DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
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	)	
Applicant for Security Clearance	)	

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: *Pro se*

07/31/2012

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding personal conduct. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On November 19, 2010, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing version of a Security Clearance Application (e-QIP).[1] On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to the interrogatories on March 26, 2012.[2] On May 2, 2012, DOHA issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December

[1] Item 4 (e-QIP), dated November 19, 2010.

[2] Item 5 (Applicant's Answers to Interrogatories, dated March 26, 2012).

29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline E (personal conduct), and detailed reasons why DOHA was unable to find 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 a clearance should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on May 12, 2012.[3] In a sworn statement, dated May 21, 2012, Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing.[4] A complete copy of the Government's file of relevant material (FORM) was provided to Applicant on June 5, 2012, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on June 13, 2012, and submitted a four-page statement on July 3, 2012. The case was assigned to me on July 19, 2012.

Findings of Fact

In his Answer to the SOR, Applicant admitted one of the factual allegations pertaining to personal conduct (¶¶ 1.a. of the SOR), as well as a portion of the other factual allegation (¶ 1.b. of the SOR). Those admissions are incorporated herein as findings of fact. He denied the remaining portion of the allegation.

Applicant is a 57-year-old employee of a defense contractor, currently serving as a senior systems engineer.[5] He earned a bachelor of science in electrical engineering in May 1979; a master of science in management information systems in July 1995; and a master of business administration in September 1995.[6] He was previously employed in a variety of positions both as a civil servant and a contractor. He was a software systems engineer from July 1979 until December 1984; a senior software systems engineer from December 1984 until October 1987; a branch manager from October 1987 until May 1990; a division manager from January 1990 until July 1992; a branch manager from July 1992 until January 1995; a paperless office project manager from January 1995 until April 1997; a partner and consultant from April 1997 until December 2008; an owner and consultant from May 2008 until December 2009; a part-time owner and consultant from July 2008 until an unspecified date; and a part-time owner and consultant from August 2009 until an unspecified date. He joined his present employer in December 2010.[7] He has not served in the U.S. military.[8] Applicant was married in

[3] Item 3 (Receipt, dated May 12, 2012).

[4] Item 2 (Applicant's Response to the SOR, dated May 21, 2012).

[5] Item 4, *supra* note 1, at 16.

[6] Item 4, *supra* note 1, at 13-15.

[7] Item 4, *supra* note 1, at 16-22.

[8] Item 4, *supra* note 1, at 23-24.

June 1979, and divorced in May 2009.[9] Applicant has three daughters (born in December 1980, December 1984, and August 1986) and one son (born in February 1982).[10]

In June 1988, Applicant was accepted into an unspecified personnel reliability program. In about July 1979, he was granted a secret security clearance, but that clearance was suspended in about January 1997 following his felony conviction, described further below.[11]

Personal Conduct

In August 1996, during a church retreat with a group of about 100 people, discussing families and family relationships, Applicant's then 15-year-old daughter revealed some disturbing facts about her family problems. As a result of what he had heard, the church youth minister contacted the police.[12] An investigation ensued, and the following facts were established through that daughter:[13]

> [Applicant] had molested her for the last several years. . . . She was made to disrobe in front of her father. She is also forced to take showers with him in which she is told to bathe him including . . . his genital areas. . . . [Applicant] inspects her vaginal area after he completely disrobes her. [He] places his fingers on the inside lip portion of her vagina, spreading her vagina apart while he looks inside her vagina.
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> [Applicant] walks throughout the residence nearly every day wearing only a T-shirt and . . . he exposes his genital areas. . . . This has been going on for the last several years at her residence. There was a total of 32 counts of child molestation over the years. . . .
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> On occasions, [Applicant] will pinch her on her buttocks. On other occasions during the disrobing incidents, [Applicant] will pinch her breasts and jiggle them back and forth. . . . [Applicant] does the same type of examination to her younger brother. . . . She has witnessed [her brother] standing in front of [Applicant] completely nude.
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> . . . [W]henever she and her brother . . . get into a fight or argument together [Applicant] makes them both disrobe in front of each other as a healing process, telling the children they have no secrets between them. They are also made to hug each other naked.

[9] Item 4, *supra* note 1, at 26-27.

[10] Item 4, *supra* note 1, at 30-32.

[11] Item 4, *supra* note 1, at 51-52.

[12] Item 11 (Police Report – Details, various dates), at 000017, 000029.

[13] Item 10 (Municipal Court Declaration for Probable Cause Hearing, dated August 10, 1996).

She also stated that Applicant had never had intercourse with her; had never performed cunnilingus on her; and never made her stroke or fondle his penis, except for the "numerous occasions" she had to wash his penis. She never had to perform fallatio on him.[14] During 1995-1996, on approximately five to ten occasions, Applicant had her strip naked and he would pat her on her bare butt and poke at her bare breasts. He would shake her breasts and make them jiggle, while commenting that her breasts are big. Whenever he did so, she was completely naked and he was wearing only a T-shirt, but naked from the waist down. On one occasion, when she was about 12 years old, Applicant was sitting on a chair next to his computer, wearing a T-shirt, but naked from the waist down, and she was wearing a full-length nightgown, she sat on his lap for about ten minutes. He moved one or two times quickly, and she felt something, warm, slippery, and sticky, come out of his penis onto her. It was semen.[15]

Applicant's then 14-year-old son stated that Applicant periodically grabbed his penis and inspected it. He also observed three incidents in which his sister was lying on her back on a bed while Applicant spread her vagina with his fingers.[16]

In August 1996, Applicant's daughter spoke with her father on the telephone while being monitored by the police. He was also interviewed by the police. The combined admissions and acknowledgments were as follows: Applicant admitted taking showers with his daughter, but stated the most recent incident occurred when she was about 13 or 13½ years old; he deferred discussing with the police whether or not he had his daughter wash his penis, although he promised her she would no longer have to do so; he did not recall ever ejaculating on his daughter's leg; he acknowledged routinely inspecting his daughter's vagina to see if she was still a virgin; he confirmed that he routinely examined his son's penis; and stated he was proud of his daughter's development and liked to watch all of his children naked so that he could see them grow.[17] Applicant wanted to make sure there were no barriers in his children's' personal lives and by having them disrobe was just to show they were not hiding anything. He attributed his actions to Japanese culture, although he admitted he was not of Japanese ancestry, had never been to Japan, and had never experienced that Japanese culture.[18] Applicant's brother denied that Applicant's actions were related to any cultural beliefs of their family.[19]

[14] Item 11, *supra* note 12, at 000019.

[15] Item 11, *supra* note 12, at 000018-000019.

[16] Item 11, *supra* note 12, at 000022-000023.

[17] Item 11, *supra* note 12, at 000032-000034.

[18] Item 11, *supra* note 12, at 000032.

[19] Item 11, *supra* note 12, at 000041.

Applicant was arrested on charges of lewd and lascivious acts with a child under 14 (32 counts) and penetration by foreign object (2 counts) in August 1996.[20] In November 1996, an information was filed against him by the district attorney, alleging (1) continuous sexual abuse with a child under 14, a felony; (2) lewd act upon a child of 14 with a defendant at least 10 years older, a felony; (3) lewd act upon a child of 15 with a defendant at least 10 years older, a felony; and (4) child molesting of a child under 18, a misdemeanor.[21] Applicant did not agree with all of the accusations against him, but did acknowledge that he had been involved in inappropriate activities. He agreed with about 60 percent of the accusations.[22] In accordance with his attorney's recommendation, Applicant entered a plea of guilty to two of the four charges.[23] In January 1997, he was convicted of counts (1) and (3), and the following month was sentenced to 240 days in jail, 60 months of probation, as well as a fine and restitution, and registered as a sexual offender.[24] He served his jail sentence in a work-furlough program, completed in September 1997, and successfully completed his probation in February 2002.[25] In March 2010, Applicant submitted a pardon request to the governor,[26] but the request was denied.[27]

Applicant has been in counseling for depression and treated with Zoloft or its generic equivalent since January 1997.[28] In addition, as part of his probation, he was initially required to participate in individual and group counseling related to sexual issues. The focus changed to family counseling in preparation for the eventual family reunification.[29] Applicant also contends he has had three psychological evaluations since his arrest and they concluded he was not a danger to society.[30] He has offered no documentation to support the type of counseling or the evaluations he contends he received.

[20] Item 6 (Federal Bureau of Investigation (FBI) Identification Record, dated December 17, 2010), at 2.

[21] Item 8 (Information, dated November 4, 1996).

[22] The Office of Personnel Management (OPM) investigator recorded that Applicant indicated that he agreed with 40 percent of the accusations. *See* Item 5 (Personal Subject Interview, dated January 10, 2011), at 5. Applicant corrected the record by stating he agreed with 60 percent of the accusations. *See* Item 5 (Applicant's Answers to Interrogatories), *supra* note 2, at 10 (Addendum to DOHA Interview Verification).

[23] Item 5 (Personal Subject Interview) *supra* note 22, at 4-5.

[24] Item 6, *supra* note 20, at 2; Item 9 (Docket Report, various dates), at 4-5.

[25] Item 4, *supra* note 1, at 49.

[26] Item 4, *supra* note 1, at 49.

[27] Item 5 (Applicant's Answers to Interrogatories), *supra* note 2, at 3.

[28] Item 4, *supra* note 1, at 48.

[29] Item 5 (Personal Subject Interview), *supra* note 22, at 6; Item 9, *supra* note 24, at 6-7.

[30] Item 5 (Personal Subject Interview), *supra* note 22, at 6.

In October 1996, in his response to a proposal of intent to suspend his "security access," Applicant focused on his view of nudity and family lifestyle rather than his actions with his children. He stated:[31]

> I do not view the situation as having to do with sexual behavior in any way. It is our view that nudity is not the same as sexuality. There is no allegation that I engaged in sexual behavior with my daughter. And of course, any sexual behavior with my wife has always been out of the presence of our children.
>
> I feel strongly that our lifestyle has always evidenced good judgment by myself and my wife. Our family is stable relative to families we have observed in the community. . . . The current situation has even increased the family bond, especially with my wife and son.
>
> My 15 year old daughter, in coming into puberty, may not be as comfortable being nude in front of me or her brother. I think that it is likely that the point she wished to discuss in the group with the counselor was an effort on her part to determine if other children her age had similar issues.

In January 2011, during his OPM personal subject interview, Applicant denied being a pedophile. He acknowledged he had a problem setting appropriate boundaries with his daughter, and denied ever engaging in any sex with her. He did not consider the inappropriate contact with her to be because of sexual desire.[32]

In May 2012, Applicant addressed the SOR allegations and admitted the following lewd acts: having his daughter disrobe routinely; having her take showers with him many times; checking her, including looking at her genitals, when she once had a nasty stomach ache; while showering, he once asked her to wash his genitals.[33] He specifically denied the following accusations: inserting his finger into her genitals; ejaculating on her; or having her wash his genitals more than one time.[34]

In July 2012, Applicant reiterated his positions by again denying any vaginal penetration or ejaculation.[35] He denied touching his daughter's breasts when they were "jiggled," and claimed the two occasions were learning moments to stop her from making fun of her mother's breasts.[36] He acknowledged he "made a couple of lewd

[31] Item 7 (Applicant's Memorandum, dated October 4, 1996), at 2-3.

[32] Item 5 (Personal Subject Interview), *supra* note 22, at 5.

[33] Item 2, *supra* note 4, at 3.

[34] Item 2, *supra* note 4, at 3.

[35] Applicant's Response to the FORM, dated July 3, 2012, at 2.

[36] Applicant's Response to the FORM, *supra* note 35, at 3.

acts," but denied his actions were sexual in nature.[37] Applicant claims that his conscience is clear and that he is at peace with himself and with God.[38]

Applicant contends he was subsequently reunited with his family, and that his children resided with him in the family home.[39] His daughter was married in December 1999.[40]

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."[41] 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[42]

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

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."[43] The Government initially has the burden of producing evidence to establish

[37] Applicant's Response to the FORM, *supra* note 35, at 2.

[38] Applicant's Response to the FORM, *supra* note 35, at 2.

[39] Applicant's Response to the FORM, *supra* note 35, at 2.

[40] Item 9, *supra* note 24, at 10.

[41] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

[42] Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

[43] "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4,

a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.[44]

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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. Furthermore, "security clearance determinations should err, if they must, on the side of denials."[45]

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."[46] 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 or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

Analysis

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

> 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

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2006) (citing Directive ¶ E3.1.32.1). "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).

[44] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

[45] *Egan*, 484 U.S. at 531

[46] *See* Exec. Or. 10865 § 7.

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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(c), security concerns may be raised if there is:

> *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.*

Similarly, under AG ¶ 16(e), it is potentially disqualifying if there is:

> *personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing . . . .*

Applicant's lewd acts included routinely having his daughter disrobe before him; exposing himself to his children; having his daughter take showers with him; touching and inspecting his daughter's vagina; having his daughter to wash his genitals; jiggling his daughter's bare breasts; commenting to his daughter about her body development and large breasts; grabbing his son's penis; and ejaculating on his daughter. This routine, long-standing, high risk behavior not only reflected a lack of discretion or judgment that undermined his fiduciary responsibilities regarding his children, it was of a criminal nature. Applicant is a convicted and registered sex offender. The governor rejected Applicant's request for a pardon. Despite the descriptions of the accounts and the frequency of the accounts by his victims, Applicant continued to deny that there was any sexual motivation for his actions. Likewise, although his children described in detail what he had done to and with them, to this day, he still denies and rejects portions of what they alleged. Applicant contends the prosecuting attorney and Department Counsel have "sensationalized" his actions; the police reports have many inaccuracies and false data; the Department Counsel continues to "lie and distort the facts;" and the police have misclassified his level of sex offender. AG ¶¶ 16(c) and 16(e) have been established.

The guidelines also include examples of conditions that could mitigate security concerns arising from personal conduct. AG ¶ 17(c) may 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 cast doubt on the individual's reliability, trustworthiness, or good judgment*.

Also, AG ¶ 17(d) may 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*.

Applicant's lewd, sexual, criminal behavior with his children ceased upon his arrest in August 1996 – 16 years ago. In January 1997, he was convicted of continuous sexual abuse with a child under 14, a felony, and lewd act upon a child of 15 with a defendant at least 10 years older, a felony, and sentenced to 240 days in jail, 60 months of probation, as well as a fine and restitution, and registered as a sexual offender. The offenses were not minor and the behavior was not infrequent. With the passage of time, the children have grown and at least one of them has married. While Applicant has acknowledged some of the behavior and obtained counseling to change that behavior, and learn from it, he has steadfastly refused to acknowledge or explain the motivation for it. At one point, Applicant focused on his view of nudity, family lifestyle, and purported Japanese culture, rather than his actions with his children. More recently he has accused the system of sensationalizing his actions and twisting the facts. It appears that he remains in at least partial denial that what he did was sexually motivated rather than the result of poor parenting skills. Accordingly, it appears that the behavior, at least as it pertains to his oldest daughter, will not recur, but it is still unclear if he remains at risk pertaining to other minors. Applicant's past behavior and current attitude do cast doubt on his reliability, trustworthiness, and good judgment. AG ¶¶ 17(c) and 17(e) only partially apply.

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.

There is some evidence in favor of mitigating Applicant's conduct. He has paid his debt to society for his lewd, sexual, criminal behavior with his children, and that behavior ceased upon his arrest in August 1996 – 16 years ago. He has undergone counseling.

The disqualifying evidence under the whole-person concept is substantial. Applicant has an extensive multi-year history of lewd, sexual, criminal behavior with his children. Applicant continues to take "full" responsibility for his actions, but he also continues to minimize them. Also significant are his denials of some of the alleged conduct; and his position that the system has sensationalized his actions and twisted the facts. He remains in at least partial denial that what he did was sexually motivated rather than the result of poor parenting skills. While Applicant's conduct may be mitigated by the passage of time, the completion of his sentence and probation, and some counseling, the disqualifying evidence outweighs those factors. Taken together, his conduct over the years, and his current attitude, vitiate any other mitigation. *See* AG ¶¶ 2(a)(1) through 2(a)(9).

Overall, the record evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has failed to mitigate the personal conduct security concerns.

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 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant

Conclusion

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

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ROBERT ROBINSON GALES
Administrative Judge