Date: December 19. 1996

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR OSD Case No. 96-0525

DECISION OF ADMINISTRATIVE JUDGE

ROBERT R. GALES

APPEARANCES

FOR THE GOVERNMENT FOR THE APPLICANT

Claude R. Heiny, II, Esquire

Department Counsel

Jeffrey K. Rath, Esquire

STATEMENT OF CASE

On August 15, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *"Safeguarding Classified Information Within Industry,"* dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *"Defense Industrial Personnel Security Clearance Review Program"* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to ---------- (Applicant), which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

A copy of the SOR is attached to this Decision and included herein by reference.

In a sworn written statement, dated September 10, 1996, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was initially assigned to Administrative Judge Kathryn Moen Braeman on September 30, 1996, but due to caseload considerations, was reassigned to, and received by, this Administrative Judge on October 10, 1996. A notice of hearing was issued on October 16, 1996, and the hearing was held before me on October 23, 1996. During the course of the hearing, six Government exhibits and four Applicant exhibits, and the testimony of one Applicant witness (the Applicant), were received. The transcript was received on November 20, 1996.

FINDINGS OF FACT

Applicant has admitted only a small portion of one of the factual allegations pertaining to sexual behavior under Criterion D (a portion of subparagraph 1.b.). That admission is hereby incorporated herein as a finding of fact. He has denied the remaining allegations (subparagraph 1.a. and the remaining portion of 1.b.), as well as those pertaining to

criminal conduct under Criterion J (subparagraphs 2.a. and 2.b.); and personal conduct under Criterion E (subparagraphs 3.a. and 3.b.).

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 59 year old male employed by a defense contractor, and he is seeking to retain a SECRET clearance which was previously granted to him in July 1982.

On September 29, 1993, the state division of family services received a "hotline" complaint of possible sexual abuse involving Applicant's eight (at that time) year old granddaughter.(1) An investigation was initiated, and the victim and her mother were eventually interviewed. The victim stated that she used to go to Applicant's house every day after school, where she would remain until her mother picked her up after work. While with Applicant, he would take her into the bedroom, and she would be wearing a nightgown and he would be wearing his underwear. He had her lie on top of him and would rub around against her, and she felt something hard against her "private," further identified as her vaginal area.(2)

The victim's mother, Applicant's 29 year old biological daughter, stated that the period of time between being dropped off at Applicant's residence, and being picked up by her, was about 30 minutes. She added that five or six months earlier, the victim had informed her that Applicant had been "messing with her sexually," and she decided that the best way to stop the abuse was to discontinue further visits with Applicant. The victim's mother also claimed that she, herself, had been sexually abused by Applicant from about the age of seven to thirteen, and she did not want the same activity to continue with her daughter.(3)

On October 22, 1993, the victim was examined at the sex assault management clinic at a local hospital, and medical findings, supposedly consistent with sexual assault, were as follows:(4)

Abnormally cooperative with genital exam - offered no resistance or flinching, including insertion of swabs for cultures. Hymenal opening appears dilated and permits easy visualization of lateral and interior vaginal walls. Hymenal margins are symmetric, but appear somewhat thinned and attenuated. Patient gives convincing disclosure and her behavior/findings during exam support her allegations.

On November 11, 1993, Applicant was arrested for sexual abuse, first degree -- a class D state felony. At the time of the arrest, Applicant denied the allegations and attributed them to his daughter's boyfriend, whom he accused of "brainwashing" both his daughter and his granddaughter. Thereafter, a series of steps occurred in the legal process in which attempts were made to specify the nature and periods of alleged sexual abuse. Applicant was indicted on January 25, 1994,(5) and charged with count 1 - sodomy of a child under 14 years. The period specified in the indictment was "between October 8, 1990 and February 28, 1993." Moreover, the nature of the abuse was declared to be "deviate sexual intercourse."

On April 12, 1994,(6) another indictment was handed down in which Applicant was charged with count 1 - sodomy of a child under 14 years, *or in the alternative to count 1*, count 2 - sexual abuse first degree. The period specified in the indictment was changed to "between March and May 1992." Furthermore, the nature of the abuse was declared to be either count 1 - "deviate sexual intercourse," or count 2 - "subjected . . . to sexual contact."

On April 18, 1995,(7) a substitute information in lieu of indictment was issued in which Applicant was again charged with count 1 - sodomy of a child under 14 years, *or in the alternative to count 1*, count 2 - sexual abuse first degree. The period specified in the information was changed to "between March and May 1993." The nature of the abuse remained unchanged.

On October 3, 1995, the state elected to proceed on count 2 - sexual abuse first degree, and filed a memorandum supporting a *nolle prosequi* as to count 1.(8) That same day, Applicant entered a plea - known as an *Alford* plea,(9) to count 2. The plea was accepted by the court as a guilty plea, and he was placed on probation for a period of two years,

directed to seek counseling, and ordered to have no contact with the victim. Imposition of sentence was suspended.[(10)]

Applicant has been interviewed, interrogated, and cross-examined on several different occasions regarding the allegations. In his initial response, during an interrogation at the time of his arrest on November 11, 1993, he denied the allegations, and attributed them to his daughter's boyfriend, whom he accused of "brainwashing" both his daughter and his granddaughter.

On April 15, 1994, one and one-half years before the final court decision on the sexual abuse allegations, Applicant was interviewed by two agents of the Defense Investigative Service (DIS), pertaining to those allegations. During that interview, and in a signed, sworn statement completed after the interview, Applicant again attributed the allegations to domestic difficulties which arose between his daughter's boyfriend and himself. He claimed that everything was fine within the family until the boyfriend came on the scene. Since the boyfriend considered himself a "prophet," he supposedly looked into Applicant's daughter's past and informed her that she had been molested as a child by Applicant. A rift eventually developed in the family, and all contact between Applicant and the victim ceased, without explanation. Applicant sought police intervention because he was afraid the victim was being withheld from school, and shortly thereafter, the allegations against Applicant arose. Applicant again contended that none of the allegations against him were true. He claimed to have never molested anyone in his life, and stated that he had never done anything that could be construed as molestation.

Applicant was interviewed by DIS on September 15, 1994, and he again denied engaging in the sexual molestation of his granddaughter.[(11)]

On May 29, 1996, Applicant was interviewed extensively by two other DIS agents pertaining to the allegations. He initially maintained his earlier consistent position and denied ever engaging in the alleged sexual activity with his granddaughter. Upon further questioning, as a bolt of lightning from the sky, in a statement prepared for his signature by DIS, at 7:50AM, Applicant suddenly altered his previously consistent position and stated:[(12)]

Up to this point I have flatly denied engaging in any activity with my grand daughter which could possibly be conceived by anyone that I had engaged in any inappropriate actions with her. After discussing this issue at length with the [DIS] agents I now admit that there were times that I had touched her in ways that were not appropriate. It is important to know that when I did, it was not done for any sexual gratification. It was only done to show her love and comfort and to reassure her that I loved her. I have not had any sexual drive since the death of my 18 year old son in 1983. During these times when I would have touched her, I can see how she could believe that I was touching her in a sexual manner.

. . . I am not denying that I did touch her in what she believes to be a sexual manner, I just did not do it for sexual pleasure as I have stated above.

I admit that I did exercise poor judgement [sic] when these actions occurred with her, but it is important that these actions were done as a display of love and not for any sexual pleasure. Still I should not have done this. I fully can understand how she and others might possibly look at this as molestation. In my interview with DIS when I signed a sworn statement I stated in that document that 'I have never done anything in my life that could be construed as molestation.' I was scared at the time I made that statement and was concerned about being fired for losing my clearance. I should have told those agents what I have admitted to these agents. This was poor judgement [sic] on my part. After talking with these agents I now believe that being honest in all phases of a process like this, is only the right thing to do. I am very greatful to DIS for allowing me to fully tell the truth and the whole truth.

In a DIS Report of Investigation, dated May 31, 1996, in commenting on the May 29, 1996 interview with Applicant, one of the agents stated that Applicant admitted that he had deliberately lied in his earlier statement and that he had done so because he was scared that he would lose his security clearance and his job.[(13)]

In his Response to SOR, Applicant returned to his earlier position, and denied ever sexually molesting his granddaughter.

During the hearing, Applicant maintained his initial position and challenged the supposed admissions of May 29,

1996.(14) He claimed that at the time the statement was executed by him, he had just completed a shift; had not slept for about 24 hours; had not read the statement which DIS had prepared for him; and believed the statement to be consistent with his comments during the interview -- information consistent with his earlier denials. Accordingly, he signed the statement without reading it. The Government offered to rebuttal to his claims. Furthermore, he again denied ever sexually molested his granddaughter.

Applicant denied ever intending to admit to actions which he has consistently denied ever occurred. He denied ever sexually touching the victim, but acknowledged that he had touched her, hugged her, and embraced her. When advised by the agents that such conduct might be construed as molestation, he adopted that position and agreed that the touching, hugging, and embracing might have been inappropriate conduct as suggested to him.(15)

In compliance with the order of the court, since October 26, 1995, Applicant has undergone monthly counseling with a licensed clinical therapist. During his continuing therapy, Applicant has been consistent with his initial position, to wit: he did not engage in inappropriate behavior with his granddaughter, and the cause of all the problems is his daughter's boyfriend.(16) The therapist "tends to believe [Applicant] is telling the truth." Furthermore, while a diagnosis and prognosis have not been provided, the therapist opined that did not feel that Applicant is suffering from any emotional or psychological condition.(17)

The mother of Applicant's daughter -- the grandmother of the victim, supported Applicant's scenario of the domestic situation which existed before the appearance of the daughter's boyfriend, as well as after his appearance. She also indicated that the dates on which Applicant was initially supposed to have sexually molested her granddaughter changed many times, and some of those alleged times were impossible because they occurred when Applicant had not been near the victim because he was recuperating from heart surgery, or even after Applicant had not been permitted by his daughter to see the victim.

Despite Applicant's *Alford* plea; his conviction of sexual abuse first degree; and his purported "confession" on May 29, 1996, for the reasons set forth below, I find that he did not knowingly engage in sexual abuse of his granddaughter, as alleged, nor did he willfully lie or falsify material facts pertaining to the sexual molestation allegations, as described above.

Applicant served with the military for ten years from February 1958 to March 1968, and received an honorable discharge certificate. He joined his present employer in January 1967, and worked there until July 1971, when he left to become a police officer. He remained a police captain of a local municipality until April 1983. He returned to his present employer once again, in January 1982, and has remained there since that time. The quality of his current work performance was not revealed.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Factors) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Factors).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision -- an expansion of the factors set forth in Section F.3. of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (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 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 or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

[Sexual Behavior - Criterion D]: Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, subjects the individual to undue influence or coercion, or reflects lack of judgment or discretion. (Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance)

Conditions that could raise a security concern and may be disqualifying include:

(1) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(4) sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

Conditions that could mitigate security concerns include:

(2) the behavior was not recent and there is no evidence of subsequent conduct of a similar nature;

(3) there is no other evidence of questionable judgment, irresponsibility, or emotional instability;

(4) the behavior no longer serves as a basis for undue influence or coercion.

[Criminal Conduct - Criterion J]: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

(1) any criminal conduct, regardless of whether the person was formally charged;

(2) a single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

(1) the criminal behavior was not recent;

(2) the crime was an isolated incident;

(4) the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;

(5) there is clear evidence of successful rehabilitation.

[Emotional, Mental, and Personality Disorders - Criterion I]: Emotional, mental, and personality disorders can cause a significant deficit in an individual's psychological, social and occupational functioning. These disorders are of security concern because they may indicate a defect in judgment, reliability or stability.

When appropriate, a credentialed mental health professional, acceptable to or approved by the government, should be consulted so that potentially disqualifying and mitigating information may be fully and properly evaluated.

Conditions that could raise a security concern and may be disqualifying include:

None apply.

Conditions that could mitigate security concerns include:

(1) there is no indication of a current problem;

(2) recent diagnosis by a credentialed mental health professional that an individual's previous emotional, mental, or personality disorder is cured or in remission and has a low probability of recurrence or exacerbation;

[Personal Conduct - Criterion E]: Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

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

Conditions that could raise a security concern and may be disqualifying also include:

(3) deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination;

(4) personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure;

(5) a pattern of dishonesty or rule violations;

Conditions that could mitigate security concerns include:

None apply.

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"[(18)] or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded that both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences that are grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate that it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that 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. Decisions under this Directive include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to the potential for, rather than actual risk of, compromise of classified information.

One additional comment is worthy of note. Applicant's loyalty and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance 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." Security clearance decisions cover many characteristics of an applicant other than loyalty and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied decision as to Applicant's loyalty or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of the witness testimony, demeanor, and credibility, and after application of all appropriate legal precepts and factors, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

At the outset, I am obliged to state that I had ample opportunity to evaluate the demeanor of Applicant, observe his manner and deportment, appraise the way in which he responded to questions, assess his candor or evasiveness, read his statements, listen to his testimony, and watch the interplay between himself and those around him. It is my impression that his explanations regarding the alleged sexual abuse, criminal conduct, and falsifications, are both consistent and simplistic, and hence, considering the quality of the other evidence, have the resonance of truth. Accordingly, in weighing the evidence before me, despite Applicant's *Alford* plea; his conviction of sexual abuse first degree; and his purported "confession" on May 29, 1996, for the reasons set forth below, I find that he did not knowingly engage in sexual abuse of his granddaughter, as alleged, nor did he willfully lie or falsify material facts pertaining to the sexual molestation allegations.

With respect to Criterion D, the Government case has been effectively refuted. Applicant was convicted, upon his *Alford* plea, on one count of sexual abuse first degree. That conduct apparently referred to sexual abuse which was alleged, by the state, to have occurred between March and May 1993, not October 1990 to September 1993, as alleged in the SOR. Furthermore, it appears that despite the static nature of the somewhat vague evidence against him, arising out of the statements of the victim and the victim's mother, the substance of which apparently has never been reduced to writing by them, the state constantly altered the allegations as to nature and time.

The summary of the victim's evidence against Applicant, furnished through the victim's mother and the police officer, was that while she was with Applicant, he would take her into the bedroom, and she would be wearing a nightgown and he would be wearing his underwear. He had her lie on top of him and would rub around against her, and she felt something hard against her "private," further identified as her vaginal area. That is the sum total of the evidence against him which supposedly emanated from the victim, directly or indirectly.

It should be noted that there was no comment from the victim about penetration by him; rubbing of her vagina by him; rubbing of her breasts by him; or any other inappropriate activity, other than having to lie on top of her grandfather and "rub around against" each other -- whatever that connotes. Furthermore, the "something hard" against her "private" is never identified, although there appears to be the *suggestion* that the "something" is Applicant's penis, or his finger. There was no claim that Applicant performed cunnilingus on the victim; that he copulated with her anally; that she was coerced to perform fellatio upon him; or any other act included within the generally accepted definition of the term "sodomy."

Moreover, the victim offered no time parameters pertaining to when the alleged activities may have taken place. The mother did, however, acknowledge that Applicant had no contact with the victim for five or six months prior to September 1993.[(19)] That means that Applicant's most recent opportunity to possibly sexually molest the victim occurred in March or April 1993.

Although the court ruled the hearsay statement of the victim to be admissible through the state's witnesses (the victim's mother and the interviewing police officer),[(20)] and the Government herein has apparently accepted the purported comments of the victim at face value, there is no evidence as to the competency of the victim to testify in relation to the sexual abuse described, and there is no indicia of reliability afforded. Considering the tender age of the victim, among the factors missing, and which I believe should have been offered to this tribunal to assist it in determining whether

sufficient guarantees of trustworthiness exist to warrant admission of the unrecorded statement of the victim, are: the victim's level of development, and capacity to comprehend the significance of the events and to verbalize about them; the victim's general physical and mental condition; whether the victim understands the difference between truth and falsity, and duty to tell the truth; the exact language used by the victim in describing the events; the existence of corroborative evidence; the existence of any apparent motive of the victim to falsify; the time when the statement was made; the number of interviews of the victim prior to the statement; the victim's custodial situation and the attitude of other household members to the events to which the victim has furnished an oral statement; and whether there exists any evidence of undue influence or pressure on the victim at or before the time of the statement.

The medical examination of the victim supposedly supports a finding of sexual assault, but is seemingly inconsistent with the victim's description of the events involving her grandfather. It is unclear if the findings support a theory of penetration. Moreover, if they do, since intercourse was alleged in the first two indictments, but not alleged in the final information against Applicant, and it is not alleged in the SOR, such findings might not be material. Furthermore, the medical-physical findings are unclear. No explanation has been offered as to the significance of the absence of resistance or flinching; the presence of a hymenal opening that appears dilated; easy visualization of lateral and interior vaginal walls; symmetric hymenal margins; or somewhat thinned and attenuated hymenal margins. I have considered those medical findings, and without evidence from an expert witness to explain those findings, and how they are consistent with sexual abuse first degree, I am forced to speculate on their significance. This I may not do. "Symmetric hymenal margins which appear somewhat thinned and attenuated," is a meaningless description of physical findings which, without more evidence, offers little to support the sexual abuse theory against Applicant, considering the substance of the victim's statement against him.

Also, the verbal comments of the victim which were supposedly given to the examining physician -- those unspecified comments which gave "convincing disclosure" which support the victim's allegations, offer little in the way of evidence to allow any more than slight weight to be given to that portion of the medical findings.

Aside from Applicant's purported confession of May 29, 1996, and his *Alford* plea and eventual conviction, Applicant has steadfastly denied any such sexual molestation, as alleged against him. The Government seemingly argues that the *Alford* plea alone is sufficient to support a factual finding that Applicant sexually abused his granddaughter over a period greater than that alleged by the state in his criminal proceeding. As stated above, the actual plea was to conduct covering the period between March and May 1993, while the SOR covers the period between October 1990 and September 1993. There is no evidence that the alleged conduct occurred before or after March or April 1993, and there have never been any interim indictments or informations covering a period more recent than May 1993. In fact, the vagueness and fluidity of the state's sexual abuse allegations against Applicant create special difficulties in addressing those allegations.

While the *Alford* plea may offer some evidence that Applicant had participated in the conduct alleged, it is by no means conclusive proof of such conduct. Even assuming that the plea might be used against him as an admission in a subsequent administrative proceeding such as this (and it is by no means clear that it may), unlike the subsequent criminal or civil case, Applicant is not estopped from offering evidence in support of his case in mitigation and extenuation. In so doing, he is not challenging the *validity* of the conviction.

Accordingly, aside from the purported confession, the evidence against Applicant is his *Alford* plea; the less than competent evidence from the victim; and the conviction -- combined to show that the alleged conduct may have occurred during a period from March to April 1993. It is significant to note that Applicant's therapist "tends to believe [Applicant] is telling the truth," and did not feel that Applicant is suffering from any emotional or psychological condition. Thus, it appears that even *if* the conduct had occurred, it would have been relatively isolated to the period reflected above; it would have ceased over three and one-half years ago, and hence, it would not be recent; the alleged behavior would no longer serve as a basis for possible undue influence or coercion; it may have resulted from unintentional misguided actions by a grandfather towards his granddaughter; given his newly acquired *appreciation* of such actions, they are not likely to occur in the future; and there is no indication of a current emotional or psychological problem.

I do not take this position lightly, but based on the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988),

my evaluation of the evidence, my application of the pertinent factors under the Adjudicative Process, including those pertaining to Emotional, Mental, and Personality Disorders under Criterion I, and my interpretation of my responsibilities under Enclosure 2 of the Directive, I believe that Applicant has, through evidence of extenuation and explanation, successfully refuted the Government's case. Accordingly, allegations 1.a. and 1.b. of the SOR are concluded in favor of Applicant.

With respect to Criterion E, the Government case has been effectively refuted. Examination of Applicant's statements and admissions reveals a pattern of consistent denial that sexual molestation, involving himself and his granddaughter, ever occurred. Because I find that, in fact, Applicant did not sexually molest his granddaughter, those statements were full, frank, and truthful, and did not involve deliberately providing false or misleading information to a DIS investigator. Moreover, there was no pattern of dishonesty or effort to conceal.

The May 29, 1996 "confession" by Applicant starkly stands out against those consistent denials. In it, Applicant has provided a sworn statement which is an investigator's dream -- the *smoking gun*, in which the signatory seemingly admits each and every element of each allegation. In fact, the statement is so encompassing in scope; the language and syntax so different from that which Applicant normally uses; the content so aberrant from the consistent story previously and subsequently furnished by Applicant, that it immediately brings to mind the *voluntary* "confessions" of prisoners of war before propaganda cameras. I have read Applicant's other written statements, reviewed written notes of his oral comments to the police and his therapist, and looked him in the eye while he was testifying during the hearing. I have evaluated all of those comments and admissions, and assigned what I believe to be appropriate weight to each such element of the evidence.

Equally significant about that statement is what it fails to say. When Applicant confesses to "touching her in ways that were not appropriate," he still does not describe what he did, and once again, I am left to speculate as to what he means. When he confesses to touching the victim in what she believed to be a sexual manner, he does not specifically describe that touching either. Left unanswered is the question, "what did he do?" The answer is not in the record, despite his "confession." Likewise, Applicant avers that the agents convinced him that the simple non-sexual touching, such as an embrace or hug, could conceivably constitute in the minds of some to be sexual molestation. Did he "confess" to their vague description or did he "confess" to the actual deed? The answer is not in the record. Did Applicant's actions dilate the victim's hymenal opening; or thin and attenuate the hymenal margins? The answer is not in the record. Did Applicant penetrate her vagina with his penis or finger? The answer is not in the record.

On the other hand, what the Government construes to be Applicant's "confession" as to his previous failure to admit his actions to the other DIS agents during prior interviews, is, in reality, not a "confession" at all. Applicant seems to be saying that if what he did was conceivably inappropriate, than he probably should have admitted it during the earlier interviews. In adding the gratuitous language about being scared and exhibiting poor judgment, and "being very greatful [sic] to DIS for allowing [Applicant] to fully tell the truth and the whole truth," the agents, in my mind, have so gilded the lily as to render the entire statement suspect.

It is interesting to note that while the Report of Investigation characterized Applicant's actions and statements as constituting an admission that he had "deliberately" lied because he was scared, the statement itself contains no such admission. Also, when Applicant disputed the intent and content of the May 29, 1996 statement, and described how and under what circumstances it was taken, including the advice to Applicant that he not burden the effort by the presence of his attorney, the Government failed to offer any evidence to rebut Applicant's contentions.

In light of the evidence before me, I conclude that Applicant neither lied, willfully falsified, omitted, concealed, or minimized the nature of his actions and activities with his granddaughter. I believe that Applicant has, through evidence of extenuation and explanation, successfully refuted the Government's case. Accordingly, allegations 3.a. and 3.b. of the SOR are concluded in favor of Applicant.

With respect to Criterion J, the Government case has been effectively refuted. By virtue of his *Alford* plea, Applicant was clearly convicted of serious criminal conduct involving the sexual abuse of his granddaughter. Also, statements made by an applicant for access to classified information encompass matters within the jurisdiction of the Department of Defense, and are provided for under Title 18, United States Code, Section 1001.[(21)] However, as stated above, despite

Applicant's *Alford* plea; his conviction of sexual abuse first degree; and his purported "confession" on May 29, 1996, I found that he did not knowingly engage in sexual abuse of his granddaughter, as alleged, nor did he willfully lie or falsify material facts pertaining to the sexual molestation allegations, as alleged. Thus, for the reasons set forth above, I believe that Applicant has, through evidence of extenuation and explanation, successfully refuted the Government's case. Accordingly, allegations 2.a. and 2.b. of the SOR are concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is suitable for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1. Criterion D: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Paragraph 2. Criterion J: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: For the Applicant

Paragraph 3. Criterion E: FOR THE APPLICANT

Subparagraph 3.a.: For the Applicant

Subparagraph 3.b.: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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Robert R. Gales

Chief Administrative Judge

1. *See*, Government Exhibit 4, at 4.

2. *Id.*, at 5.

3. *Id.*, at 4 and 5.

4. *See*, Government Exhibit 4, at 5.

5. *See*, Applicant Exhibit B, at 1.

6. *See*, Government Exhibit 6.

7. *See*, Applicant Exhibit C.

8. *See*, Government Exhibit 5, at 3 and 4.

9. An *Alford* plea is, for the purposes of punishment, the same as a plea of guilty. *See*, generally, *North Carolina v. Alford*, 400 U.S. 25 (1970). However, unlike a plea of guilty, it is unclear if it can be used against a defendant as an admission in a subsequent criminal or civil case. *See, e.g.*, Fed. R. Evid. 410; Fed. R. Crim. P. 11.

10. *Id.*, at 1, 2, and 4.

11. *See*, subparagraph 3.b. of the SOR. It should be noted that Applicant denied the allegation in his response to the SOR.

12. *See*, Government Exhibit 3.

13. *See*, Applicant Exhibit D, at 2.

14. Applicant avers the DIS agents told him he would be better off if he didn't have an attorney to assist him during the interview. *See*, Transcript (Tr.), at 54. The Government offered no rebuttal to the assertion.

15. *See*, Tr., at 57.

16. *See*, Applicant Exhibit D, at 1.

17. *Id.*

18. *See*, Executive Order 12968, *"Access to Classified Information;"* as implemented by Department of Defense Regulation 5200.2-R, *"Personnel Security Program,"* dated January 1987, as amended by Change 3, dated November 8, 1995. However, the Directive uses both "clearly consistent with the national interest" (*see*, Sec. B.3; Sec. C.2.; and Sec. D.2.; Enclosure 3, Sec. 1.; and Sec. 25), and "clearly consistent with the interests of national security" (*see*, Enclosure 2 (Change 3), Adjudicative Guidelines, at 2-2).

19. *See*, Government Exhibit 4, at 4.

20. *See*, Government Exhibit 5, at 5.

21. The cited provision provides, in relevant part, as follows: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up a . . . material fact . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."