DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 11-06198
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

07/12/2013

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines D (Sexual Behavior) and E (Personal Conduct). Security concerns under Guideline D are mitigated, but security concerns under Guideline E are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 1, 2010. On July 19, 2012, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines D and E. DOD acted 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) implemented by DOD on September 1, 2006.

Applicant received the SOR on July 30, 2012; answered it on August 11, 2012; denied all the allegations; and requested a hearing before an administrative judge.

Department Counsel amended the SOR on March 27, 2013, by adding an additional allegation under Guideline E. Department Counsel was ready to proceed on April 1, 2013, and the case was assigned to me on April 5, 2013. Applicant answered the additional allegation on April 17, 2013, denying it. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 6, 2013, scheduling the hearing to be conducted by video teleconference on May 22, 2013.

On the day of the hearing, Applicant's vehicle broke down as he was driving to the teleconference site, and he telephonically requested a postponement. I granted his request, and the hearing was rescheduled to be conducted by video teleconference on June 11, 2013. I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through C. Department Counsel objected to AX A and B on the ground that they were not properly authenticated, and I granted Applicant additional time to obtain and submit authenticated copies. He timely submitted an authenticated copy of AX B, and requested additional time to authenticate AX A. At Applicant's request, I extended the deadline until July 8, 2013, but he was unable to contact the author of AX A. The admission of AX A is discussed further below. DOHA received the transcript (Tr.) on June 19, 2013.

Evidentiary Issue

At the hearing, Department Counsel objected to the admission of AX A, an email from a psychologist to Applicant summarizing a conversation with him about the basis for her diagnosis. The email identifies the psychologist as the sender but it does not reflect an electronic signature. Applicant responded that he could readily obtain a signed version of the document from the psychologist. Based on Applicant's representations, I deferred admission of AX A. (Tr.18-20.) However, Applicant was unaware that his psychologist was on an extended family vacation, and he was unable to contact her. (Hearing Exhibit I.) On further consideration, I am satisfied that the email contains sufficient indicia of authenticity to warrant its admission. Accordingly, I have exercised my authority under the Directive ¶ E3.1.19 to relax the rules of evidence, and I have admitted AX A "to permit the development of a full and complete record." *See* ISCR Case No. 04-12449 at 4 (App. Bd. May 14, 2007) (administrative judges encouraged to err on the side of initially admitting evidence into the record and then to consider a party's objections when deciding what, if any weight to give that evidence).

Findings of Fact

Applicant is a 33-year-old employee of a defense contractor. He served in the U.S. Marine Corps from July 1998 to August 2003 and was honorably discharged. He held a security clearance while in the Marine Corps. He worked for federal contractors from May 2004 to December 2004 and from June to October 2005, and he held a security clearance from another government agency during those periods of employment. He was fired in October 2005 because of the conduct alleged in the SOR, and his clearance was revoked. Since January 2010, he has been employed by a

defense contractor as an instructor, preparing military personnel for deployment. (Tr. 29.)

Applicant has never married, but he is currently in a committed relationship with an active-duty service member deployed overseas. He earned an associate's degree in 2009 and a bachelor's degree in November 2012. (Tr. 37.)

In September 2005, Applicant was deployed in a hostile-fire location, where the environment fluctuated between periods of loneliness and boredom and periods of intensive combat and fear of imminent death or injury. He had a close call with an improvised explosive device that left him frightened and depressed. (Tr. 34, 48.) During his free time, he sought out internet chat rooms, because the time difference between his deployed location and the United States made contact with U.S.-based friends difficult. (Tr. 44-45.) He found a chat room for persons from his home state and he made contact with a person identified as a 12-year-old girl. He testified that he did not remember how he first made contact with her. (Tr. 39.) The person actually was a police detective posing as a 12-year-old girl.

During an instant-message internet conversation on September 29, 2005, Applicant identified himself as a 25-year-old male deployed overseas, and the detective identified herself as a 12-year-old female from his home state. Applicant asked her if she was a virgin, and they discussed the possibility of meeting when he returned to the United States. He asked her twice for a picture and she said she did not have one. (GX 3 at 7-8.[1])

On October 6, 2005, Applicant and the detective chatted again. Applicant asked her again if she was a virgin and asked the extent of her sexual experience. He talked to her in great detail about masturbation, sexual intercourse, and the possibility of video-recording themselves having sexual intercourse. Applicant expressed concern several times that she was not a 12-year-old and might be an undercover police officer. The detective gave Applicant her telephone number and Applicant agreed to call her. The telephone number was for an "undercover line" used by the internet crimes unit. (GX 3 at 4-10.)

Applicant called the undercover telephone line and asked the detective to orally say what she had written to him about sexual activity, and she declined. Applicant asked, "So how old are you really?" When she insisted that she was 12 years old, Applicant said, "Well I can tell what a 12-year-old sounds like and I can tell what an older person sounds like . . . [and] there's no way you are 12." He told her he thought she was "a cop or working with the cops or something." As she tried to end the conversation, Applicant again said, "[Y]ou [are] not 12." (AX B.) The detective then sent Applicant an email, saying she was sorry for making him angry, but that she was "super upset" that he did not believe her. (GX 3 at 15.)

[1] GX 3 is a multi-page facsimile transmission, with page numbers beginning with page 3 of 52 pages.

On October 12, 2005, the detective sent Applicant an instant message. During the ensuing conversation, Applicant again told her that he thought she was a cop. He asked her again for a photograph, and she promised to send one on the following day. He then asked her to send a nude photo to prove that she was not a cop. When she expressed reluctance, he asked her to send a photograph of herself wearing "barely any clothes." After some more conversation, he asked her again for a nude photograph, and she refused. They exchanged last names, using their real names. Applicant then described in graphic sexual detail what he would like to do when he returned to the United States, and he gave her explicit instructions on how to masturbate. (GX 3 at 15-19.)

On October 19, 2005, Applicant was on leave in the United States. He sent a message to the detective at about 10:00 a.m. When she responded, he asked why she was not in school. He asked again how old she was. After some sexually explicit conversation, they exchanged addresses, but Applicant gave her his previous address rather than his current address. They agreed to meet later in the day at a convenience store. (GX 3 at 19-27.)

On October 20, 2005, Applicant sent an email to the detective, and when she responded, he again commented about the fact that she was not in school. She replied that she was at school and accused him of failing to meet her. He responded that he drove past the agreed meeting place but did not stop because a friend who was a police officer told him that he would be arrested if she was actually an undercover police officer. The email exchange ended with Applicant asking the detective not to be angry and saying that they could still be friends. (GX 3 at 27-28.)

At the hearing, Applicant testified that he continued his conversations after returning to the United States even though he was not sure who he was talking to, because he "just didn't like anybody not liking me." (Tr. 52.) He also testified that he talked to the detective about a meeting with the intention of "setting the person up so that they just wouldn't talk to me after that." (Tr. 60.) He denied intending to arrange a meeting with the detective, and he denied driving past the convenience store where the detective said they could meet. (Tr. 33, 50.)

Applicant was arrested at his home on October 26, 2005, and charged with attempted aggravated sexual assault on a minor, an attempt to lure or entice a minor, and endangering the welfare of a minor. He was questioned by the police after his arrest, and he admitted giving his telephone number to the detective on October 19, explaining, "[A] that time I really thought she was underage and I wanted to talk to her this one last time to find out who she really was." He admitted that he made sexually explicit comments to the detective, explaining that he thought "it was all a game." (GX 3 at 35.) He admitted that he set up a meeting on October 20. He denied going to the agreed location, but he admitted that he told the detective that he drove past the meeting place but did not stop. (GX 3 at 29-30.)

Applicant was accepted into a pretrial intervention program on October 25, 2006, for a term of three years. The terms of the program included psychotherapy. Applicant sought the service of a licensed psychologist when he was arrested, and he continued therapy until late 2009. He gave his psychologist copies of the police transcripts of his conversations with the undercover police officer, and they discussed them in detail during his treatment. His psychologist described him as "open, earnest, intent on self-improvement and as having made an error in judgment on the issue that brought him to therapy but not as someone who would prey upon a woman or child." She further stated, "Among the young adults I have known, [Applicant] stands among the more active, honest, goal-oriented, competent and committed to positive personal and communal goals." (GX 4.)

In an email to Applicant dated May 21, 2013, the psychologist shared with him her basis for concluding that he was not at risk of engaging in behavior harmful to minors. She described the email conversations as a sexual fantasy in which Applicant expressed care for the physical and emotional pleasure of his fantasy partner. One of the factors she considered was "[t]he psychological assessment which I indirectly suggested to your lawyer would be appropriate and that he had you undergo, and the results of which you shared with me, did not indicate that you would pose a risk of harm to minors." She expressed hope that "this earlier lapse of good judgment not continue to haunt you." (AX A.)

Applicant successfully completed the intervention program in November 2009, and the charges were dismissed. The record of Applicant's arrest and disposition of the charges was expunged on April 5, 2011. (GX 3 at 40-42.)

Applicant has received strong support from his family. Shortly after his arrest, one of his sisters asked him to be her infant daughter's godparent. Another sister entrusted him to take custody of her 16-year-old daughter for a short time. (GX 4 at 2; Tr. 89-90.)

During the hearing, Applicant testified that it was painful for him to talk about his sexually explicit conversations with the undercover detective. (Tr. 34.) He became emotionally distraught during his direct examination and needed to pause for a few minutes to compose himself. (Tr. 35.) He objected to Department Counsel's detailed, line-by-line questioning about the transcripts of the conversations with the detective. I overruled his objection and explained why it was necessary for Department Counsel to question him. (Tr. 40-41.)

When Applicant submitted his SCA in June 2010, he disclosed his October 2005 arrest. He added the following comment to his disclosure: "I did not arrange for any meeting and stopped talking to the individual when I arrived home." (GX 1 at 46.)

In response to DOHA interrogatories in May 2012, Applicant answered "No" to the question, "Did you ever attempt to arrange a meeting with the 12- or 13-year-old?"

He also answered “No” to the questions, “Did you ever ask her for a picture of herself?” and, “Did you ever request sexually explicit images from her?” (GX 5 at 2.)

At the hearing, he admitted having the conversation with the undercover officer about a meeting, but he explained that he stated on his SCA that he did not “arrange” a meeting because he did not try to meet the person and never intended that a meeting occur. (Tr. 33-34.) He testified that when he returned to the United States he was convinced that he had not been talking to a 12-year-old girl, and he knew that, if undercover police were involved, he would be arrested if he went to the meeting. (Tr. 46, 54.) He testified he answered “No” to the DOHA interrogatory about asking for a picture because he did not remember asking her for a picture. (Tr. 60-61.)

Applicant’s supervisor for the past three years has known him since childhood. (Tr. 68.) He considers Applicant an honest and trustworthy person and a gifted and knowledgeable instructor. He entrusts him daily with sensitive information pertaining to tactics, techniques, and procedures. (AX C.)

Policies

“[N]o 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 applicants 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” *See* Exec.

Or. 10865 § 7. Thus, a decision to deny a security clearance 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). "[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

Guideline D, Sexual Behavior

The SOR alleges that in September 2005, Applicant was charged with attempted aggravated sexual assault on a child of less than 13 years; attempt to lure or entice a minor; and endangering a child's welfare. It also alleges that he was placed in a pretrial intervention program and required to complete three years of counseling, after which the charges were dismissed.

The security concern under this guideline is set out in AG ¶ 18:

> 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. . . .

The following disqualifying conditions under this guideline are potentially applicable:

AG ¶ 13(a): sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

AG ¶ 13(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;

AG ¶ 13(c): sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

AG ¶ 13(d): sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

Department Counsel presented no evidence showing that, under the law of the jurisdiction where the offenses were committed, a crime against a minor can be committed even though the intended victim is not a minor. However, the evidence reflects that Applicant was charged with criminal conduct, indicted, appeared before a court of competent jurisdiction, and placed in a pretrial diversion program. Thus, I conclude that AG ¶ 31(a) is established.

AG ¶ 13(b) is not fully established. While Applicant's sexual overtures to a person he did not know were arguably "high risk," there is no evidence that his conduct was compulsive or self-destructive, no evidence that he was unable to stop his conduct and no evidence of a personality disorder. To the contrary, Applicant has not repeated his behavior, and his psychologist is confident that it will not recur.

AG ¶ 13(c) is established. Until Applicant's conduct was discovered and made public, his sexual overtures to a person he thought was a 12-year-old girl made him vulnerable to coercion, exploitation, or duress.

AG ¶ 13(d) is established. Applicant's explicit sexual overtures to a woman he thought might be a 12-year-old girl reflected lack of discretion and good judgment.

The following mitigating conditions are potentially relevant:

AG ¶ 14(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;

AG ¶ 14(c): the behavior no long serves as a basis for coercion, exploitation, or duress; and

AG ¶ 14(d): the sexual behavior is strictly private, consensual, and discreet.

AG ¶ 14(b) is established. Applicant had several sexually explicit conversations with a person claiming to be 12 years old. His conversations did not occur under unusual circumstances making them unlikely to recur. However, the key issue is whether his conduct is mitigated by the passage of time without recurrence. There are no "bright line" rules for determining when conduct is mitigated by the passage of time." The determination must be based on a careful evaluation of the totality of the evidence. *See* ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.* An applicant's failure to be forthright about his or her misconduct is a relevant factor in determining whether the passage of time indicates rehabilitation. *See* ISCR Case No. 10-03291 (App. Bd. Jan. 16, 2013); ISCR Case No. 10-00218 (App. Bd. Oct. 17, 2011).

Applicant's conduct was almost eight years ago, which is a significant period of time. He successfully completed the three-year pretrial diversion program, and he has received extensive evaluation and counseling and has been diagnosed as not posing a threat to underage girls. He has obtained a college degree and has earned the confidence of his current supervisor. He has disclosed his conduct to his supervisor and his family. He has received strong support from his family. He is the godfather of an infant niece and was entrusted with the care of a 16-year-old niece for a short time. He expressed remorse and embarrassment at the hearing.

There is evidence that Applicant went beyond engaging in a sexual fantasy, because he continued his sex-oriented conversations and arranged a meeting to carry out the sexual acts he talked about after he returned to the United States. He admitted to the police during his October 26 interview that he believed he was talking to an underage girl during his October 19 conversation. However, the transcript of his October 6 conversation with the detective indicates that, after hearing the detective's voice on the telephone, he feared that he might be talking to a police officer instead of a 12-year-old girl. He did not agree to a meeting until October 19, and he did not go to the agreed meeting place, because he was afraid that he would be arrested.

Applicant did not know with certainty whether he was talking to a 12-year-old or an adult until after he was arrested. In spite of his uncertainty, he continued to have sexually explicit conversations with a person that he believed might be a 12-year-old girl. The transcripts of his conversations reflect that he asked for photographs on several occasions, and that on October 12 he asked several times for nude or nearly nude photographs. In response to DOHA interrogatories in May 2012 and at the hearing, he denied asking for photographs or sexually explicit images of the person with whom he was talking. At the hearing, he testified that he had forgotten about asking for photographs, and he continued to deny asking for sexually explicit photos.

Based on all the evidence, I have concluded that Applicant was not totally candid in his responses to DOHA interrogatories or at the hearing. He admitted to the police that on October 19 he thought he was talking to an underage girl, but he testified at the

hearing that he was convinced after the October 6 telephone call that he was talking to an adult. *See* ISCR Case No. 08-09232 at 3 (App. Bd. Sep. 9, 2010) (Previous inconsistent statements are relevant to credibility and rehabilitation, even if not alleged in the SOR.).

Notwithstanding Applicant's inconsistent statements about his perception of the age of the person he was talking to, the content of his conversations, and his actions after returning to the United States, I am convinced by his testimony, his demeanor at the hearing, and the favorable prognosis of his psychologist that the memory of his conduct is so abhorrent and painful that he will not repeat it. Thus, I conclude that his conduct has been mitigated by the passage of time without recurrence.

AG ¶ 14(c) is not fully established. Applicant has disclosed his conduct to his family, his current supervisor, and the woman with whom he has a serious, committed relationship. The expungement of the record of his criminal record makes it less likely that someone outside his circle of confidants will discover it. However, he was not fully forthcoming about the extent of his misconduct in his SCA, his response to DOHA interrogatories, and at the hearing. His intense embarrassment and mental anguish about his conduct makes him vulnerable to exploitation in spite of his limited disclosures of his misconduct and the expungement of his criminal record.

AG ¶ 14(d) is not established. Applicant believed that his first sexually explicit conversation was with a 12-year-old girl, legally incapable of consenting. His conversations were explicit, vulgar, and clearly not discrete.

Guideline E, Personal Conduct

The SOR cross-alleges Applicant's sexual behavior under this guideline. It also alleges that he falsified his SCA by stating, "I did not arrange for any meeting and stopped talking to the individual when I arrive home."

The concern under this guideline is set out in AG ¶ 15 as follows:

> 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.

The disqualifying condition relevant to the allegation that Applicant falsified his SCA is AG ¶ 16(a): "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . ." When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. A misstatement, standing alone, does not prove falsification. An administrative judge must

consider the record evidence as a whole to determine an applicant's state of mind at the time of the misstatement. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

Applicant falsified his responses to DOHA interrogatories in May 2012 by denying that he had asked for photographs or sexually explicit images. His explanation that he forgot that he asked for photographs is implausible and not persuasive. His denial at the hearing that he asked for sexually explicit photographs is also not persuasive. The transcripts reflect that he repeatedly asked for photographs, including nude or nearly nude photographs. He provided the transcripts to his psychologist, and he testified that they discussed the transcripts at length and in detail. His demeanor at the hearing reflected that the contents of the transcripts were vivid and painful to recall, making it unlikely that he did not remember his repeated requests for a photograph.

The SOR did not allege that Applicant falsified his responses to the DOHA interrogatories. However, conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). I have considered Applicant's falsification of his response to DOHA interrogatories and his false denial at the hearing that he ever asked for sexually explicit images for the limited purposes of assessing his credibility and determining whether he has demonstrated successful rehabilitation.

Applicant's explanation for denying that he had "arranged" a meeting is facially plausible. If he did not intend to meet with the detective, but wanted to stand her up as an easy way to end the relationship, then he correctly stated that he did not arrange a meeting. However, I found that his explanation was not credible. During his October 26 interview with the police, he admitted that on October 19 he still believed he was talking to an underage girl and he wanted to continue the conversations to find out who she really was. His explanation during the October 20 conversation indicates that, based on the advice of a friend who was a police officer, he was afraid of being arrested. His statement in his SCA that he had no further conversations with the detective after returning to the United States is contradicted by the transcripts of his conversations on October 19 and 20. Accordingly, I conclude that his denial that he "arranged" a meeting and his declaration that he "stopped talking to the individual when [he] returned home" were intentionally false. His comment in his SCA falsely indicated that he had engaged in a sexual fantasy that ended when he returned from overseas deployment and that he made no attempt to turn his fantasy into reality.

The following disqualifying conditions under this guideline are raised by Applicant's sexual conduct cross-alleged under this guideline:

> AG ¶ 16(c): 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(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. . . ; and

AG ¶ 16(e): 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.

Security concerns raised by false or misleading answers on a security clearance application or during a security interview may be mitigated by showing that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." AG ¶ 17(a). This mitigating condition is not established because Applicant made no effort to correct his falsifications.

Security concerns raised by personal conduct also may be mitigated by any of the following:

AG ¶ 17(c): 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;

AG ¶ 17(d): 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; or

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(c) is not established for Applicant's falsifications, which were serious, recent, and did not occur under unique circumstances. It is established for the sexual behavior cross-alleged under this guideline, for the reasons set out in the above discussion of AG ¶ 14(b).

AG ¶ 17(d) is not established for Applicant's falsifications, but it is established for his sexual behavior. Applicant has obtained extensive counseling and his counselor had concluded the similar behavior is unlikely to recur.

AG ¶ 17(e) is established. Applicant has disclosed his conduct to his supervisor, his family, and his "significant other." The expungement of his criminal record reduces the likelihood that others will discover his past conduct. However, he has not completely eliminated his vulnerability for the reasons set out in the above discussion of AG ¶ 14(c).

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guidelines D and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant served honorably in the U.S. Marine Corps. He held a security clearance as a Marine and as an employee of a federal contractor. He was sincere and contrite at the hearing. He has gained the respect and support of his current employer. On the other hand, he has not been completely candid during the security clearance process.

After weighing the disqualifying and mitigating conditions under Guideline D and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on sexual behavior, but he has not mitigated the security concerns raised by his falsification of his SCA. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline D (Sexual Behavior):	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline D (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant

Conclusion

I conclude that 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.

LeRoy F. Foreman
Administrative Judge