

DATE: April 16, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0828

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On January 7, 1998, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, 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 clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on January 20, 1998 and elected to have his case assigned for hearing. The case was assigned to this Administrative Judge on February 2, 1998. Applicant was furnished copies of the Government's intended exhibits prior to hearing. A hearing was convened on March 2, 1998 for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke applicant's security clearance. At hearing, the Government's case consisted of seven exhibits and no witnesses; Applicant relied on seven exhibits and one witness (himself). A transcript of the proceedings was received on March 18, 1998.

PROCEDURAL ISSUES

Before the close of the hearing, applicant requested that the record be kept open for 10 days to enable him to supplement the record with documentation of his outpatient treatment. For good cause shown, applicant was afforded an additional 10 days to March 12, 1998 to supplement the record with outpatient treatment documentation. Within the time allotted, applicant provided documentation of his outpatient therapy sessions, which is received and will be considered in evidence as ex. A.

STATEMENT OF FACTS

Applicant is 41 years of age and has been employed by his current defense contractor (Company A) since August 1996.

He seeks a security clearance.

Summary of Allegations and Responses

Applicant is alleged to have (1) been arrested on January 6, 1987 in State A and charged with sexual assault and risk of injury to a minor (a felony), pleaded guilty, placed on a two-year period of accelerated rehabilitation and required to attend and complete a rehabilitation treatment program; (2) been arrested in June (sic) 1995 in State B and charged with disorderly conduct, placed on two years of probation (charges subsequently dismissed), (3) been arrested on July 6, 1995 in State A and charged with sexual assault, fourth degree, risk of injury to a minor (a felony) and reckless endangerment, second degree, sentenced to one year in jail (execution suspended), fined approximately \$3,000.00, and placed on two years of probation, conditioned on sex offender treatment, and (4) omitted all of his covered arrests in his executed security clearance application ("SCA"), and omitted his 1987 arrest for criminal/sexual misconduct, in violation of 18 U.S.C. Sec. 1001 (a felony statute).

Additionally, applicant is alleged to have (a) sexually abused his five-year old daughter by molesting her in approximately September 1986 and (b) sexually abusing his 14-year old stepdaughter by molesting her in approximately Spring 1994.

And applicant is alleged to have exhibited poor judgment, unreliability and untrustworthiness in (i) falsifying his SCA (executed on October 31, 1996) by omitting his felony sexual assault charge and (ii) understating arrests or claims of sexual assault in a signed, sworn statement given to a DIS agent on March 27, 1997, omitting his 1987 sexual misconduct arrest and counseling for his behavior in 1997.

For his response to the SOR, applicant admits most of the allegations, denying only his (a) being convicted of the charge of risking injury to a minor in connection with his 1987 charges, (b) ever sexually abusing his 14-year stepdaughter and (c) his being placed on two years probation in connection with his 1995 disorderly conduct arrest. Applicant adds several explanations: He claims he completed the prescribed treatment incidental to his 1987 felony sexual misconduct conviction and only pleaded guilty to the sexual assault charges related to his stepdaughter in 1995 because of his lawyer's advice that a defense to clear himself of the charges would cost him in excess of \$25,000.00, which he could not raise given his spouse's financial circumstances at the time. Applicant attributes his arrest omissions on his SCA to his lawyer's advice (*i.e.*, that the respective felony charges were dropped); he attributes his omission of his 1987 charge in his DIS statement to a mistaken belief that the only charge of pressing concern to the DIS agent (*viz.*, the 1987 sexual misconduct charge) was previously listed in his SCA.

Relevant and Material Findings

The allegations covered in the SOR and admitted to by applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Background

Applicant was away on patrol with the Navy (geographically separated from his first spouse for about a year) and under considerable stress from marital problems that ensued when he returned home in 1986 to learn that his wife was leaving their two children with him and going to live with her mother. After his wife's departure, applicant fondled his six-year old daughter while he was bathing her (*see* exs. 2 and 6; R.T., at 31). Applicant voluntarily sought counseling over the incident at a Naval Family Advocate Center (NFAC). His Naval counselors reported the incident to military authorities, and investigations were initiated by both local police and NIS. Applicant's January 1987 arrest followed. At the scheduled court hearing, he pleaded guilty to sexual assault and was placed on a one-year probation program of accelerated rehabilitation; the risk of injury to a minor charge (a felony) was, in turn, dropped. Applicant attended outpatient counseling and was credited with completion of the program (in March 1988) after a year (R.T., at 32). Still, applicant continued seeing his program counselor for another two years before the latter moved out of the area. No apparent disciplinary action was taken against applicant by Navy authorities.

Following his divorce from his first spouse in 1990, Applicant remarried and assumed custodial care of his stepdaughter. For the first three years of his marriage, applicant enjoyed a good relationship with both his spouse and his

stepdaughter (ex. 5). But the relationship changed dramatically for the worst in the Spring of 1994 when applicant learned that his 14-year old stepdaughter was having sexual relations with a 19-year old high school graduate. Applicant pressed his stepdaughter to end the relationship and received sustained resistance in return (*see* applicant's August 3, 1995 statement in ex. 5). Applicant's relationship with his stepdaughter turned volatile thereafter, with applicant entreating his spouse from time to time to initiate a sexual assault complaint against the boyfriend and oft-confronting the stepdaughter about her sexual relationship with the 19-year old. The stepdaughter, by her own account, oft-provoked applicant with the flaunting of her sexual relationship with the boyfriend in applicant's home and telling him "perverted jokes" (*see* ex. 5). Applicant, in turn, found old condoms in the house that had been used by the stepdaughter's boyfriend and on one occasion placed them in a box under his bed (with the apparent intention of later bringing them to the attention of his spouse).

Applicant's stepdaughter was known by applicant and his spouse to have a volatile, fragile emotional state and a history of depression (marked by two suicide attempts) that required psychiatric treatment since age eight, including multiple hospitalizations (R.T., at 37-38). Sometime in the spring or summer of 1994, the stepdaughter told her aunt (who passed it on to applicant's spouse) that applicant had sexually molested her on a single occasion in the Spring of 1994, in addition to walking around the house in an aroused state and making provocative observations about her private parts on other occasions when her mother wasn't home (*see* exs. 5 and 6). Applicant vehemently denies the stepdaughter's claims, both in his own statement given police and at hearing, and even asked to be polygraphed to prove his innocence (ex. 5; R.T., at 29-30). Applicant claimed that his stepdaughter fabricated the reported 1994 incident (alternately claiming the putative incident occurred in July-August and September 1994, and not in March as reported by the stepdaughter). He characterizes the incident as totally non-sexual and the end result of his efforts to correct his stepdaughter about her promiscuous activities with her boyfriend in their home: Following heated words, applicant claims he accidentally fell on the stepdaughter as he was attempting to pull her off the bed she was sharing with her young three-year old brother at the time (ex. 5; R.T., at 30). In her own emotionally laden telephonic statement given to police, applicant's wife expressed uncertainty over whose version to believe, even as she remained committed to supporting her stepdaughter (expecting a child and soon to be emancipated): Applicant's or her stepdaughter's (ex. 4). This opinion marked some visible retreat from her earlier complaint filed with police on July 6, 1995 (ex. 5).

Credibility on the reserved issue of whether or not applicant sexually assaulted his stepdaughter in 1994 is affected by a number of considerations: Applicant's past history of sexual misconduct with his own daughter, his stepdaughter's emotional history, sexual maturity and demonstrated resentment against applicant, his wife's ambivalence about the respective versions, and the actions taken later by the court in receiving applicant's *nolo contendere* plea on the sexually related charges filed against applicant.

Taking all of the circumstances into account (including applicant's own witness demeanor) and considering the stricter government proof burdens assigned in criminal cases than in this clearance proceeding, applicant's claims with respect to the raised issue of sexual assault of his stepdaughter must be considered insufficiently persuasive standing alone (and absent additional corroborating evidence) to withstand adverse factual inferences. Notwithstanding that this issue comes before this trier *de novo* (freed of collateral estoppel limitations), common sense cannot avoid according considerable weight to the State A court who had the same police and probation reports at its disposal in assessing the respective charges against appellant in 1996 and chose (implicitly in part, at least) to accept the stepdaughter's story in its passing of judgment on applicant. Albeit, it would certainly appear that the court was less than thoroughly impressed with the stepdaughter's story, for it dropped the most serious felony charge and disregarded the probation department's recommendation for jail time (*compare* exs. 4 and 5). Still, the court entered a guilty conviction on the sexual assault charge after a full assessment of the respective accounts of the participants, which cannot be discounted on this record. To justify contrary findings in this type of proceeding would require additional convincing corroboration which is simply not available in this record.

The July 5, 1995 Incident

In the evening of July 5, 1995, applicant found his wife (who had taken to drinking) in a local bar carousing with another patron. Emotionally wrought, he returned home and became embroiled in a dispute with his stepdaughter who was in the company of her older boyfriend (21 years of age by this time). At one point applicant pulled the phone from the stepdaughter as she was attempting to call the police (accidentally breaking the cord by applicant's account). Amidst

considerable shouting by applicant and the stepdaughter, applicant punched the latter's bedroom wall. Herself enraged, the stepdaughter (with her boyfriend in her company) went outside the home and began ripping plants out of the garden before moving over to the vicinity of her boyfriend's truck (*see* ex. 5). Angered, applicant hurled a pair of garden shears in her direction, which landed close to the stepdaughter, but did not strike her (ex. 5).

Instituted Legal Proceedings re: 1995 Incident

Appellant was arrested in the early morning of July 6, 1995 by State A police and charged with disorderly conduct. After being taken into custody, he was released upon his putting up a \$1,000.00 bond (ex. 5). The charges were subsequently dismissed without any action being taken against applicant, or probationary conditions imposed in lieu of judgment of conviction, and no criminal conduct can be inferred from the accepted underlying facts pertaining to the covered incident (*see* ex. 4; R.T., at 28).

Based on the statements obtained from applicant, his stepdaughter and his spouse, State A police returned to applicant's home on October 5, 1995, arrested him and charged him with sexual assault 4th degree (a misdemeanor) and risk of injury to a minor (a felony) (*see* ex. 4). At his scheduled trial on May 10, 1996, applicant entered a *nolo contendere* plea on each of the charges on the advice of his lawyer (who assured him that courts generally take the word of the juvenile over the adult in such cases) (*see* R.T., at 43). On the same date, the State A court returned convictions on the reduced charges of sexual assault 4th degree and reckless endangerment 2nd (both misdemeanors) (*see* applicant's response and ex. 4). Rejecting the probation department's recommended jail time for applicant, the court fined applicant \$3,000, imposed a one-year jail sentence on applicant (suspended), and placed him on two years of probation, conditioned upon his acceptance of sex offender treatment (ex. 4).

Applicant's Post-May 1996 Restorative Actions

By all manifest accounts, applicant completed one year of counseling and is scheduled to complete a second year of outpatient counseling with a certified therapist in March 1998 (*see* ex. A; R.T., at 32, 35). He is credited by his current outpatient counselor with making his appointments, exhibiting clear recall and concentration in his therapy sessions and showing no indication of constituting a threat to himself or others. Applicant's counselor's assessments are not controverted in any way and are accepted.

Since his 1995 arrest on the sexual misconduct charges, applicant and his second spouse have separated and show little likelihood of reconciliation at the present time (*compare* ex. 4 with R.T., at 36). Applicant's spouse credits him with being "a great and giving person," but who has a dark side to his character, which she describes as "a temper which is worrisome and hard to fathom" (*see* ex. 4). Still, he has never physically assaulted her or the children and is known to get angry only when he is provoked.

SCA and DIS Omissions

Executing his SCA of October 31, 1996 (electronically generated by his employer), applicant omitted to mention both his 1986 and 1995 arrests as including felony offenses. Both arrests included felony offenses for risking injury to a minor. By contrast, he mentioned his 1995 arrest under the question asking him about arrests, charges and convictions occurring within the past seven years (excluding traffic violations involving fines less than \$150.00 sans alcohol or drug involvement). By his understanding of this question, he was able to omit his 1987 misdemeanor conviction for sexual assault (R.T., at 34). Applicant attributes his omissions of the felony features of his arrests to a mistaken understanding based on his quick reading of the question and picking out only the reference to convictions (R.T., at 32-33). That he claims to have been mistaken in his answering no to felony charges and convictions does not answer the question of whether he was simply mistaken, or knowingly and willfully answered in the negative to the questions asking about felony offenses to conceal embarrassment. To make such a mistake is not inherently unreasonable, though, and in applicant's case was not accompanied by any inconsistencies in his written statements or testimony that would serve to impair his overall credibility on this issue. Inferences warrant, accordingly, that applicant did not attempt to deliberately conceal the included felony offenses associated with his 1987 and 1995 arrests and ensuing charges.

When asked about other arrests in his initial March 27, 1997 DIS interview, applicant covered all of the aspects of his 1995 arrest (including the felony offense of risking injury to a minor) but failed to acknowledge his earlier 1987 arrest at

all (*see ex. 3*). Applicant attributes his initial belief at the time that he had covered the arrest in his SCA but corrects himself at hearing, realizing that he had not included it because it occurred more than seven years previous (R.T., at 34). He attributes the omissions to his continuing understanding that because of the dismissal of the risking injury charges, he could truthfully answer in the negative to inquiries about felony arrests. Applicant appears credible in his assignment of mistaken understanding. His credibility is reinforced by his earlier voluntary request for counseling assistance from his Navy command. Had applicant not come forward and acknowledged fondling his daughter in 1986 as he did, he (more than likely) would never have faced charges. Applicant's credibility on this issue is persuasive, and his explanations are accepted.

POLICIES

The Adjudicative Guidelines outlined in the Change 3 amendments to the Directive list policy considerations to be made by judges in the decision making process. These considerations include Disqualifying Conditions and Mitigating Conditions, which should be assessed before deciding whether or not a security clearance should be granted, continued or denied. The Directive does not require the assessment of these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in the Directive, which are intended to assist judges in reaching a fair and impartial common sense decision for recommendation.

Viewing the issues raised and evidence as a whole, the following Adjudicative Guidelines are pertinent herein:

Criminal Conduct

Disqualifying Conditions:

1. Any criminal conduct, regardless of whether the person was formally charged.
2. A single serious crime or multiple lesser offenses.

Mitigating Conditions:

1. The criminal behavior was not recent.
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.

Sexual Behavior

Disqualifying Conditions:

1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted.
3. Sexual behavior that causes an individual to be vulnerable to undue influence or coercion.
4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

Mitigating Conditions:

2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature.
4. The behavior no longer serves as a basis for undue influence or coercion.

Personal Conduct

Disqualifying Conditions:

2. Deliberate omission, concealment, falsification or misrepresentation of relevant and material facts including, but not limited to information concerning arrests, drug abuse or treatment, alcohol abuse or treatment, treatment for mental or emotional disorders, bankruptcy, military service information, organizational affiliations, financial problems, employment, foreign travel, or foreign connections from any Personnel Security Questionnaire, Personal History Statement or similar form used by any Federal agency to conduct investigations, determine security clearance or access eligibility, or award fiduciary responsibilities.

3. Deliberately providing false or misleading information concerning any of the relevant and material matters listed above to an investigator, employer, supervisor, security official or other official representative in connection with application for security clearance or access to classified information or assignment to sensitive duties.

4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure.

Mitigating Conditions:

3. The individual made prompt, good faith efforts to correct the falsification before being confronted with the facts.

4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided.

Burdens of Proof

By dint of the precepts framed by the Directive, a decision to grant or continue an applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's suitability for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Put another way, the judge cannot draw inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controversial fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's inability to obtain or maintain a security clearance. The required showing of nexus, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of accessible risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSION

Applicant comes to these proceedings with two convictions on misdemeanor sexual assault charges and disorderly conduct charges that were subsequently dropped. The convictions involving his three-year old daughter in 1987 and his stepdaughter in 1996 are considerably spaced but still reflect some potential for inferred pattern sexual misconduct. Both cases entailed risk of injury to a minor charges at the outset of the respective proceedings and later dismissal of the same by the courts involved. Collateral estoppel was never raised by the Government and is not applicable to either proceeding. The reasons are clear: Neither convictions based on *nolo contendere* pleas nor misdemeanor charges are historically subject to classic collateral estoppel treatment.

Turning to the subject of *nolo* pleas, our Appeal Board has chosen (for reasons not entirely clear) to counter the case trend against extending collateral estoppel to convictions predicated solely on *nolo* pleas. See DISCR OSD No. 88-2116 (Oct. 13, 1989). Compare, e.g., *Myers v. Sec'y of Health and Human Services*, 893 F.2d 840, 844-45 (6th Cir. 1990);

Munnely v. Unites States Postal Service, 805 F.2d 295, 297 (8th Cir. 1986) with the Appeal Board's decision in DISCR OSD No. 88-2116 (Oct. 13, 1989). But this doctrinal time lag is likely to change: In its DISCR OSD No. 96-0525 (June 17, 1997), the Board acknowledged its discrepancy while reserving any contemplated change in position to future cases. For the moment, though, collateral estoppel is not available for convictions grounded in accepted *nolo* pleas under currently articulated Board decisions.

Whatever the current state of legal development on the application of collateral estoppel to convictions based on *nolo* pleas, there can be no serious dispute about the availability of fresh evidentiary considerations of convictions that are of misdemeanor quality only. *See* ISCR OSD No. 96-0525 (June 17, 1997). Evidence pertaining to both the 1987 and 1995 sexual assault incidents was received and considered anew, accordingly. In the case of the 1986 incident, resolution came much easier in the face of appellant admissions. More difficult was the weighing of the evidence received concerning the 1994 incident. For the taken stories of appellant, his wife and stepdaughter by investigators were diametrically opposed in all of the key elements of the offense: Physical force, intent and materiality. After weighing all of the evidence and assigning considerable weight to the State A court's assessment of the same documentary evidence and disposition of the respective charges (convicting appellant on the misdemeanor sexual assault offense while dismissing the more serious risk of injury to a minor charge), enough doubts remained to prevent acceptance of applicant's denials of the levied charges. Only with respect to the companion July 1995 disorderly conduct charges (which were later dropped) was the evidence of applicant's fault too weak to sustain adverse findings against him.

Applicant's 1987 and 1996 convictions on charges of sexual offenses involving minors, while not classed as felonies in the respective jurisdictions, are covered by several factors in the Adjudicative Guidelines (for criminal conduct): DC 1 (any criminal conduct) and DC 2 (any serious crime or multiple lesser offenses). To the extent the incidents (separated by an eight year interval) represent breaches of parental trust, they evoke special fiduciary concerns that bear considerably on applicant's security eligibility.

Unquestionably, applicant's sexually related conduct directed at his daughter and stepdaughter in disparate incidents separated by an eight-year interval raise sufficient moral and trust questions about applicant's overall character to be security significant criminal conduct. The parental-child bond fixes firm responsibilities on the parent to care and protect his children and stepchildren for whom they assume parental responsibilities (as here). Children look to their parents and influential adults for their physical and emotional sustenance. Applicant's actions do reflect trust betrayals of both his child and stepdaughter. Such betrayals of trust can be neither excused nor discounted when appraising his suitability for executing the fiducial duties imposed upon him as a condition to his being afforded access to classified information. *Cf. Stahlans v. NSA*, 678 F.2d 482 (4th Cir. 1982) (upholding removal of NSA employee from position of trust based on the employee's sexual misconduct with his minor daughter); *Swann v. Walters*, 620 F. Supp. 741 (DDC 1984) (upholding removal of federal employee from position of trust, which involved protection of sensitive information, based on employee's sexual misconduct with minor children that resulted in felony conviction).

Besides the adverse moral/trust implications of his conduct, applicant's condition has psychiatric ramifications, for which he has sought repeated counseling and monitoring (in the Navy and more recently). His condition has never been clinically diagnosed by a credentialed treatment provider, however, and was not considered serious enough to warrant discussion by his current outpatient counselor. Nonetheless, applicant's acts are considered serious enough to constitute potential risks to impaired judgment, trust and stability. And his covered actions are covered by several factors under the Adjudicative Guidelines for conditions and conduct covered by Criterion D (sexual behavior): DF 1 (sexual behavior of a criminal nature), DF 3 (sexual behavior that causes vulnerability and DC 4 (sexual behavior which reflects lack of discretion ro judgment).

Considered together, applicant's covered sexual offenses are security significant and raise enough concerns about applicant's suitability to access classified materials to enable Government to meet its initial burden. Government must be able to repose absolute trust in those it privileges to have access to facilities that house classified information. *See Snapp v. United States*, 444 U.S. 507, 511n.6 (1980). Applicant is fully subject to these imposed fiducial requirements. Government carries its initial burden with respect to the allegations covered by Criteria J and D.

Applicant, to his credit, sought counseling following each conviction. After self-reporting his 1986 incident to his Navy superiors, he subsequently accepted two years of accelerated rehabilitation and is credited with successfully completing

his prescribed treatment program. Separated from his daughter in recent years, he has experienced no further incidents with her. Applicant is credited, too, with complying with all of his probation conditions associated with the 1996 conviction involving the incident with his stepdaughter, including his ordered treatment. With almost two years of sustained outpatient counseling to his credit, he is now in the last stage of his second year of therapy (with no reported problems) and is scheduled to complete his conditioned probation within a month. By all accounts, his counseling has been successful for him (even with his continued denials of any sexual molesting of his stepdaughter), and he can be expected to be released from probation when his two years are concluded at the end of March 1998.

Applicant may benefit from several of the mitigating factors of the Adjudicative Guidelines for criminal conduct (*viz.*, MC 1 (not recent), MC 4 (factors not likely to recur) and MC 5 (clear evidence of rehabilitation), not to mention the mitigation guidelines governing sexual behavior (*viz.*, MC 2 (nor recent) and MC 4 (no longer subject influence). Overall, applicant does appear to have matured and increased his understanding of the proper role of a parent. He has experienced no additional sexually related incidents with minors since his last arrest associated with the 1994 incident involving his stepdaughter, a period of almost four years, and is not likely to experience any recurrent conduct, now that (a) both his children and stepdaughter reside with their respective mothers and (b) so much time has elapsed since the adjudicated 1994 sexual assault.

True, applicant's probationary status is not officially concluded. But our Appeal Board has not made an applicant's probationary status a *per se* bar to a favorable security clearance (noting the absence of anything in the Directive that requires a contrary holding). With just one month remaining on applicant's two-year probation in the present case, the presence of probation pendency should not foreclose the adoption of an otherwise favorable result. *See* ISCR OSD No. 96-0710 (June 20, 1997). It is appropriate to conclude on this record that applicant's dispositional faults have been corrected and/or stabilized to the point where risks of recurrence are no longer present. Applicant carries his evidentiary burden, and favorable conclusions warrant with respect to the allegations covered by Criteria J and D.

Before applicant may be fully absolved of risk-bearing security concerns, the reliability and trust concerns stemming from his omissions of his felony arrests/charges (associated with his 1987 and 1995 arrest incidents) on his executed SCA must be reconciled with principles of fiducial trust and reliability that inhere in the special relationship between the Government and persons cleared to access classified information. So much trust is imposed on persons cleared to see classified materials (among civilian and military personnel alike) that margins of tolerance are necessarily narrow. By his own admissions, applicant omitted his covered arrests and charges in the block reserved for felony-related incidents on his SCA. Government may raise initially the concerns covered by DC 1 (falsification of SCA) and DC 2 (omissions to DIS investigator) of the Adjudicative Guidelines (for personal conduct) in its own case.

Applicant's manifest intent in his failure to list his arrests as felonies in his SCA was not, however, motivated by any knowing and wilful concealment, but rather was attributable to his (a) lawyer's advice on his entering a *nolo* plea to a misdemeanor sexual assault offense and (b) mistaken impressions he gathered about what was called for in the SCA form electronically generated by his employer. Listing his 1995 arrest on the form reserved for all further arrests, he omitted his 1986 arrest because of its age (arrests more than seven years old were excepted from listing). Applicant's explanations for not mentioning his 1986 arrest when asked about it during his first DIS interview (in March 1997) are reconcilable, too, on grounds of mistaken understanding and are covered by MC 4 (omission caused by improper or inadequate advice) of the Adjudicative Guidelines (for personal conduct). His providing full disclosure of his 1986 arrest/charge when asked about it in a follow-up DIS interview in November 1997 is entitled under all the circumstances presented to the full benefit of MC 3 of the Adjudicative Guidelines).

In the end, it is applicant's credibility that must be put to the stern test in determining whether his omissions were motivated by true desires to limit and shade his sexual encounters with law enforcement authorities, or rather by mistaken understandings of what was being inquired about. Applicant's credibility has been put to the test on this issue and holds up under close scrutiny. Convincing are his prompt detailing of the incidences when asked specifically about his 1986 incident, and his accepted past candor in his self-reporting of the liberties he took with his daughter in 1986. Considering all the circumstances surrounding applicant's execution of his SCA and responding to questioning by his DIS interviewers, his explanations are concluded to be credit-worthy and enable him to successfully extenuate and mitigate the clearance affects of the omissions in appraising his overall clearance suitability. Applicant carries his overall evidentiary burden, and the allegations covered by Criterion E are concluded favorable to applicant.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors enumerated in F.3 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS listed above, this Administrative Judge makes the following FORMAL FINDINGS:

CRITERION J (CRIMINAL CONDUCT): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

Sub-para. 1.d: FOR APPLICANT

CRITERION D (SEXUAL BEHAVIOR): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b: FOR APPLICANT

Sub-para. 2.c: FOR APPLICANT

CRITERION E (PERSONAL CONDUCT): FOR APPLICANT

Sub-para. 3.a: FOR APPLICANT

Sub-para. 3.b: FOR 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 applicant's security clearance.

Roger C. Wesley

Administrative Judge