DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 09-03091
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel

For Applicant: Kathleen Voelker, Esquire

April 21, 2010

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the case file, pleadings, testimony, and exhibits, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under Guideline E, Personal Conduct, and the whole-person analysis. His eligibility for a security clearance is denied.

Applicant executed and signed an Electronic Questionnaire for Investigations Processing (e-QIP) on December 19, 2008. On November 12, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline D, Sexual Behavior, Guideline E, Personal Conduct, and Guideline J, Criminal Conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On November 27, 2009, Applicant answered the SOR in writing and requested a hearing before an administrative judge. On January 25, 2010, the Government amended the SOR by withdrawing the Guideline D and Guideline J allegations and adding one additional allegation under Guideline E. The case was assigned to me on January 26, 2010. Applicant answered the amended SOR in writing on February 8, 2010. I convened a hearing on March 1, 2010, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced six exhibits, which were marked Ex. 1 through 6. Applicant objected to the admission of pages 2, 3, and 4 of Government Ex. 2. I sustained Applicant's objection, and the three pages were not admitted.

Applicant testified on his own behalf and called two witnesses. He introduced seven exhibits, which were identified and marked as Applicant's Ex. A through Ex. G. All of Applicant's exhibits were admitted without objection. Applicant offered, for administrative notice, a summary and supporting statutory citations from State X which identified the age of consent for sexual contact, the elements of a fourth degree sexual offense in State X, and the elements of a third degree sexual offense in State X.[1] The Government did not object to my taking administrative notice of the information provided by Applicant. Accordingly, I marked Applicant's administrative notice documents as Hearing Exhibit (HE) 1. DOHA received the transcript (Tr.) of the hearing on March 9, 2010.

On March 12, 2010, Applicant filed a request to reopen the record, to admit a new exhibit for Applicant, and to strike material from the Government's Ex. 2 and Ex. 6. On March 16, 2010, the Government replied to Applicant's request to reopen. On March 16, 2010, upon receipt of the Government's reply, Applicant filed a request to withdraw his request to reopen the record and exclude evidence. On March 22, 2010, I granted Applicant's request to withdraw his request to reopen the record and exclude evidence. His request that the record be reopened to admit a new exhibit was denied as moot. Applicant's requests of March 12, 2010 and March 16, 2010, the Government's reply of March 16, 2010, and my memorandum of March 22, 2010 are included in the record as HE 2.

Findings of Fact

The amended SOR contains three allegations of disqualifying conduct under AG E, Personal Conduct (SOR ¶¶ 1.a. through 1.c.). SOR ¶ 1.a. alleged that Applicant deliberately falsified material facts in a June 2003 interview with a special agent from another government agency when he stated that he unknowingly had sexual relations with an underage person on two occasions in about June 2002, when he knew and sought to conceal that he knowingly engaged in sexual relations with an underage

[1] These statutes, sometimes known as statutory rape laws, impose strict liability on those who engage in sexual relations with individuals below a statutorily designated age. Statutory rape laws specify that a rape occurs when the complainant is under a certain age and the perpetrator is over a certain age.

person as late as June 2003, the same month as his interview. In his answer to the SOR, Applicant denied the allegation. (SOR; Answer to SOR.)

SOR ¶1.b. alleged that Applicant deliberately falsified material facts in a March 2009 interview with a special agent of the Office of Personnel Management (OPM) when he stated that he had not been involved in a serious crime, when he knew and sought to conceal the information set forth in SOR ¶ 1.a. In his answer to the SOR, Applicant denied the allegation. (SOR; Answer to SOR.)

Amended SOR ¶ 1.c. alleged that from about June 2002 to June 2003, Applicant engaged in sexual relations with an underage person on approximately three occasions, and on at least two of those occasions, he knew the individual was underage. In his answer to the amended SOR, Applicant denied the allegation. (Amended SOR; Answer to Amended SOR.)

Applicant is 27 years old, single, and employed as an information systems analyst by a government contractor. In 2004, he was awarded a Bachelor of Science degree in Information Sciences. In December 2009, he was awarded a Master of Science degree in Business Administration. (Ex. 1; Ex. A; Ex. B; Tr. 67-70.)

During his college years, Applicant concluded that he was gay, and he began to seek friends and relationships in the gay community. On June 15, 2002, when he was 20 years old, he participated in a gay pride event in his community. At the event, he was introduced to a young male. He and the person spent time together at the event. Later that day, he and the person went to the home of another person and had sexual relations with one another and with a third male. About a week later, Applicant and the young male met again and had sexual relations at Applicant's home. About one week after they met, Applicant learned that his sexual partner was 15 years old. (Ex. 2 at 21-22; Ex. F; Tr. 57-58, 83-87, 91, 114.)

Applicant and the young man became friends. While they lived some distance apart, and did not see one another often, they spoke on the telephone between June 2002 and June 2003. (Tr. 104-105.)

In August 2002, while still in college, Applicant became employed as a part-time research assistant by a federal contractor. Later, the federal contractor hired him to work as a full-time consultant. Thereafter, he was promoted to senior consultant. In about 2003, his employer recommended him for a security clearance and a higher level of intelligence access. As a part of his application process, Applicant was interviewed several times by authorized investigators at another federal agency. (Ex. 2, 21-26; Tr. 75-78.)

The record establishes that the first interview took place in March 2003.[2] At the interview, Applicant reported that he had sold approximately 20 Percocet pills to a

[2]Ex. 2 at 23.

coworker, identified by name, in 2001. He did not discuss his sexual relationship with the 15-year-old boy. Applicant was advised by the interviewer to review his background and experiences regarding serious crime and drug involvement and to return for another interview. Applicant did not believe that voluntary sex with a 15-year old boy was a serious crime. He did not try to determine when he had had sex with the 15-year-old. (Ex. 2 at 22; Tr. 79, 81, 109.)

On June 9, 2003, Applicant met for a second time with an interviewer from the other federal agency. At this interview, Applicant reported meeting the 15-year-old boy at the gay pride activity on June 15, 2002. He further reported that he and the 15-year-old had sexual relations with one another and with another male, identified by name, on June 15, 2002, at the third male's home. He reported that he had sexual relations with the 15-year-old again about one week later in his home.[3] He also reported that he learned of the 15-year-old's age after engaging in sexual relations with him. Applicant stated that he remained friends with the boy, but that he had not had any additional sexual encounters with him because of his age. He did not recall the name of his 15-year-old sexual partner, and he did not know the individual's exact age or his birthday.[4] Applicant knew that his relationship with the adolescent was a matter of concern in the investigation. Either before or after the June 9, 2003 interview, Applicant had sex a third time with the boy. (Ex, 2, at 21-26; Tr. 87-88, 106.)

In the June 9, 2003 interview, Applicant also reported that, since the earlier interview in March 2003, he had consulted with the individual who purchased the 20 Percocet pills from him in 2001. Applicant stated that the individual recalled that he gave Applicant $10 in lunch money and had not provided him with money in exchange for the Percocet pills.[5] (Ex. 2 at 22; Ex. 6 at 4.)

Applicant's initial concern was that his sexual partner was not yet 18 years of age. His close friend testified that Applicant told her about his security interview and his concern about his sexual relationship with an underage male. She did not know if her conversation with Applicant took place after Applicant's March 2003 or June 2003 security interview. The friend described her conversation with Applicant as follows:

> It was more of a consolation. Like he was very nervous about the situation, and I said, "Well, perhaps it may not be as much of a huge

[3] At his hearing, Applicant stated that this statement about the second sexual contact occurring a week after the first one was only an estimate. (Tr. 87.)

[4] Applicant claimed that he researched the age of consent and sex crimes in his State after receiving DOHA interrogatories, which he responded to on September 25, 2009. (Tr. 96-98.)

[5] It was not alleged in the SOR that Applicant provided false information about his drug involvement in the June 2003 interview. Applicant's statements will not be used for disqualification purposes. They will be considered in assessing Applicant's credibility; in the application of mitigating conditions; and in evaluating the "whole person."

> problem as it may seem because" - - and obviously, I was saying that not knowing exact details of the person's age, but saying, "The age of consent is not 18. It's 16 [in the jurisdiction where the sexual relationship took place]. So, it's something you could consider as you're going through this."

(Tr. 60-62.)

Sometime after his June 9, 2003 interview, Applicant contacted the young man who was his sexual partner on the day of the gay pride rally in June 2002.[6] He discussed his concerns about their sexual encounters and the partner's age. Applicant and the young man had sexual relations again in June 2003. Applicant conceded that he exercised poor judgment in having sexual relations with the adolescent a third time when he knew the relationship was a matter of concern to investigators. Applicant did not recall whether the sexual relations occurred when he met to discuss his security concerns with the young man:

> Department Counsel: Do you recall whether or not you contacted [name deleted] . . . shortly after the interview in June 2003?
>
> Applicant: I believe I did.
>
> Department Counsel: Okay, could it have been at that time that you had sex with him for the third time?
>
> Applicant: It may have. I don't recall.

(Tr. 106-108.)

On April 1, 2005, Applicant met again with an investigator from the government agency investigating his application for a higher level of intelligence access. He verified the accuracy of the information in his previous statements of March 26, 2003 and June 9, 2003. (Ex.2 at 23; Ex. 6 at 5.)

In the April 2005 interview, Applicant reported weekly mental health treatment in the fall of 2004 following a breakup with a boyfriend. His physician prescribed an antidepressant, which he took for two months until he no longer felt depressed. (Ex. 2 at 25; Ex. 6 at 7.)

In the April 2005 interview, Applicant disputed his June 2003 statement regarding sexual activity with a 15-year-old male, whose name he did not recall. Applicant then identified the individual by name and repeated the information he had given previously

[6] Applicant's statement in response to DOHA interrogatories, dated September 25, 2009, provides contradictory information: he states that he contacted the 15-year-old to discuss their sexual relationship after his first interview with the authorized investigator, which was in March 2003. At the commencement of his April 2005 interview, Applicant verified information he gave in previous interviews dated June 9, 2003 and March 26, 2003. (Ex. 6 at 5, 10.)

about his first sexual encounter with the individual in June 2002, when the individual was 15 years old. Applicant then said his second sexual encounter with the individual occurred six months later, in late 2002 or early 2003, when the individual was 16 years old. He further stated that his third sexual encounter with the individual occurred in June 2003, when the individual was 16 years old and Applicant was 21 years old. Applicant then denied any further sexual encounters with the individual or any other person under the age of 18. (Ex. 2 at 26; Ex. 6 at 8.)

In November 2005, Applicant was denied access to a higher level in intelligence by the other government agency. He did not appeal the denial. In January 2007, Applicant's security clearance was suspended, based on information provided to the Department of Defense by another government agency. (Ex. 3; Ex. 4; Ex. 5.)

Applicant was interviewed by an authorized investigator from the U.S. Office of Personnel Management on March 9, 2009. He described the interviews with investigators in March 2003, June 2003, and April 2005. He denied any lack of candor during any part of the investigation. He denied ever being involved in a serious crime. He did not discuss his sexual relationship with the underage male. (Ex. 6 at 9.)

At his hearing, Applicant denied that he withheld the 15-year-old's name from the interviewer in the June 2003 interview in order to protect himself or the 15-year-old. He claimed that he did not identify the 15-year-old by name because he did not want to implicate a third party, even though he did identify another third party in the June 2003 interview. He denied he withheld the name of his 15-year-old sexual partner because he knew he was underage. (Tr. 106-109.)

Applicant is perceived by a close friend as "very honest, extremely honest" and concerned about details:

> I think that he is - - in an effort to be brutally honest with people, he tends to stress over details, and maybe not remember them, but definitely even if there's something of insignificant concern that he felt may be misrepresented [,] something that he doesn't take lightly, then he always tries to clarify just in the sense of being completely honest with people.

(Tr. 58.)

As an adult, Applicant was diagnosed with Attention Deficit Disorder (ADD). For about one and one-half years, he has taken medication to ameliorate the ADD symptoms and to improve his concentration.

Applicant provided information showing strong academic and work performance. His academic transcript for the courses he took in pursuit of his master's degree showed he earned seven A grades, one B grade, and one Pass grade, for a cumulative grade point average of 3.86 on a 4.00 scale. Applicant's most recent work performance evaluation by his supervisor indicates outstanding performance in teamwork and

cooperation. The evaluation also shows that Applicant exceeds his employer's expectations in job knowledge, interpersonal and communication skills, adherence to security policy, and personal attributes. Applicant meets his employer's expectations in attendance, judgment/decision making, planning and time management, customer service, and business development. (Ex. A; Ex. B.)

Applicant's former manager stated that Applicant did excellent work and was timely in meeting his assignments. He stated that he found Applicant to be honest and trustworthy. (Tr. 35-44.)

I take administrative notice of certain facts provided by Applicant. The age of consent for sexual contact in State X, where Applicant's sexual contact with the adolescent took place in 2002 and 2003, is 16 years of age. Under the criminal code of State X, a sexual act between a person who is 14 or 15 years old and a person who is a least four years older is a fourth degree sexual offense, a misdemeanor punishable by imprisonment not exceeding one year or a fine not exceeding $1,000, or both. Under the criminal code of State X, sexual contact between a person who is 14 or 15 years old and a person who is at least 21 years old is a sexual offense in the third degree, a felony punishable by imprisonment not exceeding ten years. (HE 1.)

Applicant was born on April 30, 1982. The young male with whom Applicant had sexual relations on June 15, 2002 was born on June 19, 1986. At the time of their sexual contact on June 15, 2002, Applicant was 20 years old and the young male was 15 years old. (Ex. 1, Ex. F; Ex. G.)

Policies

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

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge applies these guidelines in

conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

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 classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk 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.

Section 7 of Executive Order 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." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

AG ¶ 12 of the adjudicative guidelines makes clear that security clearances may not be denied "solely on the basis of the sexual orientation of the individual."

Analysis

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions

about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant's personal conduct raises security concerns under AG ¶¶ 16(b), 16(c), and 16(e)(1). AG ¶ 16(b) reads: "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative." AG ¶ 16(c) reads: "credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but, which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information." AG ¶ 16(e)(1), reads in pertinent part as follows: "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing."

Almost eight years ago, on June 15, 2002, Applicant, who was then 20 years old, had sexual relations with a 15-year-old boy. He did not know that the individual was only 15. However, Applicant's lack of knowledge of his sexual partner's age is not relevant. Whether or not the individual consented to the sexual relations is also not relevant, for he was under 16 years of age and, under the terms of the statute, incapable of giving informed consent. Under the statute that he provided for administrative notice, Applicant's action was, on its face, a sexual offense in the fourth degree, a misdemeanor punishable, on conviction, of imprisonment not exceeding one year or a fine not exceeding $1,000 or both. Applicant admitted this sexual act; it was a crime.

Applicant also admitted that he had sexual relations on two other occasions with the adolescent male. On one of those occasions, the adolescent might still have been 15; on the other, he was 16 and still a minor, but according to the statute provided for administrative notice by Applicant, capable of giving informed consent to sexual relations with Applicant. These are relevant facts.

The security concern in this case, however, is not Applicant's sexual activity with a 15-year-old adolescent eight years ago. Instead, the security concern in this case is Applicant's ongoing pattern of deliberately providing false or misleading information about his relationship and activities with the adolescent during several interviews in 2003 and 2005 with authorized investigators from the other federal agency and, more recently, with an authorized OPM investigator in 2009. Moreover, Applicant was not candid and forthright about these matters during his security clearance hearing, thereby perpetuating the falsification.

Beginning in March 2003, Applicant withheld information about his drug involvement and criminal activity from authorized investigators. When he elected to

reveal relevant information, he did so by putting it in a context most favorable to his interest. This reflects on his credibility.

In the March 2003 interview, he admitted that, in 2001, he sold approximately 20 Percocet tablets to a coworker. In his June 2003 interview with the authorized investigator, he reported that he had subsequently discussed the matter with the co-worker who recalled that he had given Applicant ten dollars in lunch money in exchange for the Percocet tablets. The suggestion appeared to be that a barter exchange was less serious than a direct exchange of money for drugs.

In the March 2003 interview, Applicant did not discuss his sexual activity with the 15-year-old adolescent. In his June 2003 interview, he reported sexual activity with the adolescent, but he could not recall his name, even though he had remained friends with the young man. Applicant reported that he had sexual relations with the adolescent for the first time on June 15, 2002. He reported that he had sexual relations again with the adolescent about a week later. At some point, after either the first or the second time he had sexual relations with the adolescent, Applicant learned his age. After the March 2003 interview or the June 2003 interview, Applicant learned from his childhood friend that the age of consent for sexual relations in his State was 16 and not 18.

In his April 2005 interview, Applicant acknowledged that his June 2003 claim that he could not recollect the adolescent's name was not truthful. He not only remembered the individual's name, which he then gave to the investigator, but he also reported that he had met and consulted with the individual about the dates and times of their sexual relations in 2002 and 2003. Applicant reported that he and the individual concluded that they had sexual relations on June 15, 2002, and sexual relations for a second time about six months later, in December 2002 or January 2003. Applicant also reported that he and the young man had sexual relations a third time in June 2003, but, at his hearing, he could not recall when in the month of June 2003, those sexual relations occurred. He acknowledged that having sexual relations a third time with the adolescent demonstrated poor judgment.

Under the time line constructed by Applicant and the adolescent, one sexual contact occurred while the adolescent was 15; one occurred while the adolescent was 16; and one occurred while the adolescent was either 16 or 17.[7] Applicant did not credibly explain how he and the young man determined the dates of their sexual contacts and why those dates differed from those he provided to the investigator in June 2003, which was closer in time to the actual events. However, the time line reported by Applicant in his April 2005 interview would appear more favorable to Applicant because it contained only one sexual contact with the adolescent when he was not yet 16 years of age.

When he met with an authorized investigator from OPM in March 2009, Applicant denied any involvement in a serious crime. He also denied any lack of candor during

[7] According to a birth certificate provided by Applicant, the young man's birthday is June 19, 1986.

any part of the investigation. He did not discuss his sexual relationship with the adolescent.

The record as a whole supports a conclusion that from March 2003 until March 2009, Applicant was neither candid nor forthright in security interviews about his sexual relationship with an adolescent from June 2002 until June 2003. His lack of candor continued at his security clearance hearing, when he could not recall whether his third sexual contact with the adolescent occurred before or after his June 9, 2003 interview with an authorized investigator. His failure to fully disclose relevant facts about the relationship is ongoing and continues to cast doubt on his reliability, trustworthiness, and good judgment. Additionally, the behaviors he failed to disclose would, if they were known, affect his personal, professional, and community standing, and they create in him a vulnerability to exploitation, manipulation, or duress. Accordingly, AG ¶¶ 16(b), 16(c), and 16(e)(1) apply to the facts of this case.

In his answer to amended SOR ¶ 1.c., Applicant denied having sexual relations three times with an underage person between June 2002 and June 2003, and he further denied that on two of those occasions, he knew the individual was underage. In response to amended SOR ¶ 1.a., Applicant denied deliberately falsifying material facts in his June 9, 2003 interview with an authorized investigator when he told the investigator that he unknowingly had sexual intercourse with an underage person and then sought to conceal that he had knowingly had sexual intercourse with the same individual as late as June 2003. Additionally, in response to amended SOR ¶ 1.b., Applicant denied deliberately falsifying material facts in a security interview when he stated that he had not been involved in a serious crime, and he sought to conceal his sexual relations with an underage person as set forth in SOR Guideline E allegation a.[8]

Several Guideline mitigating conditions could potentially apply to the facts of this case. Applicant's disqualifying personal conduct might be mitigated under AG ¶ 17(a) if "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." If "the refusal or failure to cooperate,

[8] The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

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

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

omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security process" and "[u]pon being made aware of the requirement to cooperate or provide information, the individual cooperated fully and completely," then AG ¶ 17(b) might apply. If "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not case doubt on the individual's reliability, trustworthiness, or good judgment," then AG ¶ 17(c) might apply.

AG ¶ 17(d) might apply if "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur." AG ¶ 17(e) might apply if "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress."

I thoroughly reviewed the documentary and testamentary evidence in this case. I observed Applicant carefully, and I noted his demeanor and how he responded to questions about his interviews with authorized investigators in March 2003, in June 2003, in April 2005, and in March 2009. I also listened carefully to his responses to questions posed during his security clearance hearing in order to asses his credibility and state of mind.

The statute provided by Applicant for administrative notice established that a sexual act between a 15-year-old and a person at least four years older is a misdemeanor sexual offense. While such behavior can be considered, subjectively, to be "serious," it is not, in this case, denominated as a serious crime. Applicant's assertion to an authorized investigator in March 2009 that he had not been involved in a serious crime was legally correct. Accordingly, he did not deliberately falsify material facts when he denied involvement in a serious crime. Applicant's evidence rebutted amended SOR ¶ 1.b. I conclude that allegation for Applicant.

Amended SOR ¶¶ 1.a. and 1.c. alleged sexual intercourse with an "underage" person. Neither allegation defined with precision the term "underage." Applicant provided two statutes that defined the age of consent for sexual relations in State X, where Applicant and his adolescent sexual partner lived, as 16 years. I note also that the legal age for obtaining a driver's license in many states is 16 years; the legal age for voting in a federal election is 18 years, and the legal age for consuming alcohol is usually 21 years. Many states recognize 18 as the age of legal majority when an individual, no longer a minor, assumes control, as an adult, over his or her person, actions, and decisions and may legally marry without parental permission and enter into binding contracts. The age of legal majority is sometimes equated, incorrectly, with the age of consent for sexual relations.

The record establishes that Applicant was initially concerned that his sexual relationship with a minor (under the age of 18) was of concern to the authorized

investigators. When he met with the investigator in April 2005, he claimed that after his third sexual encounter with the adolescent in June 2003, he had no more sexual contact with him or anyone else under the age of 18.

Applicant's third sexual encounter with the adolescent occurred in June 2003. At his hearing, Applicant was unable to recall when he and the adolescent had sex for the third time. The record failed to establish whether the third sexual encounter occurred before or after the June 2003 interview with the authorized investigator. I conclude amended SOR ¶ 1.a. for Applicant because there was insufficient record evidence to establish the facts denied by Applicant.

Amended SOR ¶ 1.c. alleges that from June 2002 to June 2003, Applicant had sexual relations three times with an underage person and, on at least two of those occasions, he knew the individual was underage.

Despite the fact that amended SOR ¶ 1.c. does not define the term "underage," Applicant was on notice that his sexual partner's youthful age raised security concerns about Applicant's judgment and reliability. He sought to conceal or minimize this fact, but as late as June 2003, he was himself concerned that sexual relations with a person under the age of 18 demonstrated personal conduct that could affect his personal or professional reputation. Applicant knew that his sexual partner was underage during at least two of their three sexual encounters between June 2002 and June 2003. Accordingly, I conclude that no personal conduct mitigating conditions apply to the conduct in amended SOR ¶ 1.c.

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 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 must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature adult of 27 years. He is intelligent and well-educated. His employer values the contribution he makes to the work of his organization.

In June 2002, Applicant, who was 20 years old, had sexual relations once or twice with a 15-year-old male. Under the law of Applicant's state of residence at the time, a sexual act between a person who is 14 or 15 years old and a person who is at least four years older is a fourth degree sexual offense, a misdemeanor punishable by not more than one year of imprisonment or a fine of $1,000, or both. Applicant continued his sexual relationship with the younger individual until at least June 2003.

During the course of his interviews with authorized investigators, Applicant was not candid and truthful about his sexual relationship with an adolescent male. When interviewed by an authorized investigator on June 9, 2003, Applicant reported he had sexual relations twice with a 15-year-old male in June 2002. Applicant said he learned the individual was 15 years old after he had sexual relations with him. He said he had not had any further sexual relations with the individual because of his young age, although he and the individual remained friends. He could not remember the individual's name.

In a subsequent interview with an authorized investigator on April 1, 2005, Applicant admitted that he was not truthful on June 9, 2003, when he stated that he did not recall the name of the 15-year-old male with whom he had sexual relations in June 2002. He then changed the story he had told the investigator in June 2003 and related that he had had sexual relations with the younger male three times: in June 2002, six months later in late 2002 or early 2003, and sometime in June 2003. At his hearing, he explained that he had contacted the individual after his June 2003 security interview and had discussed their sexual contacts and the individual's age. At his hearing, Applicant could not recall if their third sexual contact occurred when they met in June 2003 to discuss their previous sexual contacts and the individual's age.

In his interview with an authorized investigator on March 3, 2009, Applicant did not discuss his sexual relationship with the adolescent. He also denied any lack of candor during any part of the investigation process.

Applicant's multiple falsifications during his security interviews and his lack of candor at his hearing raise serious security concerns. He began his falsifications in 2003, and he continued them until the present, raising ongoing concerns about his judgment, trustworthiness, and reliability.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude, after a careful review of the facts of his case, the Personal Conduct adjudicative guideline, and the whole-person concept, that Applicant failed to mitigate the security concerns arising from his personal conduct.

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 E:	AGAINST APPLICANT
Subparagraph a.:	For Applicant
Subparagraph b.:	For Applicant
Subparagraph c.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Joan Caton Anthony
Administrative Judge