DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 21-01148
	)	
Applicant for Security Clearance	)	

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: Carl Marrone, Esq.

10/16/2024

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Decision

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GARCIA, Candace Le'i, Administrative Judge:

Applicant mitigated the criminal conduct security concerns that were also cross alleged under the sexual behavior and personal conduct guidelines, but he did not mitigate the additional personal conduct security concern involving falsification on his security clearance application. Eligibility for access to classified information is denied.

Statement of the Case

On May 9, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J (Criminal Conduct), Guideline D (Sexual Behavior), and Guideline E (Personal Conduct). The action was taken under Executive Order (Exec. Or.) 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 adjudicative guidelines (AG) implemented by DOD on June 8, 2017.

Applicant responded to the SOR (Answer) on December 8, 2022, and elected a hearing before an administrative judge. The case was assigned to me on August 11,

2023. The Defense Office of Hearings and Appeals (DOHA) issued a notice of Microsoft Teams video teleconference hearing (NOH) on September 19, 2023, scheduling the hearing for November 14, 2023. On that date, I granted Applicant's request for a continuance. On November 16, 2023, DOHA issued another NOH, rescheduling the Microsoft Teams video teleconference hearing for December 13, 2023.

On December 6, 2023, Department Counsel amended the SOR to add the following language to the beginning of SOR ¶ 1.b:

> In about May 1998, court-martial charges were preferred against you alleging that you committed rape, forcible sodomy, conduct unbecoming an officer and a gentleman, and indecent acts with another. In about July 1998, charges alleging sodomy, conduct unbecoming an officer and a gentleman, and indecent acts with another were referred to a General Court-Martial.

I convened the hearing as rescheduled. Applicant stated he received a copy of the SOR amendment and was prepared to proceed. (Hearing Transcript (Tr.) 16) I marked Department Counsel's discovery letter, SOR amendment, and exhibit list as Hearing Exhibits (HE) I, II, and III, respectively. Government Exhibits (GE) 1 through 9 were admitted without objection. Department Counsel requested I take administrative notice of the following: (1) 22 [State] ADMIN. CODE § 40-705-10 (2003), to include the definitions for "founded," "preponderance of evidence," and "unfounded;" (2) the maximum punishments for the Uniform Code of Military Justice (UMCJ) Articles 120 (rape), 125 (sodomy), 133 (conduct unbecoming), and 134 (indecent acts), as contained in excerpts from the Manual for Courts-Martial, 1995 edition; and (3) the rationale contained in *Turner v. Commonwealth*, 38 [State] Ct. App. 851 (Aug. 27, 2002), for determining whether any of Applicant's court-martial charges were felonies. I marked these requests as HE IV, V, and VI, respectively. Applicant did not object to my taking administrative notice of the information contained in HE IV and HE V but objected to HE VI, arguing that the rationale contained therein was irrelevant. (Tr. 18-22) HE IV, V, and VI are not admitted in evidence, but I have taken administrative notice of the information contained therein.

Applicant testified, called six witnesses, and submitted Applicant Exhibits (AE) A-U, which were admitted in evidence without objection. I marked Applicant's exhibit list, relevant excerpts from the Directive, and supplemental exhibit list as HE VII, VIII, and IX, respectively. At his request, I held the record open until December 27, 2023, for the receipt of additional evidence. By that date, he submitted additional documentation that I marked as AE V-CC and admitted without objection. He requested I take administrative notice of the following: 1) 1991 [State] Acts ch. 517; (2) 2001 [State] Acts ch. 840; (3) 1995 [State] Acts ch. 427; (4) 2000 Va. Acts ch. 361; (5) 1990 [State] Acts ch. 788; and (6) 2000 [State] Acts ch. 770, for determining which statutes were applicable to his 2001 charge alleged in SOR ¶ 1.a. I marked Applicant's administrative notice request collectively as HE X and Department Counsel's response as HE XI. (Tr. 285-286) I also marked Applicant's supplemental exhibit list and written closing argument as HE XII and HE XIII, respectively. HE X is not admitted in evidence, but I

have taken administrative notice of the information contained therein. DOHA received the hearing transcript on December 26, 2023.

Findings of Fact

In his Answer to the SOR and amended SOR, Applicant admitted SOR ¶¶ 1.a and 1.b, with explanation, and denied SOR ¶¶ 2.a, 3.a, and 3.b. In response to SOR ¶ 1.a, which is cross alleged in ¶¶ 2.a and 3.b, he admitted he was arrested and charged in about November 2001 with felony indecent liberties with child by custodian, and that the charge was *nolle prossed* in about January 2002. He denied he engaged in the underlying conduct. (Answer)

In response to SOR ¶ 1.b, which is cross alleged in ¶¶ 2.a and 3.b, Applicant admitted the following: (1) in May 1998, court-martial charges were preferred against him alleging he committed rape, forcible sodomy, conduct unbecoming an officer and a gentleman, and indecent acts with another; (2) in July 1998, charges alleging sodomy, conduct unbecoming an officer and a gentleman, and indecent acts with another were referred to a General Court-Martial; (3) in December 1998, he pled guilty at an Article 15 hearing to two specifications of conduct unbecoming an officer and a gentleman, and indecent acts, under Articles 133 and 134 of the Uniform Code of Military Justice (UCMJ), respectively; (4) as a result of his guilty plea, he received non-judicial punishment (NJP) consisting of a punitive letter of reprimand and forfeiture of $2,000 pay per month for two months, all but $750 per month of which was suspended for six months; and (5) his NJP resulted in his involuntary discharge from U.S. military service with a discharge of general under honorable conditions in October 1999. (Answer; Tr. 16-17)

Applicant denied the information alleged in SOR ¶ 1.b, which is cross alleged in SOR ¶¶ 2.a and 3.b, that a Board of Inquiry (BOI) substantiated *all* [emphasis added] misconduct, to include not only the two specifications of conduct unbecoming an officer and a gentleman and indecent acts under Articles 133 and 134 of the UCMJ for which he received NJP, but also the rape and forcible sodomy charges preferred against him in May 1998 as well as the sodomy charge referred to a General Court-Martial in July 1998, and as a result of doing so, he was involuntary discharged from the U.S. military under general under honorable conditions in October 1999. (Answer) He maintained he was involuntarily discharged under general under honorable conditions after the BOI substantiated only that misconduct for which he received NJP. (Answer)

In response to SOR ¶ 3.a, Applicant admitted he marked "No" on his August 3, 2020, security clearance application (SCA) but denied he deliberately failed to disclose his 2001 felony charge of indecent liberties with child by custodian and his 1998 court-martial charges of rape, sodomy, conduct unbecoming an officer, and indecent acts, as set forth in SOR ¶¶ 1.a and 1.b, respectively, in response to "**Section 22 – Police Record** . . . **Police Record (EVER)**," which inquired:

> Other than those offenses already listed, have you **EVER** had the following happen to you? . . .

- Have you EVER been charged with any felony offense? (Include those under the [UCMJ] and non-military/civilian felony offenses) . . . . (Answer; GE 1)

Applicant is 60 years old. He married in 1982, separated in 1997, and divorced in November 1999. He has resided with his partner since July 2013. He has five children, ages 41, 39, 33, 32, and 30. Applicant's 39-year-old child (V), is the alleged victim in the 2001 charge discussed below. (GE 1, 7-8, 148-151, 212; AE U)

In 1982, Applicant enlisted in the U.S. military. He earned an associate degree in 1987 and a bachelor's degree in 1990. He was subsequently commissioned in the U.S. military and served until he was involuntarily discharged under general under honorable conditions for unacceptable conduct in October 1999, as further discussed below. (Tr. at 6-7, 147-148, 164-165, 173-174, 190-192; GE 5-8; AE L, P, Q, R)

Applicant worked overseas as a federal contractor for a U.S. Government agency from August 2008 to October 2010. He was a personal trainer for a nonprofit organization from December 2010 to June 2018 and was also self-employed from October 2011 to June 2018. From June 2018 through August 2020, when he prepared his SCA, he worked as a self-employed trainer and instructor. He was an independent contractor for a company sponsoring him for a security clearance as of the date of the hearing. He previously held a clearance when he served in the U.S. military and when he worked overseas for a U.S. Government agency, but he does not currently hold one. (Tr. at 6-7, 147-148, 181-184; GE 1, 5-8; AE L, P, Q, R)

Guideline J (cross alleged under Guidelines D and E)

When Applicant and his then-spouse were separated in December 1997, a court in county A awarded them joint legal custody of their five children, and his then-spouse was awarded primary physical custody while he was permitted visitation. In December 1998, he was awarded overnight custody of only his then-7-year-old and then-4-year-old children (now ages 30 and 33, respectively), who desired it. Overnight custody was not required for his other three children, who were then 14, 13--V, and 6, unless they too desired it. (Tr. 55-58, 76-87, 159-160, 177-181, 232-233; GE 7; AE E, F, H, K, V, W, X, Y, A, AA, BB)

In September 1999, the overnight custody order was suspended pending the outcome of an investigation conducted by county A Child Protective Services (CPS), regarding an allegation of acts committed by Applicant on V, who was then 14 years old. In October 2001, Applicant's visitation with his then-minor children, which included all but the eldest child who was then 18 years old, was also suspended pending the outcome of the county A CPS investigation. In November 2001, Applicant was arrested and charged in county B with felony indecent liberties with child, V, by custodian, and the charge was *nolle prossed* in January 2002, as further discussed below (SOR ¶¶ 1.a, 2.a, 3.b). In September 2004, Applicant's visitation with his then-minor children, which included only the three younger children, was suspended except that he could accept

contact from them only upon their initiation. (Tr. 55-58, 76-87, 214-215; GE 7; AE E, F, H, K, V, W, X, Y, A, AA, BB)

Prior to the September 2004 suspension of Applicant's visitation with his then-minor children, county A informed Applicant in February 2003 of the following:

> the 'Founded' disposition of abuse of [V] is being overturned to 'Unfounded.' This Department will make the necessary changes in the Central Registry System for [CPS]. The decision to change the disposition was made after reviewing the information [Applicant] provided during the informal conference and the Department's record. (AE N)

In May 1998, court-martial charges were preferred against Applicant alleging he engaged in misconduct. He was a captain in the U.S. military and separated from his then-spouse. A record from another government agency reflects, "Allegation of misconduct: [Applicant] during the course of his 15-year marriage raped and sodomized his [then-]wife." (GE 5) Applicant's then-spouse reported, in November 1997, that Applicant raped her in 1985 and sodomized her several times over the course of their then-15-year marriage and as recently as September 1996. (SOR ¶¶ 1.b, 2.a, 3.b; GE 5; AE I)

The charge sheet, dated May 11, 1998, reflects four initial charges, in violation of the UCMJ, Articles 120, 125, 133, and 134, respectively. It reflects two rape specifications under charge one; one specification of forcible and nonconsensual sodomy under charge two; six specifications of conduct unbecoming an officer and gentleman under charge three; and three specifications of indecent acts under charge four. It also reflects Applicant was informed of these charges and the name of his accuser, to wit: his then-spouse, on May 12, 1998. (SOR ¶¶ 1.b, 2.a, 3.b; AE I)

UCMJ Article 32 hearings were held in June 1998. The charge sheet also reflects that on July 20, 1998, the first and third charges were lined out; the second charge under violation of the UCMJ, Article 125 was renumbered to charge one, and the specification under it was revised to remove the forcible and nonconsensual descriptors attached to the sodomy charge; the third charge under violation of the UCMJ, Article 133 was renumbered to charge two, and the specifications were modified to only four specifications of conduct unbecoming an officer and gentleman; and charge four under violation of the UCMJ, Article 134 was renumbered to charge three. These charges were referred to a general court-martial on July 24, 1998, upon recommendation by Applicant's commanding officer. (SOR ¶¶ 1.b, 2.a, 3.b; GE 5; AE I)

In September 1998, a trial was scheduled for that December, but those charges were withdrawn in October and additional charges not in the record were preferred. An officer was appointed to conduct an Article 32 investigation scheduled for that month, but that investigation did not occur because Applicant's offer, to plead guilty at NJP to indecent acts and conduct unbecoming an officer and gentlemen, with a woman who was not his then-spouse, was accepted. (SOR ¶¶ 1.b, 2.a, 3.b; Tr. 161-163, 165-173, 178, 192-204, 233-236; GE 5, 7; AE I, L, T, CC)

Following the acceptance of Applicant's guilty plea offer, an Article 15 NJP hearing occurred in December 1998 and Applicant was found guilty of two specifications of conduct unbecoming an officer and gentleman and one specification of indecent acts, under Articles 133 and 134 of the UCMJ, respectively. These charges stemmed from Applicant's conduct during the summer of 1996, when he had a consensual relationship with a civilian woman who was not his then-spouse while he was separated but still married. On two occasions, he wrongfully kissed, caressed, and fondled this woman while in a motor vehicle parked outside a restaurant, and he digitally penetrated this woman's vagina. He received a punitive letter of reprimand and forfeiture of $2,000 pay per month for two months, all but $750 per month of which was suspended for six months. (SOR ¶¶ 1.b, 2.a, 3.b; Tr. 154-155, 161-163, 165-173, 178, 192-204, 206-209, 233-236; GE 4-5, 7)

Applicant testified that when he was charged in 1998 with a view towards a court-martial, he was represented by a Judge Advocate General (JAG) attorney. He testified he did not recall seeing the charge sheet until after the charges brought against him by his then-spouse were lined out, leaving only the charges involving his consensual relationship with a woman who was not his then-spouse. He stated he knew he was being investigated for rape allegations made by his then-spouse, but he did not know he had ever been charged with rape. He understood, then, the severity of the charges preferred against him based on his then-spouse's allegations and that he faced a maximum punishment of more than one year if he were convicted of rape. He did not believe he understood the maximum punishment he potentially faced for the remaining charges initially preferred against him based on his then-spouse's allegations. He also stated there was no discussion between him and his JAG attorney about whether these charges were misdemeanors or felonies (Tr. 165-169, 172, 186, 192-200, 226, 233-236, 240-241, 243-246; AE I)

Applicant's commanding general issued a punitive letter of reprimand on December 1, 1998. (SOR ¶¶ 1.b, 2.a, 3.b; Tr. 204-205, 208-209, 236; GE 4) In it, he cited only to the conduct for which Applicant was found guilty at the NJP hearing, stating:

> Your deplorable actions serve to discredit the [U.S. military] in the eyes of the public and are inconsistent with those standards expected of [the U.S. military].
>
> Your conduct is inexcusable. Professionalism, good judgment, integrity, and loyalty are the most valuable attributes of a [U.S. military] officer. By your actions you have shown a lack of these qualities. Your behavior was unacceptable for an officer of <u>any</u> grade. This course of conduct cannot and will not be tolerated. Accordingly, pursuant to reference (b) and (c) [Part V, [U.S. military manual] (1995 Edition) and Manual of the Judge Advocate General], *you are hereby reprimanded for your misconduct as previously described* [emphasis added]. (GE 4)

In a subsequent December 22, 1998, letter to the convening authority, the commanding general again cited only to the misconduct for which Applicant was found guilty at the NJP hearing in recommending Applicant be required to show cause for retention in the U.S. military at a board of inquiry (BOI). (SOR ¶¶ 1.b, 2.a, 3.b; GE 4) A BOI was convened for Applicant in April 1999. (SOR ¶¶ 1.b, 2.a, 3.b; Tr. 163-165, 167, 209-212, 236-237) A July 1999 record referencing the BOI reflects the following:

> According to MAJ . . . Military Justice Officer, SJA, . . . the BOI substantiated all misconduct on [Applicant's] part and recommended a general discharge. Contact with the SJA's office on 07Jul99, revealed that [Applicant's] discharge is pending the . . . signature, which is expected in the near future. This investigation, which was conducted following *suspected* [emphasis added] violations of Articles 120 (Rape), 125 (Sodomy), and 134 (Indecent Acts), is closed as resolved. (GE 5)

An undated record, also referencing the BOI as well as Applicant's characterization of discharge from U.S. military service, contains the following entry:

> 1999 Apr 99 – BOI completed. Board substantiated misconduct and substandard performance of duty and recommended discharge with a General (Under Honorable Conditions) characterization of service. . . . (GE 5)

In addition, an August 2020 Federal Bureau of Investigation record reflects Applicant was arrested or received in February 1998 and charged with "UCMJ Articles 120 (Rape), Article 125 (Sodomy), and Article 13[4 (Indecent Acts)]." It further reflects the following entry:

> Court- ()
> 1999/04/19
> Charge-*Board of Inquiry for violation of UCMJ Article 134 (Indecent Assault)* [emphasis added].
> Received forfeiture of $4,000,
> 00 pay and a general discharge from the military service. (GE 3)

The record evidence demonstrates the BOI substantiated only the misconduct for which Applicant was found guilty at the Article 15 NJP hearing, to wit: two specifications of conduct unbecoming an officer and gentleman and one specification of indecent acts, under Articles 133 and 134 of the UCMJ, respectively. As a result, Applicant was involuntarily discharged from the U.S. military in October 1999 under general under honorable conditions for unacceptable conduct. (Tr. 163-165, 173-174; GE 3-5, 7; AE I)

In November 2001, Applicant was arrested and charged in county B with felony indecent liberties with child, V, by custodian, and the charge was *nolle prossed* in January 2002. (SOR ¶¶ 1.a, 2.a, 3.b; Tr. 174-181, 212-214; GE 2-3, 7; AE L, M) There is no evidence in the record regarding the reason the charge was *nolle prossed*. Applicant acknowledged police showed up at his house, served him with a warrant,

handcuffed him, and took him to the police station. He stated the warrant contained the alphabet code of the charge, the statute, and the charge of indecent liberties with a child, but it neither reflected the classification of the charge nor the identity of his accuser. He knew the severity of the charge and retained an attorney to represent him during these proceedings. (Tr. 212-214, 219-223, 237)

A December 2001 investigation report from the county B police department reflects that on the date of Applicant's interview with the detective, Applicant denied his involvement with V. (GE 2) He maintained at the hearing that he never sexually abused V. (Tr. 174-181) The report reflects that Applicant "offered no reason for why [V] would make these allegations up. He pointed all reasons to that of his ex-wife being behind the disclosure of [V]." (Tr. 127-128; GE 2) The report also reflects Applicant's arrest and charge stemmed from two incidents that allegedly occurred between November 1998 and December 1998, when:

> [V] advised that she and her siblings had been watching movies at her father's home as they typically would. She didn't feel well and went to her room at what she recalled as being late afternoon. She had shut her door and fell asleep. She described her clothing that she slept in and advised that there came a time where she felt the presence of someone in her room and found that person to be her father. He was standing over her and masturbating. She articulated seeing him with his penis (erect) in his hand and moving his hand back and forth over his penis. She could not describe any unique characteristics on or about his penis but stated he was circumcized [sic]. She also stated she had never seen his penis before. She claimed that he next reached down and placed his hand down her shorts and into her underwear. He began to fondle her vagina with what she thought was his right hand. She advised that he placed his finger in her vagina but that a knock at the door had him remove his hand all together from her clothing. She advised that he never spoke to her during the incidents nor did he ever threaten her or suggest that she not tell anyone. There was never any follow-up by her father to these events in any manner. She advised the only precaution she took in any future visits to her father's residence was the locking of her door. (GE 2)

V testified Applicant sexually abused her between the ages of 3 and 15. (Tr. 95-138; GE 2-3) She stated the sexual abuse was something she "would wake up to generally. Either I would be almost asleep or asleep when it started," and it began at age 3 "with touching under my night gown while I was in bed. And it proceeded through the years to finger penetration." (Tr. 99-103) She stated the sexual abuse happened periodically on average every several months, either in her mother's house prior to the divorce or in Applicant's house during her parent's period of separation and divorce towards the end of the abuse period. (Tr. 99-103, 112-113, 122-123)

V reported her sexual abuse to a mental health professional for the first time in 2001, when she was hospitalized for self-harming. She had not previously told anyone about the abuse, to include her mother or her licensed professional counselor (LPC), as

further discussed below, because she was embarrassed. As of the date of the DOHA hearing, she stated Applicant, her mother, her stepfather, her spouse, her siblings, and LPC were aware of the abuse, but she had not disclosed the full extent of it to her stepfather, spouse, and siblings. (Tr. 103-107, 109-124, 130-138; GE 2)

After V reported the sexual abuse during her 2001 hospitalization, Applicant was arrested and charged, as previously discussed. She was unaware the reason the charge was *nolle prossed*. She maintained she never recanted and denied fabricating the allegations or being coached or influenced by anyone, to include her mother. She acknowledged being told by her mother, at the time, about the ongoing custody battle between her and Applicant. She stated before she reported the abuse, her mother encouraged her upon her return from visitation with Applicant to have a positive relationship with him, and her mother ceased that encouragement once she reported the abuse. She denied telling her eldest brother's former spouse or anyone that Applicant had never sexually abused her or that she did not know how to move on with her life because so much of it was built around that accusation. (Tr. 103-107, 109-124, 130-138; GE 2)

V stated she was diagnosed with either depression or manic depression during her 2001 hospitalization. She acknowledged she was diagnosed with bipolar I disorder, without psychotic features, and stated she continued to carry that diagnosis as of the date of the hearing. She could not recall when she was so diagnosed but did not believe it to have occurred during her hospitalization in 2019, as recalled by LPC and further discussed below. She stated she has experienced flashbacks of her abuse, and she described the flashbacks as part of her memory where she hears her voice as well as Applicant's. She acknowledged having been previously diagnosed with post-traumatic stress disorder (PTSD) but stated she has not carried that diagnosis since approximately 2011. (Tr. 105-107, 124-126, 135-136) As of the date of the hearing, she stated she was "stable and have been stable for years." (Tr. 107) She also does not have contact with Applicant but maintains contact with her mother. (Tr. 107, 127)

LPC, who specializes in treating individuals, to include children, struggling with PTSD because they experienced sexual abuse and trauma, testified as a government witness. (Tr. 27-95; GE 2, 7, 9) Since approximately 2003, she has testified as an expert witness on behalf of victims of sexual abuse between 25 and 30 times and only once as an expert witness in a criminal case for a father-defendant who was accused of abusing his child. She was also a victim of sexual abuse between the ages of 12 and 17. (Tr. 29-32, 45-49) In 2013, she "went to the court and I prosecuted the individual that had assaulted and raped me 27 years after the fact and he was found guilty and put in jail." (Tr. 32) She acknowledged her abuser confessed to what he did. (Tr. 48-49)

LPC testified that children who are sexually abused do not generally report their abuse until they are adults and out of the environment in which they were being abused. She also testified that a common behavior she has seen in individuals who were sexually abused as children is self-harm. She acknowledged that a child could engage in self-harm for various reasons, to include exposure to the parents' contentious

marriage and divorce, and that a child could also self-harm even with loving parents. (Tr. 34-36, 47-48, 58-59)

LPC recalled she began treating V for adjustment disorder, with anxiety and depression, when V was self-harming as a teenager in high school. She could not recall the exact date when their counseling began because her treatment records for V were destroyed in a 2019 office flood, but she believed it would have been between 1999 and 2001, when V was between the ages of 15 and 17. She recalled seeing V on a weekly basis, either in the spring of V's sophomore year or early junior year in high school and continuing until V graduated from high school. She testified she knew of Applicant's family before she began counseling V, as she had previously attended the same church and potentially served as the Sunday school teacher for one or several of their other children, but she did not personally know them. V's mother was referred to her, for counseling for V, by a fellow church member, and LPC primarily dealt with V's mother, and not Applicant, when V was struggling with depression, anxiety, and self-harm. (Tr. 37-38, 49-50, 53, 55-66, 68-74)

In approximately the fall of 2001, LPC assessed V when V's mother brought V in to LPC's office after V had significantly self-harmed. LPC deemed V suicidal and had her hospitalized. During her hospitalization, V reported to hospital staff that she had been abused by Applicant. V had not previously reported the abuse to LPC. CPS and the police were subsequently contacted, an investigation was initiated, and LPC served as the aftercare outpatient provider to help V work through the trauma from the alleged abuse. (Tr. 38-39, 45, 50, 55-58, 60, 68-87; GE 2, 7)

LPC testified that through counseling, "it ended up coming out that [V] was being molested by her father, skin to skin fondled." (Tr. 38) LPC testified that V reported Applicant began sexually abusing V when V was a young child, but V did not have a clear recollection of when it started. LPC further testified that V did not report that Applicant sexually abused V during the period in which he was permitted visitation. After several months of working with V, LPC diagnosed V with PTSD, based on Applicant's abuse of V. LPC testified she was unaware of the findings made by any other entities that investigated the abuse allegations against Applicant, but V has never given her any reason to doubt her reports that Applicant sexually abused her. (Tr. 38-39, 45, 50, 55-60, 63-64, 68-87; GE 2, 7)

From approximately 2003 to September 2004, LPC was ordered by a county A court to provide quarterly reports about the status of her therapy with V, and V's three younger siblings, for the purpose of determining whether Applicant could be reintegrated into his children's lives. She stated reintegration between V and Applicant did not occur during this period and she recalled the ruling by county A court that Applicant could not have any contact with his then-minor children until they reached age 18, and only if the children pursued the contact. (Tr. 38-39, 45, 50, 55-60, 63-64, 68-87; GE 2, 7)

LPC continued to counsel V once every couple of weeks for about one year after V graduated from high school, "until eventually [V] got married and started doing life."

(Tr. 65-66). She then did not see V for about seven to eight years but resumed seeing V in approximately 2011, and she saw V about 12 times up through as recently as two weeks before the hearing date. She testified that her counseling with V generally occurred one to two times per year when V would experience bouts of depression or suicidal ideation around the same periods in the year when her reported abuse by Applicant happened. LPC stated that since 2011, V was hospitalized in a psychiatric hospital for self-destructive behavior or the desire to kill herself at least four to five times, with the last hospitalization occurring in the fall of 2019. (Tr. 40-45, 49-50, 53, 66-68, 73-76, 88-94)

During V's last hospitalization in the fall of 2019, LPC received discharge paperwork revealing that in addition to continuing to list V's PTSD diagnosis, the hospital practitioners also diagnosed V with bipolar disorder. LPC could not recall whether the paperwork reflected that V's bipolar diagnosis was with or without psychotic features, which "means [V] sees or hears things, sometimes it's related to the trauma." (Tr. 74) LPC testified that in her counseling with V, V has never relayed that she hears or sees things that were not actually there. LPC testified that V has said that "sometimes she feels like someone's touching her and that she is being molested or abused." LPC referred to V's experience as "body memories," which she stated is common among sexual abuse survivors. (Tr. 93-95) LPC testified that V's bipolar disorder does not impact V's reliability or trustworthiness, but it does impact her mood and ability to function. (Tr. 40-45, 49-50, 53, 66-68, 73-76, 88-94)

Dr. X, Fellow of the American Psychiatric Association (FAPA), was hired by Applicant's then-attorney when Applicant was charged in 2001 with indecent liberties with child in county B, to evaluate Applicant for the purpose of determining whether he fit the profile of a sex offender. He concluded, in his July 2002 report of evaluation, that "it is very unlikely that [Applicant] is a sex offender who would have performed the acts of which he is charged." He noted in his evaluation that it took V approximately three years, while maintaining frequent visitation with Applicant, to make the complaint of sexual abuse against Applicant; there was no evidence Applicant abused V other than her own statements to that effect; all the charges of sexual abuse and addiction generated by Applicant's ex-spouse occurred after their separation; and, in each case, the complaints made by Applicant's ex-spouse dated from years before they were made. (AE L)

Applicant's eldest child, his 41-year-old son, testified. He speaks with Applicant approximately once every one or two months, and stated he is close to Applicant. He does not work due to his physical disabilities, and Applicant takes him to his medical appointments but does not provide him with financial support. He testified he was unaware of the allegations made by his mother against Applicant, but he was aware of V's allegations. He stated V did not confide in him in 1998 about her allegations that their father sexually abused her. He also stated he heard V tell his ex-wife several years before the hearing that Applicant did not do what V alleged he did. (Tr. 216-217, 241, 253-266) He further stated:

> So before any allegations were made, my mother, after every single visit with my father, would take us kids to her room and drill us for anything she could use. Including very specifically asking – well, telling us, you need to remember that he did something to you. It's very important that you remember that he did these things to you. She never specified what he did, but she would then go, did he touch you inappropriately? Did he do these things? It's very important that you remember that he did that . Never forget - - (Tr. 259-260)

Applicant characterized his previous marriage as plagued with conflict due to his then-spouse's domineering personality and her displeasure with his military career affecting his ability to assist with caring for their children. He attributed her misconduct allegations against him while he was in the U.S. military primarily to her attempt to prevent him from having custody and visitation rights over their children during their contentious divorce. He stated V's sexual abuse allegations against him stemmed from his ex-spouse, who used it as a means of leveraging the children against him in their ongoing divorce and custody battle. He has never been accused of sexual misconduct by anyone other than his ex-spouse and V. (Tr. 151-161, 169, 187-190, 240; GE 8; AE H, K, L, O, P)

Guideline E (falsification)

Applicant maintained he has never lied on a U.S. Government background investigation form. (Tr. 181-187, 189-190, 242) He stated he did not consult with anyone to determine if any of his court martial charges or the indecent liberties with child by custodian charge was a felony. (Tr. 217-219) He knew he had to complete the questions on his SCA truthfully, and that his responses would be assessed to determine his security worthiness. (Tr. 223-228)

As previously discussed, Applicant maintained he did not know he had been charged with rape in 1998. He maintained that although he knew he was being investigated for allegations of rape made by his then-spouse, he did not see the charge sheet until after that and her other misconduct allegations, to wit: sodomy, conduct unbecoming an officer and gentleman, and indecent acts, had been lined out, leaving only the charges involving his consensual relationship with a woman who was not his then-spouse while he was still married. He denied knowing he had been charged with rape and the other misconduct allegations before they were lined out on the charge sheet. He also maintained there was no discussion between him and his JAG attorney about whether the charges involving his consensual relationship with a woman who was not his then-spouse were misdemeanors or felonies. He acknowledged having the charge sheet before completing his SCA in 2020. (Tr. 165-169, 172, 186, 219, 226, 233-236, 240-241, 246)

Applicant acknowledged he knew the rape charge was a felony, despite maintaining he did not know he had been charged with rape. (Tr. 219, 226, 240-241) The following exchange occurred between Applicant's counsel and Applicant:

[Applicant's counsel]: Did your lawyer ever explain to you the difference between misdemeanors and felonies, or anything like that?
[Applicant]: Never mentioned at all. It was –
[Applicant's counsel]: Did you –
[Applicant]: -- my understanding. If I may?
[Applicant's counsel]: Yes.
[Applicant]: That rape would be a felony, but that was dismissed.
[Applicant's counsel]: Why –
[Applicant]: But that was my speculation.
[Applicant's counsel]: What was speculation? The felony or the dismissed part?
[Applicant]: The felony part. (Tr .172)

Applicant also testified he was unaware that his November 2001 charge for indecent liberties with child by custodian was a felony. He stated he first became aware that this charge was a felony when he saw it listed as such in the FBI report he received from Department Counsel in discovery. As previously discussed, he stated the arrest warrant did not reflect the charge was a felony. He also stated that although he understood the severity of the charge, he considered it to be less than a felony because similar allegations previously made by V in October 2001 in county A were determined to be unfounded. He also stated that at no point before the charge was *nolle prossed* did anyone, to include his then-attorney, inform him the charge was a felony. He acknowledged knowing he could go to jail for more than one year if convicted of engaging in indecent liberties with his child. (Tr. 175-176, 186-187, 219-223, 226-227, 237-239, 241-243; GE 3) He stated his then-attorney used the term "wobbler:"

My understanding of it was, there's a – its classification was that, upon conviction, the judge has a procedure to determine whether it's a misdemeanor or a felony. (Tr. 219)

Applicant indicated during his September 2020 background interview that he unintentionally did not list his 2001 felony charge for indecent liberties with child by custodian because he did not remember to list it. He also indicated he interpreted the question as requiring him to list incidents in the previous 7 years. When he adopted the summary of his 2020 background interview in January 2022, he did not provide any corrections or additions. He did not state, as he did at the hearing, that he was unaware the indecent liberties with child by custodian charge was a felony. (Tr. 227-232; GE 8)

Applicant provided numerous character references who attested to his trustworthiness, good judgment, and reliability. (Tr. 247-253, 266-284) Among them were five individuals who testified at the hearing, to include a friend of 13 years, two fellow volunteers, the son of his partner (who referred to himself as Applicant's "functional stepson,") and his brother-in-law. His partner, and cohabitant of nearly 12 years, also wrote that she has entrusted Applicant with her children, and he has been a positive role model and caretaker for them. (Tr. 272-275; AE S, U)

Applicant's DD 214 reflects numerous decorations, medals, badges, citations, and campaign ribbons awarded or authorized to Applicant. (GE 6) He has also received numerous certificates of achievement, appreciation, and completion. (Tr. 190-192; AE P, Q, R)

Policies

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 to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching 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."

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 the 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Exec. Or. 10865 provides that adverse 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* Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct: 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 willingness to comply with laws, rules, and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant:

> (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 1998, court-martial charges were preferred against Applicant alleging he committed rape, forcible sodomy, conduct unbecoming an officer and gentleman, and indecent acts against his then-spouse. In July 1998, charges alleging sodomy, conduct unbecoming an officer and gentleman, and indecent acts against his then-spouse were referred to a general court-martial. In December 1998, Applicant was found guilty at an Article 15 NJP hearing of two specifications of conduct unbecoming an officer and gentleman and one specification of indecent acts with a woman not his then-spouse while he was still married. He received a punitive letter of reprimand and forfeiture of $2,000 pay per month for two months, all but $750 per month of which was suspended for six months. In April 1999, a BOI substantiated the misconduct for which he was found guilty and he was consequently involuntarily discharged from the U.S. military in October 1999 under general under honorable conditions for unacceptable conduct. In November 2001, Applicant was arrested and charged with felony indecent liberties with child by custodian. AG ¶ 31(b) is established.

I have considered all of the mitigating conditions under AG ¶ 32 and considered the following relevant:

> (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
>
> (c) no reliable evidence to support that the individual committed the offense; and
>
> (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶ 32(c) applies to the May 1998 court-martial charges preferred against Applicant and the July 1998 charges referred to a general court-martial that were ultimately withdrawn. AG ¶¶ 32(a) and 32(d) apply to the charges of conduct unbecoming an officer and gentleman and indecent acts, involving a woman who was not Applicant's then-spouse while he was still married, for which Applicant was found guilty at NJP in December 1998. Nearly 26 years have passed since Applicant's 1998 conviction, for which he was involuntarily discharged from the U.S. military under honorable conditions after a BOI substantiated the misconduct for which he was found guilty. His conduct also happened under such unusual circumstances in that it occurred while he was a captain in the U.S. military and going through a contentious divorce and custody battle. He has not since engaged in similar conduct, and such conduct is unlikely to recur, and does not cast doubt on his reliability, trustworthiness, or good judgment. I find SOR ¶ 1.b for Applicant.

AG ¶ 32(c) applies to Applicant's November 2001 charge of felony indecent liberties with child by custodian. Applicant maintained at hearing, as he did during his interview with the detective in December 2001, that he never sexually abused V. Despite the hearing testimony of V and LPC, that charge was *nolle prossed*. In addition, V's testimony was contradicted by the testimony of her older brother, who testified he heard V tell his then-spouse that Applicant did not do what she alleged he did. Further, V's similar allegations against Applicant in a different county were determined by that county to be unfounded. I find SOR ¶ 1.a for Applicant.

Guideline D, Sexual Behavior

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

> 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 or 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.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant:

> (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted; and
>
> (d) sexual behavior of a public nature or that reflects lack of discretion or judgment.

As stated above in my analysis under Guideline J, court-martial charges involving criminal sexual behavior on Applicant's part against his then-spouse were preferred and referred to a general court-martial in 1998. Applicant was also found guilty at an Article 15 NJP hearing in 1998 of engaging in sexual conduct of a public nature and reflective of a lack of discretion and judgment, with a woman who was not his then-spouse while he was still married. He was also charged with felony indecent liberties with child by custodian in 2001. AG ¶¶ 13(a) and 13(d) are established.

I have considered all of the mitigating conditions under AG ¶ 14 and considered the following relevant:

> (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.

For the same reasons as set forth above in my Guideline J analysis, AG ¶ 14(b) applies and I find SOR ¶ 2.a for Applicant.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . .

The guideline notes conditions that could raise security concerns under AG ¶ 16. The disqualifying conditions potentially applicable in this case include:

> (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
>
> (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.

AG ¶ 16(a) applies to Applicant's deliberate failure to list his 2001 felony charge for indecent liberties with child by custodian on his 2020 SCA. He provided inconsistent explanations at the hearing and during his adopted 2020 background interview for why

he did not list this charge. He testified that although he understood the severity of the charge, he was unaware it was a felony because the arrest warrant did not identify it as such, similar allegations previously made by V in a different county were determined to be unfounded, his then-attorney never informed him the charge was a felony and led him to believe the charge's classification would be determined only upon conviction, and he did not learn of its felony classification until he saw it in the FBI report. Yet, nowhere during his September 2020 background interview or in his January 2022 adoption of the report of that background interview did he state such. To the contrary, he indicated that he did not remember to list it and he interpreted the question as requiring him to only list incidents from the previous 7 years. Moreover, I do not find it credible that an individual of Applicant's educational and professional pedigree would be unaware, at the time he completed his SCA, that a charge of indecent liberties with child by custodian would be anything less than a felony.

AG ¶ 16(a) also applies to Applicant's deliberate failure to list his court-martial charge of rape preferred against him in May 1998 on his 2020 SCA. Despite Applicant's position that he did not know he had been charged with rape in 1998, he knew he was being investigated for allegations of rape made by his then-spouse, he admitted seeing a charge sheet in which the rape allegations had been lined out, and he acknowledged knowing that a charge of rape was a felony. Again, I do not find it credible that an individual of Applicant's educational and professional pedigree would be unaware, at the time he completed his SCA, that he had to list the rape charge in response to a question inquiring whether he had ever been charged with a felony.

AG ¶ 16(a) does not apply to Applicant's failure to list his court-martial charges of sodomy, conduct unbecoming an officer and gentleman, and indecent acts, as alleged in SOR ¶ 3.a. Although the record evidence, as discussed above, demonstrates Applicant knew he was charged with rape, which is a felony, it does not establish that he knew that the other misconduct allegations, to wit: sodomy, conduct unbecoming an officer and gentleman, and indecent acts, were felonies. I therefore find that part of SOR ¶ 3.a for Applicant.

For the same reasons as set forth above in my Guideline J analysis, AG ¶ 16(c) applies to SOR ¶ 3.b, which cross alleges the information set forth in SOR ¶¶ 1.a and 1.b.

AG ¶ 17 provides the following conditions that could mitigate security concerns:

> (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
>
> (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made

aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

For the same reasons as set forth above in my Guideline J analysis, AG ¶ 17(f) applies to SOR ¶ 3.b, which cross alleges the information set forth in SOR ¶¶ 1.a and 1.b.

However, none of these mitigating conditions are established for SOR ¶ 3.a. Applicant did not make prompt, good-faith efforts to correct his falsifications on his 2020 SCA before being confronted. His concealments were not caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing him specifically concerning security processes. His deliberate falsifications on his 2020 SCA are not minor offenses. Instead, these omissions strike at the heart of the security clearance process, which relies on candid and honest reporting. Applicant has not taken accountability for his deliberate falsifications. As such, he has not shown that his behavior was infrequent, happened under unique circumstances, or is unlikely to recur. I find against Applicant on the part of SOR ¶ 3.a that alleges he deliberately failed to list on his 2020 SCA his 2001 felony charge for indecent liberties with child by custodian and the court-martial charge of rape preferred against him in May 1998.

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 eligibility for a security clearance 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J, D, and E in my whole-person analysis. I have also considered Applicant's good character references. However, I find that the totality of the evidence concerning his dishonesty on his SCA leaves me with questions and doubts about his eligibility and suitability for a security clearance. I find Applicant mitigated the Guideline J security concerns that were cross alleged under Guideline D and Guideline E. I also find Applicant mitigated the part of the Guideline E security concern alleging he deliberately falsified his 2020 SCA by failing to disclose the May 1998 court-martial charges of sodomy, conduct unbecoming an officer and gentleman, and indecent acts. I do not find Applicant mitigated the part of the Guideline E security concern alleging he deliberately falsified his 2020 SCA by failing to disclose his 2001 felony charge for indecent liberties with child by custodian and his May 1998 court-martial charge of rape.

Applicant requested in his Answer that I consider granting him a waiver or granting him eligibility with the imposition of appropriate conditions, in accordance with SEAD 4 Appendix C. (Answer; HE VIII) The adjudicative guidelines give me the authority to approve a waiver "despite the presence of substantial issue information that would normally preclude eligibility," with the provision that a waiver may be approved "only when the benefit of initial or continued eligibility clearly outweighs any security concerns," and that a waiver "may also require conditions for eligibility." The guidelines also give me the authority to grant or continue eligibility "despite the presence of issue information that can be partially but not completely mitigated, with the provision that additional security measures shall be required to mitigate the issue(s)." It provides that such measures "include, but are not limited to, additional security monitoring, access restrictions, submission of periodic financial statements, or attendance at counseling sessions." I have not done so as I have concluded neither are warranted in this case.

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:	FOR APPLICANT
Subparagraphs 1.a – 1.b:	For Applicant
Paragraph 2, Guideline D:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant (except for the part of the allegation that alleges Applicant falsified his 2020 SCA by failing to list the May 1998 court-martial charges of sodomy, conduct unbecoming an officer and gentleman, and indecent acts, which I find for Applicant)
Subparagraph 3.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 Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Candace Le'i Garcia
Administrative Judge