**DEPARTMENT OF DEFENSE**
**DEFENSE OFFICE OF HEARINGS AND APPEALS**

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| In the matter of: | ) | |
| | ) | |
| ---------- | ) | ISCR Case No. 12-03661 |
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| Applicant for Security Clearance | ) | |

## Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Michael E. Veve, Esq.

07/05/2013

## Decision

Harvey, Mark, Administrative Judge:

Applicant has a history of being sexually attracted to children, including his daughter. In 1997, he intentionally rubbed his 13-year-old daughter against his erect penis when she was sitting on his lap. When his daughter was 15 years old, he attempted to get his daughter intoxicated so he could engage in sexual activity with her. However, there is insufficient evidence to support the allegation that Applicant suffers from an emotional, mental, or personality disorder affecting his judgment, reliability, or stability. Psychological conditions concerns are mitigated. Personal conduct concerns are mitigated as a duplication of sexual behavior concerns. Sexual behavior concerns are not mitigated. Eligibility for access to classified information is denied.

## Statement of the Case

On September 16, 2011, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) or SF 86. (GE 1) On February 20, 2013, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) the President promulgated on December 29, 2005.

The SOR alleged security concerns under Guidelines D (sexual behavior), E (personal conduct), and I (psychological conditions). (Hearing Exhibit (HE) 2) The SOR detailed reasons why DOHA was unable to find that it is clearly consistent with the national interest to continue a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

On March 29, 2013, Applicant responded to the SOR and requested a hearing. (HE 3) On May 6, 2013, Department Counsel indicated she was ready to proceed on Applicant's case. On May 9, 2013, the case was assigned to me. On May 23, 2013, DOHA issued a hearing notice, setting the hearing for June 19, 2013. (HE 1) Applicant's hearing was held as scheduled. Department Counsel offered three exhibits, and Applicant offered one exhibit. (Tr. 24-27; GE 1-3; AE A) There were no objections, and I admitted GE 1-3 and AE A. (Tr. 25, 27) Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR. (HE 1-3) On June 27, 2013, I received the transcript of the hearing.

## Findings of Fact[1]

Applicant's SOR response denied the SOR allegations in whole or in part. (HE 3) He made some partial admissions. He also provided extenuating and mitigating information. (HE 3) His admissions are accepted as findings of fact.

Applicant is a 58-year-old network engineer or systems engineering manager employed by a defense contractor. (Tr. 109; GE 1) He graduated from a nationally known university with a bachelor of science degree in systems engineering, and he earned a master's degree from a nationally known university in computer science in 1989. (Tr. 109-110). After graduating from college he served on active duty as a pilot for eight and a half years. (Tr. 110, 214) During his years on active duty, he served in some dangerous environments, and he is eligible to join the Veterans of Foreign Wars. (Tr. 215-216) He served 13 years in the reserves, and he honorably retired as a commander (O-5). (Tr. 110, 214)

In 1978, Applicant married, and about 18 months later, he and his spouse divorced. (Tr. 115-116, 142) One year after the divorce, he remarried his spouse. (Tr. 116) His two children from that marriage were born in 1982 and 1984. (Tr. 116-117, 202) In 2000, he and his spouse divorced after 18 years of marriage. (Tr. 116-117) In 2002, he met his future spouse, and in December 2002, Applicant told her about the incident where he attempted to give alcohol to his daughter, and he told his spouse that "he wanted to have sex" with his daughter. (Tr. 237, 239, 245, 248-249) He did not disclose to his future spouse that he had fantasies about having sex with children, and she did not believe that would happen. (Tr. 246) He also related to her that he had a problem with his security clearance. (Tr. 239-240) In 2006, Applicant married his current

[1]Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

spouse. (Tr. 133, 238) His current spouse is 56 years old, and she does not have any children. (Tr. 238-239)

In August 1986, Applicant held a top secret clearance with access to sensitive compartmented information (SCI). (Tr. 112) In 2001, Applicant's security clearance was denied or revoked. (Tr. 203) In 2006, Applicant applied for a security clearance based on the favorable assessments of Dr. C and Dr. M, two psychologists he hired, who wrote letters on his behalf in 2003. (Tr. 128; GE 2 at I82-I91) In 2006, his request for a security clearance was withdrawn without a decision.

A friend from Applicant's church, who has known Applicant for about five years, described him as honest, extremely reliable, trustworthy, organized, thoughtful, considerate, generous, ethical, and honest. (Tr. 220-234) Applicant's pastor served in the Air Force for over 20 years, and she has frequent contact with Applicant. (GE 2 at I98-I99) Applicant's pastor described him as friendly, outgoing, helpful, honest, committed, reliable, and enthusiastic. (GE 2 at I98-I99) She recommended Applicant for a position having access to highly sensitive information and sensitive responsibilities. (GE 2 at I99)

Over the years working for defense contractors, Applicant received several awards, including four personal excellence cash awards. (Tr. 115) Applicant is very religious and receives a great deal of support from his church. (Tr. 141-147) He describes himself as financially secure, conscientious, responsible, trustworthy, proactive, and security minded. (Tr. 144-147) Applicant's spouse describes Applicant as highly ethical, honest, reliable, and conscientious about security. (Tr. 240)

**Sexual Behavior and Personal Conduct**

Applicant admitted that he engaged in inappropriate behavior with his daughter and that he fantasized about sexual activity involving children. He denied that any of this conduct occurred after 2001. Applicant's SOR does not allege that: (1) He obtained an erection while his 13-year-old daughter was sitting on his lap. He placed his hands on her hips, and he repositioned her so he could rub her against his erection; (2) He obtained an erection while a six-year-old girl was sitting on his lap in the 1980s; (3) He intentionally falsified his February 12, 2002 SF-86 when he denied that he left employment in the last seven years under unfavorable circumstances or by mutual agreement after allegations of misconduct or unsatisfactory performance because he was concerned that it would adversely affect his security clearance. He actually left employment with a bank in 2001 under such circumstances. (4) He lied at his hearing in the following instances: (a) He said he could not remember whether he masturbated at work while looking at pictures of women wearing short skirts and high heels on his computer; (b) He denied looking at child pornography; (c) He said that he could not remember having an erection while a six-year-old girl was sitting on his lap; (d) He denied that he told an AGA polygrapher about having an erection while the six-year-old girl was sitting on his lap; and (e) He claimed he did not remember rubbing his daughter against his erection when she was 13. (GE 2 at 110; GE 3) These four non-SOR

allegations will also be discussed; however, their consideration is limited.[2] The consistency and credibility of Applicant's statements are in issue and are described seriatim.

**2001 and 2006 Post-Polygraph Interviews**

In 2001, Applicant received three polygraph tests from another government agency (AGA). In his post-polygraph interviews, Applicant stated:

(1) He developed a sexual interest in his daughter when she was 13 years old. In 1999, when she was 15, he took her to a motel and offered her alcohol. (GE 3 at 3) Applicant believed if she became intoxicated, he could have sex with her. (GE 3 at 3) She declined the alcohol, and they did not have any sexual contact. (GE 3 at 3)

(2) Applicant estimated that he masturbated ten times while fantasizing about his daughter. (GE 3 at 3)

(3) Twice per month since 1996, Applicant visited websites that contained short stories about children engaging in sexual activity with each other and with adults. (GE 3 at 3) This admission suggests that he visited such websites more than 100 times from 1996 to 2001.

(4) Applicant masturbates to sexual fantasies involving children between twice per day and twice per month. (GE 3 at 3)

In 2006, AGA gave Applicant two lifestyle polygraphs. (Tr. 113) Applicant said, the polygraph test "did not go well." (Tr. 202) Applicant made several statements, which the polygrapher summarized in his report. (GE 3 at 5-6) The summary has at least one error. The summary states, "[Applicant] first viewed his adopted daughter in a sexual manner, when she was six years old." (emphasis added) (Tr. 202) Applicant's daughter is not adopted. (Tr. 202) The AGA's summaries of post-polygraph interviews are summarized as follows:

(1) Applicant first viewed his daughter in a sexual way when she was six years old and most recently six months previously (in 2006). (GE 3 at 4) He fantasizes about

[2] The evidence from the post-polygraph interviews establishes these four non-SOR allegations by substantial evidence. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

> (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

*Id*. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). *See also* ISCR Case No. 09-07219 at 4-5 (App. Bd. Sep. 27, 2012) (stating same). Consideration of these four non-SOR allegations is strictly limited to these five circumstances.

sexual intercourse and other sexual acts with her. (GE 3 at 4) He had recurring thoughts about sexual activity with her about every three years when she was 6 to 12 years old. (GE 3 at 4-5) Applicant most recently masturbated while thinking about his daughter in 2001. (GE 3 at 5)

(2) Applicant reported:

> [W]hen his daughter was 13 years old, he obtained an erection while she was sitting on his lap. [Applicant] denied inappropriately touching her during this encounter, stating that his hands were placed on her hips. [Applicant] later admitted that his hands were on her hips because this allowed him to reposition her. [Applicant] stated that during this incident he may have been gyrating her against his erection. [Applicant] reported a similar incident that took place during the 1980s, in which [Applicant] obtained an erection while a six year old girl was sitting on his lap. (GE 3 at 5)

(3) Applicant related that in 1999 when his daughter was 15 years old, he purchased alcohol with the intent of getting his daughter intoxicated so that he could have sexual intercourse with her. (GE 3 at 5)

(4) Applicant read erotic stories involving children involved in sexual activities with other children and adults from once per week to twice per day between 1997 and 2001. (GE 3 and 5) This admission suggests that he visited such websites more than 250 times from 1997 to 2001.

(5) He denied that he had sexual thoughts about his daughter, and he denied viewing child pornography after July 2001. (GE 3 at 5)

(6) He indicated he had a constant battle to stop viewing child pornography. He routinely looks at young girls in church and then looks away "before becoming sexually attracted to them." (GE 3 at 5)

(7) Applicant admitted that he deliberately failed to list unfavorable termination of employment in April 2001, on his SF-86, and he did not disclose this negative information because he was concerned that it would adversely affect his security clearance. (GE 3 at 5-6)

(8) Applicant stored pictures of women wearing short skirts and high heels on his office computer while employed at the office he left in April 2001. Co-workers found the pictures to be inappropriate. Applicant stated, "he could not recall if he used the photographs for the purpose of masturbation." (GE 3 at 6)

**Applicant's Hearing Statement**

Applicant admitted that between approximately 1996 and continuing until 2001, he deliberately viewed websites with short stories involving children engaged in sexual

activity. (Tr. 118-119; SOR response to SOR ¶ 1.a) Applicant defines pornography as pictures of women in various stages of undress, and he considers Playboy magazine to contain pornography. (Tr. 189-190) He also received pornography through the mail, including VHS tapes and magazines. (Tr. 149) He said he stopped visiting those websites after Dr. C and Dr. M advised him such behavior was problematic because of his security clearance. (Tr. 121)

Applicant said he preferred to visit websites with pictures of women wearing short skirts, high heels and hose. (Tr. 118) He enjoyed watching videos of women undressing. (Tr. 119) He masturbated while viewing the content of those websites. (Tr. 118) He denied that he had ever viewed an underage person getting undressed. (Tr. 119)

From at least 1997 until 2001, Applicant masturbated to sexual fantasies of children, including his daughter. (Tr. 120-121, 150; SOR response to SOR ¶ 1.b) He read about erotic situations involving children and "masturbated to each and every one of them." (Tr. 150) He explained:

> I don't think that I was thinking of doing anything with the children, during the reading of the stories, during the reading of the stories. They were just exciting stories, and I read the stories and masturbated while I was reading the stories. . . . I mean there w[as] certainly a time when the father daughter stories came along, and I had these ideas of hey, I wonder if [my daughter] would do that. (Tr. 194)

He said he was focused on the seduction process involving the children; however, he was not focused on their physical size or sexual development. (Tr. 196)

Applicant denied that he told the polygrapher in 2006 that he had sexual fantasies about his daughter when she was six years old. (Tr. 151-152) He claimed he started fantasizing about having sex with his daughter when she was 14 years old. (Tr. 151) He denied that he sought out stories of children engaged in sexual activity; he denied seeking stories of incest; and he denied that he could remember most of the content of the stories. (Tr. 153) He said he could not remember having an erection while a six-year-old girl was sitting on his lap, and he denied that he told the polygrapher about having an erection while the six-year-old girl was sitting on his lap. (Tr. 163) He denied knowing the specific time frame when he read about children having sex on the web and began fantasizing about sex with his daughter, but it could have been around 1995 or maybe around 1998 or 1999. (Tr. 154-156) He denied knowing the frequency of his sexual fantasies about his daughter. (Tr. 159) In response to a question about rubbing his daughter against his erection when she was 13, he said:

> Actually I don't recall if I actually did that or not. Now, I may have had my hands on her hips, I may have moved her around. Why I moved her, I don't know. So, no, I don't think it would be fair to ask me do I remember, or did I do that on purpose for that, because I really do not remember. (Tr. 156)

He felt guilt and shame about having sexual fantasies about his daughter. (Tr. 159) After Applicant attempted to have sex with his daughter, he said he completely stopped having sexual fantasies about her. (Tr. 160)

In 2006, Applicant told the AGA polygrapher that he put some pictures on his computer at work that had something to do with his termination of employment. (Tr. 199) He had difficulty remembering the pictures, but believed they were probably of adult women wearing short skirts. (Tr. 199-200)

Applicant denied having sexual fantasies about children other than his daughter. (Tr. 161, 187) The following colloquy with Department Counsel occurred:

> Q: . . . [D]id you start having sexual fantasies about other children?
>
> A: I don't recall having sexual fantasies about other children. In fact, I'm sure I didn't.
>
> Q: Did you at some point find yourself to be sexually aroused when you would look at children?
>
> A: No. (Tr. 161)

Applicant said he avoids looking a people under the age of 18 because he does not want to become titillated. (Tr. 162) He continues to struggle with his desire to view pornography. (Tr. 178) He denied that he viewed pornography at work. (Tr. 178)

In about 1999, Applicant planned to get his daughter intoxicated so that he could engage in sexual intercourse with her. (Tr. 122-124; SOR response to SOR ¶ 1.c) He went on a trip with his daughter to see colleges. (Tr. 123) He purchased alcohol to provide to her; however, he denied that he brought a condom or lubricant on the trip. (Tr. 123-124) She refused the alcohol. (Tr. 123) They did not sleep in the same bed, and he did not engage in sexual activity with her. (Tr. 123) His daughter is now married and living in a different state from Applicant. (Tr. 124, 243) He said he has a positive, normal relationship with his daughter. (Tr. 124-125) Applicant's daughter has no information about Applicant's security clearance issues, and if she learned about his attraction to her "she would be sad, and upset, and shocked and dismayed, and so on." (Tr. 126, 170-171) His son and former spouse are not aware of his sexual interest in his daughter or his security clearance issues. (Tr. 171) Later during his hearing, Applicant said, "I have never tried to have sex with my daughter. And no, there were no other fantasies about possibly having sex with my daughter prior to that, no. And none since. (Tr. 165)

Applicant denied that in 2006, he said that it is a constant battle for him to stop from viewing child pornography. (Tr. 129, 157, 186; SOR response to ¶ 1.e) He conceded it was a constant battle for him to stop looking at adult female pornography. (Tr. 129-130, 186) He was uncertain what he told the AGA polygrapher; however, he

was sure he did not tell the AGA polygrapher that it was a "constant battle for him to stop from viewing child pornography. (Tr. 186) He agreed that he found looking at young girls at church to be "titillating," and he made an effort not to look at them because of the thoughts he had. (Tr. 130-131, 188-189; SOR response to ¶ 1.e)

When he was confronted with his admission that he moved his six-year-old daughter onto his erect penis, he said:

> Actually I don't recall if I actually did that or not. Now, I may have had my hands on her hips, I may have moved her around. Why I moved her, I don't know. So, no, I don't think it would be fair to ask me do I remember, or did I do that on purpose for that because I really do not remember. (Tr. 156)

Applicant conceded that in 2006 he would have had a better recollection of the incident involving his six-year-old daughter. (Tr. 159) He denied remembering that he had an erection when a six-year-old child was sitting on his lap. (Tr. 163) He denied telling the polygrapher in 2006 that he had an erection while a six-year-old child was sitting on his lap. (Tr. 163)

Around 2000, Applicant was having difficulties at work with his supervisor, who was making unreasonable demands about his work. (Tr. 207-208) Applicant left that employment by mutual agreement. Applicant stored some pictures on his computer at work of a woman wearing a short skirt and high heels. (Tr. 205, 208; GE 3 at 6) He did not remember any employees stating the pictures were inappropriate. (Tr. 209) Applicant told the polygrapher that he did not remember masturbating at work, and he reiterated that he did not recall masturbating in his cubicle. (Tr. 209) After a lengthy narrative answer about his memory, he concluded that masturbating at work was unlikely because of his cubicle's location. (Tr. 209-2012; GE 3 at 6)

Applicant disclosed his sexual interest in his daughter to his current spouse, friends from church, his father, and some psychologists. (Tr. 171-173) He received some therapy and counseling, and he is actively involved in his men's group and his church. His spouse is very supportive, and she encourages him in his fight against viewing pornography.

**Psychological Conditions**

In 2001, Applicant's security clearance application was under review at AGA. An AGA psychologist, without interviewing Applicant, reviewed his file and concluded that Applicant suffered from "essential features of a sexual disorder in which an individual's sexual focus involves sexual activity with a child" raising concerns about his "stability, reliability, and judgment." (Tr. 37; SOR ¶¶ 1.d and 3.a; GE 2 at I80) There was no diagnosis under Axis I or II.

In 2003, a Ph.D. psychologist, Dr. C, evaluated Applicant. (GE 2 at I82-I83) Dr. C knew Applicant for one year, and conducted psychological testing on Applicant. (Tr.

190-191; GE 2 at I82-I83) Dr. C noted that Applicant spent "several hundred dollars visiting various websites." (GE 2 at I82) Dr. C related that Applicant said these were similar to the exposure in "R-rated movies." (GE 2 at I82) Dr. C indicated that Applicant may have exaggerated the pornographic nature of his viewing of web-based content, and Dr. C recommended reinstatement of Applicant's access to classified information. (GE 2 at I82-I83)

A psychologist (Dr. P), who completed his Ph.D. in 1991, and has more than 20 years practice as a clinical psychologist, met Applicant at a men's group in November 2011. (Tr. 35, 69) Dr. P evaluated Applicant from March 2013 to June 2013 for a total of three hours. (Tr. 31-33, 72; AE A) Dr. P reviewed the SOR and other materials from Applicant's file as part of the evaluation. (Tr. 36, 92, 105-108) Dr. P did not interview Applicant's daughter. (Tr. 89)

Dr. P described the AGA psychological assessment of Applicant as unreliable and unethical because of the absence of an interview of Applicant. (Tr. 45-47) Applicant began looking at pornography when he was 10 years old, and part of him may have remained sexually immature and not advanced much beyond the age of 10. (Tr. 74) Applicant's interest in pornography increased over the years. (Tr. 75) He felt drawn to pornography; he had trouble controlling his urge to view pornography; and he was psychologically, but not physically addicted to it. (Tr. 75) From Applicant's report to Dr. P, his addiction to pornography ended several years ago. (Tr. 76) Dr. P thought Applicant's sexual interest in his daughter surfaced when she was about 13 to 15 years old, and Dr. P conceded that if Applicant was sexually attracted to his daughter when she was six years old, it would change his opinion and assessment of Applicant. (Tr. 79)

Dr. P opined that Applicant "seemed quite normal to me, heavily influenced by [30] years of being exposed to pornography." (Tr. 38-39) If his patients, who frequently view internet pornography are honest, they will admit that they may have seen females or males on those websites who are under the age of 18. (Tr. 40, 97, 100) Dr. P explained:

> [Pornographic websites] flash all kinds of scenes in the presentation or portals, if you will . . . so anyone who is honest would say, have I seen child pornography? Well, I have seen advertisements, I have seen promos, I have seen things, trying to lure me into that particular tunnel, if you will. . . [T]he truth is everyone of us in the room has probably read pornographic material through [E]nglish literature, that involves sex with a minor, in some way, that was arousing or titillating. We have all been exposed to it without asking for it. And just because you are exposed to it, and aroused by it, doesn't mean, my gosh that means I have these tendencies in me. No, it just means that we are all capable of being aroused by far more things than we would actually do, or desire to do. (Tr. 56)

Dr. P did not believe it was "unusual" for a father to have his six-year-old daughter on his lap, for him to become sexually aroused by her presence, and then for

him to rub her body against his erect penis. (Tr. 80) Dr. P did not believe this constituted "pedophilic behavior." (Tr. 80) Dr. P did not believe Applicant was a pedophile because Applicant denied sexual activity with children, he denied visiting child pornography websites, and he denied having a fascination or compulsion to engage in sex with children. (Tr. 41-42) Dr. P conceded that Applicant might be lying to him about his lack of sexual interest in children. (Tr. 101-102) Applicant did not exhibit a pattern of seeking sex with children. (Tr. 42) When Applicant sought sexual activity with his 15-year-old daughter, his sexual fantasy was beginning to merge into reality. (Tr. 42-43) No one knows what Applicant would have done if his daughter had taken the proffered alcohol. (Tr. 43) Applicant's reading about children engaging in sexual activity is the only evidence of a pattern. (Tr. 44)

Dr. P opined that Applicant does not suffer from an addictive pattern of being sexually attracted to children, sexual disorder, emotional, or psychiatric disorder, "unless he has been lying to all of us." (Tr. 44-47; AE A) He agreed with the opinion of Dr. C and Dr. M, two psychologists who evaluated Applicant in from 2002 to 2003. (Tr. 47-57; GE 2 at I82-I91) He noted patients often are unable to discern how their presentation of information, such as Applicant's viewing of pornography, might be misperceived to be more aggravated than it really is. (Tr. 47-50) Applicant communicated an intent to commit a crime to the AGA (attempting to engage in sex with his daughter), when it was really just "a half-baked idea that comes about simply because you have trained your mind to be easily stimulated." (Tr. 51) The attempt to have sex with his daughter was impulsive and not premeditated, and he had no difficulty ending his viewing of internet pornography. (Tr. 54-55; GE 2 at I90) Dr. P agreed with Dr. M that Applicant needed therapeutic help for situational anxiety and depression relating to the end of his marriage. (Tr. 53-54) Applicant had a history of depression, including suicide attempts, and an adjustment disorder because he was in a temporary difficult situation. (Tr. 87-88) Applicant did not have any other psychiatric diagnosis that called into question his trustworthiness or reliability. (Tr. 87)

Dr. P believed that AG ¶¶ 14(a) and 14(c) did not apply to mitigate sexual behavior security concerns; however, AG ¶¶ 14(b) and 14(d) did mitigate sexual behavior security concerns. (Tr. 62-63)[3] He concluded that AG ¶¶ 20(a) to 20(e) all applied to mitigate psychological conditions security concerns. (Tr. 65-67)[4]

[3]AG ¶ 14 provides four conditions that could mitigate sexual behavior security concerns including:

(a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;

(b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress; and

(d) the sexual behavior is strictly private, consensual, and discreet.

[4]Five Psychological Conditions mitigating conditions under AG ¶ 29 are potentially applicable:

## 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 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 eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

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

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Adverse clearance decisions are made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned." *See*

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(a) the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;

(b) the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional;

(c) recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation;

(d) the past emotional instability was a temporary condition (e.g., one caused by death, illness, or marital breakup), the situation has been resolved, and the individual no longer shows indications of emotional instability; and

(e) there is no indication of a current problem.

Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision on any express or implied determination as to applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

## Analysis

The relevant security concerns are under Guidelines D (sexual behavior), E (personal conduct), and I (psychological conditions).

### Sexual Behavior

AG ¶ 12 describes the security concern pertaining to sexual behavior:

> Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 13 lists four conditions that could raise a security concern and may be disqualifying including:

> (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(b) a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;

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

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

AG ¶ 13(b) is not established. There is insufficient evidence to support the allegation that Applicant suffers from an emotional, mental, or personality disorder affecting his judgment, reliability, or stability. The opinions and conclusions of Applicant's three psychologists are more credible and reliable than the AGA psychologist's opinion. The AGA psychologist never met with Applicant, whereas Applicant's psychologists interviewed him on multiple occasions. The AGA psychologist's opinion is not sufficiently reliable to meet the substantial evidence test. SOR ¶ 1.d is refuted.[5]

Applicant has a strong urge to view pornography. On more than 250 occasions, he read stories of children being sexually assaulted, and he has admitted masturbating on numerous occasions while reading these stories. (SOR ¶¶ 1.a and 1.b) In 1999, he went on a trip with his 15-year-old daughter. He offered her alcohol because he thought it would reduce her inhibitions against engaging in sexual activity with him. (SOR ¶ 1.c) He admitted to the AGA polygrapher that he was attempting to stop viewing child pornography, and he looks away from children in church to avoid becoming sexually attracted to them. (SOR ¶ 1.e) He is ashamed of this conduct and does not want his former wife and children to know about it. His denial of viewing child pornography is not credible. AG ¶¶ 13(a), 13(c), and 13(d) apply.

AG ¶ 14 provides four conditions that could mitigate security concerns. *See* note 3, *supra* (quoting the four mitigating conditions). Although Applicant presented some mitigating information, none of the mitigating conditions fully apply to mitigate all of the sexual behavior concerns. He did not sexually assault or view child pornography as an adolescent. He denied that he sexually assaulted any children or underage women after 1997, when his 13-year-old daughter was sitting on his lap, and he was rubbing her against his erection. As such, his criminal sexual activity is not recent. His private viewing of adult pornography, his reading of stories of incest and sexual abuse of children on a personal laptop computer or other privately owned media, and

[5]Mitigation of SOR ¶ 1.d should not be interpreted to mean the opinions of Applicant's three psychologists are accepted as accurate. His three psychologists provide sufficient impeachment of the AGA psychologist's opinion so that the reliability of SOR ¶ 1.d is not substantiated. I disagree with the underlying factual basis of his three psychologists' opinions. They accepted Applicant's current version of his past sexual activity involving children, and his promise that he will not engage in future criminal sexual conduct as accurate, sincere, and truthful. His psychologists accepted his statements that he terminated his high-risk sexual misbehavior at face value. However, I have concluded that the AGA summaries of his sexual behavior in the post-polygraph interviews are accurate.

masturbation in private are protected conduct under the First Amendment and the liberty interest of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *See Lawrence v. Texas*, 539 U.S. 558 (2003)(discussing right to engage in private, consensual sexual behavior); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (discussing adult pornography and First Amendment).

Applicant received some therapy and counseling, and he is actively involved in his men's group and his church. His spouse is very supportive of his efforts to refrain from viewing pornography. His viewing of pornography is private and discrete (except for the occasion or occasions when he viewed pictures at his office and masturbated). Applicant disclosed his sexual misbehavior to AGA, three psychologists, members of his church, his spouse, and DoD security officials. His sexual misbehavior no longer serves as a basis for coercion or duress. His sexual behavior involving viewing adult pornography in the privacy of his home does not cast doubt on his current reliability, trustworthiness, and good judgment.

Applicant admitted a continuing interest in children as he tried to avoid looking at them in church. His masturbation on numerous occasions when considering children engaged in sexual activity causes continuing concern he will revert to acting out such behavior in the future with children, or he will return to viewing child pornography. He had an erection while a six-year-old child was sitting on his lap, and when his 13-year-old daughter was sitting on his lap in 1997. He rubbed his penis against his 13-year-old daughter's body. *See* n. 2, *supra*.

Applicant's sexual assault upon his 13-year-old daughter and his viewing of child pornography are criminal conduct, and his attempted seduction of his daughter when she was 15 years old is arguably criminal conduct as an attempted statutory rape. All of his criminal sexual conduct continues to serve as a basis for coercion as he has not fully come to terms with his own misconduct. At his hearing, he minimized his sexual interest in children. He repeatedly denied remembering facts and details. His memory lapses and outright denials of the misconduct he previously admitted in the AGA's post-polygraph interviews were not credible. His denial that he viewed child pornography, even though he admitted doing so after his 2006 polygraph and his denial that he fantasized that he about sexual activity with children are not credible. Even his own psychologist, Dr. P, conceded that it is unlikely that he would not at least inadvertently view child pornography (pop-ups) when he was viewing adult pornography and masturbating while reading child-incest stories. He continues to admit that he receives visual sexual stimulation from viewing pictures and looking at children in church. Sexual behavior security concerns are not mitigated.

**Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

> 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.

Three personal conduct disqualifying conditions under AG ¶ 16 are potentially applicable. Those three disqualifying conditions provide:

> (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;
>
> (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. This includes but is not limited to consideration of: . . . (3) a pattern of . . . or rule violations; and
>
> (e) 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. . . .

AG ¶¶ 16(c) and 16(d) do not apply. SOR ¶ 2.a simply alleged, "That information set forth in paragraph 1" which is conduct alleged under the sexual behavior guideline. All of his sexual misconduct is covered under Guideline D. There is sufficient credible information under Guideline D for an adverse determination. However, if the evidence were not sufficient to resolve this case under Guideline D, then AG ¶ 16(c) would apply.

AG ¶ 16(e) applies. When Applicant engaged in the conduct alleged under the sexual behavior disqualifying conditions, he engaged in conduct which adversely affects his personal, professional, and community standing. He was anxious that his former spouse and children not learn about his conduct. Further analysis concerning applicability of mitigating conditions is required.

Four mitigating conditions under AG ¶ 17 are potentially applicable:

> (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;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

The personal conduct allegations in SOR ¶ 2.a duplicated the sexual behavior allegations in SOR ¶ 1. The scope of his security-related conduct is thoroughly addressed under Guideline D and the Whole-Person Concept, *infra*. As such, SOR ¶ 2.a is found for Applicant as a duplication of SOR ¶ 1. Applicant disclosed his sexual misconduct to two polygraphers and to a lesser extent to his spouse, members of his church, and three psychologists. I do not believe Applicant could be coerced or pressured into release of classified information by threats of public disclosure of the negative information detailed under Guideline D, *supra*. Personal conduct concerns are mitigated primarily as a duplication of Guideline D.

**Psychological Conditions**

AG ¶ 27 articulates the security concern relating to psychological conditions:

Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (e.g., clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline. No negative inference concerning the standards in this Guideline may be raised solely on the basis of seeking mental health counseling.

AG ¶ 28 provides three conditions that could raise a security concern and may be disqualifying in this case:

(a) behavior that casts doubt on an individual's judgment, reliability, or trustworthiness that is not covered under any other guideline, including but not limited to emotionally unstable, irresponsible, dysfunctional, violent, paranoid, or bizarre behavior;

(b) an opinion by a duly qualified mental health professional that the individual has a condition not covered under any other guideline that may impair judgment, reliability, or trustworthiness; and

(c) the individual has failed to follow treatment advice related to a diagnosed emotional, mental, or personality condition, e.g., failure to take prescribed medication.

An AGA psychologist, without interviewing Applicant, reviewed his file and concluded that Applicant suffered from "essential features of a sexual disorder in which an individual's sexual focus involves sexual activity with a child" raising concerns about his "stability, reliability, and judgment." This allegation was detailed under SOR ¶ 1.d and duplicated in SOR ¶ 3.a.

SOR ¶ 3.a simply alleged, "That information set forth in paragraph 1.d," which is conduct and a sexual disorder alleged under the sexual behavior guideline. All of his sexual misconduct and sexual disorder are covered under Guideline D. There is sufficient credible information under Guideline D for an adverse determination. However, if the evidence were not sufficient to resolve this case under Guideline D, then AG ¶¶ 28(b) and 28(c) would apply.

Five mitigating conditions under AG ¶ 29 are potentially applicable. *See* note 3, *supra* (quoting the five mitigating conditions). The psychological conditions allegation in SOR ¶ 3.a duplicated the sexual behavior allegation in SOR ¶ 1.d, which was mitigated because the AGA psychologist did not have an adequate basis for his opinion, and Applicant's three psychologists had ample contact with Applicant to support their opinions. The scope of his security-related conduct is thoroughly addressed under Guideline D and the Whole-Person Concept, *infra*. As such, SOR ¶ 3.a is found for Applicant because it is duplication of SOR ¶ 1.d. Psychological conditions concerns are mitigated primarily as a duplication of Guideline D.

**Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines D, E, and I in my whole-person analysis. Some of the factors in AG ¶ 2(a) warrant additional comment.

There are some facts supporting mitigation of security concerns under the whole-person concept; however, they are insufficient to fully mitigate security concerns. Applicant is a 58-year-old network engineer or systems engineering manager employed by a defense contractor. He earned bachelor's and master's degrees from nationally known universities. After graduating from college he served on active duty as a pilot for eight and a half years, including service in some dangerous environments, and he is eligible to join the Veterans of Foreign Wars. He honorably retired as a commander (O-5). Statements describe him as responsible, reliable, conscientious, trustworthy, and diligent. He received therapy to address his urges to fantasize about sexuality activity with children. He is an intelligent person, who understands the importance of compliance with security rules. His evident remorse is an important step towards rehabilitation and mitigation of security concerns.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant has a long history of viewing pornography and the urge to view pornography has not abated. His viewing of pornography and reading stories of children being sexually victimized is constitutionally-protected conduct. On about 250 occasions, he read stories of children being sexually assaulted, and he masturbated on numerous occasions while reading these stories. In the 1980s, he had an erection while a six-year-old girl was sitting on his lap. In 1997, he sexually assaulted his daughter by pressing her against his erect penis while she was sitting on his lap. In 1999, he went on a trip with his 15-year-old daughter. He offered her alcohol because he thought it would reduce her inhibitions against engaging in sexual activity with him. He admitted to the AGA polygrapher that he was attempting to stop viewing child pornography, and he looks away from children in church to avoid becoming sexually stimulated. He lied at his hearing about various aspects of his sexual behavior in an attempt to minimize his sexual misconduct, showing that he is not rehabilitated. *See* n. 2, *supra*. His denial that he viewed child pornography is not credible. Accurate information in a security context is crucial to national security. His false statements at his hearing show lack of judgment and raise unresolved questions about Applicant's reliability, trustworthiness, and ability to protect classified information.

I have carefully applied the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Psychological conditions concerns are mitigated and personal conduct concerns are mitigated as duplications of sexual behavior concerns. Sexual behavior concerns are not mitigated. Eligibility for access to classified information is denied.

## Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

| | |
|---|---|
| Paragraph 1, Guideline D: | AGAINST APPLICANT |
| Subparagraphs 1.a to 1.c: | Against Applicant |
| Subparagraph 1.d: | For Applicant |
| Subparagraph 1.e: | Against Applicant |
| Paragraph 2, Guideline E: | FOR APPLICANT |
| Subparagraph 2.a: | For Applicant |
| Paragraph 3, Guideline I: | FOR APPLICANT |
| Subparagraph 3.a: | For Applicant |

## Conclusion

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

Mark Harvey
Administrative Judge