DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-08085
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Candace Le'i Garcia, Esquire, Department Counsel
For Applicant: Nina J. Ginsberg, Esquire

January 15, 2010

Decision

HARVEY, Mark, Administrative Judge:

Applicant failed to mitigate security concerns regarding his sexual behavior and criminal conduct. In January 1994, Applicant was convicted of two felony-level counts in U.S. District Court of sexual offenses against children. His crimes cannot be mitigated because he was not forthright and candid at his hearing concerning his sexual offenses. Applicant's eligibility for access to classified information is denied.

Statement of the Case

On May 6, 2008, Applicant submitted a Questionnaire for Sensitive Positions or security clearance application (SF-86) (Government Exhibit (GE) 1). On July 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) (Hearing Exhibit (HE) 1) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended and modified; Department of Defense 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.

The SOR alleged security concerns under Guidelines J (criminal conduct) and D (sexual behavior) (HE 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. The SOR recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked.

On August 5, 2009, Applicant responded to the SOR (HE 2). He requested a hearing before an administrative judge. On August 26, 2009, Department Counsel indicated she was ready to proceed on his case. On August 28, 2009, DOHA assigned Applicant's case to me. On September 9, 2009, DOHA issued a hearing notice (HE 3). On October 21, 2009, Applicant's hearing was held. At the hearing, Department Counsel offered four exhibits (GE 1-4) (Tr. 20), and Applicant did not offer any exhibits (Tr. 21). There were no objections, and I admitted GE 1-4 (Tr. 20-21). Additionally, I admitted the hearing notice, SOR, and response to the SOR (HE 1-3). On October 29, 2009, I received the transcript.

Procedural Issues[1]

Applicant's case implicated the prohibitions of the Smith Amendment (10 U.S.C. § 986), because he was convicted and sentenced to punishments including two years of confinement, and he was confined for more than one year (13 months) (GE 2 at 16). 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. Section 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).

The Bond Amendment 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, before 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

[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.

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.

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 all of the SOR allegations (HE 2). 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 a 36-year-old systems engineer employed by a defense contractor (Tr. 106; GE 1). He has previously held an authorization to occupy a public trust position (Tr. 107). Approval of a security clearance would allow him to work on classified contracts and expand his employment opportunities (Tr. 110-111). He was in the Army from November 1992 to November 1993 (Tr. 122). He received an honorable discharge (Tr. 122-123). He is married, and his children are ages five and ten (Tr. 105, 133). He has worked with other employees with high-level clearances for the last six years (Tr. 111). On one occasion, he observed unsecure classified information, and he reported the security violation to his facility security officer (Tr. 111).

Applicant's father deserted his family when Applicant was nine years old (Tr. 26). Applicant's mother and older sister lived in his household until his mother re-married when Applicant was 12 (Tr. 26-27, 74). Applicant had problems in school and had to repeat the third grade (Tr. 27). He had a difficult, troubled childhood (Tr. 27). When Applicant was an adolescent, he was depressed and sometimes suicidal (Tr. 27). Applicant was seen by therapists for about six years (Tr. 27).

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

Criminal Conduct

When Applicant was a junior in high school, he began receiving the assistance of a tutor for his standard aptitude test (SAT) (Tr. 30, 99). His tutor was married to an Army officer, and his tutor's family lived on a military installation (Tr. 30). His tutor was in a serious car accident, and she used a wheel chair for mobility (Tr. 30, 99). Applicant continued to have a relationship with his tutor's family through his senior year of high school, and during the summer of 1992, after he graduated from high school (Tr. 118). His tutor's family entrusted Applicant to provide child care for their 12-year-old daughter (Tr. 30, 99).

Applicant admitted that from August to October 1992 when he was 19 years old, he engaged in about ten sexual acts with one 12-year-old child and about two sexual acts with another 12-year-old child (Tr. 114-115, 124). He digitally penetrated the vagina of one child and fondled her breasts, and he kissed and fondled the other child's breasts (Tr. 141, 144). Applicant made the following responses to questions at the hearing:

> Q: Well, going in the other direction, did she fondle your penis or put your penis in the mouth or anything like that?
>
> Ans: Not that I recall, no. I don't believe so. I can tell you right now, there was no oral sex. My penis never left my pants. I don't believe that she ever fondled my penis, but I – I really try hard to forget that. I can't say accurately, whether it did. It may have. I don't completely – I can't say truthfully, whether it did or didn't. I don't believe it did, but again, I spent the last 15 years of my life, trying to purge those memories from my brain. . . .
>
> Q: You did have the girls masturbate you, correct?
>
> Ans: No, I don't believe so. They may have fondled me –the one girl may have fondled me, but I — honestly, this is part of the problem I had in 2005, is a lot of this stuff, because of what it did and what I went through with my childhood, I've tried to repress a lot of the stuff and they had — it took a long time to get to that—that memory to come back from the depths of my brain.[3]

Applicant was a temporary caretaker[4] of the child he molested to the greater degree (Tr. 115, 124, 140). Applicant did not continue the sexual abuse after he went on active duty in the Army (Tr. 115). He knew what he did to the children was wrong (Tr. 116, 119). However, he denied knowledge or awareness that he knew at the time of the offenses his sexual contacts with the children were illegal (Tr. 116, 119). He denied

[3] Tr. 141-142.

[4] Applicant said he was in a position of trust as he was alone with the children and he was supposed to "keep an eye on them" (Tr. 140). However, he disputed that he was "babysitting for them" (Tr. 140).

awareness of the law concerning age of consent to sexual activity (Tr. 117, 119). Now he knows about the age of consent, and other legal limitations on sexual relationships (Tr. 117-118). When he committed the offenses, he was most concerned about the child's father finding out about what he was doing and had done (Tr. 121).

About eight months after he went on active duty in the Army, the FBI questioned him (Tr. 28, 100). He did not want to contest the case because he did not want to subject the children to re-living the experience of the sexual abuse during a court appearance (Tr. 101). In November 1993, he pleaded guilty and was convicted of one count of engaging in a sexual act with a minor between the age of 12 and 16 who was at least four years younger than the Applicant, in violation of 18 U.S.C. § 2243, and one count of engaging in sexual contact with a minor between the ages of 12 and 16 who was at least four years younger than the defendant, in violation of 18 U.S.C. § 2244 (GE 2 at 4, 7). In January 1994, he was sentenced to concurrent terms of 15 months imprisonment on each count, and a three-year term of supervised release (Tr. 104; GE 2 at 4, 7-12). Applicant was released from jail after serving 13 months of his sentence (GE 2 at 4).

Applicant regrets his conduct (Tr. 100). He knew what he had done was wrong (Tr. 101). Department Counsel asked Applicant whether he would commit the offenses again and Applicant replied:

> I'm kind of torn, because I believe in, every action has a reaction and if I go back and say 'I wouldn't do that again,' I wouldn't have met my wife, I wouldn't have two kids, I wouldn't be in the position I'm sitting [in] right now. But I'm extremely remorseful. I know firsthand, what it's like to be in that situation that I put those two girls in, and it wasn't until the evaluations with the [ ] sex offender [ ] treatment providers for me trying to be reclassified [from being registered as a violent sexual offender] that [I learned] it was a psychological thing and in fact, one of the doctors I talked to said the fact that this happened to me at about age 11, 12, 13, mentally, my mind went back to that, when I was with these girls.[5]

He admitted that the children could not consent, and that he violated their trust (Tr. 99-100, 145). He accepted what he learned through therapy that he caused the two children harm (Tr. 116). He reiterated that he was very remorseful about his conduct (Tr. 115, 120).

Dr. C, a psychiatrist, made a lengthy statement on Applicant's behalf (Tr. 24-73). Dr. C has had a psychiatric practice since 1972 (Tr. 24). Dr. C has provided treatment for some highly sensitive CIA patients over the years (Tr. 25, 49-50). None of them were similar to Applicant's case (Tr. 50). He is familiar with security clearance requirements and procedures (Tr. 24-25).

[5] Tr. 116-117.

Dr. C provided the only therapy and counseling that Applicant received after his release from jail (Tr. 128). Applicant did not seek out more therapy because he did not see himself as the type of person who would sexually molest children (Tr. 128). Dr. C has been seeing Applicant periodically as a patient since 1990 (Tr. 25). The first series of 28 treatments involved visits about once a week and lasted about a year (Tr. 25, 45-46). Then Dr. C did not see Applicant for about 18 months. From 1993 to 1994, he saw Applicant again for two to four visits (Tr. 25, 45). Dr. C did not review any police reports about Applicant's offenses (Tr. 64, 72). He never asked Applicant to provide any details about the offenses (Tr. 72). He wrote a letter on Applicant's behalf in January 1994 (Tr. 45; GE 2 at 13-14). Applicant received some counseling while in jail (Tr. 46).

Dr. C attributed Applicant's sexual offenses in part to Applicant's sister's[6] sexual abuse of Applicant when he was 11 to 13 years of age (Tr. 29, 121). Applicant was angry about the absence of his father from his life when he was a child (Tr. 29). Dr. C noted that the parents that took Applicant into their home when he was a senior in high school were nice to him, and he repaid them by molesting their child (Tr. 62). He was subconsciously trying to hurt the children's father because he was injured by his own father (Tr. 63, 70). Applicant's own emotional immaturity also had a role in the offense (Tr. 30-31). When Applicant sexually molested the children, he was chronologically 19 years old and emotionally 15 years old (Tr. 30-31, 52). Dr. C described Applicant's sexual activity as "exploratory" (Tr. 31, 52). However, he conceded that Applicant knew what he was doing was wrong and probably illegal (Tr. 61).

After Applicant went into the Army, he became more emotionally mature and has not shown any interest in underage girls (Tr. 32). Dr. C described Applicant's misconduct as a "quirky, unfortunate thing" (Tr. 32). Applicant received some therapy while he was in jail (Tr. 103). He was held in three different facilities (Tr. 104). One of his transfers was due to an inmate's threat to harm Applicant because of the nature of his conviction as a child sexual offender (Tr. 104).

Psychological testing indicates that Applicant was at the very lowest level of risk for repeating any sexual offenses (Tr. 35, 39). He disagreed with the 2006 report of a social worker that described Applicant as an "extremely socially immature, irresponsible man whose coping skills and social judgment are poorly developed. . . . He appears to lack insight, hence has little awareness of how his behavior impacts others" (Tr. 53-54). Dr. C thought this part of the social worker's report was unreliable "boilerplate that was kicked out by some computer" (Tr. 54). Applicant scored high on the incest scale in the severe problem range; however, Dr. C believed this result was caused by Applicant being sensitized to sexual material involving adolescents through the testing process (Tr. 55-59, 65).[7] The tests showed Applicant had sexual interest in adolescent females ages 14 to 17 as well as sexual interest in adult females (Tr. 59, 66). Dr. C considered this sexual interest to be normal (Tr. 59, 66). On another test, he scored low in interest

[6] Applicant's older sister also used illegal drugs (Tr. 28).

[7] Applicant explained the tests "sparked up a lot of raw emotion in me and made me re-live a lot of the stuff. . . . I essentially came out of the room crying because it [was] just rather disturbing" (Tr. 140).

towards heterosexual incest, pedophilia, and rape (Tr. 67). Dr. C opined that Applicant did not have a personality disorder (Tr. 39). He agreed with the social workers, who reported Applicant had a low risk of re-offending and was unlikely to commit future sexual offenses (Tr. 39, 60). Dr. C believes Applicant has a law-abiding character (Tr. 43).

Dr. C counseled Applicant twice in the summer of 2009 (Tr. 44). Applicant started seeing Dr. C again in 2009 because he wanted some help in how to reveal his sexual offender history to his children (Tr. 105). Applicant was concerned that the neighbors of his children will discover he is a registered sexual offender (Tr. 48). Applicant did not want his children to learn from other children that they could not play with Applicant's children because Applicant was "a bad person" (Tr. 127). He is worried about the impact of this information on his children (Tr. 48). Dr. C believed Applicant's concerns about his children are reasonable (Tr. 68). He considered divorce to conceal his connection to his children (Tr. 112-113). He explained:

> The only people I'm concerned with [about] adverse effects are my two kids, because they're my life and my soul. They're the reason I do what I do and again, it sucks that they have to be put in a situation where my past is affecting their livelihood and if there was a way I could do something to mitigate that, I'd do it in a heartbeat. . . . I mean, we go to great lengths to kind of shield them from the repercussions, but at some time, it's going to come out and I'm hoping that it's later on down the road, but I'm preparing for it to be rather soon. (Tr. 112-114).

Dr. C provided a positive diagnosis and prognosis. He believes Applicant's emotional age is now the same as his chronological age (Tr. 52). He has a mature, balanced, and appropriate relationship with his spouse and two children (Tr. 42). Applicant has a proper level of integrity, reliability, and trustworthiness (Tr. 41). He is fully capable of protecting classified information (Tr. 41).

Applicant's step-father was the president of a company that provided security-related electronic equipment to prominent persons for 30 years (Tr. 75). He has previously held a security clearance (Tr. 75). He has known Appellant for 23 years (Tr. 74). Before Applicant joined the Army he was immature (Tr. 77). Applicant had the trust of the family that took him in, and he abused that trust (Tr. 93). When he was charged, he admitted he did the misconduct (Tr. 78). His step-father advised Applicant to admit to the court what he had done and to throw himself on the mercy of the court (Tr. 94).

Applicant does not try to actively hide his criminal history (Tr. 82, 84). He has been forthright with his employers (Tr. 85). His step-father believes Applicant has solid integrity and honesty (Tr. 97). His step-father opined that Applicant is careful to abide by the law, and he can be trusted with classified information (Tr. 81, 86).

Registration as a violent sexual offender and residence limitations

Applicant and his wife purchased a residence within 300 feet of a school (Tr. 79, 95, 108). In 2001, the state law changed and Applicant was required to re-register as a "sexually violent offender" every 90 days for life (GE 2 at 38). As a registered violent

sexual offender, he could not live within 500 feet of a school (Tr. 79-80, 108). He was unable to sell his home because the value of the home is less than his mortgage (Tr. 108-109). Applicant has lived with his mother and his step-father for the last five years (Tr. 78-80, 85-87). He spends a considerable amount of time with his wife and children; however, he usually stays overnight in his mother and step-father's residence (Tr. 88-89, 109). When his wife travels out of town, Applicant stays with his children. The state and county police are aware of this arrangement and have not arrested Applicant for non-compliance with residence requirements for registered violent sexual offenders (Tr. 90, 95, 109).[8]

Applicant's manager, supervisors, and some peers at work know about his registration on the sexual abuse registry (Tr. 102, 131-132). When questioned by friends or colleagues, he explains it happened before he served in the military (Tr. 131). He was 19 and the girls were more than four years younger than he was (Tr. 131). He does not provide specifics about what he did to the children (Tr. 130-131). He was worried that his children would be traumatized if another child said his or her parents would not let them go over to Applicant's house because their father is a sex offender (Tr. 102).

Applicant has complied with requirements for registration as a sexual offender (Tr. 35-36). *See* SOR ¶¶ 1.b (listing Applicant's registration as a violent sex offender). Because his offense is a public record, he is unlikely to try to conceal it (Tr. 40).[9]

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 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.

[8] Applicant was concerned because state law does not define primary residence; however, he said the police knew about how much time he spent with his children at their home (Tr. 135-136). Applicant "spends as much time as humanly possible" with his children" (Tr. 136-137). Evidently, there is some variance about how frequently he stays overnight with his children, depending on when his spouse goes out of town for work (Tr. 134-137).

[9] At the hearing, I accepted as fact without additional post-hearing evidence that Applicant's employer, supervisors, and colleagues were aware of his conviction and registration as a violent sexual offender. Further, I am convinced he would not succumb to extortion to avoid further disclosure of his offenses because such information is readily available on the internet, and as part of the public record (Tr. 152). He is well aware that eventually his children will learn of his sexual crimes.

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 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 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, including those described briefly above, I conclude the relevant security concern is under Guidelines J (criminal conduct) and D (sexual behavior).

Criminal Conduct, Guideline J

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its 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 in this case:

> (a) a single serious crime or multiple lesser offenses; and
>
> (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

AGs ¶¶ 31(a) and 31(c) apply because in January 1994, Applicant was convicted of two felony-level counts of sexual abuse of a minor, in violation of 18 U.S.C. § 2243 and abusive sexual contact, in violation of 18 U.S.C. § 2244. He admitted that he committed the two felonies. He was sentenced to 15 months incarceration, fines, and supervised release for three years. He served 13 months in jail.

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.

None of the mitigating conditions fully apply. AG ¶¶ 32(b) and 32(c) clearly do not apply because Applicant admitted the offenses and no one pressured him into committing the offenses. AG ¶¶ 32(a) and 32(d) are similar and partially applicable. Applicant's last offense resulting in a conviction occurred in about October 1992, more than 17 years ago. He served his incarceration and paid his fines. He presented strong evidence of remorse, job training, a good employment record, and support from his psychiatrist, social workers, spouse, and father-in-law. A fairly lengthy period has elapsed to contemplate his poor judgment and to respond to therapy. The therapy he received is particularly noteworthy because Dr. C's services were not court ordered, and

Applicant funded Dr. C's therapy. This therapy and counseling has had a significant 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 for the same employer for several years and has a good employment record. He accepted some responsibility and culpability.

Notwithstanding these positive attributes, more progress is necessary to assure Applicant has the improved reliability, trustworthiness, and good judgment necessary to safeguard classified information. When asked about whether the victims touched his penis, Applicant was not credible when he denied that he knew whether they did or not. His failure to be fully candid and forthright about a material matter at his security clearance hearing shows poor judgment and militates against approval of a security clearance. He also emphasized that he was a victim of his older sister's sexual abuse and had his own psychological issues. When asked whether he would commit the offenses if he had it to do all over again, he was evasive. He lacked sincere empathy for the victims, and instead emphasized the impact of the offenses on himself and his family. He did not want to accept full responsibility for making the choices that led to his conviction.

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 . . . .

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 sexually abused two 12-year-old children. He was convicted of two felonies. It does not make him vulnerable to coercion because he has

been open to his spouse, father-in-law, employer, and others about his offense. He is a registered violent sex offender and his conduct is readily discoverable on the internet. Applicant has stopped his criminal, sexual behavior. 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.

Applicant committed the offenses when he was 19 years old. The Directive does not define "adolescence" in chronological terms, and Applicant was emotionally immature. AG ¶ 14(a) applies because Applicant was still an emotional adolescent when the committed the sexual crimes. In regard to the issue of whether the sexual offenses were recent, they occurred in about October 1992, which is more than 17 years ago. He has served his incarceration and received extensive therapy. He has not committed any sexual crimes in the last 17 years. However, Applicant described years of sexual abuse by his older sister. There is still a possibility of recurrence and AG ¶ 14(b) can only be partially applied. As indicated previously, the behavior no longer serves as a basis for coercion, exploitation, or duress and AG ¶ 14(c) applies. Applicant sexually abused two 12-year-old children. The minors could not legally consent to the sexual activity and AG ¶ 14(d) does not apply. However, the "Whole Person Concept," *infra*, elaborates on whether Sexual Behavior under Guideline D can be mitigated under all of the circumstances.

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 J and D 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. In October 1992, Applicant was 19 years old when he committed the sexual offenses with two minors. Moreover, he was emotionally immature for his age. AG ¶ 14(a) characterizes a person as an "adolescent" rather than using a particular chronological age to permit factors such as emotional age to be relevant to mitigation. Dr. C described Applicant's sexual behavior with two 12-year-old children as "exploratory" rather than manifesting a fixated orientation towards children. Applicant has not committed any sexual offenses since his crimes in 1992. He admitted his two felonies to his employer, psychiatrist, security officials, law enforcement, step father, and spouse. He is registered on the internet as a sexually violent offender, and there is no possibility he could be coerced into revealing classified information because of the public nature of this information. He knows the consequences of offenses. He completed his incarceration and paid his fines. He has received years of counseling, providing important mitigation of his sexual offenses. 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. His character and good work performance show some responsibility, rehabilitation and mitigation. His employer supports his access to classified information as indicated by sponsoring him for a security clearance.

The evidence against approval of Applicant's clearance is more substantial. Applicant was sexually abused by his older sister. In turn, when he was 19, he sexually abused two minors, who were only 12-years-old. At the age of 19, he was an adult and legally responsible for his criminal conduct under 18 U.S.C. §§ 2243 and 2244. Applicant abused them knowing the devastating impact his older sister's sexual contact had on himself.

The most important reason for denying his security clearance is Applicant's lack of credibility. At his security clearance hearing he was evasive about remembering whether the children had touched his penis, or not. He failed to candidly take full responsibility for what he had done to the children. His sexual misconduct was a critically important event in his life, and his claimed lack of memory or evasive comments or both (quoted at page 4, *supra,* about whether the children touched his penis) are not fully truthful. At age 36, he was sufficiently mature to be fully responsible for his knowing that he had to be truthful, candid, and forthright at his security clearance hearing.

The sexual offenses in 1992 must be considered in combination with Applicant's statement at his hearing on October 21, 2009. His conduct in 1992, and in 2009, shows

a lack of judgment and raises a serious security concern. 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 sexual behavior and criminal conduct. His access to classified information is not justified.

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"[10] 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 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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 1.a:	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 for access to classified information. Applicant's eligibility for a security clearance is denied.

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Mark W. Harvey
Administrative Judge

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