DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 16-03606
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Leon J. Schachter, Esq.

04/16/2018

Decision

MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline D (Sexual Behavior), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 15, 2015. On February 15, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines D, J, and E. The DOD CAF acted under Executive Order (EO) 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) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on April 8, 2017, and requested a hearing before an administrative judge. The Government was ready to proceed on May 19, 2017, and the case was assigned to me on December 4, 2017. On February 12, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for March 6, 2018. I convened the hearing as scheduled.

Government Exhibits (GE) 1 through 5 were admitted into evidence. GE 1 and 5 were admitted without objection. GE 2 through 4 were admitted over Applicant's objection. I appended to the record correspondence the Government sent to Applicant as Hearing Exhibit (HE) I, and the Government's exhibit list as HE II. At the hearing, Applicant testified and submitted Applicant Exhibits (AE) A through J, which I admitted into evidence, without objection. One witness testified on behalf of Applicant. DOHA received the transcript (Tr.) on March 14, 2018.

On June 8, 2017, the DOD implemented new AG (2017 AG).[1] Accordingly, I have applied the 2017 AG.[2] However, I have also considered the 2006 AG, because they were in effect on the date the SOR was issued. I conclude that my decision would have been the same under either version.

Evidentiary Rulings

Counsel for Applicant objected to the admissibility of GE 2 through 4. GE 2 is a letter from another government agency (AGA) containing redacted reports of Applicant's polygraph examinations. GE 3 is a letter from AGA containing a redacted clearance decision. GE 4 contains Applicant's answers to DOHA interrogatories that include adopting an investigator's summary of his personal subject interview from a report of investigation. I construed the bases of Counsel's objections to be a lack of authenticating witnesses (Directive ¶ E3.1.20) and an inability to cross examine witnesses (Directive E3.1.22). I overruled each of his objections based on long-established Appeal Board precedent holding that, under circumstances similar to those at issue here, these types of documents are admissible under ¶ E3.1.20 without authenticating witnesses, and that ¶ E3.1.22 does not provide a right of cross examination concerning out-of-hearing statements that are admissible under other provisions of the Directive. Counsel conceded this precedent but averred that he disagreed with the Appeal Board.[3]

[1] On December 10, 2016, the Security Executive Agent issued Directive 4 (SEAD 4), establishing a "single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position." (SEAD 4 ¶ B, *Purpose*). The SEAD 4 became effective on June 8, 2017 (SEAD 4 ¶ F, *Effective Date*). The new AG, which are found at Appendix A to SEAD 4, apply to determine eligibility for initial or continued access to classified national security information. (SEAD 4 ¶ C, *Applicability*).

[2] ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DOD policy and standards).

[3] *See* ISCR Case No. 07-18324 (App. Bd. Mar. 11, 2011); ISCR Case No. 11-12461 (App. Bd. Mar. 14, 2013); ISCR Case No. 11-07509 (App. Bd. Jun. 25, 2013); and ISCR Case No. 11-13999 (App. Bd. Feb. 3, 2014).

Findings of Fact[4]

Applicant, age 48, has been married for 20 years. He has a son, age 26, and a daughter, age 20. He earned a bachelor's degree in 1994 and a master's degree in 2004. He has been employed by the same defense contractor since 2003, and for three years prior with a company absorbed by it. He was initially granted a DOD security clearance in 1994, which he maintained until it was suspended in 2015 in connection with this matter.[5]

The SOR cross-alleged under Guidelines D, J, and E that Applicant inappropriately touched his daughter's vagina from approximately 2000 until 2001 (SOR ¶¶ 1.a, 2.b, and 3.a); and that he was charged, in 2014, with felony sexual abuse and misdemeanor second degree sexual offense of his daughter (SOR ¶¶ 1.b, 2.b, and 3.a). Under Guideline J, the SOR alleged that, in 2015, Applicant was found guilty of misdemeanor second degree assault, for which he was placed on supervised probation for three years (SOR ¶ 3.b). Under Guideline E, the SOR alleged that Applicant, during a 2001 interview with AGA, falsified material facts in order to conceal the facts alleged in SOR ¶ 1.a (SOR ¶ 2.a). In his SOR Answer, Applicant admitted the facts alleged in SOR ¶ 1.b, and denied the facts alleged in SOR ¶¶ 1.a, 2.a, 2.b, 3.a, and 3.b.

SOR ¶¶ 1.a, 2.b, and 3.a

Applicant was interviewed on two occasions in 2001 by AGA in connection with a security clearance adjudication (to determine his suitability for access to Sensitive Compartmented Information (SCI)), during which he was administered several polygraphs. The second interview was convened because of "inconsistencies" that occurred during the first interview.[6]

During the first interview in November 2001 (Interview 1), Applicant revealed that he shoplifted an item from his university book store on an unspecified date. During the second interview in December 2001 (Interview 2), Applicant stated that he made up the shoplifting incident. Applicant further stated that he believed that if he told the polygrapher that false statement, he would not be queried anymore about his reactivity to an unspecified crime topic.[7]

During Interview 2, after administering several polygraphs, the polygrapher queried Applicant about his reactivity to an unspecified crime topic. Thereafter, Applicant stated that he had been touching his daughter's vagina for his sexual gratification from approximately October 2000 through August 2001 (when she was between approximately two and three years old). He explained that he would rub her vagina with a washcloth

[4] Unless otherwise indicated by citation to another part of the record, I extracted these facts from Applicant's SOR answer and his SCA (GE 1).

[5] GE 1 at 5, 11-12, 16, 21, 37-38; Tr. at 93-95.

[6] GE 2; Tr. at 108.

[7] GE 2.

while giving her baths, and that he would get sexually aroused from doing so. He clarified that he did not get a full erection, but that he would feel his penis getting partially erect. Applicant also reported that he masturbated on one occasion after rubbing her vagina. On that occasion, he took his daughter out of the bathtub and put her in another room, while he masturbated. He denied fantasizing about his daughter while he masturbated on that occasion, but admitted that he had fantasized about her after rubbing her vagina – just not while masturbating. Applicant estimated that he had been bathing his daughter three times per week, during which he would touch her vagina approximately one to two times per week.[8]

During Interview 2, Applicant also revealed that his daughter had been present in his bedroom on occasions (during unspecified periods) when him and his wife were nude while getting ready for work or going to bed. On approximately five to ten such occasions, his daughter walked up to him and pulled his penis. He became sexually aroused on approximately two to three of those occasions. After an occasion in which Applicant became aroused from his daughter pulling his penis in August 2001, he realized that it was wrong to become sexually aroused. At that time, he advised his wife (who had not been aware of any of the incidents) that they needed to stop allowing their daughter to see him nude. He did, however, continue to give his daughter baths, but denied touching her vagina after August 2001.[9]

In 2002, AGA denied Applicant's SCI access after concluding that the conduct revealed during Interviews 1 and 2 demonstrated poor judgment and untrustworthiness. Applicant did not to exercise his right to appeal that decision.[10] In his 2015 SCA, Applicant reported the denial and provided the following explanation: "Due to misinterpretation of information provided during a polygraph, I was investigated on alleged activity later to be found unsubstantiated."[11]

During a DOD security clearance adjudication interview in 2016, Applicant explained differently the contact with his daughter that he previously revealed during Interview 2. He admitted that he scrubbed her with a washcloth and tickled her vagina with a washcloth, but claimed that it was only in the act of cleaning her. He also admitted that he would occasionally masturbate after washing his daughter with a wash cloth. However, Applicant maintained that AGA misconstrued the information that he revealed during Interview 2 and wrongfully concluded that he touched his daughter inappropriately.[12]

[8] GE 1 at 21; GE 2.

[9] GE 2.

[10] GE 3.

[11] GE 1 at 39.

[12] GE 4, Interview at 2-3.

At the hearing, during his direct testimony, Applicant recounted the following facts (to the best of his recollection) that he shared with the polygrapher during Interview 2: [13]

- He masturbated after bathing his daughter and after she touched his penis, but that there was no connection between his masturbation and those events.
- He would tickle his daughter "all over her body" in an effort to make her bath time enjoyable. However, he maintained that "bath time was an innocent father giving his daughter a bath."
- He had to clean his daughter's vaginal region with a washcloth because she was not potty-trained and could not clean herself well.
- He never touched his daughter's vagina without a washcloth.
- His routine had been to put her to bed in her bedroom after bath time and, occasionally, masturbate "sometime later" in another room (with a time gap in between the events).
- On the occasions that he masturbated after his daughter touched his penis (during the mornings while he was getting dressed), he would do so "at some point later after everyone would leave." "The masturbation would happen certainly not with [his daughter] present and not necessarily the same time frame of getting dressed in the morning."
- Sometimes his wife would see his daughter touch his penis and sometimes she did not see it.

During his cross-examination at the hearing, Applicant stated the following with respect to Interview 2:[14]

- He did not recall ever telling the polygrapher that he touched his daughter for "sexual gratification."
- He cleaned his daughter's vagina with a washcloth because she was "a little girl" that needed to be taken care of to prevent "owies down there."
- He would take care of his daughter "in a natural parenthood manner," assisting his wife who was her primary caregiver.
- He took a washcloth with soap on it and rubbed it over his daughter's vagina "in an effort to make fun of it" and to have his daughter "giggle" and to clean her at the same time. He further stated that he believed there was nothing wrong with him doing that.
- He did not recall stating that he got "sexually aroused" from rubbing his daughter's vagina with a washcloth while giving her baths.
- When he mentioned to the polygrapher that he had partial erections, he meant "just a tingling feeling, not necessarily during the act of bathing [his daughter]."

[13] Tr. at 106, 111-114, 130-136.

[14] Tr. at 111-114.

Applicant believed that the polygrapher tied together facts gleaned from a series of questions that were "seemingly untied together" in his report "in a different fashion" than what he "meant to tell the polygrapher."[15] He also claimed that his religious beliefs influenced his disclosures to the polygrapher.[16]

After the polygrapher reported the incidents revealed during Interview 2, Applicant was investigated by his local sheriff's office and child protective services. While he was instructed not to be alone with his daughter for a certain unspecified period, he was not otherwise charged with any crime.[17]

SOR ¶ 2.a

Applicant emphatically denied that he fabricated the shoplifting story. During the hearing, Applicant asserted that he shoplifted an unrecalled item from his college bookstore during his first year in 1991. He recalled that, during Investigation 2, Applicant was asked by the polygrapher whether he made up the shoplifting incident to which he responded with a shrug, and no verbal words. He intended his shrug to convey that he did not make it up. He did not recall ever stating to the polygrapher that he made it up.[18]

SOR ¶¶ 1.b, 2.b, 3.a, and 3.b

In June 2014, after an investigation that began in 2013, Applicant was charged with (1) felony sexual abuse of a minor and (2) misdemeanor second degree sexual offense. In March 2015, as part of a plea deal, count (1) was amended to misdemeanor second degree assault and count (2) was *nolle processed*. The court found Applicant guilty of the amended count (1) to which he had entered an *Alford* plea. The court sentenced him to eighteen months in jail (with all but one day suspended) and placed him on supervised probation for three years. Special conditions of his probation included that Applicant was not to have any contact with his daughter, and that he was not to enter or be found near his residence until his daughter turned 18 years of age or left for college, whichever occurred first. Other conditions included that he was not to travel out of state, except for work purposes, and that he had to receive permission from his supervising agent before leaving the jurisdiction. Applicant stated that he had successfully complied with the terms of his probation through the date of the hearing and expected to be released as scheduled on March 25, 2018.[19]

Neither party presented a police report or any other documents detailing the specific allegations underlying the 2014 charges. However, during the hearing, Applicant

[15] Tr.at 98-103.

[16] Tr. at 98-99, 109, 114,

[17] Tr. at 98, 118.

[18] Tr. at 106-107, 108-110.

[19] GE 5; AE G; Tr. at 121, 139-140. Applicant was granted permission to travel to Virginia for the hearing.

and his wife (who testified on his behalf) discussed them. His wife stated that she understood the allegations to be that Applicant "would start touching" his daughter when he was home alone with her between 2007 and 2008 (when she would have been between approximately 10 and 11 years old). Applicant stated that he was told that he was accused of touching his daughter's breast and vaginal area, when she was between approximately 8 and 10 years old. He was told that the alleged incidents occurred "more than once." He was also told that he was accused of touching both breasts "under her clothes." Applicant acknowledged that the amended second degree assault charge related involved an "unwanted touch." However, he maintained that he never inappropriately touched his daughter in any way, including touching her breast or vaginal area, putting his finger or fingers in her vagina, or otherwise abusing her physically.[20]

Applicant and his wife claimed that their daughter lied about the incidents underlying the 2014 charges. In support of their position, they claimed that she had a history of lying, including that she was sexually abused by a fellow classmate when he lifted up her skirt and put his fingers in her vagina, which she later recanted. Applicant acknowledged that the allegations against the classmate involved similar contact that was alleged to have occurred between him and his daughter. He and his wife also claimed that their daughter reported the incidents in 2013 to retaliate for her anticipated punishment for an incident that Applicant and his wife deemed inappropriate (Incident A), during which time she had also been going through a rebellious stage. To support their claims, Applicant submitted affidavits by his wife and his wife's sister, and a November 2013 clinical evaluation undergone by their daughter.[21]

Applicant's wife's affidavit consisted of 11 pages and 6 exhibits, including a copy of text messages exchanged between their daughter and a male friend in June 2012 (that his wife obtained during a 2013 search of their daughter's email account), a letter from their daughter written to a classmate in approximately 2012 or 2013 (that his wife found during a 2013 search of their daughter's bedroom), class notes exchanged between their daughter and a friend at school (that his wife found during a 2013 search of their daughter's school books), apology notes that their daughter wrote to Applicant and his wife in connection with Incident A, and a note from their daughter that his wife found during a 2013 search of her belongings.[22]

Applicant's sister-in-law's affidavit included her observations of Applicant's familial relationships. It also included her opinion about the accusations that Applicant's daughter made against him and others, based on discussions that she had with Applicant's daughter, Applicant, and Applicant's wife. She believed that Applicant's daughter had lied about the incidents underlying the 2014 charges and that Applicant did not commit any of the alleged offenses. However, she recounted a conversation that she had with the daughter about the allegations underlying the 2014 charges. She stated that the daughter

[20] Tr. at 88, 91, 106, 119, 130-136.

[21] Tr. at 46, 96-97; AE H and I.

[22] AE H.

told her that she was about nine years old when it began, and that Applicant "sexually assaulted" her for a "few years." She also stated that Applicant "sexually penetrated her," that she "bled all over the place," and "was damaged and torn and could not sit or walk for days."[23]

The report of Applicant's daughter's "youth clinical profile" included assessments by a licensed clinical counselor about her basic traits of inclusion (social orientation and intellectual energies), control (willingness to make decisions and to accept responsibility for self and/or others), and affection (the need to express and receive love, affection, and approval). Based on those assessments, the counselor provided a list of suggestions about his daughter's "most vital needs" with respect to each trait. The counselor also provided a list of suggestions in order for Applicant and his wife, as parents, to "help" their daughter and "alleviate tension and severe problems in the home." The counselor noted that the report was based on their daughter's "temperament" and "not actual behavior." There were no facts contained in the report about the daughter's truthfulness.[24]

Whole Person

In March 2017, Applicant underwent a psychological evaluation by a psychologist, who was retained by his attorney in connection with this security clearance adjudication. Based on a two-hour clinical interview, a review of the SOR and SCA, and results of a psychological test, the psychologist opined that Applicant met "no criteria for any mental health diagnosis" and was "psychologically healthy." The psychologist emphasized that the "validity finding" of Applicant's psychological test was "rather rare" and supported the psychologist's "clinical conclusion" that Applicant "had been honest during the interview." The psychologist recognized that he was "not in a position to confirm" whether Applicant's daughter made numerous false allegations, all in contexts that lead to some benefit to herself, as Applicant averred. The psychologist also acknowledged that he could not "[o]bviously . . . assert that [he knew] the truth regarding [Applicant's] most recent criminal charges." Nevertheless, he concluded, "to a great degree of psychological certainty," that Applicant "committed no crimes."[25]

Applicant is very active in his church.[26] Seven fellow church members wrote letters on his behalf praising his character and trustworthiness, including the couple with whom he resided for a year and a half during the condition of his probation that required him to stay away from his home.[27] His work performance met or exceeded expectations between

[23] AE I.

[24] AE J.

[25] AE F; Tr. at 121-122.

[26] Tr. at 98.

[27] AE C.

2011 and 2017.[28] Applicant's wife has observed Applicant to be an "honest, truthful, and trustworthy" man during the 23 years that she has known him.[29]

Policies

"[N]o one has a 'right' to a security clearance."[30] As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information."[31] The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[32]

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."[33] Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from

[28] AE B.

[29] AE H.

[30] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

[31] *Egan* at 527.

[32] EO 10865 § 2.

[33] EO 10865 § 7.

being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR.[34] "Substantial evidence" is "more than a scintilla but less than a preponderance."[35] The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability.[36] Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.[37] An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.[38]

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."[39] "[S]ecurity clearance determinations should err, if they must, on the side of denials."[40]

Analysis

Guideline D (Sexual Behavior)

The security concern under this guideline is set out in AG ¶ 12:

> Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information . . .

The security concerns raised in the SOR establish the following disqualifying conditions under this guideline: AG ¶ 13(a) (sexual behavior of a criminal nature, whether or not the individual has been prosecuted); and AG ¶ 13(c) (sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress). They have not been mitigated by either of the following potentially applicable factors under this guideline:

> 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 judgment; and

[34] *See Egan*, 484 U.S. at 531.

[35] *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

[36] *See* ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

[37] Directive ¶ E3.1.15.

[38] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

[39] ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

[40] Egan, 484 U.S. at 531; *See also* AG ¶ 2(b).

AG ¶ 14(c): the behavior no longer serves as a basis for coercion, exploitation, or duress.

Applicant's inappropriate sexual touching and sexual assault of his daughter in approximately 2000, 2001, 2007, and 2008 (when she was between the ages of 3 and 10) are egregious offenses. The fact that he was never charged for the 2000 and 2001 offenses is inconsequential. I found Applicant's attempt to explain his conduct as merely exercising his parental duties incredulous. Whether criminally charged or not, Applicant's rubbing of his daughter's vagina and allowing her to pull on his penis (not only more than once but over an extended period), for his sexual gratification, was criminal behavior. Even if not deemed criminal behavior, these incidents were extraordinary lapses in judgment.

Despite Applicant's protestations of innocence as to the 2013 charges, I find that he did sexually assault his daughter between approximately 2007 and 2008. While the *Alford plea* was not an admission of guilt on Applicant's part, a court convicted him of assaulting his daughter based on his admission (as part of that plea) that the evidence developed during the investigation was sufficient to prove his guilt and sustain a conviction, albeit of a lesser charge.[41] There is no evidence in the record that Applicant assaulted his daughter in any manner other than sexual. The special conditions of his probation (that he have no contact with his daughter and was not permitted to enter or be found near his residence until his daughter turned 18 years of age or left for college) denote the severity of Applicant's conduct. I found compelling the fact that his daughter shared some details about the sexual abuse she suffered from Applicant with her aunt. I also found persuasive not only the phraseology of the polygrapher's report, but also the fact that Applicant did not to appeal AGA's decision that was based on it. By contrast, I accorded little weight to Applicant's psychological evaluation, and found that his daughter's 2013 clinical evaluation had no probative value.

Even assuming *arguendo* that Applicant's wife and sister-in-law believed the facts and opinions to which they attested, their testimony is undermined by the substantial evidence weighing against mitigation. After having an opportunity to observe Applicant's demeanor at the hearing and considering his inconsistent statements within the record, I did not find his testimony credible. I have substantial doubts about Applicant's reliability, trustworthiness, and judgment.

[41] In an *Alford plea*, a defendant enters a plea of guilty without making an admission of personal guilt. *See North Carolina v. Alford*, 400 U.S. 25 (1970). This enables a defendant to enter a guilty plea while maintaining his or her innocence. However, before a court can accept an *Alford plea*, the defendant must admit that there is sufficient evidence to prove his or her guilt, and the court, in turn, must satisfy itself that the plea is supported by facts sufficient to sustain a conviction. See *North Carolina v. Alford*, supra, 400 U.S., at 37-39; ISCR Case No. 07-03307 at 7-8 (App. Bd. Sept. 26, 2008). A court that receives an *Alford plea* "must independently determine that the plea has a factual basis." *See Crowfoot v. U.S. Government Printing Office*, 761 F.2d 661 at 665, at n. 1 (Fed. Cir. 1985).

Guideline J (Criminal Conduct)

The concern under this guideline 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 raised in the SOR establish the following disqualifying conditions under this guideline establish the following disqualifying conditions under this guideline:

> AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;
>
> AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and
>
> AG ¶ 31(c): individual is currently on parole or probation.

They have not been mitigated by any of the following potentially applicable factors under this guideline:

> AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
>
> AG ¶ 32 (c): no reliable evidence to support that the individual committed the offense; and
>
> AG ¶ 32(d): there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Incorporating my comments under Guideline D, Applicant has not mitigated the concerns raised by his 2014 arrest and criminal charges of felony sexual abuse of a minor and misdemeanor second degree sexual offense; his *Alford plea* to an amended to misdemeanor second degree assault charge; and his three-year period of supervised probation. I have assumed Applicant was released from probation on March 25, 2018 as expected and considered the significant time passed since the most recent alleged incident. However, the nature and circumstances of Applicant's inappropriate sexual touching and sexual assault of his daughter (especially given his failure to accept any

responsibility for his actions) continue to cast doubt on his current reliability, trustworthiness, and good judgment.

Guideline E, Personal Conduct

The concern under this guideline is 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:
>
> > (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and
> >
> > (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Sexual Behavior and Criminal Conduct

Applicant's inappropriate sexual touching and sexual assault of his daughter establishes the general concerns under Guideline E involving questionable judgment and unwillingness to comply with rules and regulations. It also establishes the following additional disqualifying condition:

> AG ¶ 16(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing . . . .

Falsification

If deemed deliberate, security concerns raised in the SOR concerning the shoplifting incident could establish the following disqualifying condition under this guideline:

> AG ¶ 16(b): deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

When a falsification allegation is controverted, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission.[42] An applicant's level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate.[43]

Applicant admitted that he intentionally fabricated the shoplifting story to avoid disclosure of his inappropriate sexual touching of his daughter. I did not find credible his emphatic denial. The polygrapher's report contains details and terminology that could only reasonably be attributed to Applicant's self-report. Accordingly, I find substantial evidence of an intent on the part of Applicant to deliberately provide false or misleading information to the polygrapher. Therefore, AG ¶ 16(a) is established.

The security concerns raised under this guideline have not been mitigated by either of the following applicable factors:

> AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

> 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.

Given the passage of time since 2001 when that false statement was made, Applicant might have been able establish mitigation. However, his continued lack of candor about that false statement and his inappropriate sexual touching and sexual assault of his daughter brings current its security significance. Incorporating my aforementioned comments under this guideline and Guidelines D and J, I have grave concerns about Applicant's reliability, trustworthiness, and good judgment, which call into question his ability to safeguard classified information.

[42] *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

[43] ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

> (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.

I have incorporated my comments under Guidelines D, J, and E in my whole-person analysis, and I have considered the factors AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guidelines D, J, and E, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated security concerns raised by his sexual behavior, criminal conduct, and personal conduct. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline D (Sexual Behavior):	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 2.a – 2.c:	For Applicant
Paragraph 3, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 3.a – 3.b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant's eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge