DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 11-02234
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: Robert E. Craven, Esq.

02/26/2013

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Decision

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MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant was convicted in September 1991 of a felony charge of lewd and lascivious act on a child. He completed his sentence and is no longer required to register as a sex offender in his community. Despite the passage of time, Applicant showed insufficient reform. He initially lied about his culpability for the sex offense when questioned by an investigator in January 2011. Applicant also exhibited a lack of candor on his April 2010 security clearance application. He claimed he was laid off from a previous job when he had been involuntarily terminated. He also did not list any delinquent debts when he was making no payments on two accounts. Clearance denied.

Statement of the Case

On August 31, 2012, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct), and explaining why it was unable to find it clearly consistent with the national interest to grant him a security clearance. The DOD took action under Executive Order 10865, *Safeguarding Classified Information within*

Industry (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

Applicant answered the SOR allegations on September 14, 2012, and he requested a hearing. On January 2, 2013, counsel for Applicant entered his appearance. The case was assigned to me on January 7, 2013, and I scheduled a hearing for January 24, 2013.

The hearing was convened as scheduled. Five Government exhibits (GEs 1-5) and 11 Applicant exhibits (AEs A-K) were admitted into evidence without objection. The Government initially offered another exhibit, to which Applicant objected. I withheld my ruling on its admissibility pending further development of the evidentiary record. The proposed exhibit was later withdrawn by the Government. Applicant and three witnesses testified, as reflected in a transcript (Tr.) received on February 4, 2013.

Summary of SOR Allegations

The SOR alleges under Guideline J (SOR 1.a) that Applicant pleaded nolo contendere in September 1991 to felonious lewd and lascivious act on a child, for which he was sentenced to one year of home confinement and nine years of probation. He was also required to complete five years of sex offender counseling and to register as a sex offender. Under Guideline E, Applicant was alleged to have told an investigator during a January 2011 security interview that his bathrobe inadvertently opened when he passed by his niece when in fact he had purposely exposed himself and had inappropriate sexual contact with her (SOR 2.a). Also, Applicant was alleged to have falsified his April 2010 Electronic Questionnaire for Investigations Processing (e-QIP) by misrepresenting the nature of an employment termination (SOR 2.b), denying that he had any bills or debts turned over for collection (SOR 2.c), and denying that he was currently over 90 days delinquent on any debts (SOR 2.d).

Findings of Fact

In his *pro se* Answer to the SOR, Applicant admitted SOR 1.a and 2.a. He denied the alleged falsification of his e-QIP (SOR 2.b-2.d). He indicated that he was not terminated from a previous employment due to unsatisfactory performance and that the two debts alleged to be in collection were instead held by a legal service pending settlement. Applicant's admissions to the criminal charge and sentence, and to initially not disclosing his sexual misconduct, are incorporated as findings of fact. After reviewing the exhibits and transcript, I make the following additional findings of fact.

Applicant is a 54-year-old senior process improvement engineer, who has been employed by a defense contractor since May 2010. (GE 2.) He was initially issued an interim clearance, which was withdrawn in early 2011 pending the resolution of his security clearance eligibility. (Tr. 35-36.) Applicant has a bachelor's degree in electronics and a master's degree in program management. (Tr. 32-33.) Applicant has been married to his

current wife since December 1997. He has two adult children from a previous marriage, which ended around April 1994. (GE 1; Tr. 31-32, 52-53.)

In 1976 or 1977, Applicant began working for a semiconductor firm in state X. (GE 4.) In July 1985, he was granted a secret-level security clearance for his duties building semiconductor circuits for the military. (GE 1; Tr. 33.)

Applicant and his first wife married in December 1986. (GE 1.) By 1991, her nine-year-old niece was spending overnights at their home about every third weekend. Their children were still young (son age four and daughter under one). (GE 4; Tr. 53.) Late one Sunday night in mid-April 1991, while his spouse was asleep, Applicant lay down next to his niece on a pull-out sofa. Wearing only a bathrobe at the time, Applicant exposed himself to his niece and rubbed his genital organ against her knee. Applicant's niece began to cry, and she complained to Applicant's spouse about his inappropriate sexual conduct. Applicant denied any misconduct when confronted by his spouse. She expressed her disbelief, to which Applicant responded that he wanted to get help. (GE 4; Tr. 55-57.) At work on Monday, Applicant informed his supervisor that he had problems at home over the weekend and was unsure whether he was in any condition to do his job. Applicant told his supervisor that the incident involved reported molestation,[1] although he was not in a state of mind to know exactly what happened. At the referral of his supervisor, he met with an employee assistance program (EAP) counselor, to whom he admitted that he had committed a lewd act.[2] After work, Applicant was contacted by an investigator from the state's health and rehabilitative services (HRS) department. Applicant admitted his sexual misconduct and told the HRS investigator that he was getting help. (GE 4; Tr. 58-60.) The HRS department notified the local police, and Applicant was arrested for lewd and lascivious act on a child, a second degree felony. Applicant did not disclose the specifics of the incident to the police, but he indicated that he began attending Alcoholics Anonymous (AA) about three years ago because he was a "borderline alcoholic at the time." Applicant told the police he hadn't consumed any alcohol in over two years or attended AA in the past year.[3] (GE 4.)

Applicant and his first wife separated immediately after the April 1991 incident involving her niece. (Tr. 53.) On September 12, 1991, Applicant pleaded guilty to felonious

[1]There is no evidence that Applicant fondled his niece's private parts. Still, his conduct was lewd and felonious.

[2]When pressed on cross-examination for the details of what he told the EAP counselor, Applicant responded that he did not recall whether he told the clinician that he had intentionally exposed himself to his niece or that he had rubbed his genital organ against his niece. (Tr. 60.)

[3]At his security clearance hearing, he testified discrepantly on direct examination that "alcohol was a mitigating factor the night in question" in that he drank too much. (Tr. 21.) On cross-examination, he indicated that he drank one bottle of beer and was not intoxicated. (Tr. 54.) When asked to explain then what he meant by alcohol being a mitigating condition, Applicant expressed his belief "that alcohol lowered [his] resistance for this event to happen." (Tr. 60.) Asked to explain the discrepancy between his report to the police that he had not consumed alcohol in over two years and his present testimony about alcohol influencing his behavior, Applicant testified that he had been drinking non-alcoholic beer in the two years before the incident. (Tr. 62.)

lewd and lascivious conduct.[4] He was adjudicated guilty, placed on "Community Control" for one year under the supervision of the department of corrections followed by nine years of probation at a fee of $50 per month, and assessed costs totaling $225. Conditions of his Community Control included confinement to his residence except for approved employment, public service work, or other special activities approved by his Community Control Officer. He was also required to complete an approved sexual offender program and to perform 100 hours of public service. He was to refrain from any contact with his victim, and to have no contact with children under age 18 without parental supervision. Use of any illegal drug or alcohol was also prohibited, and he was required to attend three AA meetings per week, as well as Narcotics Anonymous (NA) meetings. (GEs 3, 5; Tr. 19-23.)

Five years after his conviction, Applicant was released from the requirements to report to a probation officer and pay probation costs. Full custody of his children was also restored. (Tr. 45-46.) Applicant's term of probation ended on September 11, 2001 (Tr. 46-47.), and on September 13, 2001, Applicant registered as a sexual offender in state X. (GE 3.) Applicant was issued a formal letter of release from the supervision of state X's department of corrections on October 2, 2001. (GEs 3, 5; AE D.)

Applicant completed six years of group sex offender therapy. The counseling sessions were once a week under the guidance of a state-licensed therapist. (AE A; Tr. 25, 40-41.) As a result of that counseling, Applicant understands that he molested his niece in an act of regression. He was repeating behavior that had been done to him 20 to 28 years previously. (Tr. 25-26.)

From July 1998 to June 2005, Applicant worked as an industrial engineer in state X. He was unemployed from June 2005 until January 2006, when he relocated to state Y for a new job. (GEs 1, 2.) In March 2006, Applicant registered as a sex offender in state Y. He was notified at that time of his duty to register each March until September 12, 2011. (GE 5; Tr. 50.) Federal Bureau of Investigation (FBI) records report that in addition to registering as a sexual offender in state Y in March 2006, Applicant registered as a sexual offender in state X in July 2006. (GE 3.) Applicant understands that if he returns to state X to live, he will be required to re-register as a sex offender because the requirement to do so does not expire. (Tr. 72.)

Applicant worked as an engineer for an electronics company until November 2008, when he was laid off in a company downsizing. (GEs 1, 2.) He collected unemployment compensation until March 2009, when he started working for a manufacturing company. In November 2009, Applicant was involuntarily terminated from his employment for performance that his employer considered to be unsatisfactory. He collected unemployment until February 2010, when he began a six-week temporary assignment. (GE 2.)

[4]Applicant has repeatedly maintained, including at his security clearance hearing, that he pleaded nolo contendere to the charge. (GEs 1, 2; Tr. 19, 29.) The court's sentencing documents indicate that Applicant entered a plea of guilty. (GE 5.)

On April 30, 2010, Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) for his current employment. In response to employment record inquiries covering the preceding seven years, including whether he had been fired or left a job under unfavorable circumstances, Applicant indicated that he had been laid off from his last full-time job in November 2009. Applicant answered "Yes" to question 22.c of the police record inquiries section about whether he had ever been charged with a felony. He indicated that he had pled nolo contendere to a charge of lewd and lascivious in September 1991. Applicant answered "No" to all the financial record questions, including 22.g ("Have you had any bills or debts turned over to a collection agency?"), 22.h ("Have you had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed?"), and 22.m ("Have you been over 180 days delinquent on any debt(s)?"), which had a seven-year scope, and 22.n ("Are you currently over 90 days delinquent on any debt(s)?"), even though he was in negotiation about settling two delinquent credit card debts. (GEs 1, 2; Tr. 94-95.)

On January 5, 2011, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM), primarily to discuss issues related to his felony conviction. On review of his employment history, Applicant initially maintained that he had been laid off from his last employment. He then admitted that he had been fired from his last job. He expressed dissatisfaction with the job because he was hired as an industrial engineer, but he was given the additional duties of mechanical engineer, maintenance supervisor, and building facilities supervisor. He acknowledged that he should have indicated on his e-QIP that he left the job under unfavorable circumstances or alternatively, that he left the job following notice of unsatisfactory performance. Concerning his listed arrest for lewd and lascivious conduct, Applicant "indicated that his robe must have been open when he walked through the living room whereby his niece was able to see his genitals." Applicant denied that he stopped next to the couch where she was reportedly laying with his daughter or that he talked to his niece. He reiterated that he just walked through the living room en route to the kitchen. His niece awoke his spouse by her crying, and after his spouse left with the children, he was arrested by the police. He asserted that on the advice of counsel, he pleaded nolo contendere in court and was adjudicated guilty. Applicant indicated that during the last five years of his probation (which the investigator reported erroneously as still in effect), he was not required to report to a probation officer. He completed five years of court-ordered sex offender counseling in state X, and as a designated sex offender, he was required to notify authorities of any change in his residency for 10 years. In 2006, he notified both states X and Y of his change in residency. When asked by the OPM investigator why he would plead nolo contendere to such a serious charge if he had not exposed himself, Applicant responded that he received poor legal advice. The investigator continued to press Applicant, pointing out that a reasonable person would have secured a bathrobe before walking by these children. Applicant initially responded with silence, before acknowledging that he had exposed himself. In response to who knew about his felony conviction, Applicant responded that his minister and entire family, including his current spouse, were aware, but that his employer only knew what was on his e-QIP. Applicant denied he could be blackmailed because of the incident. (GE 2.)

Applicant was asked by the OPM investigator about a previous interview that focused on his financial problems,[5] and why he had responded negatively to all financial record inquiries on his e-QIP. Applicant related that he was in a two-year debt consolidation program for two credit card debts, of $2,000 and $4,000, which had been reduced in a negotiated settlement to $1,100 and $3,271. He paid $1,100 to settle the $2,000 debt in July 2010. He was still making monthly payments of $272 toward the other debt, which had a current balance around $2,500. Applicant claimed that he did not know the current status of the debts when he completed his e-QIP, although he admitted that it had been "a mistake" on his part to have answered questions 26.g, 26.h, 26.m, and 26.n negatively. (GE 2.)

In June 2012, DOHA asked Applicant to verify the accuracy of the information in the investigator's summary of his interview. Concerning corrections relevant to the SOR allegations, Applicant indicated that he was not terminated for cause from his previous job in November 2009. He left because his position was eliminated, as evidenced by his receipt of unemployment compensation. Applicant also indicated that it was inaccurate for the investigator to have reported that his probation for the sex crime was still in effect. He completed his sentence in September 2001. Concerning his credit card issues, Applicant related that his debts have been paid in full, and the accounts were closed. (GE 2.)

At his hearing, Applicant initially claimed that when asked by the OPM investigator about the 1991 sexual offense, he tried to answer to the best of his ability ("I was trying to remember from 22 years ago, I didn't have the documentation, I've never seen the original interviews, and I answered to the best of my ability with my knowledge at that time."). (Tr. 30.) Asked specifically whether he meant to raise ambiguity when he denied that he intentionally exposed himself to his niece, Applicant responded, "It's the way it came out." (Tr. 39.) Yet, on cross-examination Applicant admitted that he had falsely misrepresented his sexual misconduct when he stated that his robe inadvertently opened, and that he had no contact with his niece. (Tr. 70.) He had no explanation for his initial lack of candor during his OPM interview. (Tr. 71.) Concerning his two previously delinquent credit card accounts and his failure to list those debts on his e-QIP, Applicant indicated that both accounts became delinquent when he was unemployed between November 2009 and April 2010. (Tr. 74.) He claimed he was behind only one month when both accounts, which were with the same lender, were turned over to a settlement attorney. (Tr. 75-76.)Yet, he testified discrepantly that about 11 and 14 months passed between when he was first contacted by the settlement attorney and he began making payments. (Tr. 76-77.) He paid one of the debts in a lump sum and made smaller payments on the other after he began working for his current employer. (Tr. 78-79.) When asked why he did not list either debt on his April 2010 e-QIP if he was making no payments, Applicant responded it was an unintentional omission. He did not have the information on the accounts at the time. (Tr. 79.) He later indicated that he listed credit cards that were active that he was paying down and simply forgot about the two pending settlement. (Tr. 95.) Concerning the circumstances which led to the loss of his previous job in November 2009, Applicant testified that his then employer told him his services were no longer needed. While his

[5]The evidentiary record does not include a credit report or other financial records showing the delinquency history of the two credit card accounts.

employer considered his performance as unsatisfactory, it was not his view of his performance. He admitted that he did not resign voluntarily. Yet, he continued to maintain that he was laid off, not for performance reasons, but rather because the employer wanted to go in a new direction. (Tr. 81-83.) The company did not appeal his award of unemployment compensation. (Tr. 84.)

With regard to his sexual crime, Applicant has not reoffended. (Tr. 26.) He does not have a criminal record in state Y. (AE E.) He testified that his friends, family (including his current wife), and two co-workers, know about his past. (Tr. 38.) One friend, who has known Applicant for more than 18 years, confirms that Applicant shared his "experiences" and his regret about what happened in 1991. (AE I.) Applicant has not informed his facility security officer (FSO) about his past criminal sexual misconduct. Applicant denies any vulnerability to coercion or pressure or any personal embarrassment should his misconduct with his niece become commonly known, given he is no longer the person he was in 1991. (Tr. 70-71.)

Applicant believes that he had a problem with alcohol in the past. He continues to attend AA meetings once a week. (Tr. 22.) He also attends NA (Tr. 127-32.), even though he did not abuse a legal or illegal controlled drug in the past. (Tr. 23-24.) He considers the 12-step recovery process to be "ingrained in [his] life." Applicant had mentioned to an NA friend that he had legal trouble 22 years ago following an alcohol-related blackout episode. This friend was not told about the specifics of his misconduct, other than it was sexual in nature. He does not know whether a minor was involved. (Tr. 129, 134-35.)

Applicant's church is also a very important to him. (Tr. 24.) Applicant has a very good relationship with his adult children, who both attest to Applicant's commitment to his church and to the AA and NA fellowships. (AEs F, G.) Applicant's daughter is currently serving in the U.S. military, and his son completed a six-year enlistment, which included a tour in South Central Asia. (AE K; Tr. 32.)

Applicant is a committed runner, who has completed one marathon and three half marathons. (Tr. 40.) A member of an athletic club running team at work, Applicant has been supportive and considerate of other members. A co-worker, who met Applicant through the running club, believes Applicant is an appropriate candidate for security clearance. He has shown "attention and zeal" in his work with their defense contractor employer. In her character reference letter, this co-worker indicated that Applicant "has been up front and honest with [her] about his past." She offered no details about the nature of Applicant's disclosures. (AE H.) Applicant testified that sometime "last summer" he informed this co-worker about his sexual misconduct in 1991. (Tr. 68-69.)

Applicant has impressed another co-worker with his "kindness, optimism, conscientiousness, and his ability to be humble in all situations." This co-worker, who started work on the same day as Applicant in May 2010, believes Applicant is focused on his church and family. He has no reason to believe that Applicant would ever disclose information that might compromise the safety of his children or of the country. (AE K.) This co-worker is unaware of Applicant's lewd conduct in 1991 toward his niece. (Tr. 88.)

In August 2010, Applicant completed a training course at work involving the continuous improvement of engineering processes to increase their efficiency and safety. (AE B; Tr. 34-35, 42-43.) A co-worker and fellow trainee, who did not know Applicant before the course, thereafter partnered with Applicant on several projects. He found Applicant's work ethic to be "incredible," and he considers Applicant to be one of his most reliable sources for performing continuous improvements. Due in part to their shared interest in fitness, this co-worker has developed a friendship with Applicant over the past two years. (AE J; Tr. 104-06.) After Applicant received the SOR, he told this co-worker about his past misconduct with his niece, including that he deliberately exposed himself and that he rubbed his genital organ against her. (Tr. 68-69.) The co-worker testified that Applicant told him that he "had a night where he ended up in jail, and there was drinking involved, and there was some sexual exposure involved, with like, a minor." (Tr. 106-07.) Applicant apparently told the co-worker that he was "very drunk" on the night in question and could not remember half of what he did. (Tr. 110.)

Applicant enjoys his job. (Tr. 35.) His ability to perform has been impeded since early 2011 in that he requires an escort to certain areas because of his lack of security clearance. (Tr. 36-37.) His supervisor, who checks in with him biweekly, testified to Applicant's continued contributions despite some challenges involving him needing an escort. This supervisor had no knowledge before Applicant's security clearance hearing about the reasons for the withdrawal of Applicant's interim clearance. When advised of a 1991 incident where Applicant pleaded nolo contendere but was adjudicated guilty of exposing himself to a nine-year-old niece, the supervisor indicated that based on his experience, he is comfortable working with Applicant. He declined to judge Applicant for any conduct in the past. (Tr. 115-19.) Applicant has not violated any security requirements. Applicant makes it clear to others on the job that he has no clearance to ensure that classified information is not disclosed to him. (Tr. 121-23.)

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," are established by Applicant's felonious lewd and lascivious conduct in April 1991 involving his then nine-year-old niece.

It has been over 20 years since Applicant was adjudicated guilty of the sexual crime, and he completed his sentence. He is no longer required to register as a sexual offender in state Y, where he has resided since March 2006. 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," applies to the conduct alleged in SOR 1.a. The risk of recidivism of the sexual criminal behavior is minimized by the passage of so many years without recurrence.

Reform depends in large part on acknowledgment of wrongdoing, which includes an appropriate expression of remorse and acceptance of responsibility. Applicant has attributed his sexual criminal conduct to regression and also to alcohol. He told a close co-

worker and a friend from NA that he was impaired by alcohol at the time of the incident. The NA friend was led to believe Applicant had an alcohol-related blackout. Applicant testified on direct examination that alcohol was a mitigating factor in that he drank too much. Yet, when asked to elaborate about his drinking on that occasion, Applicant responded that he consumed one non-alcoholic beer. The evidence establishes that Applicant knew what he was doing when he laid next to his niece, exposed his genitalia, and then rubbed his sexual organ against his niece's leg. Neither alcohol nor repressed memories mitigate or extenuate his lewd sexual acts. AG ¶ 32(b), "the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life," does not apply.

Applicant's good work record with the defense contractor, the passage of almost 22 years without recurrence, his involvement in AA and NA, and his commitment to his church, 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." Yet, it is difficult to fully apply AG ¶ 32(d) in light of his lack of candor at times about his criminal conduct. He led a co-worker and also a friend in NA to believe that he was so impaired by alcohol that he did not fully appreciate the nature of his criminal behavior toward his niece. His friend in NA was unaware that Applicant's victim was a minor. Applicant was initially not candid with the OPM investigator when he claimed that the exposure occurred because his robe happened to open when he walked by his niece, and when he denied that he had any contact of a sexual nature with her. He claimed he pleaded nolo contendere to the felony sexual charge on the poor advice of legal counsel. His deliberate misrepresentations are inconsistent with the reform one would expect after six years of sex offender counseling and years of exposure to 12-step recovery programs, which rely heavily on honesty and accountability. The passage of almost 22 years since his lewd behavior, and the changes in his lifestyle (i.e., personal relationships, activities, home and work environments) lessen the risk of recidivism. At this juncture, his false statements and minimization of his culpability are primarily of security concern under Guideline E, but they also cast doubt about his reform under Guideline J. By falsely denying his culpability when initially confronted by the OPM investigator, Applicant committed felony conduct in violation of 18 U.S.C. § 1001.[6]

[6]The Government did not allege under Guideline J that Applicant committed felonious conduct under 18 U.S.C. § 1001 by lying to the investigator about his lewd behavior or by falsifying his responses to pertinent employment and financial inquiries on his April 2010 e-QIP. 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 stating:

> (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 whole person analysis under Directive Section 6.3.

Id. (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)). Applicant's false denials of any intentional exposure and any sexual contact with his niece are relevant in assessing his reform of his criminal conduct.

Guideline E, Personal Conduct

The security concerns about Personal Conduct are set out in AG ¶ 15:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant lied to an OPM investigator in January 2011 when first confronted about his lewd conduct committed against his niece in April 1991. He claimed that his robe opened inadvertently when he walked by, and he denied that he had any inappropriate contact of a sexual nature with his niece. The misrepresentations alleged in SOR 2.a implicate disqualifying condition 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."

Applicant contests the DOD's allegations that he deliberately falsified his April 2010 by misrepresenting that he had been laid off from his previous job in November 2009 when in fact he had been terminated for unsatisfactory performance (SOR 2.b) and by falsely denying that he had any debts turned over for collection (SOR 2.c) or that he was currently over 90 days delinquent on any debts (SOR 2.d). Applicant cites his award of unemployment compensation as proof he was laid off and not terminated for cause. Concerning his debts, Applicant indicates that in retrospect, he should have listed the two credit card debts at issue, but he was behind only about one month when the accounts were placed with a settlement attorney. He did not view the settlement negotiations as collection efforts.

Question 13C on the e-QIP asked whether within the last seven years Applicant had been fired; quit a job after being told he would be fired; left a job by mutual agreement following charges or allegations of misconduct; left a job by mutual agreement following notice of unsatisfactory performance; left a job for other reasons under unfavorable circumstances; or been laid off by an employer. Applicant responded that he had been laid off by two previous employers, in November 2008 in a downsizing and in November 2009 due to "layoff." The Government's case for deliberate falsification rests on the OPM investigator's summary of Applicant's January 2011 interview (GE 2.) According to the investigator, Applicant initially indicated that he had been laid off from his previous employment in November 2009. He was told the company no longer had a position for him. Applicant then reportedly admitted that it would have been more appropriate for him to have indicated that he left the job following notice of unsatisfactory performance or that he left under unfavorable circumstances. However, Applicant then admitted that he had been fired. When given an opportunity to review the investigator's report, Applicant asserted in June 2012 that he had not been terminated for cause. Rather, he left because his position

was eliminated, and he was allowed to collect unemployment benefits. At his hearing, Applicant claimed he was not told by his former employer that he was terminated for unsatisfactory performance. While acknowledging that his former employer viewed his performance as unacceptable and admitting that he did not resign voluntarily, he continued to maintain that he was laid off. The company did not contest Applicant's application for unemployment benefits, and the evidence does not establish that Applicant was terminated for any misconduct. Nevertheless, the evidence shows that Applicant knew his employment ended under unfavorable circumstances and not for business considerations unrelated to his performance, such as the corporate downsizing that led to the loss of his previous employment in 2008. Applicant did not resign voluntarily. His response to 13C is found to have been false under the circumstances. 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 listed no delinquent debts on his April 2010 e-QIP. Instead, he answered all the financial record inquiries negatively. Applicant admitted during his January 2011 interview that he had some financial difficulties due to his past unemployment. He attributed his negative responses to the debt questions to not knowing the current status of his accounts when he completed his paperwork. Two credit card debts, with balances around $2,000 and $4,000, were in a debt consolidation program under which he settled the smaller debt through payment of $1,100 in July 2010. He was making monthly payments of $272 toward a negotiated settlement balance of $3,271 on the other debt. At his hearing in January 2013, when asked whether there was a period of time when he failed to make a monthly payment on these credit card accounts, Applicant responded that he missed only one payment before his accounts were placed with a settlement attorney, which he did not consider to be a collection activity. Even if I accept that Applicant believed his accounts were not in collection and that he did not knowingly falsify his response to 26.g (SOR 2.c), he knew that he had not been making any payments on either credit card account within the 90 days preceding his April e-QIP. AG ¶ 16(a) applies to his false response to question 26.n (SOR 2.d).

AG ¶ 16(d), "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," must be considered because Applicant has deliberately concealed details about his criminal sexual conduct from some co-workers. Applicant led an NA friend and a co-worker to believe that he was so impaired by alcohol that he could not appreciate the nature of his actions. Applicant had not informed his supervisor or his FSO about his criminal conduct. Due to the nature of the information, Applicant cannot reasonably be expected to inform persons who have no need to know. At the same time, vulnerability concerns are raised by active concealment or misrepresentation about his conduct.

Mitigating condition AG ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts," has limited applicability. Although Applicant admitted to the OPM investigator that he had intentionally exposed himself to his niece, it was only after he was confronted with the notion that any responsible person would secure his bathrobe before walking by the children. Similarly, he initially persisted in explaining his job termination in November 2009 as a layoff. He claimed that he did not know the status of his two delinquent debts when he completed his April 2010. His disclosures of his involuntary employment termination and his delinquent debts were in response to prompting and confrontation from the investigator.

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," cannot credibly apply. Applicant's misrepresentations to the OPM investigator about his lewd conduct in 1991 were serious and relatively recent. He had no explanation at his January 2013 hearing for his lack of candor upfront with the OPM investigator about his lewd conduct with his niece. Furthermore, reform is not established by hearing testimony that was patently false or contradictory in several aspects. When asked on direct examination whether he attempted to evade questions of the investigator about his 1991 arrest, Applicant responded that he tried to answer to the best of his ability and knowledge at the time. About whether alcohol was involved, Applicant first stated that he drank too much on that occasion. He led two of his character witnesses to believe that he was significantly impaired by alcohol before the sexual offense to such a degree that he lacked full recall of what happened. Applicant admitted on cross-examination that he had consumed one non-alcoholic beer. He also admitted that he had not been truthful with the investigator when he denied any intentional sexual exposure. Concerning the loss of his previous job, Applicant admitted that he had not resigned voluntarily. Yet, when asked then to confirm that he had not been downsized or laid off due to an elimination of his position, Applicant responded that he did not know what happened after he left. He persisted in his claim that he had been laid off. As for his failure to list his debts on his e-QIP, when confronted with the evidence that he had not paid on his two debts for a year, and that he was not making any payments on them as of his e-QIP, Applicant testified in part that he listed the credit cards that were currently active, and he forgot to list the two accounts in settlement negotiations. (Tr. 95.) Yet, no delinquent credit listings appear on his e-QIP of record (GE 1.).

Persistent concerns about his candor also preclude me from fully applying AG ¶ 17(d):

> (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.

After six years of sexual offender counseling, Applicant chose to lie about his criminal sexual behavior to an OPM investigator. He placed his self-interest before his obligation of

candor when he chose to list his employment termination in November 2009 as a layoff and to omit any delinquent debt information from his e-QIP. He showed little remorse at his hearing for his lack of full candor.

Concerning the vulnerability concerns, Applicant testified, without any corroboration, that he has shared his criminal past with his current spouse. A few close friends, including two of his witnesses, indicate that Applicant has shared his past with them. (AEs H, I; Tr. 129, 133-35.) Yet, neither witness knew about the specific conduct or the charge of which Applicant was convicted. AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress," is only partially satisfied.

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 to consider Applicant's extremely poor judgment in exposing himself to his niece and in having inappropriate contact of a sexual nature with her. There is no evidence that this sexual criminal conduct has been repeated, and Applicant has completed the terms of his sentence. Applicant's exercise of very poor judgment has not been confined to the distant past, however. By choosing the timing and extent of his disclosures of information that could affect the investigation and adjudication of his security clearance eligibility, Applicant placed into serious doubt whether he can be counted on to fulfill the fiduciary obligations of a security clearance without regard to his personal interest. His efforts to ensure that co-workers do not discuss classified information in his presence, and to ensure that he has the proper escort to access sensitive areas, weigh in his favor. Yet, they are not enough to fully mitigate the Criminal Conduct and Personal Conduct concerns. 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.

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

> (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.

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:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	Against Applicant

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