



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



In the matter of:)
)
 REDACTED) ISCR Case No. 14-01343
)
 Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: Anita Gorecki-Robbins, Esq.

10/27/2015

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not mitigate the sexual behavior and personal conduct security concerns. Over the course of several decades, he has engaged in deviant sexual conduct, to include incest with both of his sisters and masturbating to child erotica and anime with his minor children present in the room. Although Applicant’s behavior can, in part, be attributed to the sexual abuse he suffered as a child and he apparently has not engaged in similar conduct in several years, he failed to establish that the deviant behavior is unlikely to recur and no longer serves as a means through which he can be unduly influenced. Clearance is denied.

Procedural History

On November 19, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR), alleging that Applicant’s conduct and circumstances raised security concerns under the sexual behavior and personal conduct guidelines.¹ On December

¹ This action was taken under Executive Order (E.O.) 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 implemented by the Department of Defense on September 1, 2006.

16, 2014, Applicant submitted a response and requested a hearing to establish his eligibility for access to classified information. (Answer)

On March 23 2015, Department Counsel notified the Hearing Office that the Government was ready to proceed. Applicant's hearing was scheduled, with the agreement of the parties, for May 21, 2015.² The hearing was convened as scheduled. Department Counsel offered Government Exhibits (Gx.) 1 – 3. Applicant testified and offered Applicant's Exhibits (Ax.) A – L. All exhibits were admitted into evidence without objection.³ The hearing transcript (Tr.) was received on June 2, 2015.

Findings of Fact

Applicant and his wife have been married for nearly 20 years. They have three children, ages 6 to 12. He is a graduate of one of the U.S. military service academies and served honorably in the military for over 10 years. After separating from active duty, Applicant was hired as a federal contractor. He has been with his current employer since 2009. His work performance, both in and out of uniform, has generally been considered good to excellent. He held a security clearance for approximately 20 years before it was revoked following an unfavorable clearance decision by an Other Government Agency (OGA) in 2012.⁴

In July 2009, Applicant was sponsored by his employer for access to sensitive compartmented information (SCI) to work on classified matters for the OGA. He had previously been granted SCI access while in the military. He was polygraphed and interviewed by the OGA on four separate occasions between October 2009 and June 2010.⁵ He testified that following the first OGA interview he “was a nervous wreck coming out of it. [He] had never had that much scrutiny applied to [him.]”⁶ During his second OGA interview, he “was feeling good getting everything off [his] chest so . . . [he] just blurted out every dark thought, every nervous feeling [he] ever had . . . So [he] just laid it all out on the table. No secrets, no nothing.”⁷

During the course of the four polygraph-aided OGA interviews, Applicant disclosed he had been sexually abused as a child; had sexual relationships with both of his sisters from when he was 8 or 10 years old to when he was 17 years old; and

² See Hearing Exhibit (Hx.) I (prehearing correspondence and scheduling order). The Government's discovery letter was remarked Hx. II; while the Government's list of exhibits was remarked as Hx. III.

³ Tr. at 15-17.

⁴ Tr. at 18-22, 41, 52-54; Gx. 1; Gx. 3; Ax. C; Ax. F; Ax. G.

⁵ Tr. at 22-29; Gx. 3.

⁶ Tr. at 23.

⁷ Tr. at 28. See also, Gx. 2 at 10 (Applicant previously stated that “gathered from research and coworker that the best way to be successful at the lifestyle polygraph is to give as much information as possible and not hide any information.”).

engaged in sexual acts with other family members. He expressed concern to the OGA interviewers that he would abuse his own children.⁸ He further disclosed that:

- From 1995 to 2009, he read and masturbated to sexually-explicit stories involving children between the ages of 5 and 17. Some of these stories involved minors having sex with adults and incest. He told the investigator that the majority of the stories involved consensual sexual encounters, except for one story that “depicted physical abuse and rape of an individual.”⁹
- From 2002 to 2010, “approximately once every one or two weeks,” Applicant masturbated while in the same room as his minor daughters while reading sexually-explicit stories involving children. His daughters were typically 6 to 10 feet away.¹⁰
- From 2000 to 2002, Applicant viewed and masturbated to online cartoons or comics depicting minors engaging in sexual activity.¹¹
- On two occasions in 2009, including a week before his first OGA interview, Applicant was sexually aroused when his then two-year old daughter sat on his lap and “wiggled around.”¹²

Following the initial OGA interview in October 2009, Applicant began seeing a counselor to deal with the abuse he had suffered as a child and anxiety.¹³ He continued counseling until December 2010, when he was purportedly told by his counselor that “no further treatment was needed.”¹⁴

In about June 2010, the OGA referred Applicant's case to child protective services (CPS). CPS conducted its own investigation, including interviewing Applicant's spouse and his then seven or eight-year-old son. In approximately September 2010, CPS issued an unfavorable report finding that Applicant had committed child abuse. This unfavorable finding was subsequently reversed by a state court judge on grounds that the incriminating statements elicited during the OGA interviews were unreliable and violated Applicant's constitutional rights.¹⁵

⁸ Gx. 3 at 4 – 12 (*Clearance Decision Statement*).

⁹ Gx. 3 at 4.

¹⁰ Gx. 3 at 4-5.

¹¹ Gx. 3 at 5.

¹² Gx. 3 at 3.

¹³ Tr. at 25-28, 42-44; Gx. 1; Gx. 3 at 6, 8.

¹⁴ Tr. at 28. No counseling records were provided.

¹⁵ Tr. at 44-46, 49-51; Gx 2 at 5, 11.

In 2011, after the unfavorable CPS finding was reversed, the OGA requested that Applicant undergo a psychological evaluation as part of the processing of his still pending application for SCI access. During the evaluation, Applicant denied making the incriminating statements to the OGA interviewers about becoming sexually aroused by his minor daughters and masturbating to child erotica and anime.¹⁶ Applicant told the psychologist that he did not search for sexually-explicit material involving children, because “girls between the ages of 8 and 16 are not sexually arousing to me.”¹⁷ He was unwilling to discuss his sexual fantasies, but declared that “I am happy to say that *today*, I have no sexual interest in any of my daughters or kids.”¹⁸ He did, however, admit to the psychologist of having “fleeting images here and there” of his minor daughter while masturbating, explaining he could not “help what pops into my head.”¹⁹

The OGA psychologist diagnosed Applicant with pedophilia,²⁰ and wrote the following regarding the evaluation and findings:

Diagnosis is complicated by [Applicant’s] refusal to answer all relevant questions during the current evaluation on the advice of his attorney and wife. Nonetheless, based on statements made by [Applicant] during his security processing and the current evaluation, diagnosis was possible. Currently, [Applicant] does not appear to meet the diagnostic criteria for a mood, anxiety or psychotic disorder. Given [Applicant’s] previous sexual experiences and admissions during security processing of deviant sexual thoughts/fantasies and possibly inappropriate conduct of a sexual nature toward children, including his own, diagnosis of a sexual paraphilia was considered. [Applicant] has shown a longstanding pattern of having sexual fantasies about and becoming sexually aroused to prepubescent children. According to information provided by [Applicant], beginning as early as 1995 and lasting to approximately 2009, he has sought out material involving sexual relationships between adults and children . . . to use for sexual fantasy and as a masturbatory aid. He has also viewed cartoons of underage characters involved in sexual activity, including intercourse, to which he has masturbated. More recently, beginning in 2008 and lasting until at least October 2009, [Applicant] began having sexual fantasies about his daughter to which he would masturbate (on one to six occasions), and became sexually aroused by his daughter when she sat on his lap (on two occasions). . . .

¹⁶ Gx. 3 at 6-10.

¹⁷ Gx. 3 at 8.

¹⁸ Gx. 3 at 8 (emphasis in original).

¹⁹ Gx. 3 at 8.

²⁰ The OGA psychologist’s diagnosis was not alleged as a security concern. It is only being considered for the limited purpose of assessing Applicant’s mitigation case, credibility, and whole-person factors.

[Applicant] has at times had sexual fantasies involving male children (i.e., an underage male being initiated into sex by an adult female) and at times involving female children. At times his sexual fantasies of children having sex with adults involve incest, at other times not. In addition to him finding these fantasies about children sexually arousing, he has also been sexually aroused by relationships, fantasies and sexual experiences with adult women, including his wife. Collectively, there is evidence that [Applicant] meets the criteria for Pedophilia Nonexclusive Type. Given his lack of candor during the current evaluation, it is impossible to determine if the symptoms of his Pedophilia disorder are currently in remission. However, paraphilic disorders are extremely difficult to treat and very resistant to change.²¹

On March 2, 2012, the OGA issued a clearance decision statement (CDS) denying Applicant SCI access.²² On the same day, Applicant submitted a security clearance application (SCA).²³ He voluntarily disclosed receiving mental health counseling for 14 months from October 2009 to December 2010, to deal “with abuse that happened to me as a child.”²⁴ Applicant made no mention of the SCI denial or the CPS investigation. He did discuss the clearance denial and the CPS investigation during the ensuing background interviews conducted by agents from the Office of Personnel Management (OPM).²⁵

In August 2012, Applicant sat down for his first OPM interview. The interview did not include the use of a polygraph. Applicant disclosed the CPS investigation, indicating that it was initiated after he “said some things during the [polygraph] examination regarding child abuse.”²⁶ He “refused to disclose exactly what [he] said regarding child abuse due to being advised by the [his] attorney and the judge not to discuss the matter due to the matter being a sealed private record.”²⁷ Applicant also discussed with the OPM agent his initial security clearance investigation in 1992, but not the adverse clearance decision by the OGA.²⁸

²¹ Gx. 3 at 9-10.

²² Gx. 3 at 3.

²³ The record is silent as to whether the SCI denial, periodic reinvestigation requirements, or a combination of the two triggered the submission of a new SCA.

²⁴ Gx. 1 at 33-35.

²⁵ Gx. 2.

²⁶ Gx. 2 at 5.

²⁷ *Id.*

²⁸ Gx. 2 at 6.

In September 2013, Applicant was interviewed for a second time by OPM. Again, this interview was conducted without the aid of a polygraph. Applicant further explained that the reason he did not list the CPS investigation on his SCA was because “[t]here was no crime, no charges or arrest. . . . [he] did not list this because he thought it was a private matter.”²⁹ Applicant further stated that he did not become aware of the adverse clearance decision by the OGA until August 2012.³⁰

Applicant and his spouse testified about the significant lifestyle changes he has made over the past five years.³¹ He submitted letters from supervisors attesting to their favorable opinions regarding his character and work ethic.³² He testified that he cannot be coerced or adversely influenced regarding the information that led to the SCI denial, and he would report any attempts to unduly influence him to his security manager.³³ He went on to state that only his wife and those involved in the processing of his security clearance are aware of the adverse information that led to the CDS. Applicant explained that he and his wife “decided that that was something to keep within our family.”³⁴

Applicant’s wife testified that they have decided to keep the adverse information that led to the SCI denial private because they are concerned about what others might think.³⁵ When the CPS investigation was taking place, her family asked what was going on and she “told them that he [Applicant] had a horrific childhood and that those events, you know, came up in the [OGA interviews] and that that’s what they were examining.”³⁶

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865, § 2.

When evaluating an applicant’s eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an

²⁹ Gx. 2 at 10.

³⁰ Gx. 2 at 9.

³¹ Tr. at 30-37, 48-49, 56-57; Ax. K.

³² Ax. I, J, L.

³³ Tr. at 38-41.

³⁴ Tr. at 49.

³⁵ Tr. at 64.

³⁶ Tr. at 64-65.

administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an 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.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, recognizing the difficulty at times in making suitability determinations and the paramount importance of protecting national security, the Supreme Court has held that “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531. See also ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“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.”).

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. 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 an 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.

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.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

Analysis

The SOR sets forth eight allegations under the sexual behavior guideline. All eight allegations are incorporated by reference under the personal conduct guideline. The eight allegations can be further divided into three separate categories:

Category 1: Conduct admitted during OGA interviews.³⁷ SOR 1.a and 1.c – 1.f set forth the gravamen of the security concern in this case, namely, that over the course

³⁷ I have considered and given due deference to the state court’s finding that the polygraph-aided admissions were purportedly unreliable. However, Applicant’s hearing testimony provides sufficient guarantees as to the voluntariness, trustworthiness, and reliability of his admissions. Also, the detail and consistency of Applicant’s statements to the OGA, as reflected on the CDS, provide additional guarantees

of several decades Applicant engaged in deviant sexual behavior. The alleged conduct spans from about 1983 to 2010, and includes: (a) Applicant's 8-10 year incestuous relationship with both of his sisters; (b) his reading and masturbating to sexually-explicit stories involving children (hereinafter "child erotica"); and (c) searching for and masturbating to cartoons or comics depicting minors engaged in sexual acts (hereinafter "anime"). He, at times, would masturbate to child erotica and anime with his children in the same room.

Category 2: Statements made during OGA interviews regarding sexual fears, thoughts, and fantasies (hereinafter "bad thoughts"). SOR 1.b and 1.h.³⁸

Category 3: The CPS investigation and results of the investigation. SOR 1.g.

Guideline D, Sexual Behavior

The security concern for sexual behavior is addressed at AG ¶ 12:

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

Category 1: Conduct (SOR 1.a and 1.c – 1.f)

Applicant's 8 to 10 year incestuous relationship with his sisters occurred in the past and ended before he reached adulthood. However, Applicant's deviant sexual behavior continued well thereafter. From 1995 to 2010, Applicant sought out and read child erotica and/or viewed anime to fuel his deviant sexual desires. He was unable to control his deviant sexual impulses or was unwilling to stop his behavior. Applicant's behavior continued and became more perverse after his children's birth, as he would routinely masturbate while reading or viewing this material just a few feet away from his minor children. Even though such conduct may not violate a specific federal or state criminal statute,³⁹ in the security clearance context, Applicant's conduct calls into

as to the statements' reliability. Furthermore, the state court's finding seems to be based on the inadmissibility of polygraph evidence. Here, the Government did not offer the polygraph examination, but rather the statements Applicant made during the interviews conducted before and after the polygraph examination. ISCR Case No. 11-03500 at 3 (App. Bd. Feb. 28, 2012) (polygraph-aided admissions, as reflected on CDS, are admissible as substantive evidence in DOHA proceedings).

³⁸ SOR 1.b alleges that Applicant fantasized about having sex with his daughters, while SOR 1.h, states: "You have expressed concerns about becoming a sexual abuser."

³⁹ See generally, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389 (2002) (federal law prohibiting virtual child pornography struck down as overbroad and unconstitutional). *But see*, U.S. Department of Justice, Child Exploitation and Obscenity Section, *Citizen's Guide to U.S. Federal Law on Obscenity*, publicly available at <http://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-obscenity> (reciting three-prong test for determining whether material is obscene and, thus, not protected

question his judgment, reliability, and ability to protect classified information. His behavior also left him vulnerable to coercion, duress, and undue influence.

Applicant's conduct, when considered as a whole, raises the sexual behavior security concern and establishes the following disqualifying conditions:

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;

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

AG ¶ 13(d): sexual behavior . . . that reflects lack of discretion or judgment.

The guideline also sets forth the following conditions that can mitigate the sexual behavior concern:

AG ¶ 14(a): the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;

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 longer serves as a basis for coercion, exploitation, or duress; and

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

AG ¶ 14(a) does not apply. Applicant continued to engage in risky, highly destructive sexual behavior well after adolescence, to include after being commissioned as an officer in the U.S. military and granted a security clearance.⁴⁰

by First Amendment, and stating: "Although the law does not criminalize the private possession of obscene matter, the act of receiving such matter could violate the statutes prohibiting the use of the U.S. Mails, common carriers, or interactive computer services for the purpose of transportation."); *United States v. McCoy*, 602 Fed. Appx. 501, 2015 U.S. App. LEXIS 3880 (11th Cir. Mar. 12, 2015) (unpub op) (upholding conviction for author who posted online sexually-explicit stories involving children), *cert. denied*, 2015 U.S. App. LEXIS 5939 (Oct. 5, 2015).

⁴⁰ ISCR Case No. 07-18324 at 8 (App. Bd. Mar. 11, 2011) (error to mitigate applicant's deviant conduct as a teenager, to wit: masturbating in front of his young nephews; because he engaged in acts of a similar nature after becoming an adult).

AG ¶ 14(b) does not apply. Applicant's deviant sexual behavior spanned from approximately 1983 to 2010. Although five years have now passed since Applicant's last self-reported incident, this period of time is relatively short when compared to "the extensive span of time during which his security-significant conduct took place."⁴¹

Additionally, although Applicant has received counseling and made significant lifestyle changes, I am not convinced the behavior is unlikely to recur. It is unreasonable to surmise that a mere 14 months of counseling, no matter how skilled the counselor or intense the therapy, would be able to resolve the significant issues and impulses that led Applicant to engage in the deviant behavior at issue.⁴² Applicant's purported favorable prognosis from his counselor is undercut by the OGA's psychologist's subsequent diagnosis of pedophilia and opinion that such disorders are extremely difficult to treat and resistant to change. The intractability of Applicant's deviant impulses is supported by the information elicited during the evaluation. Applicant did not resume counseling following the unfavorable OGA diagnosis. Notwithstanding the passage of time, the underlying deviant impulses that led to the conduct at issue remain.

Furthermore, Applicant's refusal to answer all questions posed during the psychological evaluation, as well as his denials and minimization of the conduct he had previously admitted to during his OGA interviews, undercuts the mitigating value of the passage of time. Applicant's hesitancy in discussing his deviant conduct outside the context of the polygraph-aided interviews also detracts from his overall credibility.⁴³

AG ¶ 14(c) partially applies. Applicant's disclosure to his wife partially mitigates the concern that his behavior could serve as means through which he could be unduly influenced or coerced. However, Applicant and his wife are highly reluctant to discuss this matter with others, including officials connected with the current security clearance review, because of concern that it would once again result in a referral to civilian authorities. Such reticence evidences Applicant's continued susceptibility, and creates doubts about his willingness to self-report derogatory information in the future.

⁴¹ ISCR Case No. 14-00019 at 7 (App. Bd. Sep. 18, 2014).

⁴² Applicant failure to present documentation regarding the counseling he received and the purported favorable prognosis from his counselor severely detracts from his presentation. It is well settled that applicants are expected to present documentation to refute, explain, or mitigate security concerns raised by their circumstances. ISCR Case 07-10310 at 2 (App. Bd. July 30, 2008).

⁴³ ISCR Case No. 12-00609 (App. Bd. Apr. 4, 2014) (Passage of six years since individual last looked at sexual images of underage nude females not mitigated because "inconsistent and/or meretricious statements are of such a magnitude as to suggest to a reasonable mind an 'ongoing pattern of minimizing his actions' with a view not toward candor but simply toward maintaining his clearance."); ISCR Case No. 11-13644 at 5-6 (App. Bd. Aug. 15, 2013) (applicant's attempts to minimize his conduct and claims of not recalling prior inculpatory statements undercuts favorable evidence); ISCR Case No. 11-02334 at 4 (App. Bd. May 15, 2013) (Notwithstanding the fact that the security-significant conduct occurred 20 years in the past, applicant's "false and/or minimizing statements provide a reasonable basis for the Judge to have concluded that Applicant had not demonstrated a level of rehabilitation commensurate with the requirements of the Directive."); ISCR Case No. 09-03370 (App. Bd. Sep. 7, 2011) (individual only revealed security-significant conduct from the 1990s during polygraph-aided interviews with OGA).

AG ¶ 14(d) does not apply. Although Applicant's conduct was private, this mitigating condition is intended to recognize and protect the fundamental right of adults to engage in private, consensual sexual acts.⁴⁴ The mitigating condition also extends to the right of individuals, using their personal computer or device, to read and view legal pornography in the privacy of their home.⁴⁵ However, the mitigating condition does not extend to Applicant's sexual conduct in the presence of his children.⁴⁶

Category 2: Bad Thoughts (SOR 1.b and 1.h)

The focus of the guidelines at issue is regarding Applicant's behavior or conduct. The adjudicative guidelines, recognizing the importance of freedom of speech in our society, strictly limits the circumstances under which an individual's statements alone can be considered disqualifying to those instances where an individual's statements reflect an inability or unwillingness to safeguard and protect classified information.⁴⁷ Applicant's statements in this case – although clearly distasteful – do not rise to such level. Accordingly, SOR 1.b and 1.h are decided in Applicant's favor.

Category 3: CPS Investigation (SOR 1.g)

SOR 1.g does not allege independent disqualifying conduct, but instead the CPS investigation into conduct that is already addressed by another SOR allegation.⁴⁸ The Appeal Board has held that when the same disqualifying conduct is alleged more than once under the same guideline, the duplicative allegation(s) should be resolved in the

⁴⁴ *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003).

⁴⁵ *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878 (2000); *Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243 (1969); ISCR Case No. 02-12199 (App. Bd. Apr. 3, 2006) (“... Department Counsel's expression of disapproval over Applicant viewing legal pornography in the privacy of his home on his home computer does not provide a sufficient basis for concluding the Judge's decision is arbitrary, capricious, or contrary to law.”)

⁴⁶ ISCR Case No. 06-19544, n. 3 (App. Bd. May 28, 2008) (“Applicant argues, *inter alia*, that conduct such as viewing lawful pornography cannot constitute a security concern under Guideline D. The Board finds no support for this contention. Even conduct that is not illegal may, under the facts of a particular case, reflect an emotional disorder or deficiency in judgement or discretion.”). *Cf. United States v. Williams*, 553 U.S. 285, 288, 128 S. Ct. 1830, 1835 (2008) (“We have long held that obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment.”); *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691 (1990) (possession of child pornography); *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348 (1982) (upholding state criminal statute prohibiting the production and distribution of child pornography).

⁴⁷ See, e.g., AG ¶ 4 (associating with or expressing sympathy for persons or organizations that advocate overthrowing the United States Government); AG ¶ 10(d) (statement of allegiance to a foreign country). On the other hand, an individual's expression of their sexual thoughts, fears, or fantasies are generally not a proper basis upon which to deny or revoke a security clearance.

⁴⁸ Presumably, the CPS investigation and subsequent court action nullifying the CPS action dealt with Applicant's admission that he masturbated in front of his minor children while reading child erotica and viewing anime. This conduct is already alleged at SOR 1.a.

individual's favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) Accordingly, SOR 1.g is decided for Applicant.

Guideline E, Personal Conduct

The personal conduct security concern is explained at 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 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.

Applicant's deviant sexual behavior also raises the personal conduct security concern, and specifically the disqualifying conditions listed at AG ¶¶ 16(c)⁴⁹ and 16(e).⁵⁰ The personal conduct guideline also sets forth several factors that may mitigate the security concern raised by Applicant's conduct. The relevant personal conduct mitigating conditions are similar to those found under the sexual behavior guideline, and for similar reasons are either not applicable or have limited applicability.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of all the relevant circumstances, to include the nine factors listed at AG ¶ 2(a). I hereby incorporate my comments under the sexual behavior and personal conduct guidelines. I gave due consideration to all the favorable and extenuating factors in this case, to include Applicant's military service, his work performance, lifestyle changes, and character references. However, the favorable evidence does not outweigh the security concerns raised by his past conduct. Applicant has over the course of several decades engaged in deviant behavior, to include most recently masturbating only a few feet away from his children while reading child erotica and viewing anime. His desire to keep this matter private and avoid further investigation by civilian authorities led him to be evasive during the OGA psychological evaluation. Based upon a full review of the record evidence and considering Applicant's demeanor, I am not convinced that similar security-significant conduct is unlikely to recur and, if it did, he would report it.

⁴⁹ Credible adverse information in several adjudicative issue areas that . . . 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 person may not safeguard protected information.

⁵⁰ 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, professional, or community standing

A security clearance determination is not intended to punish an individual for past conduct. Instead, these decisions serve as predictive judgments regarding an individual's security suitability, where the individual's past conduct is the best indicator of future behavior.⁵¹ Here, Applicant's past conduct continues to raise concerns about his judgment, reliability, and trustworthiness. Overall, the record evidence leaves me with doubts about Applicant's eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline D (Sexual Behavior)	AGAINST APPLICANT
Subparagraphs 1.a and 1.c – 1.f:	Against Applicant
Subparagraphs 1.b, 1.h, and 1.g:	For Applicant
Paragraph 2, Guideline E (Personal Conduct)	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant ⁵²

Conclusion

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge

⁵¹ ISCR Case No. 11-13626 at 3-4 (App. Bd. Nov. 7, 2013). See also, ISCR Case No. 01-25941 at 5 (App. Bd. May 7, 2004) ("Security clearance determinations are not an exact science, but rather predicative judgments about a person's security suitability in light of that person's past conduct and present circumstances.") (citing, *Egan*, 484 U.S. at 528-529).

⁵² Only as to those sexual behavior allegations that I found against Applicant.