



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



In the matter of:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-09492

**Appearances**

For Government: Nichole L. Noel, Esquire, Department Counsel

For Applicant: *Pro Se*

November 10, 2009

**Decision**

HARVEY, Mark, Administrative Judge:

From 1972 to about 2003 or 2004, Applicant engaged in sexual activity with prostitutes. In 2007, he provided false information to a Department of Defense (DoD) investigator and in his 2007 response to DoD Hearing and Appeals Office (DOHA) interrogatories concerning the recency of his sexual activity with prostitutes. He mitigated the security concern under Guideline D because his conduct was not recent; however, he failed to mitigate security concerns under Guidelines E and J. Access to classified information is denied.

**Statement of the Case**

On January 25, 2006, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Item 4). On December 31, 2007, the DOHA issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified; and the revised adjudicative guidelines

(AG) promulgated by the President on December 29, 2005, and effective within the DoD for SORs issued after September 1, 2006.

The SOR alleges security concerns under Guidelines D (Sexual Behavior), E (Personal Conduct), and J (Criminal Conduct) (Item 1). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked.

On January 18, 2008, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing (Item 2). A complete copy of the file of relevant material (FORM), dated August 21, 2009, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.<sup>1</sup> Applicant did not provide a response to the FORM. The case was assigned to me on November 3, 2009.

### **Findings of Fact<sup>2</sup>**

In Applicant's response to the SOR, he admitted: (1) periodically engaging in sexual conduct at massage parlors and with prostitutes from 1972 until approximately 2003; (2) his access to sensitive compartmented information (SCI) was denied by another agency in 2004; and (3) he failed to fully disclose his sexual conduct to a DoD investigator in 2007. He admitted he provided some information about his sexual conduct with prostitutes and at massage parlors; however, he denied that on February 9, 2007, he intentionally provided false information to a DoD investigator. He also admitted that on October 6, 2007, he reviewed his February 9, 2007 statement to a DoD investigator; however, he denied that he intentionally failed to correct the false information that was in the statement generated by the DoD investigator. He also provided clarifications and explanations about the various SOR subparagraphs, and expressed embarrassment and regret for his conduct (Item 2). After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 57-year-old employee of a defense contractor.<sup>3</sup> He is a systems support engineer. From 1970 to 1979, he served on active duty in the Air Force as an enlisted man and then from 1979 to August 2002 as an officer. He retired in the grade of Lieutenant Colonel. In 2005, he received a master's degree in communications

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<sup>1</sup>The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated August 25, 2009, and Applicant's receipt is dated September 4, 2009. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

<sup>2</sup>Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

<sup>3</sup>Unless stated otherwise, the facts in this paragraph and the next paragraph are from Applicant's January 25, 2006, security clearance application (Item 4).

technology. He married in 1973, and he separated from his spouse in 2003. His children were born in 1974 and 1977.

Applicant has never been fired from a job or left employment under adverse circumstances. His file does not contain any adverse information relating to police involvement. For example, he has never been charged with a felony, any firearms or explosives offense(s), and does not have any currently pending charges. He has never been charged with any offense related to alcohol or drugs. His file does not contain any information showing he has been arrested for or charged with any other misdemeanor-level offenses. There is no evidence that he has abused alcohol or drugs. His file does not contain any adverse financial information.

In 2004, another government agency denied Applicant eligibility for access to SCI information because he paid prostitutes, escort services, and massage parlors for sexual services from 1972 to 2003 (SOR ¶ 2.a; Items 2 at 2, 5).

### **Sexual Behavior**

Applicant admitted he engaged in sexual conduct with prostitutes and received manual and oral sexual gratification at massage parlors from 1972 to 2003 or 2004 (SOR ¶ 1.a; Item 2 at 2, 5). He paid prostitutes, escort services, and massage parlors and received sexual services (SOR ¶ 1.a; Item 2 at 2; 7 at 2). Applicant provided specific information about receiving sexual acts, such as intercourse, as well as manual and oral stimulation in exchange for money at massage parlors in three different states in 1994, 1995, 1999, 2000, 2001, 2002, and 2003 (Item 7 at 2-3; Item 8 at 1). He engaged in similar conduct in Japan from 1981 to 1986 (Item 7 at 3). He ceased such activities in 2004 (Item 2 at 2). He is ashamed and embarrassed about his sexual conduct. He does not intend to resume such sexual activities. Applicant's wife knows about his extra-marital sexual activities (Item 5 at 6).

### **False statements**

On February 9, 2007, an Office of Personnel Management (OPM) investigator asked Applicant about sexual activity outside of his marriage. DoD sought such information for the purpose of determining whether he should have access to classified information (Item 5 at 8). The OPM investigator described Applicant's disclosure as follows:

He answered yes to having engaged in sexual activity outside of marriage. Further questioning revealed that he routinely engaged in extra-marital sexual activities with prostitutes. From 1972 to 1986, while he was married, he sought out prostitutes and paid for sex. He engaged in this behavior wherever he was stationed in the U.S. or outside the country in Japan.

He does not recall how often he did this or what he paid. He does not recall the exact locations of these activities, but recalls generally prostitutes could be found in alleys so he walked the back alleys, once or twice a month, looking for prostitutes. He engaged in this behavior because he had a strong sexual appetite and liked the excitement.

He was never arrested because of this activity and he never had any encounter of any kind with law enforcement because of this activity. He has not engaged in this activity since 1986. He has no intention of doing it in the future. Based on their evaluation of the polygraph, and the admitted past activity, [the other agency] would not grant him an SCI clearance.

Applicant's February 9, 2007, statement to an OPM investigator (emphasis added).

DOHA sent Applicant interrogatories and a copy of his February 9, 2007 OPM subject interview and asked him to authenticate or provide corrections to this OPM subject interview. Applicant provided a seven-page typed discussion of the OPM subject interview as part of his response to interrogatories. The discussion included numerous corrections and clarifications, including spelling, dates, locations, names, and the context of his actions. On October 6, 2007, he swore his responses to the interrogatories were true and correct to the best of his knowledge and belief. In regard to the above three paragraphs, he quoted the OPM summary and then provided detailed commentary. He stated:

. . . Although I did engage in extramarital sexual encounters, I do not consider it "routinely." The "prostitutes" I referred to were employees at massage parlors who offered extra services, in which I frequently accepted in exchange for a monetary tip. I did not engage in this behavior "wherever he was stationed." I do admit engaging in that immoral behavior many times [because] it was available.

I was very embarrassed to admit these activities to the interviewer, but tried to provide accurate information as I remembered. When I said that "prostitutes could be found in alleys . . . ." I was referring to my first overseas assignment to Taiwan from 1972 to 1973. During breaks from work, several friends and I would "bar hop" in Taipei, Taiwan. As we traveled from bar to bar, street walkers (prostitutes) would proposition us for sex in exchange for money. When we accepted, the ladies would take us to a building in the alley, usually where they lived, where the deed was performed. The report makes it sound like I walked through alleys looking for prostitutes. That is not accurate. . . .

He did not include a correction of his statement to the OPM investigator that he "has not engaged in this activity since 1986" in his response to DOHA interrogatories. On October 6, 2007, he signed his explanatory statement.

As indicated previously, Applicant's January 18, 2008 SOR response admits that he engaged in sexual activity with women from escort services and/or visited massage parlors from 1972 until approximately 2003 or 2004 (Item 2). He explained that he failed to disclose his sexual activities after 1986 to the OPM investigator because he "was embarrassed and did not want to recall those times [he] was not proud of." (Item 2). His SOR response admits that his response to DOHA interrogatories failed to correct the misstatement in the OPM interview.

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

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

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant's allegiance, loyalty, or patriotism. It 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 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

### **Analysis**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guidelines D (Sexual Behavior), E (Personal Conduct), and J (Criminal Conduct).

#### **Sexual Behavior**

AG ¶ 12 describes the concern about sexual behavior stating:

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. 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 provides four conditions relating to sexual behavior that could raise a security concern and may be disqualifying:

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

(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.

Applicant admitted that he engaged in sexual conduct with women employed by escort services and massage parlors for money on numerous occasions from 1972 to 2003 or 2004. He engaged in this conduct in several states (not Nevada) and overseas. His conduct in the United States was of a criminal nature. AG ¶¶ 13(a) and 13(d) apply.

Although he was ashamed of his behavior, he is not vulnerable to coercion because security personnel and others, including his wife, are well aware of his conduct. He stopped his illegal sexual behavior in 2003 or 2004. There is no evidence that he has a personality disorder. AG ¶¶ 13(b) and 13(c) do not apply.

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

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

(b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or 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.

AG ¶¶ 14(b) and 14(c) apply. His sexual behavior is a misdemeanor-level criminal offense. He stopped engaging in this sexual misconduct in 2003 or 2004. He is unlikely to continue to engage in such conduct. Security officials and others are well aware of his sexual offenses. Accordingly, the sexual behavior no longer serves as a basis for coercion, exploitation or duress.

The other mitigating conditions do not apply. Applicant committed the sexual behavior at issue, and the conduct continued until he was in his 50s. AG ¶ 14(a) does not apply because he was not an adolescent. He did not carry his burden of establishing the conduct was strictly private, consensual, and discreet. AG ¶ 14(d) does not apply.

## **Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying with respect to the alleged falsifications of documents used to process the adjudication of Applicant's security clearance in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.<sup>4</sup>

On February 9, 2007, Applicant deliberately made a false statement to an OPM investigator, when he said he ended his sexual activity with prostitutes and employees of escort services and massage parlors in 1986. On October 6, 2007, in response to a DOHA interrogatory, he made a false sworn statement when he acknowledged his February 9, 2007 OPM statement was accurate with respect to ending his sexual activity with prostitutes and employees of escort services and massage parlors in 1986. He actually continued to pay women to engage in such sexual activity with him until 2003 or 2004. AG ¶¶ 16(a) and 16(b) apply.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

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<sup>4</sup>The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions outlined in AG ¶ 17 apply. Applicant's false statements cannot be mitigated at this time because they are too serious and too recent.

## **Criminal Conduct**

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations."

AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying, ¶ 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 convicted." SOR ¶ 3.a alleges that Applicant violated 18 U.S.C. § 1001 by

making two false statements on February 9, 2007 to an OPM investigator and on October 6, 2007 in response to DOHA interrogatories. Although he said he provided false information to DoD because of his embarrassment, I conclude that he recognized that his revelations about sexual misconduct resulted in the other agency's denial of his clearance, and he deliberately provided false information about the recency of his sexual misconduct in an attempt to obtain a security clearance from DoD under false pretenses.

For a violation of 18 U.S.C. § 1001 to occur, the falsification must be material. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995), as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." See also *United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004).

If Applicant had provided accurate answers to the OPM investigator and in response to DOHA interrogatories about ending his sexual activity with prostitutes, and employees of escort services and massage parlors in 2003 or 2004, his accurate answers were capable of influencing the government to deny his security clearance. His thirty years of sexual misbehavior, including numerous misdemeanor-level crimes up to 2003 or 2004, caused another agency to revoke his security clearance. In 2007, his sexual misbehavior was still sufficiently recent, derogatory information<sup>5</sup> which reasonably could have jeopardized approval of his security clearance. Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a \$10,000 fine). Accordingly, AG ¶¶ 31(a) and 31(c) apply because Applicant violated 18 U.S.C. § 1001.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and,
- (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.

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<sup>5</sup> In Applicant's case, this includes aspects such as the seriousness of the misconduct, and the number of violations of the law, regardless of whether the misconduct resulted in an arrest or conviction.

None of the mitigating conditions under AG ¶ 32 fully apply. Applicant's false statements occurred in 2007, which is somewhat recent. It casts doubt on Applicant's current reliability, trustworthiness and good judgment. He was not pressured or coerced into making his false statements. His false statements are substantiated.

AG ¶ 31(d) partially applies. There is some evidence of successful rehabilitation, including the passage of about two years since his false statements without additional criminal activity. Although he expressed his remorse, embarrassment, and shame for his sexual conduct, he denied that he deliberately and intentionally provided false information. He has not accepted responsibility for his two false statements in 2007. He has received some job training, and has an outstanding employment record serving in the Air Force. However, his post-offense behavior is insufficient to fully mitigate the very serious misconduct in this case.

### **Whole Person Concept**

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(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.

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 D, E, and J in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There is some evidence supporting approval of Applicant's access to classified information. He has not committed any sexual offenses since 2003 or 2004. The sexual offenses occurring in the United States are misdemeanor-level offenses involving his payments for sexual acts as opposed to felony-level crimes. He served on active duty more than 30 years and retired from the Air Force in the grade of Lieutenant Colonel. Applicant significantly contributed to the national defense over his lengthy career. There is no evidence of any disciplinary problems at work. There is no evidence of drug or alcohol abuse. There is no evidence of disloyalty. There is no evidence that he would intentionally violate national security, or that he would fail to safeguard sensitive or classified information. His character and good work performance show substantial responsibility, rehabilitation, and mitigation.

The evidence against approval of Applicant's clearance is more substantial. Because of his background, military experience, and years of holding a high-level security clearance, Applicant was well aware of the importance of providing accurate information in the context of evaluating and retaining a security clearance. After another federal agency revoked his security clearance because of his sexual conduct with prostitutes and employees of escort services and massage parlors, Applicant was on notice that DoD might deny his clearance, if he revealed that his sexual indiscretions continued until 2003 or 2004. In 2007, he intentionally lied to an OPM investigator and falsely claimed that he stopped his sexual indiscretions in 1986. In response to DOHA interrogatories, he failed to correct his false claim to the OPM investigator that he ended his inappropriate sexual conduct in 1986, which was about 21 years earlier. When he responded to the SOR, he failed to take full responsibility for his attempts in 2007 to deceive the DoD. His two false statements in 2007 are felonies because they violate 18 U.S.C. § 1001 and cannot be mitigated at this time. His two false statements in 2007 were knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. These two crimes show lack of judgment and a failure to abide by the law. Such conduct establishes a serious security concern, and access to classified information is not warranted at this time. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to criminal conduct and personal conduct. His sexual behavior is mitigated because it ended in 2003 or 2004, and it is not recent.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"<sup>6</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not currently eligible for access to classified information.

### **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: Subparagraph 1.a:	FOR APPLICANT For Applicant
Paragraph 2, Guideline E: Subparagraph 2.a: Subparagraphs 2.b and 2.c:	AGAINST APPLICANT For Applicant Against Applicant
Paragraph 3, Guideline J: Subparagraph 3.a:	AGAINST APPLICANT Against Applicant

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<sup>6</sup>See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

## **Conclusion**

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 Applicant's eligibility for a security clearance. Eligibility for a security clearance is denied.

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MARK HARVEY  
Administrative Judge