

KEYWORD: Personal Conduct, Sexual Behavior, Criminal Conduct

DIGEST: Applicant failed to mitigate security concerns over his personal conduct, sexual behavior and criminal conduct based on his long history of following minor children and masturbating in his car from 1985 to 1997 which ultimately led to his arrest and guilty plea in 1998 to a misdemeanor charge of Public Sexual Indecency. He waited until January 2007 to seek treatment, so he is still in the early stages. Security concerns persist despite a favorable prognosis from his therapist. While he has taken some steps to reform his conduct, he failed to demonstrate sufficient positive changes in behavior, especially in light of the potential for blackmail and duress as he failed to divulge his past misconduct either to his current wife or family and friends. Consequently, security concerns remain over personal conduct, sexual behavior and criminal conduct. Clearance is denied.

CASENO: 06-16235.h1

DATE: 08/23/2007

DATE: August 23, 2007

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In Re:)	
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-----)	ISCR Case No. 06-16235
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
KATHRYN MOEN BRAEMAN**

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esquire, Department Counsel

FOR APPLICANT

Anthony B. Bingham, Esquire

SYNOPSIS

Applicant failed to mitigate security concerns over his personal conduct, sexual behavior and criminal conduct based on his long history of following minor children and masturbating in his car from 1985 to 1997 which ultimately led to his arrest and guilty plea in 1998 to a misdemeanor charge of Public Sexual Indecency. He waited until January 2007 to seek treatment, so he is still in the early stages. Security concerns persist despite a favorable prognosis from his therapist. While he has taken some steps to reform his conduct, he failed to demonstrate sufficient positive changes in behavior, especially in light of the potential for blackmail and duress as he failed to divulge his past misconduct either to his current wife or family and friends. Consequently, security concerns remain over personal conduct, sexual behavior and criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on November 16, 2006. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.¹ The SOR alleged specific concerns over personal conduct (Guideline E) in paragraph 1, over sexual behavior (Guideline D) in paragraph 2, and over criminal conduct (Guideline J) based on the revised (“new”) Adjudicative Guidelines issued on December 29, 2005, and implemented by the Department of Defense, effective September 1, 2006. Applicant responded to these SOR allegations in a notarized Answer of December 13, 2006, where he admitted all paragraph 1 allegations and provided a letter with explanations, but failed to answer allegations in paragraphs 2, 2.a., 3 and 3.a. He requested a decision without a hearing. However, Department Counsel on January 9, 2007, requested a hearing under paragraph E3.1.7 of the Additional Procedural Guidance of Enclosure 3 to DoD Directive 5220.6; and he informed Applicant by letter of January 9, 2007.

Department Counsel indicated the case was ready to proceed on January 30, 2007. The matter was assigned to another Administrative Judge on February 1, 2007. Subsequently, Applicant’s counsel entered his appearance on February 20, 2007. A Notice of Hearing, issued on March 14, 2007, set the matter for March 28, 2007, at a location near where Applicant works and lives. Applicant received the notice on March 20, 2007, only eight days prior to the hearing which was outside the 15 days notice required which his counsel would not waive. The case was re-assigned to me on March 27, 2007. A March 30, 2007, Notice of Hearing re-set the case hearing for April 18, 2007.

At the hearing the Government offered eleven exhibits (Exhibit 1-11) which were admitted into evidence; I overruled Applicant’s counsel’s hearsay and other objections² to police reports (Exhibits 5-10). Applicant testified; his counsel called one witness, qualified as an expert, and

¹ This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.

² In response to Applicant’s counsel’s objection, Department Counsel agreed to redact pages 152 to 155 from Exhibit 7. (TR 19)

submitted Exhibit A, his resume. Government counsel indicated no objection, so the document was admitted into evidence. The transcript (TR) was received on April 27, 2007.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 54 years old, has worked as an engineer for a defense contractor from August 1984 to present. He completed a Security Clearance Application (SF 86) in January 2005. He reported that he initially received a Secret Defense Department security clearance in 1988. But, he stated he lost³ a security clearance in August 1998 as a result of a misdemeanor conviction reported in answer to Question 26. He testified that he has either been evaluated as having met or exceeded expectations. (Exhibit 1; TR 60-62)

Applicant served in the military from 1972 to 1975; he did not report his discharge status. (Exhibit 1)

Applicant received a B.S.E.E. from a state university in May 1975. Applicant met his first wife (Wife #1) in an overseas military assignment and married her in November 1976; they were divorced in September 1995. He and this wife had three adopted daughters. Shortly after his divorce he met a woman who moved in with him. He stated they had a troubled relationship and never married. Later, he remarried in October 2004. (Exhibits 1, 7; TR 63-68)

Personal Conduct, Sexual Behavior and Criminal Conduct

Applicant disclosed that in June 1998 he was convicted for a 1997 offense of Public Sexual Indecency, a misdemeanor for which he received one year of unsupervised parole from a city court. (Answer; Exhibit 1)

- Applicant admitted that from June 1985 to October 1997 he frequently followed minor children in his car and masturbated while following them in order to satisfy his sexual desires. (SOR 1.a., 2.a., 3.a.) Several of the girls were frightened and called police who filed reports on his misconduct. When the police interviewed him in June 1989, Applicant explained he had not sought counseling as he was too embarrassed to talk to anyone about his conduct. He also admitted he understood that his conduct frightened these “kids.” He was not arrested as there were no known victims, but police warned him to stop his conduct in 1989. He admitted to the police that he had driven around and masturbated in his vehicle from 50 to 100 times. (Answer; Exhibits 3, 4, 5, 6, 7, 8; TR 95-100) In March 1995 he

³ The record was not clear as to how he lost his Top Secret security clearance in 1998 but retained his Secret clearance. (TR 72) In addition to his statement and admission in the SF 86 (Exhibit 1), he also provided a statement in March 1995 to a special investigator for the Air Force (Exhibit 3) and to a special agent of the Defense Security Service in August 1998 (Exhibit 4). Perhaps his clearance was withdrawn by another agency, not DoD, as Applicant testified he retained his DoD Secret clearance. His counsel stated the SF86 submitted in January 2005 was for a ten-year update. (Exhibit 1; TR 72-75, 126)

provided a statement explaining his interpretation as to why he engaged in this sexual misconduct. He admitted, "I realized what I was doing was very wrong and there is no excuse for this type of deviant behavior." He also stated he was in the process of ending his marriage to Wife #1 as he believed his unsatisfying marriage contributed to this pattern. He also excused his conduct by stating that "this behavior has not occurred in quite some time and I believe I am in control again and will not engage in this type of behavior in the future." He was also aware that this conduct created a "potential for. . . blackmail" as he had not made the problem widely known except to his immediate family. (Exhibit 3, March 1995; TR 91-95) He explained he had continued this conduct out of habit as a junior high school was near his route from work. He no longer drives through that area. (TR 70-71) He chose that area as the junior high school was a "reliable source" of what it "took to get him off." (TR 84-85) In 1995 he reported he planned to divorce his wife and cease this conduct. However, then he began a troubled relationship with another woman. When that relationship dissolved, he again engaged in sexual misconduct. (Exhibit 3; TR 102-103)

- In March 1998 a criminal complaint was filed against him charging him with two counts of Public Sexual Indecency, both felonies, after he followed two minor children home from school in September 1997; he had masturbated in his car while following them to satisfy his sexual desires. In June 1998 he pleaded guilty and was found guilty of a lesser misdemeanor charge of Public Sexual Indecency. (SOR 1.b., 2.a., 3.a.) (Answer; Exhibits 2, 9, 10) Again, he was driving around a junior high school and following girls and stared removing his shirt while he masturbated. (Exhibit 10; TR 104) He explained in a DSS Statement that the prosecutor and his attorney interviewed the two victims in June 1998. As one was not a minor and the other did not actual see Applicant expose himself, the charges were reduced to a single misdemeanor of sexual indecency. He admitted having a problem with this behavior for ten years beginning in 1987 when he would drive around aimlessly between work and home and masturbate while in the car during "high stress" times. He reported he had been interviewed by police and "confessed" his activity to them. After he ended his first marriage in 1995, from 1996 to June 1997 he had a relationship with another woman which was stressful. After the stresses from the breakup, he again began to drive around neighborhoods and masturbate. In September 1997 he "was unable to control" himself. Later he and the girlfriend reconciled as friends; he allowed her to move back into his house in October 1997 to at least August 1998. He did not tell⁴ this girlfriend of his sexual misconduct as he was ashamed of his behavior. (Exhibit 4, August 1998) He did complete his unsupervised probation successfully. (Exhibit 1; TR 68-69) Applicant stated he and his lawyer are seeking to have this conviction set aside. (TR 75-76)
- Applicant did not seek treatment for his deviant sexual behavior after his conviction in 1998 as he was ashamed of his behavior and feared additional police contact. (SOR 1.c., 2.a.) (Answer) Again, in August 2006 he was asked if he had sought treatment; he had not as he was ashamed of what he had done. (Exhibit 11) Because of the interrogatories sent to him in August 2006, the SOR sent to him in November 2006, and the letter in January 2008 stating the government was requesting a hearing, he decided to begin psychotherapy with Mr.

⁴ Applicant's belief expressed in 1998 that he could not be blackmailed about this information does not mitigate that concern especially as he has continued his pattern of non-disclosure about this conduct to the present day.

D (credentials detailed below) in January 2007. He also took this step because he had received the Directive which explained that counseling was a mitigating factor. His shame prevented him from seeking such help earlier, but he did not want to lose his job. (Exhibit 11; TR 76-77; 85-90) Applicant also reported attending Sex Addicts Anonymous (SAA) three or four times since March 2007. (TR 77; 82-82)

Applicant testified he regrets his past behavior and attested that the last time he engaged in public sexual indecent behavior was in September 1997. (TR 79-81) He has not told⁵ his current wife of this past sexual misconduct nor of the security clearance hearing. Neither has he disclosed this conduct to family and friends. He has only discussed this conduct in SAA meetings. (TR 78, 105-106)

Expert in Psychotherapy and Sexual Addiction

Applicant's expert witness, Mr. D, has been a solo practitioner in psychotherapy in private practice from May 1989 to present. He has an MA in counseling psychology granted in 1983. He has specialized in the past five to seven years on sexual deviancy which he referred to as sexual addiction and sexual compulsive behaviors. Mr. D has counseled twenty to thirty individuals with this diagnosis. He was qualified as an expert⁶ in psychotherapy and sexual addiction. (Exhibit A; TR 29-34; 34-43)

Mr D reported he first met Applicant in late January 2008 when he sought help for "some sexual issues," including periods of asexual activity in his relationship. He has seen Applicant weekly since then. His understanding of Applicant's background is based solely on what Applicant told him as he did not review any police records.⁷ Applicant also disclosed his interest in pornography which continued to 2006. Recently, Applicant disclosed to the therapist his arrest in 1996 or 1997 and his previously being questioned by police when no arrest was made. Mr. D

⁵ Applicant's current belief he would not be subject to blackmail because of his conviction and past misconduct is not sufficient to mitigate this security concern as he has again failed to disclose this conduct to a significant person in his life out of embarrassment. His current wife did not even know he had a security clearance hearing.

⁶ The Government agreed to his expert credentials in psychotherapy. Also, Mr. D has taken some courses and workshops in the specialty of sexual addiction. He has five or six current clients with those issues; he has not published articles in this specialty. He was offered as an expert in sexual addiction; however, the government objected as he had not published in the field. Applicant's counsel countered that he was well versed in the field and publication was not required. I accepted him as an expert in sexual addiction as well as psychotherapy. (Exhibit A; TR 43)

⁷ The expert based his opinion solely on the information that Applicant disclosed to him; he did not review any of the arrest records or police documents. (TR 47; 53-54) Applicant and he did not initially discuss his conduct when he followed minors in his car and masturbated. Instead they discussed issues that underlie sexual addiction. (TR 49-51) He did not Applicant take a battery of psychological tests. (TR 53)

diagnosed Applicant with generalized anxiety disorder or impulse control disorder. The therapist has worked with Applicant on how to handle his stress. Applicant has attended all scheduled sessions and has followed through on assignments. He does not assess Applicant as a pedophile. (TR 43-48; 52) His prognosis for Applicant was good as he has not acted out sexually in public in ten years. However, as part of his treatment, he recommended that Applicant attend a 12-step group, Sex Addicts Anonymous (SAA). Applicant has complied with that recommendation. (TR 45-46; 47; 51-53) The expert could not say for certain that Applicant would never engage in sexually compulsive behaviors again. (TR 55) However, the expert has seen other people manage their addiction in an appropriate way. (TR 57-58)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility which are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns. In deciding whether to grant or continue an individual's access to classified information, the mere presence or absence of any adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed these relevant Revised Adjudication Guidelines:

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant.⁸ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a security clearance.

CONCLUSIONS

Guideline E: Personal Conduct

15. *The Concern.* 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

⁸Executive Order No. 10865 § 7.

classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The government provided substantial evidence that Applicant's personal conduct raised security concerns under disqualifying condition (DC) ¶ 16. (e), *personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, profession or community standing.* . . . as he has failed to disclose his sexual misconduct to his current wife or to friends and family which raises the potential for vulnerability to duress. Earlier he had not disclosed his misconduct to his girlfriend. While he has recently started attending a 12-step program where he has shared his past conduct, those meetings have confidentiality as a hallmark, so engagement in SAA, though commendable, would not provide a basis to mitigate a concern over vulnerability to duress. Applicant admitted to being extremely ashamed and embarrassed about this behavior and used those reasons as a justification for keeping these issues secret. While that may be understandable, those concerns also led him to postpone seeking treatment either in the 1985 to 1997, a period where he was most active and urged by the police to seek help. Neither did he seek treatment after his criminal conviction in 1998. Nor did he do so even after the SOR was issued in November 2006. It was not until he was advised that the Government would seek a hearing in his case, that he consulted a therapist in January 2008.

The relevant mitigating condition (MC) ¶ 17.(d) requires an individual to acknowledge the behavior and obtain counseling to change the behavior or to take other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and a prognosis that such behavior is unlikely to recur. To his credit, Applicant has finally sought counseling; however, his therapist has not reviewed his criminal records nor done any psychological testing. He has required Applicant to attend an SSA 12-step program where Applicant has to confront his conduct. He has only met with Applicant for a few sessions. While Mr. D provided a good prognosis as Applicant has not acted out sexually in public in ten years, he could not say for certain that Applicant would never engage in sexually compulsive behaviors again. At the time of the hearing he had only been in therapy for three months and more recently began attending SSA. Nonetheless, despite this therapy, Applicant had not yet disclosed this troubling past to his current wife⁹ or family and friends which suggests the potential for blackmail remains. Three months is too short a time frame to conclude with reasonable certainty that Application will be able to manage his addiction in an appropriate way as he admitted that as recently as 2006 he was engaged in viewing pornography. Thus, after weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has failed to mitigate the security concerns pertaining to personal conduct considerations. I rule against Applicant on subparagraphs 1.a. through 1.c. under SOR Paragraph 1.

Guideline D: Sexual Behavior

12. The Concern. Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or

⁹ Applicant provided no information on the stability of his current marriage.

which many subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The Government established security concerns over Applicant's sexual behavior which persisted over a long period of time from at least 1985 to 1997 when police reports were made that he frequently followed minor children and masturbated in his car in order to satisfy his sexual desires. He repeated this conduct in 1997 and pleaded guilty to Public Sexual Indecency, a misdemeanor, in 1998. While he has testified he subsequently ceased this conduct, he admits he has continued an interest in pornography to 2006. Thus, disqualifying concerns raised include: ¶ 13. (a) *sexual behavior of a criminal nature, whether or not the individual has been prosecuted*; ¶ 13. (c) *sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*; ¶ 13. (d) *sexual behavior of a public nature and/or that reflects lack of discretion or judgment*.

It is possible to mitigate security concerns under this guideline. Two relevant mitigating conditions (MC) include: ¶ 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 good judgment*; or ¶ 14. (c) *the behavior no longer serves as a basis for coercion, exploitation, or duress*. While Applicant testified he has not engaged in public sexual misconduct since 1997, the behavior, in the period when it did happen, was frequent and repeated and recurred even after he had been interviewed and encouraged by the police to seek treatment. Yet he persisted. While he has recently sought treatment in January 2007 to April 2007, as discussed above under personal conduct, he has failed to meet his burden of establishing that his behavior is unlikely to recur. For example, he has yet to disclose his past sexual misconduct to his current wife and family; so the potential for duress persists.

After considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraphs 2.a. under SOR Paragraph 2.

Guideline J: Criminal Conduct

30. *The Concern: Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.*

The government's security concerns under criminal conduct parallel the concerns alleged in personal conduct under subparagraphs 1.a. and 1.b. and establish security concerns under disqualifying conditions under ¶ 31.(a), *a single serious crime*, and ¶ 31. (c) *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or conviction*. As discussed above, Applicant's sexual misconduct persisted over a long period of time from at least 1985 to 1997 which led to multiple police reports and his repeated misconduct resulted in a criminal misdemeanor conviction in 1998 where he pleaded guilty to Public Sexual Indecency.

It is possible to mitigate security concerns under this guideline: ¶ 32. Conditions that could mitigate security concerns include: ¶ 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 individuals reliability, trustworthiness, or good judgment; ¶ 32.(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life; ¶ 32.(c) evidence that the person did not commit the offense; ¶ 32.(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

To his credit, Applicant finally sought therapy in January 2007 to address the underlying issues that led to his sexual misconduct and conviction. However as discussed under the other guidelines, he is just in the early stages of his therapy and recently began attending SSA, a 12-step program. Under MC ¶ 32. (a) he did establish that much time has elapsed since the criminal behavior happened; however, because of his delay in seeking therapy, no one yet can concluded with certainty that his misconduct is unlikely to recur. Thus, doubt does persist over his reliability, trustworthiness, or good judgment. On the other hand, under MC ¶ 32. (d), Applicant did demonstrate evidence of successful rehabilitation; including but not limited to the passage of over several years without recurrence of any criminal activity as there has been no additional sexual misconduct arrests reported. Also he reported a satisfactory employment record, but he provided no evidence of constructive community involvement. He has made substantial progress; but because of his delay in seeking therapy, doubts persist over his suitability to have access to classified information.

Whole Person Analysis

Having considered both the record and Applicant in light of the “whole person” concept, I conclude he is an earnest person who has struggled with reforming his life style and has finally made progress by seeking treatment from a psychotherapist. However, his continuing to keep his past sexual misconduct and criminal conviction secret from key people in his life leads to continuing security concerns. The potential for pressure, coercion, exploitation, or duress is high even though he has a long-term and favorable employment history.

Consequently, after looking at him as a whole person and considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraph 3.a. under SOR Paragraph 3.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline E:	AGAINST APPLICANT
Subparagraph 1.a.:	Against Applicant
Subparagraph 1.b.:	Against Applicant
Subparagraph 1.c.:	Against Applicant
Paragraph 2. Guideline D:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant

Paragraph 3. Guideline J:
Subparagraph 3.a.:

AGAINST APPLICANT
Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant. Clearance is denied.

Kathryn Moen Braeman
Administrative Judge