and duress. AG ¶¶ 13(c) and 13(d) are applicable to all of the Guideline D allegations.

Whether the conduct constituted "sexual behavior of a criminal nature" under AG ¶ 13(a) requires further discussion. Applicant asserted that he did not know XY's true age, and he would not have committed the sexual acts with her if he knew that she was 15. He stated that the age of consent in the military is 16, it was 13 at the time in Korea, and he thought she was 17. He stated that he shared the sexually explicit picture of XY with his cousin before he learned she was 15. However, federal child pornography statutes cover children 17 years and younger, and at one point, Applicant admitted that she said she was 17 and in at least one of her texts, she said she was 16. Moreover, he kept the child pornography of XY after he learned her true age. He has no defense to the child pornography allegations in SOR ¶ 1.b. AG ¶ 13(a) is applicable to that conduct.

Applicant's married first cousin was an adult when he communicated indecent language to her (SOR ¶ 1.d). They engaged in a series of graphic sexual messages, they discussed sending naked pictures to each other, and Applicant sent her the picture of XY performing oral sex on him. AG ¶ 13(a) is applicable to that conduct.

Applicant is partially correct when he discusses the age of consent in the military. However, it is an affirmative defense, not an absolute defense. For it to be a defense in a court-martial, an accused must prove by a preponderance of the evidence

that he "reasonably believed that the child had attained the age of 16 years." *See* Article 120b of the UCMJ in the 2012 Manual for Courts-Martial:

> Under 16 years. In a prosecution under this section, it need not be proven that the accused knew that the other person engaging in the sexual act or lewd act had not attained the age of 16 years, but it is a defense in a prosecution under subsection (b) (sexual assault of a child) or subsection (c) (sexual abuse of a child), which the accused must prove by a preponderance of the evidence, that the accused reasonably believed that the child had attained the age of 16 years, if the child had in fact attained at least the age of 12 years.[2]

Further clarification is provided in the Military Judges' Benchbook, Department of the Army Pamphlet 27-9, which military judges utilize in a court-martial to instruct the members (jury) on the law. Military judges tailor the instructions to fit an individual case. The following untailored instruction addresses the law in this matter:

> The prosecution is not required to prove the accused knew that (state the name of the alleged victim) had not attained the age of 16 years at the time the alleged sexual act(s) occurred. However, an honest and reasonable mistake of fact as to (state the name of the alleged victim)'s age is a defense to (that) (those) charged offense(s).
>
> "Mistake of fact as to age" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct was at least 16 years old. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that (state the name of the alleged victim) was at least 16 years old. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.)
>
> The burden is on the defense to establish the accused was under this mistaken belief, by a preponderance of the evidence. A "preponderance" means more likely than not. If you are not convinced by a preponderance of the evidence that, at the time of the charged sexual assault of a child, the accused was under a mistaken belief that (state the name of the alleged victim) was at least 16 years old, the defense does not exist. Even if you conclude the accused was under the honest and mistaken belief that (state the name of the alleged victim) was at least 16 years old, if you are not convinced by preponderance of the evidence that, at the time of

[2] *See* Manual for Courts-Martial United States (2012 Edition), available at: extension://efaidnbmnnnibpcajpcglclefindmkaj/https://jsc.defense.gov/Portals/99/Documents/MCM2012.pdf.

> the charged sexual assault of a child, the accused's mistake was reasonable, the defense does not exist.[3]

Applicant had sexual intercourse with XY in about June 2013 when she was 15 years old. That is not in dispute. To be a defense, Applicant must prove that he "*reasonably* believed" (emphasis added) that XY was 16 or older. In that regard, I am not holding Applicant to a preponderance of the evidence standard; I am applying a lesser standard. Before he met XY, Applicant had sexual intercourse with AB, another young girl who may have lied about her age. He received contradictory information about XY's age from XY and her friend. The first time he met XY in person, her friend told him that XY lied about her age. XY described herself in texts as 18, 17, and 16. Applicant commented about her age in texts to XY and to his cousin. He provided contradictory statements about her age. I find that even if Applicant had an honest and mistaken belief that XY was at least 16 years old, the mistake was not reasonable under the circumstances. The affirmative defense is not available to him. AG ¶ 13(a) is applicable to the conduct.

Conditions that could mitigate sexual behavior security concerns are provided under AG ¶ 14. The following are potentially applicable:

> (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 good 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.

Applicant's sexual behavior occurred more than nine years ago, and there have been no additional incidents. I accept most of the findings in the psychological evaluation, but it is given less weight because Applicant never told the psychologist that he had sex with a 15-year-old girl under similar circumstances about a year before the incidents with XY. I also had a difficult time accepting all of Applicant's statements at face value.

The bottom line is that Applicant committed serious sexual offenses with a child; and he created, possessed, and transmitted child pornography. The status of the picture he sent to his cousin is unknown. The problem with emails, text messages, and the Internet is that once something is sent, it is out of the sender's control. Applicant sent that picture to his cousin during a series of graphic sexually explicit exchanges. There is no evidence about whether his cousin deleted the picture or forwarded it to someone else, making it another piece of child pornography that is endlessly circulated around the Internet. Applicant was not the one who was "wronged," as described by his

[3] See Military Judges' Benchbook, available at: https://www.jagcnet.army.mil/Sites/trialjudiciary.nsf/homeContent.xsp?open&documentId=80086608B92177D285257B48006924A1.

girlfriend. I also note that jeopardy has not attached to any of the criminal offenses, and some of the child pornography statutes carry a maximum sentence of up to 30 years with no statute of limitations.[4]

Applicant's conduct continues to serve as a basis for coercion, exploitation, and duress; and it casts doubt on Applicant's current reliability, trustworthiness, and good judgment.[5] AG ¶¶ 14(b), 14(c), and 14(d) are not applicable.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

> Criminal activity creates doubt about an Applicant'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 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

> (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; and
>
> (e) discharge or dismissal from the Armed Forces for reasons less than "Honorable."

The above discussion about Applicant's criminal conduct under sexual behavior is incorporated here by reference. In addition to what was discussed under that guideline, Applicant violated a military protective order, and he was discharged in lieu of trial by court-martial with an under other than honorable conditions discharge. The above disqualifying conditions are applicable.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

> (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

[4] *See, e.g.,* Statute of Limitation in Federal Criminal Cases: An Overview, dated November 14, 2017, Congressional Research Service, available at: extension://efaidnbmnnnibpcajpcglclefindmkaj/https://crsreports.congress.gov/product/pdf/RL/RL31253.

[5] *See* ISCR Case No. 09-03233 (App. Bd. Aug. 12, 2010). The Appeal Board determined that an applicant's child molestation offense "even though it occurred long ago, impugn[ed] his trustworthiness and good judgment."

(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.

It has been more than nine years since the criminal conduct and almost eight years since the discharge. Nonetheless, I have unmitigated concerns under the same rationale discussed in the sexual behavior analysis.

Guideline E, Personal Conduct

The security concern for personal conduct 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 the national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

SOR ¶ 3.a alleges that Applicant was administratively separated from the military with an other than honorable discharge for the conduct described in the sexual behavior and criminal conduct allegations. SOR ¶ 3.b cross-alleges the sexual behavior and criminal conduct allegations. The conduct described in SOR ¶¶ 3.a and 3.b is identical. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. *See* ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005). SOR ¶ 3.b is concluded for Applicant.

Applicant's criminal conduct and sexual behavior reflect questionable judgment and an unwillingness to comply with rules and regulations. The conduct and behavior also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable because Applicant's conduct is sufficient for an adverse determination under the sexual behavior and criminal conduct guidelines. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

> (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;
>
> (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and
>
> (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Under the same rationale discussed above for sexual behavior, Applicant's conduct continues to make him vulnerable to exploitation, manipulation, and duress; and it casts doubt on his current reliability, trustworthiness, and good judgment. Personal conduct 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 relevant 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), 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. I have incorporated my comments under Guidelines E, D, and J in my whole-person analysis. I also considered Applicant's favorable character evidence.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the sexual behavior, personal conduct, and criminal conduct security concerns.

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:	Against Applicant
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraphs 2.a-2.b:	Against Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	For Applicant

Conclusion

It is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Edward W. Loughran
Administrative Judge