DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ADP Case No. 08-00969
SSN: ----------	)	
	)	
Applicant for Public Trust Position	)	

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
For Applicant: *Pro Se*

March 17, 2009

Decision

HARVEY, Mark W., Administrative Judge:

Applicant failed to mitigate trustworthiness concerns regarding concerns regarding his criminal conduct. His felony-level convictions in October 2004 of a crime against nature (sodomy) and in July 2005 of perjury are too recent and serious. Applicant is still on probation and is a registered sexual offender. Applicant's eligibility to occupy an ADP I/II/III position is denied.

Statement of the Case

Applicant submitted his Questionnaire for Public Trust Position (SF 85P), on April 11, 2007 (Government Exhibit (GE) 1). On November 19, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant eligibility for a public trust position, citing trustworthiness concerns under Guidelines D (Sexual Behavior) and J (Criminal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation), and

the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant's response to the SOR was notarized on December 31, 2008, and it requested a hearing before an administrative judge. Department Counsel was prepared to proceed on February 2, 2009. The case was assigned to me on February 3, 2009. On February 10, 2009, DOHA issued a hearing notice. The hearing was held on March 2, 2009. At the hearing, Department Counsel offered six exhibits (GEs 1-6) (Transcript (Tr.) 17), and Applicant offered 13 exhibits (Tr. 18-21; AE A-M). There were no objections, and I admitted GEs 1-6 (Tr. 17), and AEs A-M (Tr. 21). Additionally, I admitted the SOR, response to the SOR and the hearing notice (GEs 7-9). I received the transcript on March 13, 2009.

Procedural Issues[1]

The SOR cited facts that would have brought Applicant's case under the prohibitions of the Smith Amendment (10 U.S.C. § 986), because he was convicted and sentenced to punishments including five years of confinement for perjury. Applicant was confined for more than one year (October 13, 2004, until December 12, 2006) (GE 2 at 6; GE 3). However, this section of the United States Code, which applied only to clearances granted by DoD, was repealed on January 28, 2008, when the President signed the National Defense Authorization Act for Fiscal Year 2008 into law. It was replaced by adding Sec. 3002 to 50 U.S.C. § 435b (the Bond Amendment), which applies throughout the Federal Government. Sec. 3002(c) of this new provision continues the requirement for disqualification, absent a meritorious waiver, for persons who were sentenced to and served imprisonment for more than a year. However, this disqualification only applies to prevent clearances that would provide access to special access programs (SAP), Restricted Data (RD), or any other information commonly referred to as "special compartmented information" (SCI).

This statutory modification ends the former Smith Amendment requirement for a meritorious Secretarial waiver to grant or continue a regular, or "collateral," security clearance to a person who has received a conviction and served over one year of confinement. On June 20, 2008, prior to the issuance of the SOR and the hearing in this case, the Under Secretary of Defense (Intelligence) issued a memorandum providing interim guidance for implementation of the Bond Amendment. This memorandum set forth guidance for adjudicators to assess the potential application of the Bond Amendment to security clearance determinations and requirements for "Exception" identification of persons subject to its limitations in the Joint Adjudication Management System (JAMS) if a collateral clearance is granted. The granting of access to SAP, RD or SCI to such individuals requires a meritorious waiver under the terms of that memorandum. Such access is not at issue in this case, and accordingly the Bond Amendment was not addressed in either the SOR or at the hearing.

[1]Administrative Judge White cogently explained the interplay between the Smith Act, the Bond Amendment and revised Adjudicative Guideline (AG) J in ISCR Case No. 07-11963 (A.J. Aug. 20, 2008). I have borrowed freely and extensively without further citation from his explanation in this section.

The repeal of the Smith Amendment also nullified the legal authority by which the Under Secretary of Defense for Intelligence modified the revised Adjudicative Guidelines (AG) that were approved by the President on December 29, 2005. When the Under Secretary promulgated the AG for use within DoD, on August 30, 2006, he added provisions reflecting the Smith Amendment. AG H (Drug Involvement), AG I (Psychological Conditions), and AG J (Criminal Conduct) were each modified, but only the latter guideline is involved in this case. It was modified by adding AG ¶¶ 31(f), 32(e), and footnotes 1 and 2. Because the President, in Executive Order 12968, intended to establish "a uniform Federal personnel security program" (Intro.), and required a "common set of adjudicative guidelines for determining eligibility for access to classified information" (Sec. 3.1(f).), the authority for these DoD modifications to the guidelines ended with the repeal of the Smith Amendment. The new statutory requirements are in effect and must be followed pending formal revision of the AG, but only the prohibition against granting clearances to unlawful drug users and addicts under AG H applies to "collateral" security clearances. Accordingly, the Smith Amendment-related provisions added to AG J have been repealed, and do not apply to the remaining proceedings in this case.

Findings of Fact[2]

Applicant admitted that he is required to register as a sex offender until December 30, 2015 (SOR ¶ 1.b), and denied the remaining SOR allegations in whole or in part.[3] His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 39 years old (Tr. 7; GE 1). He has an associates degree and has earned several technology certifications (Tr. 7). Applicant met his future spouse in 1995 (Tr. 51), and married her in 1997 (Tr. 51; GE 1). Their daughter was born in September 2002 (Tr. 51; GE 1). He began his employment for a federal contractor in May 2007 (Tr. 8; GE 1). He has never served in the military (GE 1). He is a senior data base analyst and programmer (Tr. 91).

Criminal Conduct

In March 2002, a neighbor, who is a single mother, suggested that Applicant take her son on some errands because her son did not have any male influences in his life (GE 2 at 3). Applicant formed a friendly relationship with her son, who at that time was a 15-year-old minor (Tr. 94). Applicant and the minor were together about twice a week, when they went to the gym or to Lowes (Tr. 95, 97). Applicant claimed the minor initiated several sexual discussions by jokingly raising the issue of masturbation (Tr. 94). Applicant changed the subject to discourage the sexual conversations (Tr. 98). His

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

[3]Applicant's SOR response is missing page 1; however, that page only contained his address (Tr. 13-14).

mother asked Applicant how to block her son from accessing pornographic websites using the family computer (Tr. 95).

On August 27, 2002, Applicant and the minor went to Applicant's residence (Tr. 97). Applicant brought up the issue of circumcisions and the minor said he was not circumcised (Tr. 96-97; GE 2 at 4). Applicant asked the minor if he could see the minor's penis (Tr. 97). The minor exposed himself and Applicant committed oral sodomy on the minor, who was then 15-years old (Tr. 97; GE 4). Applicant denied that he used force in connection with the sodomy (Tr. 109). Applicant's wife was upstairs when he was committing the sodomy (Tr. 97). Initially Applicant denied that he knew what he had done with the minor was "inappropriate," asserting that because Applicant was the victim of incest he did not know it was wrong (Tr. 99). He subsequently admitted he realized it was inappropriate at the time he committed the offense (Tr. 100).

After the sodomy, Applicant continued to associate with the victim until March 2003 (Tr. 100; GE 2 at 4). The victim attempted to extort Applicant into giving him a car by threatening to expose the sexual activity (Tr. 101). Applicant claimed he was more worried about the incest somehow coming out than what he had done to the minor (Tr. 101-102). In August 2003, the minor informed the police of Applicant's misconduct (GE 2 at 4).

On October 14, 2004, Applicant was tried for committing forcible sodomy upon the minor (Tr. 104). Applicant testified at the trial that he masturbated the minor with his hand, and denied any sodomy (oral penetration of Applicant's mouth by the minor's penis) (Tr. 103). Applicant knew at the time that he was providing this testimony that it was false (Tr. 104). On October 14, 2004, Applicant was convicted of committing a crime against nature, consensual sodomy (GE 4). At his sentencing proceeding, Applicant disclosed his lie on the merits concerning the penetration issue (GE 2 at 5). The court sentenced him to be incarcerated for 12 months, to two years of post-release supervision, to be registered as a sex offender, and to a $2,500 fine (GE 4).

On May 16, 2007, Applicant told an Office of Personnel Management (OPM) investigator that he lied about the sodomy, "because he was fearful of what would happen to his family, losing his wife, not seeing his daughter, losing his job, and not providing any health benefits for his family. [He] also recanted because of his guilt." (GE 2 at 5).

On July 20, 2005, Applicant entered an Alford plea[4] to perjury (GE 3, 9). He was sentenced to be incarcerated for five years with 2 ½ years suspended, to run concurrently with his previous sentence (GE 3, 9). He also received two years of probation (GE 3, 9).

[4]Under *North Carolina v. Alford*, 400 U.S. 25 (1970), a judge may announce a finding of guilty, when a defendant enters a guilty plea and nevertheless makes a protestation of innocence. The defendant must also intelligently conclude that his or her interests require entry of a guilty plea and the record before the judge must contain strong evidence of actual guilt.

Applicant is on probation until December 2009 (Tr. 37). He is not allowed to be alone with any minors, including his daughter (Tr. 39).

Applicant's spouse, mother and father-in-law, roommates, employer, character references, and landlord are aware of the convictions (Tr. 106). The conviction was in the newspaper and disclosed at Applicant's church (Tr. 107). As a registered, convicted sex offender the information about his sexual offense is available on the internet (Tr. 107).

Applicant's spouse's information

Applicant's spouse made a lengthy statement on his behalf (Tr. 49-90). When the sexual offense occurred, there was considerable stress in Applicant's marriage because his spouse had two miscarriages and was concerned about her ongoing, difficult pregnancy (Tr. 51-52). His spouse was also unemployed in 2001 (Tr. 51). Their relationship became distant (Tr. 52). Six days after Applicant committed the sodomy, their daughter was born (Tr. 52-53). His spouse learned about the offense a year after he committed it, when the police approached him about the crime (Tr. 54, 78). He did not reveal the incest to her until the time of Applicant's trial (Tr. 54-55). Before he committed the offenses, she trusted him and considered him a loving, caring person (Tr. 77).

After Applicant was confined, she had to sell their home because she could not afford the monthly payments. Moreover, there was tension in their neighborhood because the victim lived nearby (Tr. 56, 68). Her father, who was a former police officer, was very supportive of Applicant, and he even hired a detective to investigate the offense (Tr. 57). Applicant's probation does not permit him to live in her residence (Tr. 61). However, he is allowed to visit his daughter and has frequently done so (Tr. 71). Probation authorities have approved her as someone who can supervise Applicant's visits with their daughter (Tr. 74).

Applicant's wife was present in court when he committed perjury. She thought he committed perjury because he was ashamed and did not want to admit the sexual conduct in front of ten or twelve children who were present in the courtroom (Tr. 68, 79).

Before Applicant obtained employment or a place to live, he informed his prospective landlord and employer of his criminal convictions (Tr. 62, 65-66). He was open with family and friends concerning his convictions (Tr. 67). Applicant's wife depicted Applicant as gentle, loving, caring, nonviolent, and mature (Tr. 58-59). She described him as a loving and supportive father and husband (Tr. 59). His therapy has increased his maturity, confidence and trustworthiness (Tr. 59, 70, 89). He is more assertive in group therapy and would not submit to coercion (Tr. 89). She did not believe he would offend in the future because he understood what he did was wrong and understood what triggered the offenses (Tr. 74, 80-81). She did not believe he was susceptible to extortion because of the offenses (Tr. 87).

Other character evidence

Applicant's father-in-law has a law enforcement background and has investigated sexual crimes as a county police sergeant.[5] He was aware of the circumstances underlying Applicant's convictions. He considers Applicant to be truthful, and trustworthy. Applicant has good judgment.

Applicant's landlord and friend has known him for two years and described him as responsible, clean, helpful, and respectful (AE E). He is compliant with the rules of his probation and does not visit alone with minors (AE E). Applicant is a good citizen, has law-abiding character and shows integrity (AE E).

A retired Army Colonel and West Point graduate, who is a licensed minister, provided an endorsement urging reinstatement of Applicant's access to sensitive information (AE G). In 2004, he met Applicant during a weekly Bible study and they became friends (AE G). He opined Applicant had changed since 2008 and is now trustworthy, reliable and will comply with the law (AE G). Other friends described Applicant as family oriented, a hard worker, trustworthy, with strong integrity (AE H, I, K). Others had similar positive comments concerning Applicant's law-abiding character and trustworthiness (AE J, L, M).

Therapy

Starting in the fall of 2003, Applicant has received therapy from Ms. N, a licensed clinical social worker in private practice, who specialized in the treatment of adult who experienced trauma in their childhood (Tr. 24-25, 47; AE A). Ms. N has a masters degree in Social Work and a wealth of private practice experience (Tr. 24, 47; AE A). Applicant is the only sex offender she is counseling (Tr. 43). Applicant pays for her counseling services (Tr. 43). Applicant received counseling from Ms. N about once a month, and then after his incarceration ended the meetings increased to once a week, until spring 2007, when his therapy sessions increased to twice a week (Tr. 26-27, 35).

Ms. N determined Applicant was the victim of incest from his brother, who was ten years older, beginning when Applicant was six and continuing until he was in his twenties (Tr. 30-31). Applicant said he was sexually abused more than one thousand times (Tr. 113). Applicant initially viewed the molestation as normal; however, later he recognized the incest was not normal (Tr. 31). The molestation was kept secret from his parents while it was happening (Tr. 30-31). Applicant has never confronted his brother; however, he did confront his mother about the incest (Tr. 36). Applicant's family was not supportive and did not attend his trial (Tr. 44-45).

Applicant told Ms. N that he committed oral sodomy on one occasion with a youth as described previously in the Criminal Conduct section of this decision (Tr. 31). Applicant thought the sexual activity with the victim was normal at the time he did it (Tr. 33). During the course of therapy or perhaps when the victim was trying to extort Applicant, he recognized it was not normal (Tr. 34).

[5]Applicant's father-in-law's written statement is the source for the facts in this paragraph (AE D).

Ms. N thought Applicant's perjury was "a desperate attempt to get himself out of the situation for a number of reasons and one being that he knew that his sexual abuse by his brother would become part of the story" (Tr. 41). Applicant scrupulously complies with the rules of his probation (Tr. 46). Ms. N predicted he would be honest about his behavior if questioned in court or a security context because he has learned about the consequences of not being forthright (Tr. 42).

Applicant's diagnosis is 300.4—dysthymia (Tr. 29).[6] He also has a moderate underlying depression (Tr. 29). Applicant is now more mature and thoughtful (Tr. 28, 47). He is not impulsive (Tr. 27). Although Applicant is her only source of information (Tr. 39), Ms. N concluded Applicant is dedicated to his employment and therapy (Tr. 27, 48). He supports his wife and daughter (Tr. 28). Applicant is a trustworthy person, who will not offend in a similar way in the future (Tr. 29, 48-49).

Applicant completed the Sex Offender Awareness Program while he was incarcerated. He also receives weekly Sex Offender Treatment and counseling from Dr. G at a clinical center once a week in group therapy and once a month with his wife (Tr. 26-27; GE 9). Applicant pays for the therapy with Dr. G (Tr. 73). Applicant eventually passed a sexual history polygraph (Tr. 108). In the polygraph, he denied that he used force, that there were other minor victims, that he viewed pornography, and that he was communicating with minors (Tr. 111). He also passed the polygraph on whether he was being truthful with his probation officer and therapist (Tr. 111). Applicant expressed remorse and was very sorry for what he had done (Tr. 129-130).

Occupational history

Applicant fully disclosed his offenses to employers and on his SF 85P (Tr. 117; GE 1; AE B, C). He also disclosed his need to attend therapy and meet other probation requirements (AE B). He is an innovative, diligent, hard-working employee, who often earned awards (Tr. 114, 120). Applicant was never unemployed, except while he was incarcerated (Tr. 114). Even when he was incarcerated, he taught inmates about computers and use of Microsoft office applications (Tr. 115). Applicant learned and matured while incarcerated and considered it a positive life experience (Tr. 116).

Applicant loved his work in information technology, and contributed to his employer's success (Tr. 116, 119). He showed integrity, professionalism and competence at work and his employer trusted him with very sensitive, government and contract information (Tr. 120-122; AE B, F). Applicant received respect and praise from his employer for several noteworthy contributions (Tr. 121-123; AE B, C, F). Fellow employees and his supervisor at the contractor believed Applicant was trustworthy and his work performance warranted a public trust position (AE B, C).

[6] A dysthymic disorder is essentially an emotional depression that persists for years of moderate or less than moderate intensity. See the diagnostic criteria for dysthymic disorder in the *Diagnostic and Statistical Manual of Mental Disorders*, 4th Edition, Copyright 1994 by the American Psychiatric Association (available at: http://www.behavenet.com/capsules/disorders/dysd.htm).

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). The government's authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. *See Id*. at 527.

Positions designated as ADP I and ADP II are classified as "sensitive positions." Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3. "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." Regulation ¶ C6.1.1.1. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. *See* Regulation ¶ C8.2.1.

When evaluating an Applicant's suitability for a public trust position, an administrative judge must consider the disqualifying and mitigating conditions in the 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 over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to classified information. *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 and trustworthiness 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 [or access to sensitive information]." 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 [or trustworthiness] determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." Section 7 of Executive Order (EO) 10865 provides that 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."

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the relevant trustworthiness concern is under Guidelines D (Sexual Behavior) and J (Criminal Conduct).

Sexual Behavior, Guideline D

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 committed sodomy upon a 15-year-old minor. His conduct constitutes a felony. It does not make him vulnerable to coercion because he has been open to his family, employer, landlord, and others about his offense. He is a registered sex offender and his conduct is readily discoverable on the internet. There is no pattern of sexual behavior because Applicant committed one offense. AG ¶¶ 13(b) and 13(c) do not apply; however, AG ¶¶ 13(a) and 13(d) 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(c) fully applies mitigating the sexual behavior. Applicant's sexual offense is public information. He is a registered sexual offender and the information is available on the internet. He informed his family, employer and landlord of the sexual behavior. Accordingly, the sexual behavior no longer serves as a basis for coercion, exploitation or duress.

The other three mitigating conditions do not apply. On August 27, 2002, Applicant committed the sexual behavior at issue, and at that time he was 32 years old. AG ¶ 14(a) does not apply because he was not an adolescent. The sodomy with a minor occurred more than six and a half years ago. He has served his incarceration and received extensive therapy. However, Applicant described years of incest by his older brother, and he was sexually abused more than 1000 times. Because of this extensive history of abuse, there is still a possibility of recurrence and AG ¶ 14(b) can only be partially applied. Applicant placed a minor's penis into his mouth. The minor could not legally consent to the sexual activity and AG ¶ 14(d) does not apply.

Criminal Conduct, Guideline J

AG ¶ 30 expresses the trustworthiness 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 six conditions that could raise a trustworthiness concern and may be disqualifying:

> (a) a single serious crime or multiple lesser offenses;
>
> (b) discharge or dismissal from the Armed Forces under dishonorable conditions;
>
> (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
>
> (d) individual is currently on parole or probation;
>
> (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program; and
>
> (f) conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year.

AGs ¶¶ 31(a), 31(c), and 31(d) apply. Applicant was convicted of two felony-level offenses on October 14, 2004 (crime against nature) and July 20, 2005 (perjury). He admitted that he committed the two felonies. He was sentenced to substantial incarceration, fines and probation. He remains on probation at this time.

AG ¶ 32 provides four conditions that could potentially mitigate trustworthiness 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.

None of the mitigating conditions fully apply. AG ¶¶ 32(b) and 32(c) clearly do not apply because he admitted the offenses and no one pressured him into committing the

offenses. AG ¶¶ 32(a) and 32(d) are similar and are partially applicable. Applicant's most recent criminal offense occurred on October 14, 2004, about four and a half years ago. He served his sentence to incarceration and paid his fines. He presented strong evidence of remorse, job training, a good employment record and solid support from his employer, counselor, spouse, landlord, friends and father-in-law. A fairly lengthy period has elapsed after his most recent offense, and he has had time to contemplate his poor judgment and to respond to therapy.

The therapy Applicant received is particularly noteworthy because Ms. N's services were not court ordered. Applicant paid for Ms. N's therapy on his own initiative. He also completed the Sex Offender Awareness Program while he was incarcerated. He receives weekly Sex Offender Treatment and counseling from Dr. G at a clinical center and once a month receives family counseling with his wife (Tr. 26-27; GE 9). His therapy and counseling have had a powerful salutary effect. He understands his criminal offenses had a devastating impact on his lifestyle, family and career. His demonstrated intent not to commit future crimes is encompassed in these two mitigating conditions. He has worked with information technology and has a good employment record. He sincerely accepted responsibility for his misconduct.

However, Applicant's criminal conduct cannot be fully mitigated at this time. He was a victim of years of sexual abuse. He was victimized more than 1000 times. The devastating abuse by his brother has increased the risk that Applicant will sexually abuse others, or commit other criminal offenses. He is still on probation and more progress is necessary to assure he is reliable, trustworthy and responsible to be given access to sensitive information.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance or public trust position 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 or public trust position 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 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 sensitive information. Applicant's sexual offense occurred on August 27, 2002, which is six and a half years ago. His perjury offense was closely linked to the sodomy, as he committed perjury at his trial for committing sodomy upon a minor. He has not committed any offenses, since his perjury offense on October 14, 2004. He frankly and candidly admitted his two felonies on his SF 85P, to his employer, to his landlord, to his therapists, to his family, to an OPM investigator, and at his hearing. He knows the consequences of criminal offenses. He completed his incarceration and paid his fines. He has received years of one-on-one expert counseling, group therapy and family counseling, providing important mitigation of his sexual offense. Applicant significantly contributes to his company and the Department of Defense. There is no evidence at work of any disciplinary problems. There is no evidence of disloyalty or that he would intentionally violate national security or that he would fail to safeguard sensitive information. His character and good work performance show substantial responsibility, rehabilitation and mitigation. Other contractor employees, his supervisor, friends, family members and others support his continued access to sensitive information.

The evidence against approval of Applicant's clearance is more substantial. Applicant was sexually abused more than 1000 times over more than ten years by his older brother. When he was 32 years old, he sexually abused a minor, sodomizing him while his wife, who was nine months pregnant, was upstairs. He then continued to attempt to manipulate the minor into not reporting the incident, holding out the possibility that Applicant would give the minor a car, when he turned 16. When he went to trial on October 14, 2004, he committed perjury, and failed to take full responsibility for what he had done. He is currently on probation and is registered as a sex offender. Under the Appeal Board's jurisprudence, his two felonies cannot be considered individually, and must be analyzed in combination with each other. His two felonies cannot be mitigated at this time. His criminal offenses were knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. These two crimes show an extreme lack of judgment and a failure to abide by the law. Such conduct raises a serious trustworthiness concern, and access to sensitive 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. Sexual behavior is mitigated because 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"[7] 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 sensitive information.

[7] *See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant

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 to occupy an ADP I/II/III position. Applicant's eligibility to occupy an ADP I/II/III position is denied.

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Mark W. Harvey
Administrative Judge