DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 12-07087
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: Karl G. Blanke, Esq.

06/17/2013

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Decision

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline D (Sexual Behavior). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on in March 2008, and his application was granted in August 2008. He applied for eligibility for access to sensitive compartmented information (SCI) in November 2010. His application was denied on February 17, 2012. (GX 2.) Based on information obtained during the adjudication of his application for SCI eligibility, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) on February 5, 2013, alleging security concerns under Guideline D. DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant received the SOR on February 15, 2013; answered it on March 8, 2013; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 5, 2013, and the case was assigned to me on April 15, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 19, 2013, scheduling the hearing for May 29, 2013. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) 1 through 3, which were admitted without objection. DOHA received the transcript (Tr.) on June 5, 2013.

Findings of Fact

In his answer to the SOR, Applicant admitted the sole allegation in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 42-year-old architect employed by a federal contractor. He received a bachelor's degree in architecture in June 1994 and a master's degree in May 1997. He worked for several architectural companies from March 1997 to February 2007, when he began his current job. He is a "studio lead," supervising up to 15 architects and interns on various projects. (Tr. 25.) He married in June 2012. He and his wife have no children. He first received a security clearance in June 2005.

In May 2011, while being interviewed in connection with a polygraph examination required for SCI eligibility, Applicant disclosed that, between 1989 and 1991, he masturbated eight to ten times while looking at pornographic magazines that had been on sale at the drug store where he was employed. He was alone in a storage loft when he masturbated. He hid the magazines in a hole in a wall that was left from previous construction. He also disclosed that, between 1997 and 2003, while employed as an architect, he masturbated and ejaculated into his pants one time while sitting at his desk in a cubicle at work. Other workers were in the area, but Applicant did not believe that he was detected. Finally, he disclosed that, between 1997 and May 2011, he masturbated about once a month "at most," for no more than one minute while at his desk in his cubicle, with other workers in the area. He told the interviewer that the last incident was about two months prior to the interview. He stated that he was aroused by his thoughts and the attire of female coworkers, and that he masturbated without reaching into his clothing or exposing himself, stopping before he ejaculated. (GX 3 at 1-2.)

When Applicant was interviewed in March 2012 about the basis for the denial of SCI eligibility, he told the investigator that he masturbated at work about once a year. (GX 4 at 5.) In a follow-up telephonic interview in April 2012, he told the investigator that the conduct occurred "a couple of times over the years," most recently during the last half of 2010, and that he did so for less than 30 seconds each time. He told the interviewer that his conduct occurred when he "needed to adjust" himself during an erection and that he did not reach inside his clothing or expose himself. (GX 4 at 6-8.)

At the hearing, Applicant testified that he masturbated six or seven times while working at the drug store. (Tr. 29.) He testified that from 2003 to late 2010, he found it necessary to "adjust" himself less than once a year, and that there had been no incidents requiring "adjustment" since late 2010. (Tr. 34.) He testified that the last incident was about six months before the May 2010 interview, and that the report reflecting that he masturbated about two months prior to the interview was inaccurate. (Tr. 36.) Finally, he testified that he used the term "masturbation" instead of "adjustment" during the May 2010 interview, because he believed that any touching of his genitals constituted masturbation. However, he looked up the definition of masturbation after he realized that the allegations were serious, and he learned that touching or "adjusting" himself was not masturbation. (Tr. 39.)

Applicant's wife is a college professor. She testified that they met in the fall of 2009 through an online dating service. She testified that Applicant is a reliable, responsible, and conscientious worker, and his sexual behavior is not unusual. Applicant told her about the allegations after his May 2010 interview, and she accepted his explanation that his behavior consisted of adjusting himself after he became sexually aroused. (Tr. 44-47.)

Applicant presented letters attesting to his technical expertise, dedication, security awareness, and reliability from a coworker, his facility security officer, and his project manager. He testified that authors of the three letters were aware that he had lost his clearance, but he did not tell them the specific allegations on which the action was based, because the allegations were "extraordinarily embarrassing." (AX 1, 2, and 3; Tr. 28.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline D, Sexual Behavior

The SOR alleges that Applicant masturbated at his work desk up to once a month from 1997 to late 2010. The security concern under this guideline is set out in AG ¶ 18:

> Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may 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. . . .

In May 2011, Applicant told an investigator that he masturbated about once a month and that each incident lasted for no more than a minute. In March 2012, he told an investigator that he masturbated about once a year, instead of once a month. In April 2012, he told an investigator that his conduct occurred "a couple of times over the years," and that it lasted less than 30 seconds instead of no more than a minute. At the hearing, he testified that his conduct occurred less than once a year. He used the term "masturbate" in May 2011 and March 2012, but in the April 2012 interview and at the hearing he recanted his admission that he masturbated and stated that he needed to "adjust" himself during an erection, claiming that he previously thought that any touching of his genitals constituted masturbation.

At the time of his May 2011 interview, Applicant was a well-educated, 39-year-old male. I found his recantation of his disclosures during the May 2011 interview and his explanation at the hearing for changing his terminology from "masturbating" to "adjusting" himself implausible and unconvincing. The evidence reflects that Applicant was extremely embarrassed about his conduct, and that he attempted to minimize the frequency, duration, and nature of his conduct in his April 2012 interview and at the hearing, because he realized that his security clearance was at risk.

I conclude that two disqualifying conditions under this guideline are established: AG ¶ 13(c) ("sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress") and AG ¶ 13(d) ("sexual behavior of a public nature and/or that reflects lack of discretion or judgment"). AG ¶ 13(b) ("a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder") is not established, because no evidence from medical doctors, psychiatrists, or psychologists was introduced by either party to establish to presence or absence of sexual or personality disorders.

The following mitigating conditions are potentially relevant:

> AG ¶ 14(b): the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
>
> AG ¶ 14(c): the behavior no long serves as a basis for coercion, exploitation, or duress; and
>
> AG ¶ 14(d): the sexual behavior is strictly private, consensual, and discreet.

AG ¶ 14(b) is not fully established. Applicant testified that his last "adjustment" occurred in late 2010, about 30 months before the hearing. While 30 months is a

significant period of time, it occurred while Applicant was under the pressure of trying to protect his security clearance. His conduct also was infrequent, but it did not occur under unusual circumstances. I am not convinced that it will not recur if Applicant's clearance is no longer in jeopardy.

AG ¶ 14(c) is not established. Applicant admitted at the hearing that he is extremely embarrassed by his conduct and has not revealed it to his supervisors or coworkers.

AG ¶ 14(d) is not established. Applicant's conduct occurred in a cubicle at his workplace, with other employees in the area. His conduct was neither private nor discreet.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guideline D in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a mature, well-educated adult. His conduct at the drug store from 1989 to 1991 was private and occurred while he was a teenager. It was not alleged in the SOR, and I regard it as mitigated. However, his conduct as an adult was not private or discrete, and it demonstrated poor judgment. He is understandably embarrassed by his conduct, but his disingenuous efforts to minimize it during his security interviews and at the hearing were unconvincing, and they reinforced my doubts about his judgment and reliability. His embarrassment makes him vulnerable to pressure, coercion, exploitation, or duress.

After weighing the disqualifying and mitigating conditions under Guideline D, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on his sexual conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline D (Sexual Behavior):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

I conclude that 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.

LeRoy F. Foreman
Administrative Judge