



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



In the matter of: )  
 )  
 [Name Redacted] ) ISCR Case No. 16-03603  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Rhett E. Petcher, Esq., Department Counsel  
For Applicant: Alan V. Edmunds, Esq.

03/12/2019

**Decision**

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant was indicted by a grand jury in May 2013 on 12 counts of sexual criminal conduct allegedly committed against his underage stepdaughter between July 2009 and February 2013, including four counts of aggravated rape of a child. Applicant denied any culpability, and in March 2015, the state declined further prosecution. There is reliable evidence that Applicant committed sex crimes. His failure to timely report his arrest to his employer also raises significant concerns about his judgment, reliability, and trustworthiness. Clearance is denied.

**Statement of the Case**

On June 8, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline J (criminal conduct), Guideline E (personal conduct), and Guideline D (sexual behavior). The SOR explained why the DOD CAF was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive

5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DOD on June 8, 2017.

Applicant responded to the SOR through his counsel on July 27, 2018, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On January 9, 2019, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On January 15, 2019, I scheduled a hearing for February 12, 2019.

At the hearing, six Government exhibits (GEs 1-6) were admitted in evidence. An August 13, 2018 letter forwarding discovery of the GEs to Applicant's counsel and a list of the GEs were marked as hearing exhibits (HEs I-II) but not admitted as evidentiary exhibits. Five Applicant exhibits (AEs A-E) were admitted in evidence, and Applicant testified, as reflected in a transcript (Tr.) received on February 27, 2019.

I held the record open for two weeks after the hearing for Applicant to present a declaration from the attorney who represented him in defense of the felony charges. On February 14, 2019, Applicant submitted a declaration (AE F), which was accepted into evidence without any objection.

### **Findings of Fact**

The SOR alleges under Guideline J (SOR ¶ 1.a-1.b) and cross alleges under Guideline E (SOR ¶ 2.d) and Guideline D (SOR ¶ 3.a) that Applicant was arrested on February 23, 2013, on three counts of rape of a child and one count of witness intimidation and that he was indicted on May 29, 2013, on four counts of aggravated rape of a child, six counts of indecent assault and battery on a child under age 14, one count of assault and battery with intent to rape, and one count of assault and battery by means of a dangerous weapon. Under Guideline E, Applicant is also alleged to have failed to timely report his arrest to his facility security officer (FSO) (SOR ¶ 2.a) and to have lied on his May 7, 2015 Questionnaire for National Security Positions (SF 86) (SOR ¶ 2.b) and during his July 12, 2015 subject interview with a government investigator (SOR ¶ 2.c) by stating that he was falsely accused of the criminal conduct allegations.

After considering the pleadings, exhibits, and transcript, I find that Applicant's arrest in SOR ¶ 1.a is related to the charges in SOR ¶ 1.b and does not represent an allegation of additional criminal conduct. Additional findings of fact follow.

Applicant is a 40-year-old senior test engineer with a bachelor's degree in electrical engineering awarded in May 2005. He has worked for his current employer, a defense contractor, since May 2004, and was granted a DOD secret clearance in June 2005. His security clearance eligibility was suspended in February 2013 after he was arrested on rape charges. (GE 1; AEs D-E; Tr. 23-24.)

Applicant and his now ex-wife married in July 2006, when their daughter was age 2 and her daughter from a previous relationship was about to turn age 6. They had a son in March 2008. Applicant and his ex-wife separated permanently in late February 2013 after his arrest on charges of raping his stepdaughter. (GE 1.) His ex-wife filed for divorce in 2013, and their divorce was final in January 2017.<sup>1</sup> (GE 2.)

On February 28, 2013, Applicant's stepdaughter, then 12-years-old, told her mother that Applicant had sexually assaulted her on eight to ten occasions in their home, to as recently as only five days prior. She described incidents of sexual penetration (rape) and threats from Applicant to beat her with a belt if she told anyone about the assaults. Applicant's now ex-wife called the police, who, on responding, noticed that Applicant's stepdaughter appeared visibly upset. Applicant's stepdaughter reportedly had red and swollen eyes from crying, a flushed face, and hunched posture so that she appeared to be hunched in on herself. The police did not interview the girl at that time, but they obtained an account from Applicant's ex-wife of what her daughter had told her about the assaults. Applicant's ex-wife told the police that her daughter has a close relationship with Applicant, whom she regarded as her father. The police arrested Applicant for rape of a child with force and with intimidation of a witness for an offense that allegedly occurred on February 23, 2013, and for two counts of rape of a child with force for offenses that reportedly occurred between July 1, 2012, and February 23, 2013. Applicant's ex-wife obtained an emergency restraining order against him, and a report was filed with the Department of Children and Families (DCF). (GE 5.) Applicant was in custody for a week after his arrest. (Tr. 26.)

Available police records show that the police interviewed a friend of Applicant's stepdaughter, who had been identified as one of the first people she had told about the sexual assaults. According to this friend, who was then 13 years old and a close classmate, Applicant's stepdaughter related to her that she had been abused by Applicant for a while, and she feared for her half-sister's safety. Applicant's stepdaughter was crying, shaking, and speaking with a voice that was cracking when she told the friend about the assaults. (GE 5.)

On May 29, 2013, a grand jury indicted Applicant on twelve felony counts for crimes allegedly committed by him on his stepdaughter on diverse dates between July 20, 2009, and February 2013, to wit: aggravated rape of a child (four counts); assault with a dangerous weapon (a belt) (one count); indecent assault and battery on a child under age 14 (six counts); and assault to rape a child (one count). (GE 4.) On June 19, 2013, Applicant advised his security office at work that he had been arrested and charged with three counts of forcible rape on a child and "witness/juror/police/court office intimidation on February 28, 2013."<sup>2</sup> The security office issued an adverse incident report to DOHA on June

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<sup>1</sup> Applicant testified at his hearing that his ex-wife filed for divorce in 2014, about a year after he was accused of raping his stepdaughter. (Tr. 35.) However, he indicated during his subject interview in July 2016 that his ex-wife filed shortly after his arrest. (GE 2.)

<sup>2</sup> Applicant testified discrepantly at this hearing that there was a delay of "a couple of months" in him reporting his arrest. (Tr. 27-28, 46.)

19, 2013, of Applicant's arrest, stating in part: "[Applicant] failed to report the exact charges to security and also admitted to 'being scared' as a reason for not reporting it sooner." (GE 3.) Applicant testified at his February 2019 security clearance hearing that he reported his arrests to his supervisor, who walked him to their security office. (Tr. 47.) When asked why he delayed reporting his arrest to his security officials, Applicant denied that he was scared. He maintained that he was stressed, but primarily focused on taking care of his family. (Tr. 27-28, 51.) He understood at the time that he was required to report his arrest when it happened. (Tr. 46.)

Applicant entered pleas of not guilty to the 12 felony counts at his arraignment on June 24, 2013. (GE 6.) On August 12, 2013, the state filed with the trial court a statement of the case in which it summarized that Applicant abused the victim from when she was nine years old; that the abuse progressed from fondling to rape; that Applicant threatened to beat the victim with a belt if she told anyone; that he had beaten her with a belt in the past; that the victim first disclosed the abuse to her friends from school; that when the victim told her mother about the abuse, her mother called the police immediately; that Applicant was arrested in the family home that evening; that Applicant declined to make a statement to the police; and that a grand jury indictment was returned against Applicant on 12 counts on May 29, 2013. (GE 5.)

The attorney who represented Applicant during protracted proceedings in Superior Court attests that the prosecutor offered plea bargains, which included a reduction in confinement for Applicant and disposition of some allegations in return for a guilty plea. Applicant gave him clear instructions to reject any offers and prepare for trial. According to the attorney, there was no scientific evidence linking Applicant to the crimes. (AE F.) A jury trial was scheduled and then rescheduled several times to March 2, 2015. On February 26, 2015, the state moved for a nolle prosequi on all of the charges at that time. After meeting with the victim several times for the purposes of trial preparation, the state did not believe it could meet its burden of proof beyond a reasonable doubt at trial. In addition, the state did not believe it was in the victim's best interest to proceed at that time. (GE 5.) On March 3, 2015, the state filed statements of nolle prosequi as to each of the 12 counts. (GE 6; AE A.)

On May 7, 2015, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86). In response to police record inquiries, Applicant listed only two charges, of sexual abuse and domestic violence, and stated:

On February 28, 2013, I was FALSELY accused of sexual abuse against my stepchild. Due to this, a restraining order was obtained by my wife. After an intensive investigation, on March 3, 2015, the [state name] declared a Nolle Prosequi due to NO evidence and inconsistent stories by the accuser.

Applicant responded affirmatively to whether there was currently a domestic violence protective order or restraining order against him. He explained that a restraining order was issued against him on February 28, 2013, after he had been "FALSELY accused

of sexual abuse against [his] stepchild.” He added that his wife obtained a temporary restraining order against him to prevent him from seeing his children, but on May 19, 2015, the family court will grant him visitation times and joint custody of his children. Applicant answered “Yes” to whether his security clearance eligibility had ever been denied, suspended, or revoked and disclosed that the DOD suspended his Secret clearance in approximately August 2014 pending resolution of the criminal sexual assault charges. (GE 1.)

On July 12, 2016, Applicant was interviewed at work by an authorized investigator for the Office of Personnel Management (OPM). He explained that he and his spouse separated because of the February 2013 allegations made against him, and that she filed for divorce shortly after the allegations were made. He expected their divorce to be final on July 20, 2016; that he would be required to pay \$370 per week in child support for his two children;<sup>3</sup> and that he will have unsupervised visitation with his children on Tuesdays and Sundays. About the February 2013 criminal allegations, Applicant explained that the police came to his house about 30 minutes after he had returned home from work; that he was placed under arrest on alleged sexual abuse charges; that he had declined to provide a statement to the police without an attorney present; that he was jailed for a few days until his sister posted \$50,000 bail for him; and that he was required to wear a GPS monitor and stay away from his marital residence as a condition of his bail. He indicated that in May 2013, he found out that he was being indicted on five counts of sexual assault and one count of intimidation of a witness. He was required to report to a probation officer once a week from May 2013 to March 2015. Applicant explained that the charges were nolle prosequi without ever going to trial because there was not enough evidence to prosecute him. He stated that despite the “dismissal” of the charges in March 2015, the restraining order against him was not removed until December 2015. (GE 2; AE C.)

After being reminded by the OPM investigator that he was under oath and under the penalties for intentional misrepresentation or false statements set forth in Section 1001 of Title 18 of the United States Code, Applicant denied ever touching his children inappropriately and indicated that the allegations against him were false. He stated that he was unsure why his stepdaughter would fabricate these allegations against him, and asserted that there was no truth to them. He added that people who know him are surprised by the allegations, and that the only person who disbelieves Applicant is his spouse. He could provide no reason why his wife sided with his stepdaughter other than that the girl is her daughter. When asked about his delay in reporting his arrest, he indicated that he was trying to get his personal life in order, which was more important to him at that time. He denied the delay was because he feared he might lose his job. He denied that his arrest or the February 2013 allegations could be used against him because nothing happened. (GE 2; AE C.)

In response to DOHA interrogatories, Applicant indicated on January 29, 2018, that although he and his ex-wife were officially divorced in January 2017, they “have a healthy co-parenting and thoughtful parenting plan to ensure that [their] children have a happy,

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<sup>3</sup> On September 18, 2015, an adverse incident report was filed by Applicant’s employer noting that Applicant’s wages were garnished in August 2015 for child support of almost \$2,015. (GE 3.)

healthy, stable, and balance[d] life.” (GE 2.) At his hearing held in February 2019, Applicant indicated that he has unsupervised contact with his two children three days a week. (Tr. 25.) He provided a “biography” (AE E) in which he stated in part:

Unfortunately, due to false allegations, our family had to struggle through tough times. Now, even though we are divorced, we are closer than ever and we are successfully co-parenting our children. We are working together for a brighter future for all of us.

Applicant denies any truth to any of the sexual assault crimes alleged against him by his stepdaughter or any tampering with a witness. (Tr. 29-33.) He had no explanation for why his ex-wife filed for divorce, although he assumed it was “based on the false allegations.” Applicant claims he had an “excellent” relationship with his ex-wife at the time, and he does not know why his ex-wife believes that he raped her daughter. (Tr. 36, 50.) Applicant acknowledged that he has no visitation rights to see his stepdaughter, with whom he claimed he had a wonderful relationship before she accused him of the crimes. He could provide no reason why his stepdaughter would falsely accuse him. (Tr. 50-52.)

Applicant presented no statements from his ex-wife, other family members, co-workers, or friends. He provided his annual performance evaluations for 2009 through 2017, which detail his contributions to his defense-contractor employer. Applicant has consistently met, and since 2012 exceeded, his work requirements while needing minimal supervision. Detailed-oriented and a team player, Applicant has displayed a positive attitude and extreme flexibility in fulfilling work assignments. He has worked extra hours, including on weekends, to support program schedules. Applicant delivered “superior results in 2015.” In 2016, he supported a very active test area. He was considered to be a valuable asset to the test engineering organization. By 2017, he had become the “go to guy” and a subject matter expert as it related to high power testing. He was given an overall rating of “Highly Effective Contribution” for 2017. (AE B.)

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant’s eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative

judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk 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. Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline J: Criminal Conduct**

The security concern about criminal conduct is articulated in AG ¶ 30:

Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or unwillingness to comply with laws, rules, and regulations.

AG ¶ 31 lists one condition that could raise a security concern and may be disqualifying in this case:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

In May 2013, Applicant was indicted by a grand jury on twelve felony counts for crimes allegedly committed by him on his stepdaughter on diverse dates between July 20, 2009, and February 2013, to wit: aggravated rape of a child (four counts); assault with a dangerous weapon (a belt) (one count); indecent assault and battery on a child under age

14 (six counts); and assault to rape a child (one count). The indictment indicates the grand jury believed Applicant committed felonious sexual assaults on his stepdaughter between 2009 and February 2018 and that he threatened to assault her if she told anyone about the assaults.<sup>4</sup>

A grand jury is afforded a wide latitude to inquire into violations of criminal law. It may compel the production of evidence or the testimony of witnesses as it considers appropriate without restraint by the technical procedural and evidentiary rules governing criminal trials. The evidentiary standard for a grand jury indictment is probable cause to believe the defendant committed the offense. *United States v. Sells Engineering, Inc.*, 463 U.S. 418 at 423 (1983). Probable cause exists where the facts and circumstances are reasonably trustworthy and “sufficient in themselves to warrant a man of reasonable caution in his belief that an offense has been or is being committed.” *Brinegar v. United States*, 338 U.S. 160, 176 (1949).<sup>5</sup> Probable cause does not require a finding that a fact be more likely true than false. See *Texas v. Brown*, 460 U.S. 730, 742 (1983). In the state at issue, probable cause requires more than mere suspicion but something less than evidence sufficient to warrant a conviction. See *Commonwealth v. Hason*, 439 N.E. 2d 251, 255 (1982). Moreover, the state’s criminal procedure rules (Rule 4(c)) re-affirm a long-recognized rule in the state that evidence which is not legally competent at trial may be sufficient for an indictment and an indictment based exclusively on hearsay will not be invalidated at trial for that reason.

Given Applicant denies any validity to the alleged crimes, the burden is on the Government of establishing the criminal behavior alleged in the SOR. See Directive ¶ E3.1.14. The Government is not required to establish Applicant’s culpability beyond a reasonable doubt. Security clearance proceedings employ the “substantial evidence” evidentiary standard, which is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971). See ISCR Case No. 15-05049 at 4 (App. Bd. July 12, 2017) (“A Judge’s material findings must be based on substantial evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence.”) (citing ISCR Case No. 12-03420 at 3 (App. Bd. July 25, 2014)).

The Government’s evidence includes police reports containing contemporaneous summaries of interviews of Applicant’s ex-wife and a close friend of Applicant’s stepdaughter about the sexual assaults as detailed to them by Applicant’s stepdaughter. Although hearsay in nature, their accounts cannot be dismissed outright as unreliable. There is no apparent motive for either of them to have made false statements to the police about what they were told. Applicant’s ex-wife is unlikely to have pressured her daughter to

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<sup>4</sup> The state’s rules of criminal procedure may be accessed at [www.mass.gov](http://www.mass.gov). Under Rule 5 concerning grand juries, an indictment may be found only upon the concurrence of 12 or more jurors.

<sup>5</sup> There is probable cause to indict a suspect “if there is sufficient evidence to establish the identity of the accused, and probable cause to arrest him or her.” *Commonwealth v. Caracciola*, 409 Mass. 648, 650, 569 N.E.2d 774 (1991).



lie if she had as close a relationship with Applicant as he claims. Applicant presented no evidence that a classmate of Applicant's stepdaughter had anything to gain by lying to the police. There is no statement in evidence from Applicant's stepdaughter, but the grand jury indictment and the statements to the police from her mother and friend constitute probative, reliable evidence that may be considered in these proceedings, and together raise security concerns under AG ¶ 31(b).

Applicant's case for mitigation under AG ¶ 32(c) is that there is "no reliable evidence to support that the individual committed the offense." It relies on his denials of culpability and on the nolle prosequi of the charges. The state's declination to continue prosecution only days before Applicant's scheduled trial was based on the best interests of the stepdaughter, but also because the state did not think that it could prove the charges beyond a reasonable doubt. The state provides for dismissal of charges by the prosecution.<sup>6</sup> Under rule 16(b) of its criminal procedure rules, the entry of nolle prosequi to each of the 12 counts is not the equivalent of an acquittal, unless jeopardy has attached. Jeopardy does not attach before trial has commenced.<sup>7</sup> There is no evidence that the integrity of the grand jury was impaired, and it required more than mere suspicion to indict Applicant. The exercise of the prosecution's discretionary authority to decline further prosecution in this case is not a finding of no culpability. The district attorney could bring new charges at some future date, although given it has been more than four years with no evidence of any action, there appears to be little likelihood new charges would be brought without some new incriminating evidence.

Applicant's decision not to accept a plea bargain also does not prove his innocence. He faced possible incarceration for a minimum of ten years had he been convicted of aggravated rape of his stepdaughter,<sup>8</sup> and he may have chosen to proceed to trial

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<sup>6</sup> Criminal Procedure Rule 16(a) provides:

(a) A prosecuting attorney may enter a nolle prosequi of pending charges at any time prior to the pronouncement of sentence. A nolle prosequi shall be accompanied by a written statement, signed by the prosecuting attorney, setting forth the reasons for that disposition.

<sup>7</sup> See *Commonwealth v. Massod*, 350 Mass. 745 (1966).

<sup>8</sup> Section 23A of Chapter 265 of the state's general laws makes aggravated rape punishable as follows:

Section 23A. Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and hild under 16 years of age and:

(a) there exists more than a 5 year age difference between the defendant and the victim and the victim is under 12 years of age;

(b) there exists more than a 10 year age difference between the defendant and the victim where the victim is between the age of 12 and 16 years of age; or

(c) at the time of such intercourse, was a mandated reporter as defined in section 21 of chapter 119, shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 10 years. The sentence imposed on such person shall not be reduced to less than 10 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release, or furlough or receive any deduction

calculating that the evidence was not strong enough to convict him. He was zealously represented in the criminal proceedings, and he had discovery of the prosecution's case. His attorney indicates that there was no scientific evidence linking Applicant to the crime. However, this statement does not establish that there was no physical evidence of injury to the victim.

Applicant demonstrated a lack of candor about the criminal charges and his family relationships during the investigation and adjudication of his security clearance eligibility. Because of his lack of candor during the security clearance process, the credibility of his denials of committing sex crimes is diminished. The incident report filed by his employer's security office in June 2013 indicates that Applicant minimized the extent of his charges to security. On his SF 86 in May 2015, he listed only two charges, of sexual abuse and domestic violence, when he had been charged with 12 felony counts, including aggravated rape. He told an OPM investigator in July 2016 that he found out in May 2013 that he was being indicted on five counts of sexual assault and one count of intimidation of a witness. Applicant is reported to have been "surprised and shocked" when he learned of the allegations against him. Although he is not a lawyer, Applicant is a college graduate who can reasonably be expected to have known and understood the specific criminal charges against him. Moreover, he had no credible explanation during his subject interview or at his security clearance hearing for the accusations of abuse or his divorce. He maintained that he had good relationships with his ex-wife and his children, which cannot easily be reconciled with the fact of his divorce or with the fact that his ex-wife believes her daughter. It is difficult to accept as credible that he does not know the grounds for his divorce and that he never discussed his stepdaughter's accusations with his ex-wife. Applicant told the OPM investigator that his ex-wife filed for divorce shortly after his arrest in February 2013. He now claims that she did not file for about a year. It is noted that when the police came to Applicant's residence, they observed Applicant's stepdaughter to be upset. She had been crying, her posture was hunched, and she was drawn in on herself. Her demeanor was consistent with that of a victim. His denials of any inappropriate behavior with his stepdaughter lack credibility. He did not present any statements from the victim that she recanted the allegations of sexual assault. I have considerable suspicions that he sexually abused his stepdaughter, and I cannot say there is "no reliable evidence" to conclude he committed the sexual crimes at issue.

### **Guideline E: Personal Conduct**

The security concern about personal conduct is articulated 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 classified or sensitive information. Of special interest is any failure to cooperate or provide

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from his sentence for good conduct until he shall have served 10 years of such sentence. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file.

truthful and candid answers during national security investigations or adjudicative processes.

Applicant did not comply with his obligation as a clearance holder to timely report his arrest to security officials. He was arrested on February 28, 2013, and did not report his arrest until June 19, 2013. AG ¶ 16(d) and AG ¶ 16(e) apply because of the failure to report as alleged in SOR ¶ 2.a. These provide:

(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 individual may not properly safeguard classified or sensitive information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant is alleged to have deliberately lied on his SF 86 (SOR ¶ 2.b) and during his subject interview (SOR ¶ 2.c) by claiming that he was falsely accused by his stepdaughter of the criminal sexual abuse. A predicate finding that Applicant committed the crimes for which he was arrested and indicted is required before I can conclude that he deliberately lied under AG ¶ 16(a) as to the SF 86 and AG ¶ 16(b) as to his interview. For the reasons addressed under Guideline J, I find reliable evidence exists of his culpability. Disqualifying conditions AG ¶¶ 16(a) and 16(b) apply. They provide:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

I note that Applicant was not fully candid on his SF 86 or during his interview about the charges filed against him. He listed only two charges, of sexual abuse and domestic violence, when he knew he had been incited on 12 very serious felony counts, including rape. His minimization cannot be considered a disqualifying factor because it was not

specifically alleged, but it shows a lack of reform and whether his representations are reliable.

The SOR also alleges his arrest and the criminal charges under Guideline E (SOR ¶ 2.d). Sexual assault of a minor female is conduct which raises considerable judgment concerns under AG ¶ 15 and vulnerability issues under AG ¶ 16(e).

Three mitigating conditions under AG ¶ 17 have some applicability. They are:

(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 positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

The passage of more than five years since the sex crimes is a factor in mitigation under AG ¶ 17(c). Applicant made some effort to alleviate the concerns of his failure to report under AG ¶ 17(d) and of vulnerability under AG ¶ 17(e) by notifying security about his arrest in June 2013, but his disclosure was incomplete. Available information shows that he was intentionally minimizing to his employer when he described the charges filed against him. He reportedly told security officials that he had delayed informing them of his arrest because he was scared. At his subject interview, he explained that it was more important to him to get his personal life in order. He now attributes his failure to timely report to concentrating on caring for his family. None of these reasons justifies his deliberate failure to comply with his known obligation to report adverse information to security officials. He did not accurately disclose the criminal counts against him on his SF 86 or during his subject interview, even though the charges had been nolle prosequi. Little information was presented about who knows about his arrest record and what they know. Applicant has yet to show that he can be counted on to comply with his reporting obligations in the future. His persistent denials of any validity to the criminal accusations are suspect and continue to cast doubt on his reform. The personal conduct security concerns are not fully mitigated.

#### **Guideline D: Sexual Behavior**

The security concerns about sexual behavior are articulated in AG ¶ 12:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion,

exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified for sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The sex crimes for which Applicant was indicted raise disqualifying conditions AG ¶ 13(a), "sexual behavior of a criminal nature, whether or not the individual has been prosecuted," 13(c), "sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;" and 13(d), "sexual behavior . . . that reflects a lack of discretion or judgment." Given the reliable evidence of sexual assault, and his refusal to acknowledge any sexual misconduct, none of the mitigating conditions under AG ¶ 14 are fully established. The passage of time alone is insufficient for mitigation under AG ¶ 14(b) because of the egregiousness of the behavior. AG ¶ 14(b) provides:

(b) 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 judgment.

Applicant testified that when he told his supervisor about his arrest, his supervisor walked him to their security office. Even so, it is unclear what he told his supervisor. He minimized the charges to security officials and on his SF 86. Applicant did not establish AG ¶ 14(c), "the behavior no longer serves as a basis for coercion, exploitation, or duress."

### **Whole-Person Concept**

In the whole-person evaluation, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d).<sup>9</sup>

Applicant was indicted by a grand jury for 12 serious crimes, any of which are too egregious to warrant restoration to him of his suspended Secret clearance. He presented no reliable evidence to substantiate his claim that none of the criminal accusations have merit. Moreover, there exists a substantial reason to doubt Applicant's continued security clearance eligibility in that he knew he had an obligation to report his arrest and charges to his employer, and he deliberately waited until June 2013, several months after he had

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<sup>9</sup> The factors under AG ¶ 2(d) are as follows:

(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.

been first arrested and a month after he was indicted. Applicant did not accurately disclose the charges to his employer, on his SF 86, or during his subject interview. He testified evasively when asked about the serious criminal charges and his family relations, leaving the impression that he might say something incriminating if he elaborated.

Under the whole-person evaluation, Applicant's work performance for his employer is unassailable, but it does not entitle him to a clearance. The security clearance adjudication involves an evaluation of an applicant's judgment, reliability, and trustworthiness in light of the security guidelines in the Directive. See ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010). It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). For the reasons noted above, I am unable to conclude that it is clearly consistent with the national interest to grant or continue access to classified information to Applicant.

### **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 J:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant <sup>10</sup>
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.d:	Against Applicant
Paragraph 3, Guideline D:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

### **Conclusion**

In light of all of the circumstances, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance.

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Elizabeth M. Matchinski  
Administrative Judge

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<sup>10</sup> A favorable finding is returned despite the fact of Applicant's arrest because he was arrested for the crimes set forth in the indictment alleged in SOR ¶ 1.b.