DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-10076
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Tom Coale, Esquire, Department Counsel
For Applicant: *Pro Se*

July 16, 2009

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Decision

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HARVEY, Mark, Administrative Judge:

Applicant has a long history of sexual offenses, culminating with his attempted sexual assault on two minors in August 2000. This conduct shows such extremely poor judgment that more time without conduct raising security concerns is needed. Applicant failed to mitigate sexual behavior concerns. Criminal conduct security concerns are mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On July 31, 2007, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or Security Clearance Application (SF-86) (Item 4). On March 17, 2009, the Defense Office of Hearings and Appeals (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, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, are effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR alleges security concerns under Guidelines D (Sexual Behavior) and J (Criminal Conduct). 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 April 3, 2009, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing (Item 3). A complete copy of the file of relevant material (FORM), dated May 20, 2009, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.[1] Applicant responded to the FORM on June 16, 2009. The case was assigned to me on July 7, 2009.

Findings of Fact[2]

In Applicant's response to the SOR, Applicant admitted the SOR allegations, except he updated the status of his probation and the criminal convictions (Item 3). He also explained why he believed he was not a security risk. His admissions are accepted 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 56-year-old employee of a defense contractor.[3] He has approximately 18 months of college education. He married in 1980 and divorced in 2002. He remarried in 2008. His children were born in 1971 and 1981. He has been a consultant to a defense contractor since 2001. He has never served in the U.S. military. In 2000, he quit his job after being told he was going to be fired. The 2000 termination of employment resulted from Applicant's disclosure of his being charged with sexual offenses involving children. Aside from the sexual offenses at issue, his file does not contain any other adverse information relating to police involvement. For example, he has never been charged with any other felonies, 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. There is no evidence that he has abused alcohol or drugs. There is no evidence of civil court actions or financial delinquencies.

[1]The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated May 21, 2009; and Applicant's receipt is dated May 26, 2009. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

[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]The facts in this paragraph are from Applicant's July 31, 2007, security clearance application (Item 4).

Sexual Behavior and Criminal Conduct[4]

Applicant admitted in his March 14, 2008, affidavit (Item 6) to the following relevant conduct in this paragraph and the next two paragraphs:

> [Applicant] has a long history of sexual deviancy. Since the early 1970's when [he] was in his 20's, [he has] looked at women in dressing rooms or [through] their bedroom windows. This happened almost weekly in the years leading to 2000. During the summers,[5] [he] would expose [his] genitals to young girls or women at least monthly.

In August 2000, Applicant went to an elementary school parking lot and approached two girls, who were ages nine or ten. He engaged them in conversation about whether they had reached puberty. Applicant grabbed one of the girl's shorts and pulled her shorts towards him so that he could look inside her shorts. She pulled away from him, and Applicant released her. Applicant's fly was down so that the girls could see Applicant's genitals.

Applicant also noted in his affidavit that his sex offender treating therapist, "believes [he] will always be at risk for repeated [sexually deviant] behavior, and [Applicant] agree[s] with this assessment]."[6]

Applicant was charged with two counts of Attempted Sexual Assault of a Child, two counts of Indecent Exposure to Minors Under 15, and four counts of harassment (SOR ¶ 1.a; Item 3). In July 2001, Applicant pleaded guilty to Counts 1-4, and Counts 5-8 were dismissed. He received a four-year deferred judgment and sentence as to Counts 1 and 2 (both are Class 5 felony-level Attempt to Commit Sexual Assault on a Child charges). He received concurrent probation as to Counts 3 and 4 (both are Class 2 misdemeanor-level Indecent Exposure charges).

Applicant was also sentenced to sixty days in jail (he served 37 days of confinement), ordered to attend counseling and register as a sex offender. The court ordered probation for ten years.

In January 2006, the District Attorney's office notified the court that Applicant had successfully completed sex offender specific treatment as required by the terms of his deferred judgment and sentence. In January 2006, the District Attorney's office filed a motion to dismiss Counts 1 and 2, and to terminate probation as to Counts 3 and 4.

[4]Unless stated otherwise, the source for the facts in this section is Applicant's FORM response, especially the Chief Deputy District Attorney's court filing in June 2009.

[5]Applicant lives in a part of the United States where the temperature in the non-summer seasons is low.

[6]Applicant concedes in his FORM response that he understands through his therapy, "sex offenders are always at risk of re-offense." However, he believes his concession is a positive, rehabilitative development, and argues he is at very-low risk of committing more sexual offenses.

The court failed to issue an order responding to the District Attorney's January 2006, motion.

In June 2009, the District Attorney's office asked the court to dismiss Counts 1 and 2 retroactive to January 2006, and to reflect he has completed his probationary sentence as to Counts 3 and 4. The District Attorney's office indicated the misdemeanor convictions for Counts 3 and 4 remain. In June 2009, the court granted the District Attorney's office's requests.

Sex-offender treatment[7]

Applicant received sex-offender treatment from November 2000 to January 26, 2006 (FORM response). Applicant admitted his sexual misconduct and understands that there is a possibility he can re-offend. His acknowledgement of the possibility that he will re-offend is a positive development because it enhances his commitment to recovery. He demonstrated sincerity and empathy. He is constantly on guard to avoid relapsing into sexually inappropriate conduct. His therapist evaluated him under three systems for risk of re-offense and determined him to be of LOW to MEDIUM-LOW risk. His therapist thought he had less than a 20% risk for re-offense within ten years. His risk for re-offense will be reduced if he "continues a program and path of recovery." Applicant married last year and "is surrounded by a healthy support system, which can also lower re-offense rates." There is no evidence that he is currently in a therapy program for sex offenders.

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.

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 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.

[7]The source for the information about Applicant's sex-offender treatment is a letter, dated June 22, 2009, from his primary therapist, which is part of his FORM response.

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 [A]pplicant 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, I conclude the relevant security concerns are 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 viewed women in dressing rooms and through an exterior window, while they were in their bedrooms on hundreds of occasions from the early 1970s until 2000. During the summers of those years, he exposed his genitals to young girls or women at least monthly or approximately 50-100 times. In 2000, he was arrested for assaulting two children in a school parking lot. His conduct constitutes numerous criminal offenses and they were public to the extent that the offenses occurred in public areas. His sexual misbehavior violates important civil and criminal rules in our society, and a lengthy history of indecent exposure and voyeurism, culminating in attempted sexual assault on two children is conduct a person might wish to conceal, as it adversely affects a person's professional and community standing. Such conduct also makes him vulnerable to coercion. He has a lengthy pattern of deviant sexual behavior with numerous offenses over many years. AG ¶¶ 13(a), 13(c) and 13(d) apply. AG ¶ 13(b) does not apply because Applicant has stopped his sexually deviant behavior since August 2000, and there is no record evidence establishing he has a personality disorder.

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.

In August 2000, Applicant committed his most recent offense. At that time, he attempted to sexually assault two minors, and exposed his genitals to them. In August 2000, he was 47 years old and a mature adult. AG ¶ 14(a) does not apply. He has served his incarceration and received six years of sex-offense therapy (2000 to 2006). However, Applicant described years of sexually-deviant, criminal behavior. He committed sexual crimes on hundreds of occasions. Because of this long history of sexual offenses, there is still a significant possibility of recurrence and AG ¶ 14(b) can only be partially applied. However, Applicant's sexual misbehavior no longer serves as a basis for coercion, exploitation or duress because police and security officials are well aware of his conviction for attempted sexual abuse of two children. AG ¶ 14(c) applies to mitigate AG ¶ 13(c). Over the last 25 years, he repeatedly viewed women in dressing rooms and their bedrooms without their consent and he exposed his genitals to adults and children. The minors and adults subjected to his exposure of his genitals did not consent to his sexually-deviant, criminal activity and these offenses likely occurred in public areas, such as an elementary school parking lot. AG ¶ 14(d) does not apply.

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 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 security 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.

AG ¶¶ 31(a) and 31(c) apply. AG ¶¶ 31(b), 31(d), 31(e), and 31(f) do not apply. Applicant committed numerous misdemeanor-level offenses, when he exposed himself to female adults and children, and when he viewed women in dressing rooms and their bedrooms without their consent. He admitted that he committed these offenses. He completed his probation and other court-mandated rehabilitation programs. He was sentenced to 60 days of imprisonment, which is substantially less than one year. He currently only has two misdemeanor-level convictions.

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 he 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 occurred in August 2000, almost nine years ago. He served his sentence to incarceration and paid his fines. He presented strong evidence of remorse, job training, and a good employment record. A lengthy period has elapsed to contemplate his poor judgment and to respond to therapy. The six years of therapy he received is particularly noteworthy. This significant amount of therapy and counseling has had a powerful salutary effect. He should understand his criminal offenses have had an adverse impact on his lifestyle, family and career as well as on his victims. His demonstrated intent not to commit future crimes is encompassed in these two mitigating conditions. He accepted responsibility and declared his culpability. He has demonstrated significant progress and improved reliability, trustworthiness, and good judgment; however, more progress is necessary to assure and safeguard classified information.

Nevertheless, Applicant’s criminal conduct is best adjudicated under the Sexual Behavior Guideline. It specifically addresses his sexually-deviant behavior, including its criminal nature. In contrast to this Guideline’s emphasis on sexual misconduct, the Criminal Conduct Guideline encompasses numerous criminal offenses, such as crimes against property, crimes against persons, drug crimes, and crimes involving breaches of integrity (most crimes in criminal codes are unrelated to sexual misconduct). Even though his long-history of criminal conduct disqualifies him from holding a security

clearance, I will find "For Applicant" under the Criminal Conduct Guideline to avoid duplicative findings.

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 relevant 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 classified information. He completed his probation and other court-mandated rehabilitation programs. He served 37 days of imprisonment and paid his fines. He frankly and candidly admitted his numerous sexually-deviant acts of criminal conduct. He admitted his sexual offenses on his SF-86. He married last year and his spouse supports his efforts at rehabilitation. He knows the consequences of being convicted of such offenses. He has received six years of counseling and therapy, providing important mitigation of his sexual offenses. Aside from the sexual offenses at issue, his file does not contain any other adverse information relating to police or judicial involvement. He has never been charged with any other felonies (aside from the sexual offenses discussed previously) or any firearms or explosives offense(s). He does not have any currently pending charges. He has never been charged with any offense related to alcohol or drugs. There is no evidence that he has abused alcohol or drugs. There is no evidence of other civil court actions or financial delinquencies. Applicant 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 work performance show substantial responsibility, rehabilitation and mitigation.

The evidence against approval of Applicant's clearance is more substantial. Applicant committed numerous misdemeanor-level, sexually-deviant offenses, when he

exposed himself to female adults and children, and when he viewed women in dressing rooms and their bedrooms, without their consent. He admitted that he committed these offenses. He attempted to sexually assault two children in a school parking lot, and he exposed his genitals to them. He has only been held accountable for his crimes committed in August 2000, and has not been prosecuted for his numerous previous sexual offenses. His sexually-deviant criminal offenses were knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. These offenses show a lack of judgment and a failure to abide by the law. Such conduct raises a serious security concern, and access to classified information is not warranted at this time. I conclude he has not mitigated the security concerns pertaining to his sexual behavior; however, his criminal conduct is mitigated because it is better addressed under the Sexual Behavior Guideline.

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"[8] 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 D:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For 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 access to classified information is denied.

Mark Harvey
Administrative Judge

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