



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 20-00354

Appearances

For Government:
Andrew Henderson, Esquire, Department Counsel

For Applicant:
Ryan Nerney, Esquire
Tully Rinckey

November 9, 2021

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on December 21, 2018. (Government Exhibit 1.) On November 9, 2020, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines D (Sexual Behavior) and E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on June 8, 2017.

Applicant answered the SOR in writing (Answer) on January 27, 2021, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on March 15, 2021. The case was assigned to me on March 24, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on April 22, 2021. I convened the hearing as scheduled on May 26, 2021.

The Government offered Government Exhibits 1 through 6, which were admitted without objection. Applicant offered Applicant Exhibits A through V, which had been attached to his Answer. Those exhibits were admitted without objection. Applicant testified on his own behalf and called two additional witnesses. DOHA received the transcript of the hearing (Tr.) on June 9, 2021.

Findings of Fact

Applicant is 47 years old, and married to his third wife. She has two children, ZS and NS. He has a bachelor's degree. Applicant is employed by a defense contractor as an insider threat analyst and is seeking to obtain national security eligibility for a security clearance. (Government Exhibit 1 at Sections 12, 13A, 17, and 18; Tr. 45-47.)

Paragraph 1 (Guideline D, Sexual Behavior)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he engaged in sexual behavior that reflects a lack of judgment, or may subject Applicant to undue influence or coercion.

1.a. Applicant denied this allegation, which concerned his alleged inappropriate conduct with his minor stepdaughter, EM, from 2012 to 2014.

Applicant served in the Air Force for 24 years, retiring in 2017 with the rank of master sergeant (E-7). He was a member of the Air Force Office of Special Investigations (AFOSI) for the majority of his career, including when these alleged incidents happened. (Applicant Exhibits C, D, E, F, G, and H; Tr. 47-48.)

Applicant was married to his second wife, RL, from March 2013 to May 2015. Her daughter is EM. She has two other children, AC and LC. All three of the children lived with Applicant and RL during the time of their marriage. (Government Exhibit 1 at Section 17.)

On June 10, 2015, RL reported to the local police authorities that EM had been sexually assaulted. This original report concerned people other than the Applicant, and occurred at a time after Applicant and RL were divorced. (Applicant Exhibit R.)

EM was subsequently interviewed at a child advocacy center on June 11, 2015. During the interview she first discussed the sexual assault that had recently occurred to her. She then went on to discuss the Applicant. The report stated in part:

[EM] reported that her ex step-dad [sic], [Applicant], sexually abused her in 2014. She stated that he touched her when her mom was out of town for work. [EM] reported that it happened more than one time. She stated that [Applicant] would rub on her thighs and try to “finger” her. [EM] reported that [Applicant] would rub her genitalia on the inside and outside of her pants. [EM] reported that one time they were watching a movie when [Applicant] put his hand in her pants. She stated that [Applicant] inserted his fingers on the inside of her vagina. [EM] reported that [Applicant] pulled his pants down, showed her his penis and asked her to touch it. She stated that she told him “no”. . . . She indicated that there was another time where [Applicant] digitally penetrated her anally and vaginally. [EM] reported that [Applicant] looked at her, told her that he should not have done that and not to tell her mom. . . . [EM] reported that some of the incidents happened on the couch in the living room. She stated that her siblings would be in their bedrooms. She stated that she told her mom and [AM]. [EM] reported that [Applicant] would act inappropriately around her and [AM]. She stated that [Applicant] would “smack” her and [AM]’s buttocks randomly. . . . She stated that he touched her on the inside of her pants when she would sleep in the bed with him. [EM] reported that [Applicant] told her he made a mistake and not to tell her mom. She stated that she still told her mom. [EM] reported that [Applicant] and her mom convinced her that it was a dream and that it did not actually happen. She stated that the last time anything happened was while her mom was in the hospital which was around her mom’s birthday. [EM] reported that her mom’s birthday is October 12th 2014. (Applicant Exhibit R at 21-24.)

The police forwarded the case to the county prosecuting attorney’s office. That office declined to prosecute the case due to “inability to sustain a conviction.” (Applicant Exhibit Q.)

Subsequent to the declination of prosecution the local police turned the case over to the AFOSI for their investigation. Applicant had been temporarily assigned to the Inspector General’s office during the pendency of the investigation. AFOSI began their investigation on September 17, 2015. AFOSI re-interviewed RL, which basically confirmed what EM had told the local authorities. AFOSI did not re-interview EM. (Applicant Exhibit N.)

AFOSI interviewed AM, a step niece of Applicant. She was 17 at the time of the alleged acts. The report stated:

An interview of VICTIM [AM] disclosed that she moved in with the [Applicant and RL] before her senior year in High School (2014), and lived with them for about a year. One day (NFI; VICTIM [AM] could not recall the date), VICTIM [EM] came to her in tears and told her [Applicant] touched her inappropriately on the couch in the living room. VICTIM [EM] said [Applicant] was touching her stomach and eventually touched her "boobs." VICTIM [EM] told her [Applicant] would go into VICTIM [EM]'s room at night when her mother was working and touch her when she pretended to be asleep. VICTIM [EM] told [RL] who convinced her it was just bad dreams. VICTIM [AM] described she felt uncomfortable around [Applicant], and he inappropriately smacked her buttocks. (Applicant Exhibit N at 5-6, 11-12.)

EM also confided in another girl, ES. ES was also interviewed by AFOSI. The interview was reported as follows:

[ES] stated that VICTIM [EM] visited her residence after being released from the hospital. . . . VICTIM [EM] stated she wanted to speak with ES. VICTIM [EM] started tearing up and told [ES] that when she lived at the first residence, [Applicant] touched her legs, her buttocks, and gave "weird" hugs that she did not like on several occasions. VICTIM [EM] then demonstrated how [Applicant] touched her thigh and "slapped her butt." (Agent Note: During this portion of the interview, [ES] placed her right hand in the area between her right hip and knee indicating where VICTIM [EM] stated [Applicant] touched her.)

[ES] told her mother what VICTIM [EM] shared with her and as a result, [ES]'s mother told [RL]. A few days later, [ES] and VICTIM [EM] talked about the incident again. VICTIM [EM] asked [ES] if she told [RL] about what she shared with her and [ES] said that she told her mother due to the severity of the incident. [ES] then asked VICTIM [EM] if the incident really happened. VICTIM [EM] stated, "Yeah, but no, because I didn't want anyone else to know." (Applicant Exhibit N at 16-17.)

It is noted that AM stated during the investigation that she did not believe EM about Applicant because EM has been untruthful in the past. The mother of ES also stated that she did not believe RL or EM because, "they did not know the difference between the truth and a lie." Evidence was introduced that RL had made unfounded sexual misconduct allegations against another former husband. (Applicant Exhibit N at 11-12, and 17, Exhibit V; Tr. 78.)

Applicant called two witnesses during his case. In addition to providing positive recommendations regarding Applicant, further discussed below, the reputation of RL and EM for truth and veracity was also discussed.

One of the witnesses is a serving deputy sheriff in the county where the alleged incidents took place. He is a retired AFOSI agent and has known Applicant, RL and EM. He had a very negative view of the veracity of RL and EM. The witness considers Applicant a close friend. (Tr. 20-31.)

The second witness is a former Air Force non-commissioned officer in the medical field. She is also a friend of Applicant's. Applicant lived in her house for a year after his divorce from RL. The witness does not believe the allegations made by EM against Applicant. She believes Applicant to be trustworthy and someone that she has trusted with her children. (Tr. 31-43.)

After the AFOSI investigation the Air Force preferred charges against Applicant under Article 120(b) of the Uniform Code of Military Justice (UCMJ). The specifications under the charge consisted of two counts of Sexual Assault of a Child, and two counts of Sexual Abuse of a Child. They were all connected to Applicant's conduct with EM.

Pursuant to the UCMJ an Article 32 hearing was held before a senior Judge Advocate officer. EM did not testify at the hearing. However, she did provide a written statement dated January 24, 2017. That statement was sealed by the Hearing Officer and is not a part of this record. However, the Hearing Officer did discuss the contents of this statement in his "Preliminary Hearing Officer's Report" dated February 6, 2017, as follows:

As to the first – in her mother's bed – she [EM] stated that she was 10 years old and it happened at the family home . . . (before the families moved in together). . . . She recalls waking up with the Accused [Applicant] "rubbing my vagina on the skin with his hand." . . . She pretended to be asleep, the Accused eventually stopped, and the next day everyone seemed normal. . . .

She further explained that the "lotion" incident occurred right after the family had moved into their first home . . . She said that she complained about her sore tailbone, that the Accused told her to lay on her stomach on the couch and take off her underwear (she was just wearing a large t-shirt), and he then took baby oil and starting [sic] rubbing her: "He was rubbing my back and then my butt. And then he inserted his fingers inside my vagina and anus. He would insert one whole finger and then transition to multiple fingers at a time, up to four fingers at one point." . . . She repeated that he admitted to this sexual assault and asked her not to tell. . . .

As to the incident on the couch, EM stated:

While we were living in the first house . . . , we were sitting on the couch watching TV. He was rubbing my thigh (as he often did) for a long time. He was wearing a blue underarmour short [sic] and black basketball shorts and depending on how he was sitting on the couch, I could see his private parts. While we were sitting on the couch, he began to rub my vagina on the skin, and then he reached into his pants and took out his hard penis from the top of his basketball shorts. He told me if I was ever curious or if I wanted to see and understand or something to that affect [sic]. He then grabbed my hand and tried to get me to touch his penis, but I pulled back and tensed up and then he let me [sic] hand go. I then got up and went to the bathroom and then went to bed.

EM discussed a couple of other incidents of touching after this, and reported that the last occasion was when she was 13 years old and her mother was in the hospital. (Applicant Exhibit O.)

As stated, the Hearing Officer prepared a report. In addition to the discussion above, the report basically reiterated the facts as set forth in this decision. The Hearing Officer found, "There is probable cause to believe that the Charge and each Specification has been committed And there is probable cause to believe that Accused [Applicant] committed the offenses." (Applicant Exhibit O.)

Despite his factual findings the Hearing Officer recommended that the charges be dismissed. He stated:

On the evidence before me, there is no reasonably [sic] possibility of success on the merits. In the "best" of circumstances, child sexual assault/sexual abuse cases are notoriously hard to prove beyond a reasonable doubt. There are numerous circumstances here that will make it even more difficult. Though not uncommon not to have third-party witnesses to such offenses, here neither EM's mother, younger brother, younger sister, or [sic] adult household resident [AM] will provide any substantive information to corroborate EM's allegations. Thus, proof beyond a reasonable doubt will hang on EM's credibility. The Government will have a difficult time establishing that as the Defense will likely subject EM to a devastating cross-examination.

This analysis is not whether the offenses did or did not occur or whether EM is or is not telling what she believes to be the truth about. This analysis is simply an experienced and objective overview of the difficulty of proving these allegations beyond a reasonable doubt. Moving forward with trial with no reasonable likelihood of success it [sic] not fair to either the victim or the Accused. Here, there is no reasonably [sic] possibility of success on the merits. Thus, **I recommend the Charge and Specifications be dismissed.** (Emphasis in original.) (Applicant Exhibit O.)

The Staff Judge Advocate of a major Air Force command recommended to the general court-martial convening authority that the charges be dismissed without referral to a court-martial. His reasoning generally tracks with that of the Hearing Officer. Based on that recommendation the court-martial convening authority, an Air Force lieutenant general, dismissed the charges and specifications on April 4, 2017. (Applicant Exhibit P.)

Applicant subsequently received a letter of reprimand from the commander of AFOSI on May 11, 2017. Its terms basically follow all the allegations discussed in the SOR. On June 29, 2017, Applicant was permanently disqualified from being an AFOSI agent. Applicant requested retirement, which was granted with an effective date of July 1, 2017. (Government Exhibit 3 at Exhibit O, and Exhibit 6; Tr. 79-80.)

Later in 2017 Applicant was provided an administrative due process hearing by the Department of Children and Family Services in the state where he lived. After a hearing the administrative law judge (ALJ) found that the department failed to show by a preponderance of the evidence that a specific incident regarding EM occurred, specifically, "Sexual Penetration as to [EM]." The ALJ recommended that the record be expunged as to that allegation and one other, further described below. The particular facts of the allegation concerning EM are not set forth in the ALJ decision. (Applicant Exhibit T; Tr. 91-92.)

Applicant was extensively questioned by his counsel, cross-examined by Department Counsel, and also questioned by me. He absolutely denied that any inappropriate sexual activity happened between him and EM. (Tr. 50-59, 78-81, 84-96.)

1.b. Applicant admitted in part and denied in part this allegation, which alleged that in 2014 he sexually harassed his minor step-niece, AM, by smacking her on the buttocks.

Applicant admitted that he engaged in such conduct. He testified that "there was a smack on the bottom, but it wasn't anything sexual in nature. It was, I guess, a love tap, if you will, kind of like an attaboy with baseball." During the period this happened AM was 17 and lived with Applicant and RL. (Tr. 59-63.)

During the investigation of Applicant described in detail above AM was interviewed by AFOSI. The report of that interview stated, "VICTIM [AM] described she felt

uncomfortable around [Applicant], and he inappropriately smacked her buttocks.” (Applicant Exhibit N at 5-6, 11-12.)

AM provided a signed statement to Applicant’s attorney dated January 26, 2021. She stated, “I am writing this email to confirm that [Applicant] did not sexually harass me. I believe it was just simply a misunderstanding. He has never done anything to me to make me think that he did or would sexually harass me.” (Applicant Exhibit U.)

1.c. Applicant admitted in part and denied in part this allegation, which stated that he “sent a sexually suggestive message to A.S., an eighteen-year-old family friend. You were married at the time.”

According to Applicant he saw an attractive picture of AS on the internet. He responded with the comment, “Sooooo, you almost got me with the bewitching pic. As soon as I saw it my thought was you can ride my broomstick anytime! Then, I realized who you were [frowny face] stop growing up so fast. [whistling face]” AS replied, “XD I’ll try.” According to Applicant this occurred in January 2015 and he was separated from his wife at that time. (Applicant Exhibit Q; Tr. 63-66.)

Paragraph 2 (Guideline E, Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations.

2.a. The Government alleged in this subparagraph that Applicant’s alleged sexual misconduct, as set forth above, was also cognizable under this guideline. Applicant denied this allegation.

2.b. The Government alleged in this subparagraph that Applicant falsified information regarding other alleged acts of sexual misconduct in interrogatories propounded to him by DOHA and signed by him on June 10, 2020. Specifically, Applicant is alleged to have falsified Section 2, Item 2 of the interrogatories, which asked him whether “[o]ther than the allegations made against you by your minor stepdaughter [E.M.] in about October 2014, have you EVER been accused of child sexual abuse by ANY person at ANY time.” (Emphasis in original.) Applicant denied this allegation stating he forgot about these particular allegations due to the age of them. (Government Exhibit 3; Tr. 67-70.)

This allegation has three subparts:

2.b.i. In this subpart it is alleged that Applicant lied by not stating that he was accused in March 8, 2012, of abusing his minor stepdaughter, AC, by her biological father.

Applicant stated this allegation was false and was instigated by AC's biological father. He also stated that the allegation was unfounded, which is supported by the ALJ decision in Government Exhibit 3 at Exhibit T. In addition, Applicant submitted a *guardian ad litem* report from 2012 about this particular allegation, supporting the fact that it was unfounded. (Applicant Exhibit V; Tr. 69-72.)

2.b.ii. The Government alleged in this subpart that Applicant failed to admit that in December 2015 his minor stepdaughter, AC, told her mother that he had "tickled her peepee." Applicant denied this allegation, stating that it was actually made against the child's birth father. Therefore, there was no need to report it since this allegation did not involve Applicant. (Tr. 72-74.)

2.b.iii. The Government alleged in this subpart that Applicant failed to disclose that he was the subject of at least five hotline complaints regarding the three children of RL – EM, AC, and LC; also the children of his cohabitant (now his third wife) NS and ZS. Applicant's interrogatory responses include the AFOSI report (Government Exhibit 3 at Exhibit L), and the ALJ decision (Government Exhibit 3 at Exhibit T). Both documents discuss these allegations and discount them. (Tr. 74-77.)

Attached to the interrogatory response (Government Exhibit 3) is Exhibit T, the 2017 decision of the DCFS ALJ also discussed above. In addition to the allegation regarding EM the ALJ also adjudicated an allegation of "Substantial Risk of Sexual Injury as to [AC], [LC], [ZS], and [NS]." Once again he found that the department had not proved their case using the preponderance of the evidence standard, and recommended that the report be expunged.

Mitigation

As stated, two witnesses testified for Applicant. In addition to their testimony about the factual allegations in this case they also discussed the Applicant as a person. Both witnesses describe him as a friend who they trust in important matters in their own personal lives. They recommend him for a position of trust.

Applicant supplied positive letters from Air Force personnel who worked with him in the Inspector General's office after the allegations set forth in this case surfaced. The writers stated that Applicant was a very good non-commissioned officer who helped the Inspector General's office in many ways. With knowledge of the allegations against him the writers recommend him for a position of trust. (Applicant Exhibit F.)

Applicant provided documentary evidence about his Air Force career. The evidence shows that he had a successful career with many accomplishments. (Applicant Exhibits G and H.)

Applicant also submitted evaluations from his current employer. They show that he meets expectations. (Applicant Exhibit I.)

Policies

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

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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, "Any 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 national security eligibility. 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 or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (Guideline D, Sexual Behavior)

The security concerns relating to the guideline for sexual behavior are set out in AG ¶ 12, which reads in pertinent part:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence or coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission.

The following disqualifying conditions apply to the facts of this case under ¶ 13:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and
- (d) sexual behavior of a public nature or that reflects a lack of discretion or judgment.

1.a Applicant was investigated for sexual abuse of his minor stepdaughter, EM. Applicant was eventually referred for court-martial. The case was eventually dismissed due to evidentiary concerns. Applicant received a letter of reprimand and retired. All of the above disqualifying conditions apply to the facts of this case as set forth in allegation 1.a.

1.b. Applicant did spank his minor step-niece, AM, by slapping her on the buttocks. At the time she indicated that the conduct was inappropriate. Now she states that he did not mean to sexually harass her and she did not take it that way. Since she is the complaining witness, and has repudiated her earlier statement, I find there is insufficient evidence to support this allegation. It is found for Applicant.

1.c. Applicant did send an email to an 18-year-old woman that could be interpreted as sexual in nature. Applicant was separated from his wife, RL, at the time the email was sent. The recipient was an adult. While arguably crass, given that the recipient was an

adult at the time, there is no security significance in this act, and this allegation is found for Applicant.

The following mitigating conditions have been considered in this case under AG ¶ 14:

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

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

Applicant has consistently argued that he did not engage in criminal sexual activity with EM. He submits that the decision not to try Applicant in state court or by court-martial, evidence of RL's history of making false accusations, evidentiary issues with EM's reputation for veracity, and the findings of the state DCFS ALJ support his innocence. I disagree.

In considering the allegations against Applicant by EM we start with one primary fact – that his alleged conduct was not her primary purpose for going to the police. In fact, her mother took EM to the police to report a later act of sexual assault against EM by other people. It was during that investigation she revealed the facts of Applicant's misconduct. In other words, the predicate for the investigation was not the alleged conduct by Applicant.

We also look at the facts as described by EM four separate times. She described the conduct of Applicant to her relative, AM. She also described it to a friend, ES. She was interviewed by a clinical social worker. Finally, she submitted a written statement to the Hearing Officer. She described Applicant's conduct in great detail. While there were, admittedly, some details that were inconsistent between the statements, the basic facts remain consistent. Applicant argues that RL, given her reputation for making false accusations, might have prompted EM to make a false report about Applicant to the police. That does not explain EM's disclosures to the two girls. I have considered all of Applicant's arguments and find them wanting.

The decisions of other tribunals have been viewed and considered by me, but are not controlling. Based on the state of the record, I find that Applicant did engage in criminal sexual acts with his minor stepdaughter, EM. Paragraph 1 is found against Applicant.

Paragraph 2 (Guideline E, Personal Conduct)

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

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The following disqualifying conditions are applicable under AG ¶ 16:

(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;

(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 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 engaged in inappropriate sexual conduct with his minor stepdaughter. The Government also alleges that Applicant falsified his responses to DOHA interrogatories. All of the above disqualifying conditions apply.

The following mitigating conditions are applicable under ¶ 17:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged that behavior and obtained counseling to change the behavior or taken other 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.

Applicant's conduct with his stepdaughter, as set forth above, shows extremely poor judgment. Applicant's failure to accept responsibility for it means it cannot be mitigated either as a minor incident, or due to the passage of time. Neither of the mitigating conditions apply. Allegation 2.a is found against Applicant.

Applicant is also alleged in allegation 2.b to have falsified his interrogatory responses when he said that he had not been accused of other acts of child sexual abuse. This answer was false in the response document. However, Applicant incorporated voluminous documentary correspondence with his response, which is considered to be part of it. That documentation contained all of the information about the allegations he is alleged to have concealed. Accordingly, the Government was put on notice of all of the allegations that made up this paragraph in the SOR. Since Applicant submitted all the documentation voluntarily, I find that there was no intent to deceive on his part. Accordingly, none of the Disqualifying Conditions apply to allegation 2.b and it is found for Applicant. However, based on the finding concerning allegation 2.a, this paragraph is found against Applicant.

Whole-Person Concept

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

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

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant has not mitigated the security significance of his misconduct with his stepdaughter, EM. Overall, the record evidence does create substantial doubt as to Applicant's present suitability for national security eligibility, and a security clearance.

Formal Findings

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

| | |
|----------------------------|-------------------|
| Paragraph 1, Guideline D: | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |
| Subparagraphs 1.b and 1.c: | For Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |
| Subparagraph 2.a: | Against Applicant |
| Subparagraph 2.b: | For Applicant |

Conclusion

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

WILFORD H. ROSS
Administrative Judge