DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 11-00211
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
For Applicant: *Pro se*

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Decision

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MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant was convicted in March 1990 of felony unlawful contact involving an underage niece. In October 2004, he pled guilty to assault for sexual acts committed against another niece in January 2004. In March 2007, he was fined for failure to register as a sex offender. He did not report his felony charges or his violation of the sex offender registry requirement on his July 2010 security clearance application. The Criminal Conduct, Sexual Behavior, and Personal Conduct concerns are not fully mitigated. Clearance denied.

Statement of the Case

On February 28, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline J (Criminal Conduct), Guideline D (Sexual Behavior), and Guideline E (Personal Conduct), as to why it was unable to find it clearly consistent with the national interest to grant him a security clearance. DOHA took action 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 adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR allegations on March 13, 2012, and he requested a hearing. The case was assigned to me on April 19, 2012, and on April 27, 2012, I scheduled a hearing for May 24, 2012.

The hearing was convened as scheduled. Five Government exhibits (GEs 1-5) and three Applicant exhibits (AEs A-C) were admitted into evidence without objection. Applicant also testified, as reflected in a transcript (Tr.) received on June 5, 2012. On the Government's motion, and with no objection from Applicant, the SOR was amended, as set forth below.

Procedural Rulings

The SOR alleged under Guideline E, subparagraph 3.b, that Applicant deliberately falsified his July 22, 2010 Electronic Questionnaire for Investigations Processing (e-QIP) in that he responded "No" to 22.b concerning any arrests in the last seven years and omitted his arrests in 2004 for unlawful sexual conduct and in 2006 for violation of the sex offender registry.[1] Applicant testified that he believed he had been summoned but not arrested for failure to register as a sex offender in 2006. At the close of the evidentiary record, the Government moved to amend the SOR, to delete from SOR 3.b that Applicant had failed to disclose that he had been arrested in November 2006, and to add a new subparagraph 3.d alleging that Applicant falsified his e-QIP by responding "No" to question 22.a concerning whether he had been summoned to court in the last seven years, as follows.

> d. You falsified material facts on an Electronic Questionnaire for Investigations Processing, signed by you on July 22, 2010, in response to section 22.a, "Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you? Are you on trial, or awaiting a trial on criminal charges, or are you currently awaiting sentencing for a criminal offense? You answered "No" and deliberately omitted the information set forth in subparagraph 1.c, above.

Applicant did not object to the proposed amendments, although he denied intentional falsification of his e-QIP. Accordingly, I granted the Government's motion while advising both parties that the burden of proving Applicant deliberately falsified his e-QIP, as set forth in newly amended SOR 3.b and 3.d, remained on the Government.

Summary of SOR Allegations

The SOR as amended alleges under Guideline J that Applicant was convicted in March 1990 of felonious unlawful sexual conduct, and sentenced to four years in prison

[1]After reviewing the e-QIP (GE 1), I note that Applicant answered "Yes" rather than "No" to 22.b, although he listed only an arrest for simple assault in October 2004. The Government did not move to correct the obvious error.

(three years suspended) and required to register as a sex offender (SOR 1.a); that he was charged with unlawful sexual conduct and assault in January 2004, and convicted of the assault (SOR 1.b); that he was convicted of failing to comply with the sexual offender registry requirement in November 2006 (SOR 1.c); and that he committed a felony violation by falsifying multiple responses on his July 22, 2010 e-QIP (SOR 1.d). Applicant was alleged under Guideline D to have had inappropriate sexual contact with two minor females, leading to the criminal charges in SOR 1.a and 1.b (SOR 2.a). Under Guideline E, Applicant allegedly falsified his July 2010 e-QIP by responding "No" and omitting pertinent criminal charges from questions 22.c (any felony charges ever) (SOR 3.a), 22.b (any arrests within the last seven years) (SOR 3.b), and 22.a (any summons within the last seven years) (SOR 3.d). The criminal conduct and inappropriate sexual contact were also cross-alleged under Guideline E (SOR 3.c).

Findings of Fact

When he answered the SOR, Applicant admitted with clarification the criminal charges and sentences in Guideline J. He admitted without explanation the inappropriate sexual contact with two underage females, as alleged in Guideline D. He denied that he knowingly failed to comply with the sex offender registry requirement or that he intentionally falsified his e-QIP. Applicant's admissions are incorporated as findings of fact. After reviewing the exhibits and transcript, I make the following additional findings of fact.

Applicant is a 41-year-old welder/fabricator, who has been employed by a defense contractor since about August 2010. (Tr. 40.) He has been married since June 2008. (GE 1.) He and his spouse have two children: a daughter almost four years old and a son under six months old. (Tr. 71.) Applicant seeks his first security clearance. (GE 1.)

Applicant was arrested in state X as a juvenile for having inappropriate contact ("more of a touch") with a minor female younger than him. (Tr. 41-42, 44.) He pled no contest to a charge of gross sexual misconduct and was sent to a youth center, where he had some counseling. (GE 3; Tr. 45, 72.) Around August 1988, when he was 17, Applicant fondled his then five-year-old niece. When confronted by his sister, Applicant admitted the sexual contact. In late September 1988, Applicant's sister reported him to state X's Department of Human Services Child Protection Division after she learned of a second incident of abuse. In November 1988, Applicant was indicted on a felony charge of unlawful sexual contact. Applicant was convicted of the charge in March 1990, although he does not believe that anything untoward happened. He remembers the girl being on top of him when he woke up (Tr. 47), but he denies he touched her. Applicant testified that he accepted a plea bargain because he feared being found guilty at a trial where it would have been his niece's word against his. Applicant was sentenced to serve one year of a four-year prison term and placed on four years of probation. (GEs 3, 5; Tr. 47-49.) In March 1991, the state moved to revoke his probation for being near a minor under age 15. (Tr. 50.) Probation was continued for 18 months. On October 8, 1993, his probation was terminated, and he was incarcerated until August 8, 1994. (GEs 4, 5.) Applicant received no counseling in prison. (Tr. 72.) After he was released, he attended a few sessions of sex offender counseling. (Tr. 57, 72.)

Around June 2003, Applicant began traveling out-of-state for work with a marine company in state Y. (GE 1.) He claims that he established residency in state Y around that time (Tr. 32), although he continued to rent premises with his mother in state X (GEs 1, 3), register his vehicle in state X, and return to state X on weekends. (GE 3; Tr. 59.)

Five or six times over the course of a few weeks in January 2004, Applicant had criminal sexual contact in state X with the 14-year-old daughter of another sister. In early February 2004, Applicant's niece informed her mother that Applicant had touched her private parts. Applicant was told by his sister that he was not welcome in her home. The police investigated on a complaint by a third party. Applicant was arrested after his niece indicated that he had penetrated her vagina with his fingers. In March 2004, he was indicted for unlawful sexual contact, a Class C felony offense, and for assault, a Class D offense. In October 2004, Applicant pled guilty to the assault charge, and on November 9, 2004, the unlawful sexual contact charge was dismissed, and he was sentenced to 90 days in the county jail in state X for assault. (GE 3; Tr. 52-55.) Applicant did not seek out any counseling other than "a little bit of research online, kind of self-counseling." (Tr. 72.) He admits that he "was attracted to" his niece, but asserts that he "found the problems" that he had with himself and had "grown from that." (Tr. 56-57.)

Applicant was unemployed from October to December 2005. His address of record was in state X. (GE 1.) According to his e-QIP, Applicant then worked until May 2006 for a technical services company in state Y. Paystubs reviewed for December 18, 2005 through April 22, 2006, show he was paid not by the technical services company listed on his e-QIP, but rather by a subcontractor for the marine company in state Y. Applicant maintains that his worksite remained in state Y, although his paystubs for that period show no address for him or his employer. (Tr. 26-31.) Around February 2006, Applicant bought a home in state Y. (GE 1.)

On November 14, 2006, law enforcement in state X received information that Applicant was living in the state and was a convicted sex offender. Criminal checks confirmed Applicant's felony conviction in 1990 for unlawful sexual contact, and he had not complied with state X's sex offender registry.[2] The police informed Applicant on November 15, 2006, that he was in violation of the sex offender registration act. On November 19, 2006, the police interviewed Applicant to determine whether he had been a resident of the state for at least five days, and if he had begun the process of registering as a sex offender. Applicant told the police that he frequently traveled out of the state for work, and that he had not been notified to register. Applicant gave the police a local address in state X, and he admitted that his motor vehicle was registered in the state. He indicated that within the past day or so, he had received two letters from the state informing him of his

[2]Under Chapter 15 § 11202 of state X's Sex Offender Registration and Notification Act of 1999, the sex offender registration act applies to a person sentenced in state X on or after January 1, 1982, for a sex offense or a sexually violent offense as an adult or as a juvenile sentenced as an adult unless excepted. Under Section 11202-A, which was amended in 2009, Applicant would not now be required to register if he provided documentation establishing that he was finally discharged from the correctional system (which includes completing probation) at least 10 years before providing the documentation.

duty to notify local law enforcement of his sex offender status within 24 hours, which he had not done.[3] Applicant was arrested for failure to comply with the state's sex offender registration act, first offense, a Class D crime.[4] In January 2007, Applicant pled not guilty. On March 12, 2007, Applicant entered a guilty plea, and he was sentenced to pay fines and fees totaling $310. (GEs 3, 4.) Applicant now challenges the validity of the charge, contending that he was not a resident of state X as of November 2006. He kept his driver's license and vehicle registration in state X because it was cheaper for him to do so. (Tr. 61.) He "only occasionally came up to [state X]." (Tr. 58-61.) About his guilty plea, Applicant testified, "I think I just thought that they, you know, might have enough evidence to uphold what they. . . ." (Tr. 62.)[5] As of May 15, 2007, Applicant was not required to register as a sex offender in state Y. (GE 3.)

Around October 2008, Applicant was laid off from his employment with the marine company. He was unemployed until March 2009. He then worked for a local welding company in state Y until June 2010. (GE 1.)

On July 22, 2010, Applicant executed an e-QIP for his current employment with a defense contractor. He responded "No" to questions 22.a, concerning whether he had been issued a summons, citation, or ticket to appear in court in a criminal proceeding against him in the last seven years, and 22.c, about whether he had ever been charged with a felony offense. Applicant answered "Yes" to 22.b, concerning any arrests within the last seven years, and he disclosed that he had been arrested in October 2004 for simple assault, for which he served 90 days. (GE 1.)

On September 22, 2010, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Applicant claimed he could not describe what led to his arrest for assault in 2004. He expressed his belief that he had not been convicted while indicating that he had been required to register as a sex offender after the incident. Applicant denied any recall of the November 2006 charge or the conduct that may have led

[3]State sex offender registry records indicate that letters were sent to Applicant notifying him that he had to register on June 6, 2006, June 23, 2006, and October 4, 2006. The first letter was returned address unknown. However, the second and third letters were not returned to the registry. (GE 3.) Presumably, Applicant received the letters well before he was contacted by the police in November 2006.

[4]The police filed an arrest report (GE 3) identifying Applicant as the arrestee, a charge of sex offender violation for failure to register under § 11227, and an arrest date of November 19, 2006, at 1715 hours, with booking at 1719 hours. Available court records show that Applicant was bailed on November 19, 2006, on payment by check of $400 by a third party. A bench notice for a trial on March 12, 2007, was mailed to Applicant's counsel, who had been appointed on January 3, 2007.

[5]Applicant presented wage and earning statements for his employment with the subcontractor from December 18, 2005, to April 22, 2006, and as a direct hire for the marine company in state Y from January 7, 2007, through June 29, 2007. He testified that he was unable to find the paystubs that could conclusively establish his domicile in state Y from May 2006 through December 2006. (Tr. 29-31.) Applicant indicated on his e-QIP that he worked as a welder for a manufacturing company in state Y from June 2006 to August 2006, when he then started with the marine company. (GE 1.) Even if he had established his domicile in state Y by November 2006, it would not explain his failure to register as a sex offender in state X before February 2006, when he apparently bought his home in state Y.

to a charge against him. He had no explanation for his omission of the charge from his e-QIP. (GE 2.)

On November 21, 2011, at DOHA's request, Applicant provided the arrest and court records of his 1988 unlawful sexual contact, 2004 assault, and 2006 noncompliance with the sex offender registry offenses, including a police report indicating that Applicant was arrested at 1715 hours on November 19, 2006, for violation of § 11227 (failure to comply with sex offender registration act). Applicant explained his omission of criminal charges (the 1988 felony unlawful sexual contact conviction, 2004 felony unlawful sexual charge, and 2006 misdemeanor sex offender registry conviction) from his July 2010 e-QIP, as follows:

> The application as I understood, explained going back 10 years and the charge was beyond that time frame. I do not believe [that] the charge was a felony. I did not recall the charge for failing to register . . . At no time was I trying to hide my criminal record or conduct. Apologies. (GE 3.)

When he answered the SOR in March 2012, Applicant indicated that he thought he only had to go back ten years on the felony question. As for omitting the failure to register as a sex offender offense, Applicant admitted that he had been fined $310, but he was not arrested. He was told to appear in court on a given date. When asked at his hearing about his failure to disclose on his e-QIP that he had been charged with felony unlawful sexual contact in 1988 and in 2004, Applicant responded that he understood the 1988 charge was a felony, but he thought he was required to report offenses that occurred within the last seven years, or ten years if it involved alcohol or drugs. (Tr. 66-67.) As for the 2004 felony charge, Applicant claimed that he thought he was charged only with simple assault since he was given a plea bargain. (Tr. 69.) Applicant initially had no explanation for his failure to disclose the November 2006 failure to register as a sex offender charge ("I don't know"). (Tr. 68.) When asked a second time, Applicant stated, "I didn't remember to put it down." (Tr. 69.)

Applicant testified without corroboration that he told his spouse about the charges involving his niece in 2004 ("explained what my charges were and what happened. It was nothing I hid from her"). He is "pretty sure" that he also informed her about the 1988 unlawful sexual contact charge as well. (Tr. 70-71.) Concerning whether anyone at work knows about his criminal record, Applicant testified that security was aware because he went over his paperwork with them. (Tr. 69.) Applicant is willing to go to counseling to obtain his security clearance. (Tr. 90.)

Applicant has been a good worker for his defense contractor employer. He follows procedures, pays attention to detail, and exhibits a desire to learn. (AEs A-C.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing

that "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 adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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 overall adjudicative goal is a fair, impartial, and commonsense 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. 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 to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to 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

The security concern about Criminal Conduct is set out in AG ¶ 30: "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 security concerns under AG ¶ 31(a), "a single serious crime or multiple lesser offenses," and AG ¶ 31(c), "allegation or admission of criminal conduct, regardless

of whether the person was formally charged, formally prosecuted or convicted," apply because of Applicant's convictions for felony unlawful conduct involving his five-year-old niece in 1988; for sexually assaulting a 14-year-old niece in 2004; and for failing to register as a sex offender. AG ¶ 31(e), "violation of parole or probation, or failure to complete a court-mandated rehabilitation program," is also implicated. Applicant violated his probation for his felonious sexual contact in 1988 by having contact with a female minor, and he was incarcerated from October 1993 to August 1994. Furthermore, Applicant's deliberate omissions of his felony sexual contact and misdemeanor violation of the sex offender registry act from his e-QIP (*see* Personal Conduct, *infra*) violate 18 U.S.C. § 1001, and raise security concerns under AG ¶ 31(c).

It has been over 20 years since Applicant's felony conviction, but that offense cannot be viewed in isolation from his subsequent sexual assaults in January 2004, his failure to register as a sex offender in 2006, or his felonious false statements on his July 2010 e-QIP. Potentially mitigating condition 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," is not established in light of his repeated sexual assaults on an underage female in 2004 and his more recent false statements on his e-QIP in July 2010.

Applicant now believes he did not sexually assault his then five-year-old niece in 1988. He testified that he remembers the girl being on top of him when he woke up, but he did not touch her. He pled guilty because he was afraid of being convicted. The evidence shows that as a juvenile, he pled no contest to a charge of gross sexual misconduct (not alleged), for which he was sent to a youth center. He admits the sexual assaults committed in 2004. His pattern of sexual assault on female minors makes it difficult to accept his present denials of any wrongdoing in 1988. Furthermore, his sister told the police that he had admitted having sexual contact with her daughter in 1988. AG ¶ 32(c), "evidence that the person did not commit the offense," is not established.

AG ¶ 32(c) also does not apply to his failure to register as a sex offender. On November 19, 2006, Applicant told the police that he had received two letters within the last day or two advising him of his duty to notify local law enforcement of his sex offender status within 24 hours. State records indicate Applicant likely received notification well before November 2006. He was sent two letters in June 2006 and another letter in October 2006. The second and third letters were not returned to the state. Applicant spent some weekends in state X, and he had an address for mail delivery in state X.

Applicant's good work record with the defense contractor, and the stability of his lifestyle since his marriage in June 2008, are indicators of reform under 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." That being said, Applicant's present denial of any culpability in the 1988 felony sexual contact involving his then five-year-old niece, and his lack of full candor about his criminal record

on his e-QIP, undermine his reform. The Criminal Conduct security concerns are not fully mitigated.

Guideline D, Sexual Behavior

The security concerns about Sexual Behavior are set out in AG ¶ 12:

> Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.

AG ¶ 13(a), "sexual behavior of a criminal nature, whether or not the individual has been prosecuted," applies not only to his felony conviction for unlawful sexual conduct in 1988, but also to his assault conviction involving another niece in 2004. Applicant admits that he repeatedly had unwanted sexual contact with this niece around January 2004. AG ¶ 13(d), "sexual behavior of a public nature and/or that reflects a lack of discretion or judgment," is established in that Applicant's abuse of two underage female family members reflects extremely poor judgment on his part. Furthermore, concerns of potential vulnerability because of this sexual misconduct arise under AG ¶ 13(c), "sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress." Applicant apparently told his spouse about the charges involving his older niece in 2004. He also testified he told her what happened. However, there is no confirmation that his spouse knows about the full extent of his misconduct, or that he "did time" for abusing a five-year-old niece. Also, it is unclear to what extent his employer is aware of his past sexual misconduct. Security personnel at work are aware of his criminal record from reviewing his paperwork with him. A review of his e-QIP would have given them no reason to know that Applicant was convicted of any offense of a sexual nature. He listed only that he was convicted in 2004 of "simple assault."

None of the potentially mitigating conditions fully apply. Applicant was a juvenile when he pled no contest to gross sexual misconduct. He was only 17, although punished as an adult, when he had illegal sexual contact with a five-year-old niece. However, his repeated sexual assault of another niece in 2004, when he was 32 years old, precludes mitigation under AG ¶ 14(a), "the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature."

AG ¶ 14(b), "the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment," is also not satisfied. It has been eight years since Applicant's last sexual assault, but there was 15 years between his sexual assaults of his two nieces. Furthermore, Applicant has received no professional counseling since 2004. His online research is not enough to guarantee against recurrence.

Applicant's uncorroborated claims that he has informed his spouse of what happened between him and his niece in 2004, and that security personnel at work are aware of his criminal past, do not prove that "the behavior no longer serves as a basis for coercion, exploitation, or duress," under AG ¶ 14(c). As noted under Guideline J, *supra*, it is unclear what, if anything, Applicant told his spouse about his unlawful sexual conduct in 1988. Security personnel would have no reason to know of the sexual nature of Applicant's criminal conduct from reviewing the e-QIP. Sexual contact with underage females is not consensual. AG ¶ 14(d), "the sexual behavior is strictly private, consensual, and discreet," is clearly inapplicable in this case.

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.

On his July 2010 e-QIP, Applicant disclosed that he had been arrested for simple assault under 22.b, concerning whether he had been arrested within the last seven years. Applicant responded "No" to the remaining police record inquiries, including 22.a about whether he had been issued a summons in the last seven years, and 22.c about whether he had ever been charged with a felony offense. The evidence establishes that Applicant should have responded "Yes" to 22.c and disclosed both his felony conviction for unlawful sexual contact committed in August 1988 and the felony charge for unlawful sexual contact in January 2004. Also, Applicant was required to disclose his conviction for failing to register as a sex offender. The police filed an arrest report (GE 3) identifying Applicant as the arrestee, a charge of sex offender violation for failure to register under § 11227, and an arrest date of November 19, 2006, at 1715 hours, with booking at 1719 hours. Available court records show that Applicant was bailed on November 19, 2006, on payment by check of $400 by a third party. A bench notice for a trial on March 12, 2007, was mailed to Applicant's counsel, who had been appointed on January 3, 2007. Sufficient evidence exists to conclude that Applicant should have reported his failure to register as a sex offender in response to the arrest record inquiry, although had he listed the offense in response to 22.a (any summons), he would have bolstered his credibility on the falsification issue.

Applicant's claimed inability to recall the details of his offenses when he was interviewed in September 2010, and his inconsistent explanations for his failure to fully disclose his criminal offenses on his e-QIP, make it difficult to believe he had no intent to conceal or deceive. Applicant was not asked about the August 1988 sexual abuse in his September 2010 interview. In his November 2011 response to interrogatories and in his Answer, he attributed the omission of his felony conviction from his e-QIP to a belief that

he had to disclose only offenses within the last ten years. At his hearing, he testified that he thought he had to go back seven years. Concerning his failure to disclose a more recent charge of felony unlawful sexual contact in 2004, Applicant told the OPM investigator that he did not believe he had been convicted of the assault. He did not tell the investigator that he had also been charged with felony unlawful sexual contact in 2004. In November 2011, he told DOHA that he did not believe he was charged with a felony in 2004. At his hearing, he testified that since he had been given a plea bargain, he thought he had been charged only with assault. Concerning his omission of his November 2006 arrest from his e-QIP, Applicant claimed during his interview that he did not know why he failed to list it. Applicant denied any recall of the charge, including the nature of the conduct, when it happened, why he was involved, or if he was arrested, charged, cited, or convicted. In November 2011, he told DOHA he did not recall the charge. When he answered the SOR, he indicated that he did not believe he was arrested in that he was told to appear in court on a given date and assessed a fine, which he paid. At his hearing, Applicant initially had no explanation for why he did not list the offense if he knew he had to report charges within the last seven years. He later claimed he did not remember the charge.

No one reading Applicant's e-QIP would have reason to know that he had been convicted of a sexual crime, never mind a felony offense. He was also not candid about his past criminal conduct when he was interviewed by the OPM investigator. It is difficult to conclude that Applicant acted in good faith when he failed to disclose in answer to question 22.a or 22.b that he had been fined as recently as March 2007 for failure to register as a sex offender. It is simply not credible for him to claim that he did not recall anything about it. Viewing the evidence as a whole, I am led to conclude that Applicant concealed information about his criminal record that would implicate him in the sexual assaults of underage female family members. AG ¶ 16(a) applies:

> Deliberate omission, concealment or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant's sexual behavior of a criminal nature also raises concerns about his judgment, reliability, and trustworthiness. In addition to implicating the security concerns in AG ¶ 15, his sexual misconduct raises vulnerability concerns in 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."

During his interview in September 2010, Applicant had the opportunity to mitigate his failure to fully disclose his criminal sexual misconduct on his e-QIP through a "good-faith effort to correct the omission, concealment, or falsification before being confronted with the facts," under AG ¶ 17(a). Instead, he claimed to have no recall about the November 2006 charge, and he denied he was convicted of any charges in 2004. His lack of candor during this interview could raise independent security concerns under AG ¶ 16(b)

("deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative"), although the Government did not allege a lack of candor during his interview with the OPM investigator.[6]

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," is not pertinent to falsification of a security clearance application signed under advisement that a knowing and willful false statement can be punished by fine or imprisonment or both under 18 U.S.C. § 1001. Deliberate false statements made on a security clearance application are serious, and when Applicant is unwilling to acknowledge his lack of candor, it is very difficult to apply AG ¶ 17(c) or 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 factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur."

Similarly, AG ¶ 17(d) does not mitigate the judgment concerns raised by his sexual misconduct and failure to comply with the sex offender registry requirement when he is unwilling to acknowledge his culpability of any wrongdoing in the 1988 assault or 2006 failure to register as a sex offender. Furthermore, for the reasons stated under Guideline D, *supra*, Applicant's evidence falls short of mitigating the vulnerability concerns. Assuming he has not hidden his criminal past from his spouse, AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress," is only partially established without information corroborating that she knows Applicant abused a five-year-old niece in 1988 or that he repeatedly sexually assaulted a 14-year-old niece in 2004. The Personal Conduct concerns have not been adequately mitigated.

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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).[7] In making the overall commonsense determination required under AG ¶ 2(c), I have

[6] In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered:

> (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for the whole-person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). I have considered the non-SOR misconduct for the five above purposes, and not for any other purpose.

[7] The factors under AG ¶ 2(a) are as follows:

to consider Applicant's extremely poor judgment in sexually abusing his underage nieces. Applicant recognizes that he was attracted to his then 14-year-old niece, which led him to assault her repeatedly in 2004. There is no evidence that this sexual misconduct has been repeated, but he also has had no formal counseling that would ensure against recurrence. Applicant is credited with efforts to stabilize his lifestyle through marriage, stable work, and homeownership. At the same time, he showed an unacceptable tendency to act in self-interest by omitting the most serious of his criminal conduct from his e-QIP. His present denials of culpability with regard to the 1988 and 2006 offenses continue to cast doubt on his judgment, reliability, and trustworthiness. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). Based on the facts before me and the adjudicative guidelines that I am bound to consider, for the aforesaid reasons, I am unable to conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance at this time.

Formal Findings

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

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a-1.d:	Against Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a-3.c:	Against Applicant
Subparagraph 3.d:	For Applicant[8]

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(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.

[8] Given Applicant was arrested and booked on November 19, 2006, SOR 3.d is resolved in his favor. The SOR as amended no longer alleges in SOR 3.b that Applicant failed to disclose his November 2006 charge in response to question 22.b. However, SOR 3.b is resolved against Applicant. While the allegation is inaccurate in that Applicant answered "Yes" to question 22.b, the Government met its burden of proving that Applicant deliberately omitted that he had been arrested in 2004 for felony sexual contact, as alleged.

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Elizabeth M. Matchinski
Administrative Judge