DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 17-00709
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: *Pro se*

03/20/2018

Decision

HESS, Stephanie C., Administrative Judge:

This case involves security concerns raised under Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). Applicant has not mitigated the security concerns raised by her criminal conduct and her failure to accurately disclose derogatory information as required during her background investigation. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on December 30, 2014. On June 2, 2017, the Department of Defense (DOD) sent her a Statement of Reasons (SOR), alleging security concerns under Guidelines E and J. The DOD acted under Executive Order (E.O.) 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 DOD on September 1, 2006.

Applicant answered the SOR on June 23, 2017, and requested a decision on the record without a hearing. Department Counsel submitted the Government's written case on August 14, 2017. On that same day, a complete copy of the file of relevant material

(FORM,) which included Government Exhibits (GX) 1 through 7, was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. She received the FORM on August 21, 2017, and filed a response within the allotted 30 days. The case was assigned to me on January 2, 2018.

The SOR was issued under the AG implemented on September 1, 2006. The DOD implemented the amended AG on June 8, 2017, while this decision was pending. This decision will be decided based on the amended AG effective June 8, 2017.

Findings of Fact

The SOR alleges under Guideline J, that in October 2014 Applicant was arrested and charged with felony child cruelty for abusing her then eight-year-old daughter. The SOR also alleges that in 2011 both of Applicant's minor children were taken by child protective services (CPS) because of evidence of abuse on her then four-year-old daughter. Under Guideline E, the SOR alleges that Applicant provided false information during her December 2016 sworn personal subject interview (PSI), and that she intentionally falsified her December 2014 e-QIP by failing to disclose her court-ordered counseling due to her 2014 arrest, and her 2011 CPS-required counseling. Applicant admits that her children were taken by CPS (SOR ¶ 1.b), and denies the remaining SOR allegations. However, she does admit that she was arrested in October 2014. Applicant's admissions are incorporated in my findings of fact.

Applicant is a 34-year-old aircraft mechanic employed by a defense contractor since August 2011. She was born in Central America and immigrated to the United States in 1998. She served honorably on active duty in the U.S. Navy from July 2002 until July 2006. She graduated from high school in June 2002 and has completed two technical training programs, and several college courses. She and her husband married in 2005 and they have two daughters, ages 12 and 10. (GX 3.)

In approximately August 2011, Applicant's four-year-old daughter presented at daycare with visible handprints on her arm. Daycare workers suspected child abuse and contacted the police. The police questioned Applicant, and as a result of the investigation the police contacted CPS, which took custody of Applicant's two daughters. (SOR ¶ 1.a.) Applicant's daughters were placed in foster care and Applicant was referred by CPS to counseling. Noncompliance with the requirements of the counseling program could have resulted in loss of custody of her children. Applicant completed the required counseling.

On October 2, 2014, Applicant's daughter's daycare providers contacted the base police because they suspected Applicant's daughter had been abused. The base police officers interviewed and took statements from the people who reported the incident, Applicant's two daughters, and Applicant. As a result of these interviews, the base police determined that child abuse had occurred off base, and contacted the local police department, which arrested Applicant was arrested and charged her with felony child cruelty. (SOR ¶ 1.b.) The local police conducted their own interviews and took statements from all parties involved. (GX 5.)

The summaries of both police reports consistently state the following facts: At around 11:00 a.m. on September 27, 2014, Applicant's youngest daughter, then seven, was hungry and wanted to share her older sister's breakfast. Applicant told her younger daughter that she could not eat because it was too close to lunchtime. Applicant's older daughter then threw the remainder of her breakfast in the trash, which caused the younger daughter to begin to cry. Applicant reacted to her younger daughter's crying by grabbing her daughter by the neck, throwing her to the floor, and punching her 6 to 8 times. Applicant also yelled at her daughter to be quiet. (GX 4; GX 5; GX 6; GX 7; Answer.)

As a result of this incident, in order for the children to remain in their home with their father, CPS required Applicant to move out of the house. Following her arraignment and release from jail, Applicant moved into a hotel. However, CPS removed Applicant's daughters from the home and placed them in foster care for approximately three weeks, until CPS verified that Applicant had removed her belongings from the house. Applicant remained out of the home until late November 2014. Applicant and her husband were ordered to attend one-hour weekly child-abuse-perpetrator class for six months. Applicant completed the classes as required. She has recently checked with the court several times for the disposition of her charges, but has not had a court appearance since her arraignment. In January 2016, Applicant went to the county courthouse and was given a document that stated "no cases or charges found." However, Applicant has never received any information indicating that her case has been dismissed. (GX 7.) Applicant did not provide any documentation regarding the status of the charges.

In her Answer, Applicant denies that she told the local police that she "grabbed her [daughter] by the neck, threw her on the floor and started punching her," (SOR ¶ 1.a.) but admits that she was arrested in October 2014. Applicant explains that she made a statement to the base police officers but did not make a second statement to the local police. She further states that she told the base police only that she had "disciplined" her daughter. However, the Government's evidence includes a copy of the local police's report that contains the officer's narrative detailing his interview with Applicant. (GX 5.) The summary of the base police officer's interview with Applicant states, "she explained she knocked her down and punched her five or six times in the side and told her to stop crying." (GX 4.)

Applicant further states that she does not know what the base police told the local police, that she did not sign the field arrest report made by the base police, and had no way of "refuting the report." However, Applicant provided a copy of the field arrest report from the base police, which states in the officer's notes, signed under penalty of perjury by the officer, that Applicant "heard her daughter crying for food and she became angry. She threw her daughter to the ground and punched her about 6 to 8 times."

Also in her denial of SOR ¶ 1.a, Applicant states that at the time of the alleged child abuse in 2014, her husband and his coworker did not notice any markings on Applicant's daughter's legs or neck on the day of the event, and that it was four days before the daycare providers reported their suspicions of abuse.

Applicant admits that her children were taken by CPS in 2011 (SOR ¶ 1.b). However, she qualifies this admission, stating "there were many different instances where [her daughter] had bruises and bumps from falling and playing both at home and while attending full-time daycare."

In her response to the FORM, Applicant denies abusing her child, and states that the person who reported the abuse is a former friend, with whom she had an earlier altercation and they were no longer on speaking terms at the time when the former friend reported the suspected abuse. Applicant further states that both police reports contain statements that she never made, and that the photographs that were allegedly taken of her daughter by the local police were never shown to Applicant or her husband despite several requests to see the pictures. She further states that she believes the police coerced her daughter into making the statements that her daughter made, stating that she has talked to her daughter about that day and her daughter "claims that she never told the officers that I punched her or choked her." She goes on to say that, "though I know it has been three years since it occurred, I know that she still remembers what happened that afternoon."

Applicant gives a very long, detailed explanation about the 2011 incident, explaining that she grabbed her daughter's arm to prevent her from tripping. Without provocation, Applicant provides details about a spanking that occurred coincident to the arm grabbing, and volunteers that the CPS caseworker misunderstood Applicant's daughter's explanation of why she was spanked. She then goes on to describe the mistreatment of her children by the caseworker and the foster parent, stating that "both of my girls will say now that anything I have done to them is nothing compared to the foster home." Applicant states that, although her children have been taken away from her twice, "that is no real proof of criminal conduct."

Applicant denies making false statements to the investigator during her December 2016 sworn PSI (SOR ¶ 2.a). She reiterates that she gave a statement to the base police who then contacted the local police, and that that she does not know what was said by the base police to the local police. She further reiterates that she did not sign the field arrest report, and was unable to refute its contents.

However, during her December 2016 sworn PSI, Applicant told the investigator that on "the day before" her arrest, her youngest daughter "threw a fit when [Applicant] told her child to wait until lunchtime to eat," and Applicant spanked her child three times. Applicant told the investigator that this is the account that she gave to police officers on the day of her arrest. She further denied ever having given a statement about "punching her child."

Applicant denies that she intentionally falsified her December 2014 e-QIP as alleged in SOR ¶¶ 2.b and 2.c. Applicant responded "no" when asked if, in the past seven years, she had "consulted with a healthcare professional regarding an emotional or mental health condition." The instructions to the question permit an Applicant to answer "no" under certain specified circumstances, but only if the counseling was not court-

ordered and not related to violence by the Applicant. At the time Applicant completed her e-QIP, she was participating in court-ordered counseling for violence against her child. Applicant had also previously been required by CPS to attend two months of counseling for suspected child abuse in 2011.

In her Answer, Applicant states her failure to list her then-current CPA-ordered counseling was because she did not understand the question, and that she was told by CPA that she would be tried in criminal court and in juvenile court, and that she was "under the impression that the question was referring to the criminal court system."

In response to SOR ¶ 2.b, Applicant stated that the 2011 counseling was voluntary. However, she provided a signed agreement that she would participate in counseling through Voluntary Family Maintenance Services, and that noncompliance with the program could result in her children being placed in protective custody or removed from the home.

Applicant listed her October 2014 arrest, stating that she "was arrested because they found bruises on my child on her upper thigh and they think that I abused her." She further stated that she had not been charged with any crime, and that no charges had been filed. She did not disclose that the arrest was for felony child cruelty, nor did she disclose that her children were removed from the home by CPA, and that she was currently participating in CPA-ordered counseling.

Applicant asserts that she was going through very difficult period in 2014. She states that she has changed, is currently participating in counseling for depression, and has completed all the CPS-ordered counseling. She further states that she no longer spanks her children, nor does she yell at them. Applicant's younger daughter states that her mother has changed, and that although she may not be perfect, she is not scared of her mother, and feels safe at home.

Applicant's supervisor considers Applicant to be professional, efficient, and a positive member of the team. Applicant's two friends since 2015, a married couple, spend extensive social time with Applicant and her family, and view her as an outstanding parent, with whom they have entrusted their children.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." *Id.* at 527. 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." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant's 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." *See* Exec. Or. 10865 § 7. 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 being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

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 following disqualifying conditions apply 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; and
>
> AG ¶ 31(b): evidence . . . of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.

The following mitigating conditions are potentially applicable:

> 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; 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.

Despite Applicant's denials, the record evidence establishes that Applicant abused her daughter in September 2014, and was arrested and charged with felony child cruelty as a result of this criminal conduct. It further establishes that Applicant's children were removed from the home by CPS as a result of this instance, and also in 2011 due to suspected child abuse by Applicant. Although there has been no reported abuse by Applicant since 2014, and Applicant has completed both CPS-ordered courses of counseling, Applicant's denial of her conduct, her deflecting her culpability, and her failure to accept responsibility for her actions cast doubt on her reliability, trustworthiness, and good judgment, and undermines the credibility of successful rehabilitation. The security concern raised by Applicant's criminal conduct is not mitigated.

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 disqualifying conditions are potentially applicable:

> AG ¶ 16(a): 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 national security eligibility or trustworthiness, or award fiduciary responsibilities; and

> 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, as in this case, 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. *See* ISCR Case No. 03-09483 at 4 App. Bd. Nov. 17, 2004).

Applicant denies that she made false statements to the investigator during her December 2016 PSI. Instead, she states that she never described the incident of September 27, 2014, the way that both the base police report and the local police report reflected her statements. This is simply not plausible. Given the record evidence as a whole, I find that Applicant intentionally falsified her statements to the investigator during her PSI. None of the mitigating conditions apply to SOR ¶ 2.a.

Applicant also denies that she intentionally falsified her December 2016 e-QIP. Her explanation for why she did not list CPA-ordered counseling for child abuse perpetrators that she was actively participating in at the time she completed the e-QIP does not make sense. Her statement that she did not list the 2011 CPA-ordered counseling because it was "voluntary," is not true. However, there is no record evidence that establishes that either of Applicant's CPA-ordered counseling was characterized as being for an emotional or mental health condition. Therefore, Applicant technically did not falsify her e-QIP. SOR ¶¶ 2.b and 2.c are resolved in Applicant's favor.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a).

I have also considered Applicant's honorable service on active duty in the U.S. Navy, and that Applicant is thought highly of by her supervisor and her friends. Although Applicant's conduct occurred several years ago, her failure to accept responsibility for her actions remains a concern.

After weighing the disqualifying and mitigating conditions under Guidelines J and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by her conduct. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct)	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraphs 2.b and 2.c:	For Applicant

Conclusion

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

Stephanie C. Hess
Administrative Judge