



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



In the matter of:)	
)	
-----)	ISCR Case No. 04-11904
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: Daniel S. Conway, Esq.

April 28, 2009

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Serious criminal conduct and personal conduct concerns arise from an indecent assault of his stepdaughter in August 2002, but his current situation makes recurrence unlikely. He is remarried and living in Lithuania, where he works as a defense contractor employee. Foreign influence concerns persist primarily because he has close bonds through marriage to Lithuanian resident citizens and his spouse and her sister work for the Lithuanian government. Clearance is denied.

Statement of the Case

Applicant submitted a Security Clearance Application (SF 86) on March 11, 2004. On May 14, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline J, Guideline B, and Guideline E that provided the basis for its action to deny him a security clearance and refer the matter to an administrative judge. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry*

(February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense as of September 1, 2006.

Applicant answered the SOR in writing on June 16, 2008, and requested a decision without a hearing. He subsequently asked for a hearing before an administrative judge, and the case was assigned to me on November 20, 2008. On September 29, 2008, counsel for Applicant entered his appearance. With the agreement of the parties, on December 8, 2008, I scheduled a hearing for January 7, 2009.

I convened the hearing as scheduled. Seven government exhibits (Ex. 1-7) and ten Applicant exhibits (Ex. A-J) were admitted. At the government's request and with no objection from Applicant, I agreed to take administrative notice of Article 134 of the Uniform Code of Military Justice (UCMJ) pertaining to indecent assault, and of two U.S. State Department publications for background information about Lithuania: *Background Note: Lithuania*, dated December 2008, and *Lithuania, Country Reports on Human Rights Practices-2007*, dated March 11, 2008. Applicant and his spouse also testified, as reflected in a transcript (Tr.) received on January 28, 2009.

Findings of Fact

DOHA alleged under Guideline J (criminal conduct) and under Guideline E (personal conduct) that Applicant was arrested in August 2002 and found guilty at a summary court-martial of indecent assault, in violation of Article 134 of the UCMJ (SOR ¶¶ 1.a, 3.a); that he was arrested in April 1993 and charged with domestic battery (dismissed) (SOR ¶¶ 1.b, 3.a); and that he arrested in December 1990 for criminal trespass and simple assault, and pleaded guilty to the assault charge (SOR ¶¶ 1.c, 3.a). DOHA alleged only under Guideline E that because of the August 2002 indecent assault, the U.S. military had intended to adjudicate his security clearance, although his affiliation with the military was terminated before any final resolution (SOR ¶ 3.b). Under Guideline B (foreign influence), Applicant was alleged to currently reside in Lithuania (SOR ¶ 2.a), and to be in a domestic relationship with a Lithuanian resident citizen (SOR ¶ 2.b), who works for the Lithuanian government (SOR ¶ 2.c). Applicant admitted the allegations with explanations, and offered in mitigation that he had made national security his primary concern over his 27-year career. After considering the evidence of record, I make the following findings of fact.

Applicant is a 47-year-old database designer for, and trainer of, a military simulation application that replicates battlefield conditions in the computer to train military staffs (Tr. 41). He has worked for a U.S. defense contractor since February 2004 following his retirement from the U.S. military. He held a secret-level security clearance since 1979, most recently renewed in August 1995 (Exs. 1, 7, Tr. 89).

Applicant enlisted in the U.S. military under a delayed entry program in November 1978 (Tr. 42). He entered on active duty in May 1979, and was stationed on a ship equipped with nuclear weapons that was ported overseas (Tr. 44). In November 1979, he married his first wife. Both were only 18, and they had no children before they divorced in February 1982 (Ex. 1, Tr. 47). In late May 1982, Applicant married his second wife, just before he completed his three-year enlistment term and was discharged from active duty (Exs. 1, B).

After he was discharged, Applicant realized that he wanted to continue in the military. He enlisted in another branch of the service under a delayed entry program because it offered more opportunity for education and promotion (Tr. 45). Following his entry on active duty in November 1982, he had a distinguished career, which included a tour in Southwest Asia during Desert Storm for which he received the Bronze Star (Tr. 46). He progressed through the ranks to sergeant first class (E-7) by July 1993 (Ex. A). As a fire support noncommissioned officer, Applicant routinely handled classified information without incident. A brigadier general (now retired), who served first as a battalion commander from 1996 to 1997 and then as commander of the field artillery regiment from 2000 to 2001, considered Applicant an "exceptional paratrooper." He observed Applicant's duty performance to be "exceptional in all aspects," and his reliability and trustworthiness to be beyond reproach (Ex. G).

Applicant had problems at home. While Applicant and his second wife were together, Applicant was twice arrested, once on domestic charges. In December 1990, Applicant was arrested for criminal trespass and simple assault after an incident involving his then sister-in-law's ex-boyfriend. Applicant had accompanied his sister-in-law to her ex-boyfriend's home to retrieve some of her possessions. When he saw his sister-in-law being manhandled by her former boyfriend, Applicant ran into the house and pushed him away. Applicant asserts that all charges were dismissed against him (Ex. 2, Answer, Tr. 49), and the government presented no evidence to show otherwise. In April 1993, Applicant was arrested for domestic battery against his spouse. During an argument between them, their dogs began fighting each other. Applicant's spouse, who had picked up an electric cattle prod to stop the dogs, struck Applicant in the back. He turned and kicked his spouse in the chest and right shoulder area, leaving bruises. Applicant called the police, and he was arrested. He was released the next day without formal charges being filed (Ex. 3, Tr. 51). He denies striking her at any other time during their marriage (Tr. 72). He divorced her in October 1996 after 14 years of marriage (Ex. 1) because the marriage had been abusive physically and emotionally for him. Following his divorce, he discovered that during the first seven years of their marriage, his ex-wife had still been legally married to her first husband. Applicant sought and obtained an annulment of the marriage after the divorce (Tr. 48).

On July 28, 1994, Applicant completed a National Agency Questionnaire (DD Form 398-2) in renewal of his secret-level clearance. He listed his arrests for trespassing in December 1990 and in April 1993 for physical abuse (Ex. 2). His clearance was renewed in August 1995 (Ex. 7).

In late November 1996, Applicant entered into a third marriage. His new wife was on active duty in the U.S. military. She had two daughters, then ages 10 and 12, and a son age 15 from a previous marriage (Tr. 52-53). Applicant, who had no experience with children, engaged in "roughhousing" with his stepdaughters on occasion (Tr. 54), and sometimes touched them inappropriately by accident as he wrestled with them. They felt uncomfortable at times (Ex. 5), but there is no indication that they let him know that.

In August 2002, Applicant's 16-year-old stepdaughter asked him to draw a fake tattoo on her back. As she lay on a pillow across his chest, he "got excited" (Tr. 54) and inappropriately fondled her breast. Twice she left to check on the progress of the tattoo, only to return for him to finish the drawing. Each time, he "groped" her breast for a few more minutes. The last time, his actions were observed by Applicant's other stepdaughter, who had briefly entered the room. Neither she nor the victim told Applicant at the time that his behavior was inappropriate. After he finished the drawing, he returned to work (Ex. 5, Tr. 53-54).

The sequence of events that led to the incident being discovered is not clearly set out in the available record,¹ but Applicant did not deny to his spouse or to military investigators that he had inappropriately touched his stepdaughter's breast (Ex. 5). During an investigation, Applicant's younger stepdaughter was asked whether Applicant had ever placed his hand on his breast previously. She responded only when they were roughhousing. She admitted that she had not told Applicant to stop fondling her and that she did not think he would do it again. Applicant's older stepdaughter was interviewed as well, and she indicated she had seen Applicant's left hand on her sister's breast, and she left without saying anything. She believed Applicant saw her, but he did not remove his hand from her sister's breast. She denied Applicant had ever touched her inappropriately at any time (Ex. 5).

During his interview, Applicant acknowledged his misconduct to the investigator. He indicated that he had asked his younger stepdaughter repeatedly at the time whether it felt good and she responded, "Yes." He averred that his stepdaughter did not tell him to stop, but that he "should have known better." He denied having engaged in similar behavior in the past other than during some tickling and roughhousing. When asked about how he was treated during his interview, Applicant responded, "With more respect than I deserve." Applicant's younger stepdaughter was re-interviewed a couple

¹Applicant's spouse at the time told investigators that she had been contacted by her first sergeant to take her daughter to the hospital because Applicant had assaulted her daughter. She called her first sergeant back and then her daughter, who in the presence of a military chaplain, told her Applicant had fondled her. Applicant's spouse also indicated to investigators that Applicant had informed her on the way home from a movie that he had assaulted her younger daughter and that she had to take her daughter to the MP station (Ex. 5). It is unclear whether Applicant broached the subject with his spouse or whether she confronted him about it after speaking to her daughter. It is difficult to believe that Applicant's spouse would have gone to the movies with him if she had just learned that her daughter had been assaulted. Applicant's current recollection is that after he came back from his shift, he was asked by his spouse whether he had done it, and he told her that he had (Tr. 55).

of days later. She maintained she did not want Applicant to go to jail but that he needed to go to counseling (Ex. 5).

Applicant began living apart from his spouse and her daughters immediately (Tr. 82). He was ordered to undergo one year of counseling, which began in or before mid-September 2002 as couples counseling with only his spouse (Ex. 7, Tr. 57). After six months, he moved back home and he began family sessions with his spouse and stepdaughter (Tr. 57-58, 82). Applicant learned that he had to separate the roles of parent and friend, and he should have had a parental relationship with his stepdaughters, that it was inappropriate to roughhouse with teenage girls, and that he never should have gotten into a level of intimacy with his stepdaughter that he did (Tr. 79-81).

As a result of the military's investigation, a charge of indecent assault was filed against Applicant (Exs. 4, 5). His access to classified information was not suspended by his command pending the outcome, although the clearance adjudicating authority was informed of the indecent assault charge on September 19, 2002 (Ex. 7). Applicant continued to serve as a senior NCO where he was rated by his superior as one of his most capable staff members. Applicant handled and safeguarded classified intelligence and targeting information on a daily basis, in many cases keeping his officers in line on ensuring information was properly secured (Ex. H).

Applicant appeared before a summary court-martial on the indecent assault charge in November 2002 (Tr. 78).² He was found guilty, and he was ordered to forfeit \$2,166 pay for one month and was restricted to his apartment for 60 days (Ex. 5, Tr. 56). An officer (now retired), who was present at the summary courts-marital proceedings, attested to Applicant being "candid, forthright, and remorseful in publicly acknowledging his error." This officer considers Applicant's mistake an anomaly in an otherwise spotless military career, and he continues to hold Applicant in high regard (Ex. H).

Effective late November 2003, Applicant retired from the Army after 21 years of otherwise honorable service (Exs. 6, A). He received many awards during his military career, which, in addition to the Bronze Star Medal include the Meritorious Service Medal, the Army Commendation Medal (5th award) and the Army Achievement Medal (8th Award) (Ex. A). Applicant terminated his affiliation with the U.S. military before the security clearance adjudicating authority acted on its intent to review Applicant's ongoing eligibility for access to classified information (Ex. 7).

²Under Article 16 of the UCMJ, a summary court-marital is presided over by one commissioned officer (see Tr. 86). The investigating officer felt that the testimony provided by Applicant's stepdaughter was somewhat unreliable and not supportive of referral to a higher level courts-martial (Ex. E). Moreover, if Applicant was not represented by counsel at his summary court-martial, the finding of guilty of indecent assault would not constitute a criminal conviction. See *Middendorf v. Henry*, 425 U.S. 25 (1975).

Applicant returned to his home state with his family in August 2003, and in about January 2004 (Ex. D) he began voluntary counseling at a military health center to learn more about himself. Through individual counseling sessions twice a month for almost a year, he learned how to maintain a proper relationship as a parent (Tr. 58-59). To Applicant's knowledge, he was not given any formal diagnosis nor was he told he was at risk to re-offend (Tr. 87).

In February 2004, he began working as an analyst for his current employer on a military installation. On March 11, 2004, he completed his SF 86, listing the summary court-martial proceedings for the indecent assault in August 2002. He also responded "Yes" to both questions under module 19 concerning any consultation with a mental health professional or with another health care provider about a mental health related condition in the last seven years, and whether it involved marital, family, or grief counseling not related to any violence by him (Ex. 1).

From February 2004 to April 2006, Applicant's primary duty for his employer was to train the user community on the company's tactical simulation software. Applicant earned the trust of the user community, and kept his supervisors informed of issues that could have a negative impact on the overall quality of the software or on the ability of the user community to effectively employ the simulation. A senior analyst, who is most familiar with Applicant's work at the company's national simulation center from February 2004 April 2006, does not doubt Applicant's ability to protect sensitive or classified information (Ex. I). It is unclear whether this analyst has any knowledge of Applicant outside of work.

In April 2006, Applicant was transferred by his employer to Lithuania as part of a four-person defense modernization team to assist the Lithuanian military on a project sponsored, managed, and funded by the U.S. Department of Defense (Ex. J, Tr. 61). He routinely works with members of the Lithuanian military (Tr. 82). The contract under which the team is in Lithuania is up for renewal annually in late November (Tr. 90, 99), and the company decided that Applicant will be the person to continue the contract, regardless of the issue with his clearance (Tr. 100). The manager of the company's team in Lithuania has worked with Applicant since January 2007 on a near-daily basis. He attests that Applicant lives within his means, has superb work habits, and handles sensitive proprietary and restricted distribution information conscientiously and precisely. A former U.S. military officer himself, he "has not seen or sensed the behaviors or conditions that could cause [him] to question [Applicant's] loyalty to the United States or flag him as a security risk" (Ex. J). While this professional colleague expressed his trust in Applicant "to tell the truth even when it could be perceived as reflecting negatively on him personally," (Ex. J), it is unclear whether he knows of the 2002 indecent assault. He confirms that Applicant has not handled any classified information since he has been in Lithuania but a secret level clearance is required by the contract in anticipation that they will work with NATO or another country that does require a clearance for exercises (Tr. 85).

Applicant has a Lithuanian immigration card that he has to renew each year to remain legally in the country beyond 90 days (Tr. 69). As part of the immigration process, he is required to have health insurance, which he purchases annually at a cost of \$400 (Tr. 83).

In May 2006, Applicant met his current spouse, who is a native citizen of Lithuania. She ended up sitting at his table in a local outdoor café in Lithuania and they eventually became friends³ and then a couple (Tr. 60, 121). In about November 2006, Applicant's current spouse met his now former wife when the latter came to Lithuania to visit him. Applicant informed his current spouse about his abuse of his stepdaughter (Tr. 122).⁴ In May 2007, Applicant's third wife was granted a decree of divorce in the U.S. (Tr. 60, 66). In April 2008, after more than 26 years of marriage, Applicant's current spouse divorced her husband (Tr. 112), and she and Applicant married in Lithuania in June 2008 (Tr. 64, 70, 107). In October or November 2008, Applicant's spouse applied for U.S. lawful permanent residence status ("a green card") (Tr. 123). Applicant is not allowed to apply for permanent permission to live in Lithuania until after he has resided in the country for five years (Tr. 125). Applicant and his spouse reside in a flat that she owns in Lithuania (Tr. 62), which is a garden property of less than one acre (Tr. 62-63). She also owns in full (Tr. 115) or in part (Tr. 65) a flat in which she previously lived during her marriage to her ex-husband. She plans to give the property to her daughter (Tr. 116).

Applicant's spouse has a master's degree in mathematics. Before their deaths, her father was a published academic and university professor, her mother worked as a computer programmer in the early days of the information technology field (Tr. 110-11). Applicant's spouse has been employed as a database programmer for the Lithuanian government for over the past nine years (Tr. 61, 64, 66-67, 108-09). She is the only person who does her particular job (Tr. 108). She had previously owned her own company in Lithuania, but she transferred ownership to her now ex-husband when she started working for the Lithuanian government (Tr. 113-14). Her ex-husband attended

³Applicant's spouse testified they had been friends for a long time. She met Applicant's ex-wife when she was visiting him in Lithuania in November 2006 (Tr. 122).

⁴When asked specifically about what he told her, Applicant's spouse testified, in part:

He went home between shifts and his stepdaughter [name omitted] asked him to draw a tattoo on her shoulder. And she was laying on his lap and she offered to open her bra, just to be easier to draw, and she did that and then at that moment he was holding her and then his arm was, slipped down by the breast and after he finished that tattoo, she went to the bathroom to see what this looks like and asked him to do another one, so it was not only one tattoo (Tr. 117).

Applicant's spouse used the word "slipped," which could indicate accidental touching as opposed to groping, but she has also read the documents about the incident that her spouse received (Tr. 117-18). She was also aware that Applicant had hit his second wife after "his wife used some tool which they use for dogs, to stop, and put that power on him and his body, the reaction, he hit her. . . ." (Tr. 118).

her wedding to Applicant (Tr. 70), but they only have contact when necessary for business (Tr. 114). He is a dean of a university in Lithuania (Tr. 71, 112).

Applicant's spouse has one sibling, an unmarried sister, who previously worked as an accountant for the company Applicant's spouse founded (Tr. 97-98, 111). In October or November 2008, her sister, who has a degree in mathematics as well, began working for a ministry of the Lithuanian government (Tr. 63-64, 96, 111-12). Applicant's spouse has email contact with her sister once a month and they speak on the telephone once every three or four months (Tr. 121).

Applicant's spouse has two grown children (a son and a daughter both in their early 20's) from her previous marriage (Tr. 68, 113). Her son is currently a student, but he also works for his father in the company that she founded. Her son lives in a small apartment that she owns (Tr. 115). Her daughter is studying art and theater in Lithuania (Tr. 69, 113). Applicant and his spouse had her sister and children over to their place on December 24, 2008 (Tr. 121).

Applicant's mother came from the U.S. for his wedding in Lithuania (Tr. 70). As of March 2004 at least, she was still living in Applicant's home state (Ex. 1). Applicant has one bank account in Lithuania into which he transfers funds from his account in the U.S. He uses the Lithuanian account to pay bills there (Tr. 62). Applicant pays taxes in the U.S. on his income (Tr. 71). All his financial investments and retirement accounts are in the U.S. (Tr. 71). He owns no real estate (Tr. 91). Applicant holds life memberships in the Veterans of Foreign Wars and American Legion organizations through local chapters in his home state in the U.S. (Ex. C).

Applicant has discussed moving from Lithuania with his spouse (Tr. 91). In the event the present contract which employs Applicant in Lithuania is not renewed, Applicant plans on remaining with his employer even if he has to relocate. He earns an annual salary of \$160,000 USD (Tr. 88), while his spouse's monthly salary is between \$1,600 and \$1,700 per month (Tr. 116). He testified that she wants to work in Lithuania about five more years so that she can be eligible for retirement and medical benefits (Tr. 92, 94), but she indicated she would not mind leaving Lithuania with him for his job (Tr. 119, 126). Both Applicant and his spouse testified to planning to live in the U.S. at some point (Tr. 93, 119).

After reviewing the U.S. State Department's *Country Reports on Human Rights Practices-2007-Lithuania* and *Background Note: Lithuania*, I take administrative notice of the following facts:

Lithuania is a constitutional, multiparty, parliamentary democracy with an ethnically homogeneous populous of about 3.4 million. Oriented toward the west and Christianity from the 14th century, Lithuania retained its sovereignty until 1795 when a joint Lithuanian-Polish state was dissolved and over 90% of Lithuanian was incorporated into the Russian Empire. After World War I, Lithuania was declared a parliamentary republic, but Soviet pressure and a complicated international situation led

to Soviet domination. In August 1940, Lithuania was proclaimed a Soviet Socialist Republic under totalitarian rule with Sovietization of the economy and culture. Lithuanians were either killed or deported to Siberia and other remote parts of the Soviet Union while Russian immigration into Lithuania was encouraged as a way of integrating the country into the U.S.S.R. With the advent of social and political reforms in the Soviet Union, Lithuania proclaimed its independence in March 1990, being the first Soviet republic to do so. Lithuania joined the United Nations in September 1991, the World Trade Organization in May 2001, NATO in March 2004, and the European Union in May 2004.

The U.S. never recognized the Soviet claim to Lithuania, and the two countries have had continuous diplomatic relations since 1922. Lithuania has been a staunch ally of the U.S. in the war on terror, contributing to military operations in Afghanistan and Iraq. It also participates in peacekeeping operations in Bosnia and Kosovo. Lithuania has also been a strong supporter of U.S. objectives in promoting democracy in the former Soviet republics. Lithuanian national policy recognizes the primacy of NATO as the guarantor of security in Europe. Its foreign policy is based on protecting itself and the Eastern European region from what it perceives as an expansionist Russia.

Lithuania has privatized nearly all formerly state-owned enterprises, including the gas and power companies. The railway and post remain state-owned. More than 79% of the economy's output is generated by the private sector. At the end of the third quarter of 2008, Lithuania had accumulated direct foreign investment of \$12.8 billion, with U.S. investments amounting to \$294 million. Lithuania has enjoyed most-favored-nation status with the U.S. since December 1991. Lithuania's national currency is pegged to the euro. Adoption of the euro has been postponed due to high inflation in Lithuania.

The U.S. State Department reports that the Lithuanian government generally respected the human rights of its citizens in 2007. Government officials were cooperative and responsive to domestic and international investigations of alleged violations of human rights. There were some issues of poor prison conditions, widespread domestic violence against women and abuse of children, some trafficking in women and girls, and increased reports of racial or ethnic violence and intolerance. The government was committed to children's rights and welfare, investigating complaints of abuse, but insufficient assistance was provided to combat the problem of child abuse, including physical abuse of children in orphanages. While the police cooperated with other European governments on several trafficking cases, Lithuania remained a source, transit, and destination point for trafficking in women and girls from the most vulnerable social groups and ethnic minorities. Police corruption and abuse of power were reported with the officers being subjected to disciplinary actions. There were fewer complaints from the previous year of alleged arbitrary interference with privacy involving the processing of personal data and the government did not restrict access to the Internet or engage in improper monitoring of e-mail correspondence. The government respected the freedom to associate generally while continuing to ban the Communist Party and other organizations associated with the former Soviet regime. Complaints of societal discrimination and racial and/or ethnic intolerance, including hate crimes, were

investigated, but sanctions were often insufficient. Lithuania respected the right of its citizens to move freely within the country, to travel abroad, to emigrate, and to repatriate. Periodic free and fair elections were held on the basis of universal suffrage, yet officials found guilty of corruption were often punished with minor penalties.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an Applicant’s suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), 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 access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining 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 protect or safeguard classified

information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J—Criminal Conduct

AG ¶ 30 sets out the security concern about 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.

The government alleged that Applicant pleaded guilty to simple assault following an incident in December 1990 (SOR ¶ 1.a). Applicant, the sole source of the information about that incident, does not deny that he entered his sister-in-law’s ex-boyfriend’s home and pushed the ex-boyfriend away from his sister-in-law before chasing him out of the house. Yet, he explained his conduct was in response to aggressive action from this boyfriend toward his sister-in-law, and that the judge dismissed the charge. On his 1994 NAQ, in his Answer to the SOR, and again at his hearing (Tr. 49), Applicant has consistently denied that he was convicted of any charge. The government presented no evidence to show otherwise. Even in the absence of a conviction, conduct criminal in nature can be security disqualifying under AG ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.” But it was minor in nature, in defense of his sister-in-law, and happened so long ago to be of little current significance (*see* AG ¶ 32(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”).

AG ¶ 31(c) clearly applies to the 1993 domestic assault. Again, although Applicant was not convicted of any crime, he does not dispute that he kicked his ex-wife in the chest after she hit him with a cattle prod. The vehemence of his reaction is likely attributable to anger with his ex-wife and not to years of hand-to-hand training as he suggests. But at least as to physical abuse not sexual in nature, it appears to be isolated in nature, and he took responsibility by calling the police. AG ¶ 32(a) would appear to apply to that offense as well.

Applicant’s sexual assault of his 16-year-old stepdaughter in August 2002 raises considerable criminal conduct concerns. If his contemporaneous account to the Army investigator is accurate, he “groped” his stepdaughter at least three separate times, and

for several minutes each time, on that occasion in August 2002. He reportedly asked her repeatedly if it felt good, and she responded affirmatively with no request to stop. He admits he breached the relationship of trust with his stepdaughter for his own gratification, and it is no less egregious because of any verbal acquiescence on her part (assuming she told him it felt good) or her failure to remove herself from the situation. Even if Applicant did not realize before counseling that he should not have wrestled or roughhoused with his teenage stepdaughters, he knew or should have known that he crossed the line when he fondled the 16-year-old's breast. Furthermore, while he told the military investigator that he did not sense any fear in his stepdaughter at the time (Ex. 5), he indicated that she might have been scared. The evidence suggests a level of intimidation in his relationship with his stepdaughters that likely led them to keep silent when they should have spoken out. It also shows a careless disregard for their emotional well-being. He was punished by summary court-martial rather than a special or general courts-martial, but it does not diminish the security implications of criminal conduct that falls under both AG ¶ 31(a), "a single serious crime or multiple lesser offenses," and AG ¶ 31(c).

When asked by the military investigator whether either of her daughters had complained about any inappropriate touches by Applicant, Applicant's spouse responded, "Yes, when they roughhouse." Applicant asserts that any previous touching of intimate areas in that context was accidental. Even so, the seriousness of the sexual assault in August 2002 precludes consideration of AG ¶ 32(a) in mitigation.

As to whether the available record supports application of AG ¶ 32(d), "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement," acceptance of responsibility with an appropriate expression of remorse is required for successful rehabilitation. Applicant admitted to his spouse that he inappropriately touched her daughter, and he suggested to her that they go to the military police. When interviewed by the military investigator, Applicant indicated that he had repeatedly asked his stepdaughter whether it felt good and she responded affirmatively. However, when asked at his hearing whether he said anything to his stepdaughter at the time, he responded, "During that process I said does this feel okay? And I didn't get any response." (Tr. 54). Any suggestion that she might have enjoyed the contact would be an improper attempt to shift some of the responsibility to her. At the same time, Applicant acknowledged to the investigator that he should have known better, and that he was being treated by the investigator with more respect than he deserved.

Furthermore, he went to counseling for the year that it was ordered, and was allowed to continue to perform his military duties, including those involving access to classified information. By all accounts of record, he executed his responsibilities in an exemplary manner, and he retired honorably from the military. Following his retirement, he sought additional counseling voluntarily through a military family advocacy office because he felt he needed to learn more about himself (Tr. 58-59). Applicant was unable to obtain the records of his counseling (see Ex. D), and there are no formal

prognosis or clinician assessments available that could corroborate his claim of insight into his behavior and the triggers that led to the inappropriate contact with his stepdaughter. However, more than six years have passed since the assault, and his current personal situation is not conducive to any recurrence. He moved to Lithuania for work in about April 2006, and is now married to a woman with two adult children of her own. There is no evidence that he has any ongoing contact with his stepdaughters, or any other female minors.

Guideline E —Personal Conduct

The security concerns about personal conduct are 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant reacted in 1990 to prevent harm to his sister-in-law. That incident does not now cast doubt on his reliability, trustworthiness, or good judgment. Yet, Applicant exercised poor judgment that implicates the general security concerns of AG ¶ 15 when he assaulted his ex-wife in 1993 and his stepdaughter in 2002. Domestic assault and sexual assault of a minor family member could negatively influence others' opinions of him. AG ¶ 16(e), "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing," applies.

The government failed to make its case for additional personal conduct concerns separately arising from any intent of the military adjudicators to adjudicate Applicant's clearance but for the fact that he separated before any formal action was taken (SOR ¶ 3.b). The evidence shows Applicant made the decision to retire on or before April 22, 2003 (Ex. 6). The military could have immediately suspended his access back in September 2002 but chose not to do so.

While there has been no recurrence of any assault since 2002, AG ¶ 17(c), "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," does not apply for the same reasons that AG ¶ 32(a) did not mitigate the criminal conduct concerns. But his subsequent counseling, including additional voluntary sessions in 2004, satisfies AG ¶ 17(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 facts that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur."

As for potential vulnerability concerns, it is not clear that the work colleagues at his present employment are aware of his past assaultive behavior, but there is also no indication that he is acting to conceal that information. He disclosed the 1990 criminal trespass and 1993 physical abuse charges on his July 1994 NAQ and the August 2002 indecent assault on his March 2004 SF 86. He initially informed his current spouse about the 2002 offense in November 2006, within months of their first meeting, and she has read the military investigator's report that was sent to Applicant in preparation for his January 2009 security clearance hearing. AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress," applies in mitigation.

Guideline B—Foreign Influence

The security concern for foreign influence is set out in AG ¶ 6:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

Applicant has lived in Lithuania since April 2006, where he works on a DoD-sponsored project to assist the Lithuanian military. The month after he arrived, he had a casual encounter with a Lithuanian native citizen, whom he eventually married in June 2008. Through her, he has bonds of affection and/or obligation to other Lithuanian citizens, most notably her two grown children, but also her sister, with whom she has once monthly e-mail contact. As recently as December 2008, Applicant and his spouse hosted her sister and children for the holiday. AG ¶ 7(a), "contact with a foreign family member, business, or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion," AG ¶ 7(b), "connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology, and the individual's desire to help a foreign person, group, or country by providing that information," and AG ¶ 7(d), "sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion," apply.

Applicant does not himself own any foreign property that would implicate AG ¶ 7(e), "a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to

heightened risk of foreign influence or exploitation.” His military retirement, salary, and investment income, are all in the U.S. While he has a Lithuanian bank account out of which he pays his expenses in Lithuania, the funds he has on deposit are transferred from his primary account in a U.S. financial institution. Yet, he has an interest through his spouse in the home in which he lives with her in Lithuania, so AG ¶ 7(e) applies. The aggregate value of her real property in Lithuania was not set forth in the record. She owns some small parcels of land, a very small apartment in which her son lives, and a flat where she had previously resided with her ex-husband that she plans on giving to her daughter (Tr. 115-16). But her foreign property interests cannot be considered minimal since she provides shelter for herself, Applicant, and also her son.

Since the risk of undue foreign influence exists largely, although not solely, because of his marriage to a foreign national, Applicant cannot satisfy the first prong of mitigating condition AG ¶ 8(a), “the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.” Moreover, his spouse’s and his sister-in-law’s employments with the Lithuanian government increase the risk that he could be placed in the untenable position of having to choose between them and their interests and U.S. interests. Although there is nothing about his spouse’s work in the tax area that is particularly of concern, she is also the only person who does her job, and she relies on the Lithuanian government for her salary. Applicant has not shown that his sister-in-law’s work, albeit as an accountant, does not have military or defense implications.

In assessing the general concerns underlying Guideline B and the potential applicability of AG ¶ 8(a) in particular, the country at issue and whether it is known to target U.S. protected information or is associated with terrorism, must be considered. A former Soviet republic because of a complicated international situation and Soviet pressure, Lithuania has been aligned to the West historically. The U.S. and Lithuania have had diplomatic relations since 1922, even when it was a member of the Soviet Union. Lithuania is a committed NATO member and supporter of the U.S. in its fight against terrorism. A close relationship between the U.S. and Lithuania is evidenced by Applicant’s work with the Lithuanian military on a project sponsored by the U.S. Defense Department. The country is not known to aggressively target U.S. classified information or sensitive proprietary information for its own gain. Ongoing problems with official corruption and minor sanctions for abuses raise some concerns about selective enforcement of the law, but Lithuania generally respects the human rights of its citizens. Government officials have been cooperative and responsive to domestic and international investigations of alleged violations of human rights. Relations between nations can shift dramatically and unexpectedly, however. Given the considerable ties Applicant has to Lithuania at this time, and the employments of his spouse and her sister for the Lithuanian government, Applicant cannot fully satisfy AG ¶ 8(a).

AG ¶ 8(b), “there is no conflict of interest, either because the individual’s sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest,” requires a comparative assessment of the obligations and loyalties owed to the foreign person, government, or country and to the U.S. Applicant has no political affinity or loyalty to the Lithuanian government but his personal ties to Lithuania cannot fairly be characterized as “so minimal.” At the same time, his 24 years of active duty service for the U.S. military carries considerable weight in determining whether he has “deep and longstanding relationships in the U.S.” that he can be expected to resolve any conflict of interest in favor of the U.S. interest. The absence of strong familial ties in the U.S. (other than perhaps his mother) does not preclude application of AG ¶ 8(b), especially where he has shown a level of dedication and commitment to the military. Even now, he intends to relocate if necessary to keep his job, knowing that his spouse would like to remain employed in Lithuania for five more years. His lifetime memberships in the Veterans of Foreign Wars and American Legion are additional indicators of the significance of U.S. military service to him. Although he owns no property in the U.S., he has financial investments (including his military retirement) in the U.S. His spouse has applied for U.S. permanent residency status, presumably under his sponsorship. But it is unclear whether he intends to reside permanently in the U.S. He has been selected by his employer to continue on the project if it is extended in Lithuania. When asked about his future plans, Applicant testified that if the contract was not renewed, “it’s going to be a tough decision . . . somehow she has to find a way that she will maintain that retirement and go with [him].” (Tr. 93). While he would not consider taking a job on the Lithuanian economy because of the income from his present job and the fact that it leads to other jobs in the U.S., he indicated that they eventually want to live in the U.S. “for a period or two.” (Tr. 94). In light of his considerable ties to Lithuania at this point (which also include medical benefits for which he pays \$400 per month), I cannot apply AG ¶ 8(b).

Applicant’s spouse testified that she does not have close and continuing contact with her ex-husband (Tr. 114), and that she has closer ties with friends than with her sister (Tr. 111). Yet, her son works for his father in the company that she founded and Applicant has contact with her ex-husband at times for necessary business. Although she has only monthly contact with her sister, they share enough of a familial bond for Applicant’s spouse to invite her sister to her home for holiday celebrations, including in December 2008. AG ¶ 8(c), “contact or communication with foreign citizens is so causal and infrequent that there is less likelihood that it could create a risk for foreign influence or exploitation,” does not apply. AG ¶ 8(d), “the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority,” applies in limited part, in that the government alleged as a concern Applicant’s residency in Lithuania (SOR ¶ 2.a). Applicant came to Lithuania for his defense-contractor employment and his continued residency in and of itself does not raise independent concerns given he is still working on a project with the Lithuanian military with the approval of the U.S. Defense Department.

As for the value of his financial stake in Lithuania, Applicant's salary is paid by a U.S. company. His annual income of \$160,000 per year plus his U.S. military retirement and other financial investments are all from U.S. sources. His spouse earns about \$1,600 to \$1,700 per month in Lithuania. The record contains no information about the dollar values of her real estate in Lithuania, but I cannot fully apply AG ¶ 8(f), "the value or routine nature of the foreign business, financial, or property interest is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual"), in light of his overall ties to Lithuania.

Whole Person Concept

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

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

Applicant's judgment is called into serious question because of his indecent assault of his stepdaughter in 2002. He betrayed the trust of his stepdaughter by his actions, and the negative security implications are not easily overcome. On the other hand, security clearance decisions are not intended to punish for past misconduct. Rather, they involve an assessment of risk to security, and Applicant's present situation is not amenable to a recurrence. Applicant's counseling and the passage of six years without recurrence are sufficient to mitigate the criminal conduct and personal conduct concerns.

Applicant's current employment in Lithuania was sanctioned by the U.S. But his ties to Lithuania are beyond residency and employment. With his relationship and then marriage to a Lithuanian national, who has substantial connections to Lithuania through property ownership and government employment, Applicant has placed himself in the untenable position of potentially having to choose between a dear family member and the interests of the U.S. Despite his long record of appropriate handling of classified information, and the good relationship between the U.S. and Lithuania, I am unable to

conclude at this time that it is clearly consistent with the national interest to grant Applicant access to classified information due to unmitigated foreign influence concerns.

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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	For Applicant

Conclusion

In light of 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.

ELIZABETH M. MATCHINSKI
Administrative Judge