

KEYWORD: Criminal Conduct

DIGEST: Applicant is a 56-year-old program manager who lost employment with a defense contractor when he was denied access to classified information. Applicant committed lewd acts on his young step-daughter over approximately an 18 month period in violation of state law. Clearance is denied.

CASENO: 04-05712.h2

DATE: 04/30/2007

DATE: April 30, 2007

In Re:)	
)	
-----)	
SSN: -----)	ISCR Case No. 04-05712
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
THOMAS M. CREAN**

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

_____Applicant is a 56-year-old program manager who lost employment with a defense contractor

when he was denied access to classified information. Applicant committed lewd acts on his young step-daughter over approximately an 18 month period in violation of state law. Clearance is denied.

STATEMENT OF THE CASE

On April 21, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny a security clearance for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). Applicant acknowledged receipt of the SOR on April 25, 2005. The SOR alleges two security concerns under Guideline J (Criminal Conduct) of the Directive.

Applicant answered the SOR in writing on May 12, 2005. He admitted a shoplifting allegation but denied an allegation of lewd acts upon a child under Guidelines J. He provided an explanation for his actions. Applicant requested a hearing before an administrative judge, and the request was received by DOHA on May 17, 2005. Department Counsel was prepared to proceed with the case, and a hearing before another Administrative Judge was held on November 10, 2005. The Administrative Judge rendered an unfavorable security clearance decision on February 6, 2006. The DOHA Appeal Board issued a decision on October 31, 2006, remanding the case for a new hearing and decision before a new administrative judge. The case was assigned to me on October 31, 2006. Applicant requested a delay of the hearing. A notice of hearing was issued on November 15, 2006, and the hearing convened on January 16, 2007. Eight government exhibits, marked Government Exhibits 1-8, were offered and six were admitted. Government Exhibits 4 and 8 were not admitted, but administrative notice was taken of facts in exhibit 8. The government presented the testimony of two witnesses. Applicant offered 60 exhibits, marked Applicant Exhibits A-HHH. Of the Applicant exhibits, 44 were admitted and 16 were not admitted. The Applicant and one Applicant witness testified. The transcript (Tr.) was received on January 24, 2007.

PROCEDURAL ISSUES

Relevant and material information:

As noted below, Applicant was charged with lewd acts upon a child by state authorities. He pled guilty to simple assault pursuant to a pre-trial agreement with prosecutors. In the first DOHA hearing, Department Counsel introduced evidence concerning the lewd acts. Applicant tried to present his evidence to contest the government's evidence of lewd acts, but the administrative judge determined his guilty plea to simple assault prevented him from presenting his evidence. The DOHA Appeal Board reversed the first decision based on the administrative judge's decision not to permit Applicant the opportunity to present evidence to contest the lewd acts.

At the second hearing, the government again introduced evidence concerning the lewd acts upon a child. Applicant was permitted to introduce any evidence or information that was relevant and material to the lewd acts as well as evidence concerning the credibility of the two government witnesses, A, the victim, and her mother, Mrs. M.

Admission of exhibits:

The government offered eight exhibits. Six of the exhibits were admitted. Government Exhibit 4 was not admitted since it was a hearsay statement from an individual who was not a party to the issues raised in the SOR allegation or the hearing.¹ Government Exhibit 8 was an article on child abuse that was used to establish facts for administrative notice.²

Applicant introduced 60 exhibits. Of these, 44 were admitted as relevant and material to the issues concerning the lewd acts and the credibility of witnesses at the hearing. The other Applicant exhibits were not admitted because they were not relevant and material to the lewd acts issues or the credibility of the witnesses.³

FINDINGS OF FACT

_____ Applicant is a 56-year-old college graduate who has worked for defense contractors as a program manager. He was born in Italy but came to the United States as a young child, and is a naturalized United States citizen. When he was denied access to classified information, he lost his position with the defense contractor. He is now a self-employed business process engineer. Applicant served in the Navy for six years, held a security clearance, and received an honorable discharge. After his discharge, he worked for either federal contractors or in the private sector until 2001 when the company he was working for went out of business.⁴

In February 1996, Applicant was charged with shoplifting when he attempted to steal a cordless telephone intended as a gift for his daughter. He pled guilty to a reduced charge of trespassing, served five days of community service, paid a fine, and completed three years of probation without incident.⁵ After the period of probation on petition of Applicant, the conviction was set aside.⁶

¹Tr. Volume I, 27-31, 34-36.

²Tr. Volume II, 205-215.

³See, Tr. Volume II, Tr. 80, 114-115, 123-125, 140-142, 189, 203.

⁴Government Exhibit 1 (Security Clearance Application, dated April 26, 2003); Tr. Volume II, 171-173.

⁵Government Exhibit 2 (Applicant's statement, dated November 14, 2003).

⁶Tr. Volume II, 147-149; Applicant Exhibit EE (Petition for Relief, dated May 11, 2005).

Applicant has been married twice. He has three adult children by his first marriage. He separated from his first wife in 1996, and their divorce was final in May 1998. Applicant's first wife and his children moved from a city on the west coast to a city on the east coast. Applicant stayed on the west coast to work. His children went to school and became friendly with the children of Mrs. M. She had four children, B the oldest child a girl, two boys, C and D, and her youngest daughter A. On a visit to see his family in 1996, Applicant was introduced to Mrs. M by his children. At the time, she lived on the east coast and he lived on the west coast. They had a long distance relationship for 18 months, and then married in June 1998 when his divorce became final. For the first 18 months of the marriage, Applicant spent two weeks each month on the west coast and two weeks on the east coast living with Mrs. M and her family. In late 1999, he moved permanently to the east coast. He worked from home until mid-2001, when his company went out of business. The marriage between Mrs. M and Applicant was acrimonious and they separated in 2002, and divorced in 2006.⁷

Mrs. M, her four children, Applicant, and Applicant's son, spent a weekend together in a mountain cabin in 1997. A was approximately nine years old at the time. As the group was talking, A was sitting on a couch and Applicant was sitting on the floor next to her. As a joke was made, Applicant put his head in A's groin area and moved it back and forth in a motion like shaking his head to indicate yes or no. This made her feel very uncomfortable. She told her sister and then her mother. Her mother was not concerned about the incident and did not talk to Applicant about it. Applicant's son was 12 years old at the time. He did not see or observe any inappropriate conduct by his father towards A. He also stated that A's actions towards his father in later years were always friendly and she appeared comfortable and relaxed around him.⁸ Shortly after this weekend, Mrs. M and Applicant married. He was Mrs. M's fourth husband.⁹

Applicant moved permanently to the house on the east coast. Applicant had an office in the house to do his work for his employer. He had a computer and other equipment in the office area. A did a lot of her homework in the office area because the computer in that room had greater flexibility and capability than the family's other computer. The office also had other equipment in the room, like music and photography equipment. Applicant would also help A with her homework projects, usually math and creative writing.¹⁰

During this time, A was between nine and 13 years of age. A stated that whenever Applicant had the opportunity, he touched her. When she was standing in the kitchen, he would purposely walk by her and press his hand on her buttock. A testified that when she worked in the office area with Applicant, he would usually lock the door. He would place his hand on her thigh. He would pick his hand up to use the computer but he would returned it to her thigh, placing it closer to her groin area. He took these actions whenever he could, about 25 times in the two weeks he was in the house. She would continue to go to the office area with him because she needed his help to complete her homework and improve her grades. A did not like his actions and one time threw his hand away

⁷Tr. Volume I, 45-48.

⁸Tr. Volume II, 176-200.

⁹Tr. Volume I, 155-157, 184-186.

¹⁰Tr. Volume I, 178-179.

from her. He would hug her a lot of times with his hands and fingers on the sides of her breast area. He would use his fingers to rub her around her breast area. Applicant would put his hands on her thighs and move them up to her groin area. All of the actions took place above her clothes.¹¹

A felt uncomfortable and “grossed out” by Applicant’s actions. She told her sister and a few close friends about Applicant’s actions. She tried to tell her mother about his actions and her feelings, but her mother did not understand. In the spring of 2002 when she was in the seventh grade, Applicant told a school counselor that her stepfather had been touching her inappropriately. The counselors called her mother to the school. In the counselor’s office, A told her mother about the actions of Applicant. Her mother did not influence or direct her to tell the school counselors about Applicant’s actions. After the school counselors called her mother and she told her about the allegations, her mother’s advice was to tell the truth about what happened.¹²

Mrs. M had no idea about Applicant’s action towards A before she was called to the school by the counselors.¹³ She remembered that A told her about the incident in the mountain cabin but felt she misunderstood what happened and it was something else. When A told her of Applicant’s actions, she was confused, shocked, and angry. When she returned home that day and before A returned from school, she confronted Applicant. He basically did not deny any of the accusations. Mrs. M stated:

“He really said nothing. Did not deny anything. He looked like he had been a person who was caught. And he - and I said, I - I mean, I did most of the talking because he hardly said anything.”¹⁴

Mrs. M told Applicant he was not to be behind closed doors in his office with A. When A returned from school that day, Mrs. M, A, and Applicant had a discussion. Because he had been out of work, he was drinking which made him not care what he was doing or how he was touching her. At the time, he had been out of work for about eight months. She did not ask Applicant to leave the home on the advice of her friends and minister. The school authorities did not report the incidents to the police.¹⁵ A few days after the incident was reported to Mrs. M by school authorities, she and Applicant were in church. Applicant asked her to forgive him for his actions. Eventually, Applicant moved from the house and lived for a time with a neighbor.

The couple had sever financial problems since Applicant was not employed full time, Mrs. M helped support him, and Applicant complained she used his money to pay some of her debts. The

¹¹Tr. Volume I, 157-160, 182-188.

¹²Tr. Volume I, 163-164.

¹³Tr. Volume I, 50-53.

¹⁴Tr. Volume I, 149.

¹⁵Tr. Volume I, 53-55.

friction between them over finances and other issues led to their eventual divorced.¹⁶

On the advice of friends and her minister, Mrs. M eventually reported the incidents concerning A to a state social service agency. The agency in turn reported the incidents to law enforcement.¹⁷ Applicant was indicted by the grand jury for the offense of committing or attempting lewd acts upon a child under sixteen.¹⁸ Applicant's attorney felt there was not sufficient facts to warrant conviction. The prosecutor offered a plea of guilty to simple assault which was accepted. Although Applicant did not want to plead to any wrongdoing, his attorney felt it was best to plead to the offense rather than take chances with a jury.¹⁹ In addition, at the same time Applicant was involved with his divorce from Mrs. M, and was incurring attorney and witness fees. He did not have the financial resources for both the divorce and the criminal action. It was best for him to plead to the lesser offense.²⁰

Applicant denied inappropriately touching A or committing lewd acts upon her at any time. He testified Mrs. M had a financial reason to fabricate the allegations against him. When they divorced, Applicant and Mrs. M would divide the marital assets if the divorce was a no fault action. If there was a significant reason for the divorce, like his actions towards A, Mrs. M would receive the marital assets and significant financial payments. Applicant presented documents and testified that Mrs. M constantly was concerned about how he was using his financial assets. She was upset because he still assisted his ex-wife and his children with financial resources. He assisted them because he felt he had an obligation to take care of his first family. He spent his assets to fix up Mrs. M's house and increase its value. The couple had separate and joint checking accounts and both spent money from the accounts. His siblings complained to him about a Christmas letter prepared by Mrs. M that did not mention the children from his first marriage, but just Mrs. M's children.²¹ Their marriage was not a loving, family oriented marital relationship.²²

Applicant denies that the lewd acts upon A took placed, or if there was improper actions, it

¹⁶Tr. Volume I, 58-66, Volume II, 134-143; Applicant Exhibits UU and VV (Letters of employment, dated June 13, 2001, and March 5, 2002).

¹⁷Tr. Volume I, 55-57.

¹⁸Government Exhibit 5 (Indictment, dated December 11, 2002). The criminal statute for lewd acts upon a child reads: "It is unlawful for a person over the age of fourteen years to willfully and lewdly commit or attempt a lewd or lascivious act upon the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passion or sexual desires of the person or of the child." Commentary on the offense shows it is the act commonly referred to as child molestation.

¹⁹Applicant Exhibit QQ (Attorney affidavit, dated March 1, 2005).

²⁰Tr. Volume II, 102-108.

²¹Tr. Volume II, 17-37; *See*, Applicant Exhibit A (Financial activity spreadsheet, December 1999-2002); Applicant Exhibit R (Christmas letter, 2000).

²²*See*, Applicant Exhibit ZZ, (Note from Mrs. M, undated); Applicant Exhibits RR, SS, and TT (messages, various dates).

was unintentional.²³ He does not remember exactly what took place in the mountain cabin in 1997. He believes whatever took place was a playful act at best. He remembers resting his head on A's knees. When Mrs. M talked to him about the incident later that night, she stated A had a "yucky sexual feeling." He did not understand what the incident was about and started wondering how an eight year old could think such sexual thoughts. That is the thought that stood out in his mind. He did not know or think A had any concerns about his conduct towards her. He asked his son what he saw and his son reinforced his belief concerning the incident. He was completely baffled by A's allegations of sexual misconduct based on this incident. He did not think anything of her actions since he considered her reactions to him as nothing out of the ordinary for a daughter.²⁴

Applicant stated that there was an atmosphere of sexuality in Mrs M's household when he came to live there. This atmosphere of sexuality also affected how A looked at the incident at the mountain cabin and on his actions in the computer room. Mrs. M's two oldest children, B the oldest daughter, and C, the oldest son, created sexual play within the household that would affect A's view of any action by Applicant.²⁵ However, Applicant also stated that A and Mrs. M's youngest son, D were good children. He referred to A as the "jewel in that crown."²⁶

Applicant was "floored" by A's allegations of inappropriate contact. He stated that if he touched A's breasts it was not intentional. He put his hand on her legs but he does not recall traveling very far between her legs. He did not touch her on her vaginal area. He may have hit her buttocks at times but not in a sexual way.²⁷ There was a good friendly relationship of stepdaughter to stepfather between he and A. She kept coming to him for help and assistance. She considered him as a father and sat near him and placed her legs over his. Pictures of them together appear to show that they had fun together and seemed to be enjoying themselves.²⁸ He stated that A would sit next to him while they watched television or used the computer. While using the computer in his office, they would laugh and talk. Many times, he told her to use the other computer outside the office since he was engaged in working for his company. At times, A would throw herself at him or fall and expect him to catch her. So there may have been some incidental touching.²⁹ After the allegation of inappropriate conduct was made, Applicant tried to avoid A but she kept asking him for help with her work until she left for a vacation in Alaska.³⁰ When confronted by Mrs. M about committing an act on A, he felt it was a better strategy to admit the possibility of an action rather than start an argument. He issued a general apology and moved on. He asked for forgiveness in church so the issue would not escalate. He heard about issues going crazy and did not want to suddenly end up

²³Tr. Volume II, 85.

²⁴Tr. Volume II, 69-70, 162-165.

²⁵*Id.*, 87-98; Applicant Exhibits L, M, V, and W (Pictures).

²⁶*Id.*, 86-87.

²⁷*Id.*, 158, 165-166.

²⁸*Id.*, 76-79; Applicant Exhibits Y, Z, AA, BB (Pictures of A at play with Applicant at the beach or in a pool).

²⁹*Id.*, 70-74.

³⁰*Id.*, 74-76.

in jail.³¹

Administrative notice was taken of facts concerning the reactions of child sex abuse victims. The reaction of a child is an accommodation syndrome. The syndrome leads to secrecy, helplessness, entrapment and accommodation, delayed and unconvincing disclosure, and retraction. A did not talk to her mother about Applicant's actions but did talk to her sister. She felt helpless about the situation and did not seek intervention. She told of the abuse only when she was older and wanted a separate life style and challenged the authority of her mother and stepfather. It is typical for a mother not to know of the action of the father or stepfather because a woman does not commit her life and the security of her children to a person capable of molesting them. The obvious clues of abuse are usually evident only in retrospect. The disclosure to the school authorities is consistent with normal actions of a child involved in abuse.³²

Applicant presented a number of character affidavits prepared for the divorce proceedings from Mrs. M. An affidavit from his sister questions the credibility of Mrs. M because she did not mention all of her marriages to her. She saw B engage in public inappropriate sexual conduct. She also saw that A was needy and clinging to Applicant. She also stated that Applicant was a positive person but he became stressed and depressed because of his relationship with Mrs. M.³³

Applicant's first wife stated she has known him for over 27 years. Applicant was a model father and caring towards his children. She observed A and felt she was starved for a father figure. A hung on Applicant whenever she observed them together. Mrs. M was always hostile towards her and always talked disparagingly of Applicant.³⁴

A daughter from his first marriage states that Applicant has never made her feel uncomfortable. He always treated her in a supportive and loving manner. She never felt apprehensive about having her female friends over to her house. Her father is a kind man that puts comfort and feelings of other first.³⁵ Applicant's oldest son notes he dated the A's older sister, B. He observe that the family dynamics were odd with argumentative, violent, and vengeful behavior. It made him feel uncomfortable.³⁶

Two friends and neighbors, who lived near Applicant and his first family on the west coast, stated that Applicant was a good friend who always treated their children correctly. Applicant gave quality time to all of his children and never made his or their children uncomfortable.³⁷ The neighbor

³¹Tr. Volume II, 74.

³²Government Exhibit 8 Article (The Child Abuse Accommodation Syndrome, by Roland C. Summit, Child Abuse and Neglect, Vol. 7, pp 177-193, 1983).

³³Applicant Exhibit JJ (Affidavit, dated February 28, 2003).

³⁴Applicant Exhibit KK (Affidavit, dated September 26, 2002).

³⁵Applicant Exhibit LL (Affidavits, dated September 30, 2002).

³⁶Applicant Exhibit MM (Affidavit, dated January 14, 2004).

³⁷Applicant Exhibit NN (Affidavit, dated February 22, 2003).

that Applicant rented a room from after his divorce from Mrs. M stated that she knew Mrs. M for over ten years. After Mrs. M married Applicant, she was with them on a number of occasions. Mrs. M was always after Applicant about something. Mrs. M's family was dysfunctional and causing problems and issues for Mrs. M. Applicant was generous and kind. He spent time with his children. The children from his first marriage have good character, and are happy, kind, and intelligent.³⁸

Applicant presented a number of affidavits from some of his long term friends attesting to his good character and that he is a good and loving father. Some of these affidavits are from childhood friends of the children from his first family that attests that they never felt uncomfortable or threatened by him.³⁹

A's testimony was credible. She testified clearly and precisely about the incidents and was direct and not hesitant. Applicant's testimony was ambiguous and contradictory. At times, he did not answer questions directly. Mrs. M's testimony was also credible. She did not observe Applicant's actions towards A, but credibly testified as to her actions after being notified by school counselors.

POLICIES

The President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information."⁴⁰ Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.⁴¹

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions and mitigating conditions for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6.

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.⁴² An administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable

³⁸Applicant Exhibit OO (Affidavit, dated March 6, 2003).

³⁹Applicant Exhibits I and J (Affidavits, various dates).

⁴⁰*Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁴¹Directive ¶ E2.2.1.

⁴²*Id.*

participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation of recurrence.⁴³

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant.⁴⁴ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the Applicant from being eligible for access to classified information.⁴⁵ Thereafter, Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts.⁴⁶ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."⁴⁷ The government is under no duty to present evidence to disprove any Adjudicative Guideline mitigating condition, and an Administrative Judge cannot assume or infer that any particular mitigating condition is applicable merely because the government does not present evidence to disprove that particular mitigating condition.⁴⁸ "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability."⁴⁹ "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."⁵⁰

Based upon a consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline J - A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

⁴³Directive ¶¶ E2.2.1.1 through E2.2.1.9.

⁴⁴See Exec. Or. 10865 § 7.

⁴⁵Directive ¶ E3.1.14.

⁴⁶ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); see Directive ¶ E3.1.15.

⁴⁷ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

⁴⁸ISCR Case No. 99-0597 (App. Bd. Dec 13, 2000).

⁴⁹ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993))

⁵⁰*Egan*, 484 U.S. at 531; see Directive ¶ E2.2.2.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions section below.

CONCLUSIONS

I carefully considered all of the factors in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Applicant was convicted and sentenced for shoplifting in 1997. He was indicted by a grand jury for lewd acts upon a child in 2002. These criminal acts raise Criminal Conduct Disqualifying Conditions (CC DC) E2.A10.1.2.2 (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*), and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*). Applicant was indicted for lewd acts upon a child. He reached an agreement with the prosecutor, pled guilty to a lesser offense as part of the plea bargain, and sentenced for simple assault. The indictment for the lewd acts upon a child is sufficient to establish the disqualifying conditions.

There is no issue that Applicant committed the offense of shoplifting since he admitted the act and acknowledges the conviction and sentencing. This misdemeanor offense occurred in 1996. Applicant successfully completed his probation period. He has not been involved in any other theft type offense or misdemeanor offense since this incident. The offense happened over ten year ago. Criminal Conduct Mitigating Conditions (CC MC) E2.A10.1.2.1 (*The conduct was not recent*) applies. Even though there is an offense for lewd acts upon a child, CC MC E2.A10.1.3.2 (*The crime was an isolated incident*) applies since the shoplifting was a one time theft offense. Since, the shoplifting offense is not recent and an isolated theft offense, Applicant has mitigated security concerns based on the shoplifting charge.

Applicant's lewd actions was established by A's testimony. She credibly testified Applicant placed his head in her lap and moved his head around. While in their home, Applicant placed his hand on her leg, moving toward her groin a number of times, and placed his hands on her sides near her breast while hugging her. A was approximately eight year old during the incident at the mountain cabin. She was between nine and 13 during the incidents at the home in the computer area. She described how Applicant's touching made her feel uncomfortable. Applicant denies that he committed lewd acts upon A. At first, he said absolutely that the acts did not take place. Then he stated that if they did take place, his actions were unintentional. Applicant's denial is also based on his allegation that (1) Mrs. M fabricated the whole episode and had A fabricate the incident to gain a financial advantage over Applicant in their divorce proceeding, and (2) the atmosphere in the home created by Mrs. M's oldest children was sexually explicit and gave A the false impression of Applicant's actions. Mrs. M knew of the mountain cabin incident because A told her about it, and she talked to Applicant about it. Applicant did not deny something may have happened, but that it was unintentional. Mrs. M did not know of the other touching incidents until A told school counselors about the actions of her stepfather. The allegation concerning the incidents did not come from Mrs. M but from the A. The directions Mrs. M gave her daughter was to tell the truth. Appellant did not raise sufficient facts to establish that Mrs. M either fabricated the action or had her daughter lie about Applicant's actions.

Even if Applicant had established that Mrs. M had a reason to fabricate the story, since the allegation did not come from her, he has not refuted that the lewd acts upon a child took place.

Applicant raised sufficient information that the family atmosphere in Mrs. M's house created by her two oldest children was sexually risky and probably dysfunctional. Applicant argues the sexual atmosphere created a false impression in A as to the meaning of Applicant's action. However, A clearly testified as to Applicant's in appropriate actions and how they made her feel. She described his actions in placing his hands along side her breast and rubbing her leg near her groin area. I conclude that Applicant committed lewd acts upon A, a child under sixteen.

After determining that the alleged lewd acts by Applicant took place, I considered Criminal Conduct Mitigating Conditions E2.A10.1.3.1 (*The criminal behavior was not recent*), CC MC E2.A10.1.3.2 (*The crime was an isolated incident*), CC MC E2.A10.1.3.3 (*The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*), and CC MC E2.A10.1.3.5 (*There is clear evidence of successful rehabilitation*). The criminal activity of lewd acts upon a child took place over a period of time from June of 1999 to December 2003, after Applicant moved to Mrs. M's house. His criminal behavior took place about three to four years ago and that is recent. There were lewd acts upon the child that took place over an approximate three year period, so the incidents are not isolated. Applicant presented testimony that A came to his office area, sat near him, placed her legs on his, and took other actions towards him. As an adult, he cannot be coerced by the actions of a child to commit lewd acts on that child. He was not pressured by A to commit a lewd act on her. I considered the affidavits from friends, neighbors, and family members attesting that Applicant is a good, loving, and caring father. However, this character evidence is outweighed by the testimony of A about Applicant's actions towards her. Applicant presented insufficient information of any rehabilitation concerning lewd acts on a child. Applicant has failed to refute the allegations against him that he committed lewd act on a child. Such acts are criminal in violation of state statute. He has not presented sufficient information to mitigate the security concerns for his actions with A.

I further reviewed all of the record evidence under the "whole person" concept. I considered the letters of recommendation attesting to the good character of Applicant. Applicant was accused of committing the heinous act of lewd conduct upon a child. He did not vigorously deny the conduct, but attempted to explain and justify it. He blamed A for misinterpreting his actions or her siblings for creating an atmosphere to misinterpret. His explanations are simply not credible or believable. He was silent when first confronted and apologized to Mrs. M. In his testimony, he was equivocal, first denying the actions then saying if they took place it was unintended. As an adult and the father figure in the family unit, he was placed in a position to use good judgment and be responsible. How one behaves in this position provides an indication of how a person may behave in regard to protecting classified information. His actions show poor judgment, unreliability, and untrustworthiness. Someone who displayed such traits in his family raises security concerns when protecting classified information. I am persuaded by the totality of the evidence that it is not clearly consistent with the national interest to grant Applicant access to classified information. Guideline J is decided against Applicant and clearance is denied.

FORMAL FINDINGS

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

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a.:	For Applicant
Subparagraph 1.b.:	Against Applicant

DECISION

In light of all of the circumstances in the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Thomas M. Crean
Administrative Judge