DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 17-02044
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

08/16/2018

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Decision

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MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant resigned from his job at a college in October 2014 after being repeatedly disciplined for inappropriate comments and conduct toward female staff members and students since 2009. Personal conduct concerns also exist because of his lack of candor on his security clearance application about his disciplinary infractions at the college. Clearance is denied.

Statement of the Case

On November 1, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing a security concern under Guideline E, personal conduct. The SOR explained why the DOD CAF was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) effective within the DOD on June 8, 2017.

Applicant responded to the SOR on January 7, 2018, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On February 9, 2018, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On February 26, 2018, I scheduled a hearing for March 20, 2018.

At the hearing, three Government exhibits (GEs 1-3) were admitted in evidence. A February 8, 2018 letter forwarding discovery of the GEs to Applicant and a list of the GEs were marked as hearing exhibits (HEs I-II), but were not admitted as evidentiary exhibits. Ten Applicant exhibits (AEs A-J) were admitted in evidence, and Applicant testified, as reflected in a transcript (Tr.) received on March 28, 2018.

Summary of SOR Allegations

The SOR alleges under Guideline E that Applicant was suspended from his job at a college for ten days without pay in July 2009 (SOR ¶ 1.a) and for five days without pay in July 2010 (SOR ¶ 1.b) for violating the college's sexual harassment policy; that he received a disciplinary notice and was suspended for ten days without pay by the college in December 2012 for having inappropriate conversations with a female student (SOR ¶ 1.c); and that he resigned from his position at the college in August 2014 following a complaint of inappropriate behavior toward a female contract employee (SOR ¶ 1.d). Additionally, Applicant is alleged to have falsified his December 2015 Electronic Questionnaires for Investigations Processing (SF 86) by responding negatively to an inquiry about whether he had been warned or disciplined for misconduct in the workplace in the last seven years (SOR ¶ 1.e).

Applicant admitted that he had been suspended as alleged in SOR ¶ 1.a, but he denied any validity to the female's complaint in that he was physically incapable of the misconduct. Applicant also acknowledged his employment suspension alleged in SOR ¶ 1.b, but he asserted the discipline was unwarranted because his behavior consisted of playful interaction and harmless social comments to a friend. Applicant denied SOR ¶ 1.c because he had no recall of any disciplinary action in December 2012. Regarding SOR ¶ 1.d, he explained that the accusation was a defensive action taken by a contract employee in an attempt to keep her job. In response to the alleged falsification of his SF 86, Applicant admitted that he had not disclosed that he had received discipline or warnings, but he denied deliberate falsification. He claimed that he had responded "Yes" but then did not have the specific details to complete the section and was not allowed to progress without the information. (Answer.)

Findings of Fact

After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is 61 years old and not married. He has a bachelor's degree conferred in 1978 and a master's degree conferred in 1991. He has been employed by a defense contractor in purchasing since January 2016. (GEs 1-2; Tr. 34.)

Applicant worked as a senior associate in business and purchasing services for a college from October 2005 to October 2014. (GE 1; Tr. 34.) He resigned from his employment under imminent threat of discharge following incidents of sexual harassment or inappropriate conduct involving women.

After informal counseling to increase his awareness of the impact of his comments on co-workers, Applicant was suspended without pay from July 14, 2009, to July 28, 2009, for violation of the college's sexual harassment policy and state regulation.[1] A 20-year-old student employee (Ms. X) complained that he had looked up her skirt during inventory work. He was kneeling on the floor managing paper lists and metal tags to attach to items, and she was standing to pull the equipment and attach the metal tags. He claims that he was incapable of looking up her skirt because he was faced away from her and had neck problems. However, the college's investigation revealed that he had behaved inappropriately toward the student during the inventory and over the previous two years, and that the conduct had persisted despite counseling and warnings from his supervisor. Applicant maintains that Ms. X initiated flirtatious behavior, and he reciprocated. Applicant was warned that any subsequent violations could result in more severe disciplinary action, up to and including termination. He was required to have counseling through the Employee Assistance Program (EAP) and to attend a session of his state's sexual harassment training. He was also moved to a different building for three months. (GE 3; AE A; Tr. 40-47, 62.) Applicant completed the sexual harassment training and approximately six sessions of EAP counseling. Applicant testified, with no evidence to the contrary, that the EAP counselor did not see the need for further treatment. (Tr. 50-52.)

Applicant's performance appraisal at the college for 2009 to 2010 indicates that Applicant worked hard "to remedy the discomfort of some female staff members cited in his last evaluation."[2] (GE 3.) Yet, in June 2010, an associate personnel manager at the college observed Applicant flick the ponytail of a female cleaning contractor. Concerned about the behavior due to his history, she spoke to Applicant about the inappropriate behavior and reported the incident to Applicant's supervisor, who was also the college's administrative

[1] Section 46a-60(8) of the state's general statutes defines sexual harassment as follows:

> (8) For an employer, by the employer or the employer's agent, for an employment agency, by itself or its agent, or for any labor organization, by itself or its agent, to harass any employee, person seeking employment or member on the basis of sex or gender identity or expression. "Sexual harassment" shall, for the purposes of this section, be defined as any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (A) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (B) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (C) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

[2] Applicant's performance evaluation for mid-2008 to mid-2009 is not in evidence.

officer and chief financial officer. Applicant's supervisor spoke with Applicant but did not discipline him at that time. Over the next month, the supervisor received a complaint from the same cleaning contractor that Applicant had asked her if she had a friend for him for a possible dating relationship. Then, at a welcome party at work, when a new employee repeatedly told him that he looked familiar, Applicant responded to her that it appeared to him that she was trying to pick him up. On another occasion, Applicant commented to a staff member, who was dangling her feet, that she had nice feet. (GE 3; AE A.)

Applicant's supervisor scheduled a pre-disciplinary meeting for July 9, 2010, to provide Applicant an opportunity to provide reasons why the college should not dismiss him from employment for his failure to maintain appropriate behavior in the workplace. At the meeting, Applicant initially indicated that his behavior was not worthy of mention. Applicant was suspended without pay from August 4, 2010, through August 10, 2010, for violating the college's sexual harassment policy for having inappropriate physical contact with the hair of the cleaning contractor. Applicant filed a grievance, although he eventually completed additional EAP counseling mandated by the college. (GE 3; Tr. 52-57.) According to Applicant, the EAP counseling resulted in "no findings of any issues." (Tr. 57.)

On August 24, 2010, an administrator with the state's employment security appeals division ruled that Applicant had been suspended for reasons other than willful misconduct in the course of employment. The college appealed, and on October 29, 2010, an appeals referee affirmed the administrator's decision. Had the college chosen to suspend Applicant shortly after his intentional contact with the hair of the female contractor, the appeals referee would have denied unemployment compensation as the physical contact violated the proper boundaries between the female contractor and Applicant, who was in a position to affect her livelihood. The college's appeal was denied because it suspended Applicant after he made two "harmless comments" to other staff, and the college did not prove a "specific and final incident of willful misconduct" triggering the discharge or suspension that would have disqualified Applicant from receiving unemployment benefits. (AE A.) Applicant does not view his conduct with the female contractor to have been problematic. He testified that she was a "dear friend" with whom he had a very good relationship. They were "horsing around" that day, and she had no problem with it. (Tr. 58-60.)

In early December 2010, a female staff member at the college complained that Applicant was giving her unwelcome compliments and inappropriately asking her about the status of her personal relationships, including whether she had a boyfriend. She indicated that such comments had persisted after she told him that she did not consider them appropriate at work and had asked him to desist. When confronted about the behavior by his supervisor, Applicant explained that he learned that the female co-worker was divorced and so he had asked her in 2009 whether they would like to get together. She told him that she wanted to keep her personal and work relationships separate. He admitted that, in December 2010, he "may have mentioned" to the co-worker that her boyfriend was "a lucky guy." He considered the conversation social chit chat and nothing more. (GE 3.) Applicant does not believe "that sort of behavior is something that should make anybody uncomfortable." (Tr. 48.) The incident was resolved without any disciplinary action. (GE 3.)

Available performance evaluations for Applicant's work at the college show a record of competence, timely completion of tasks, and productivity. Applicant showed some improvement in his interpersonal relations with staff from 2010 to 2011, but there were also occasions when his communications took on a perceived tone of authority. He had a positive attitude toward the discharge of his work responsibilities, however, and his performance was considered superior in July 2012. (GE 3.)

On December 14, 2012, a college staff member observed Applicant having a conversation with a 17-year-old student worker, who appeared to be uncomfortable. The student worker expressed that there had been other conversations with Applicant where he had shared information about his search for a young wife in the Ukraine and had told her that he would have liked to have dated her if he was younger. Additionally, he had given her some candy with a comment that it was a "sweet for a sweet," and when she gave the candy to another student, he told her that she broke his heart. Applicant does not recall, and he cannot imagine that he said "a sweet for a sweet," but he admits that he probably told the student that she broke his heart because he "horses around." On December 20, 2012, the college's administrative officer held a pre-disciplinary meeting at which Applicant expressed surprise that the student worker might have been uncomfortable with his interactions. He claimed the student encouraged the conversation about his search for a Ukrainian wife because of their shared experience with Ukraine. She had a Russian name and had relatives in Ukraine, and he had traveled to Ukraine. The college suspended Applicant for ten days without pay because of his inappropriate interactions with the student worker and his failure to heed warnings to discontinue such behavior with staff members. Applicant filed a grievance. His defense was that the student worker was not bothered by the conversation and the issue was blown out of proportion. Applicant denied that he had any romantic interest in somebody as young as the female student. (GE 3; Tr. 61-68.)

On March 28, 2013, the college's president upheld the ten-day suspension. Applicant had been previously disciplined for similar misconduct and formally warned under the college's disciplinary process not to engage female employees in conversations that were not work related. The president concluded that Applicant was seemingly incapable of distinguishing between safe personal conversation and intrusive, inappropriate topics. Applicant was advised that the onus was on him to avoid personal conversations with co-workers that do not involve work-related topics, and that another, substantiated complaint of inappropriate personal conversations with female staff members would result in his termination from employment. (GE 3; Tr. 67-68.)

For 2012 to 2013, Applicant's performance in acquiring a sustainability grant for the college was noted as exceptional. He showed competence in his work with contracts, bids, facility maintenance, and summarizing financial information. He needed improvement in his interactions with a female employee and with follow up on assigned tasks. He performance overall was rated as competent. He continued to be a very productive employee for the college over the next year. (GE 3.)

On August 4, 2014, a female contract employee of the college complained that Applicant had made inappropriate comments to her; that he was "coming on" to her; and that he had invited her to his home. Applicant's supervisor confronted him about the complaint on August 12, 2014. Applicant offered his resignation, but he was told to wait for the college to complete its investigation. Applicant chose not to rebut the complaint, and admitted during a pre-disciplinary hearing that he had engaged in flirtatious behavior with the contract employee. At a meeting held in mid-September 2014 with his supervisor, Applicant again tendered his resignation and it was accepted.[3] Applicant continued to work until October 17, 2014, the effective date of his resignation. He resigned from his employment before the college completed its investigation, believing that he would be discharged because he had been told that another incident would result in his termination. In his opinion, any charge made by a female would have a negative result for him no matter what he said or did, or whether it was accurate or not. (GE 3; Tr. 70-73.)

Applicant filed for unemployment compensation and received benefits for the weeks ending October 25, 2014, and November 1, 2014. On November 17, 2014, an administrator for the state's employment security appeals division disqualified Applicant from unemployment compensation finding that Applicant had been discharged for willful misconduct in the course of employment. Applicant appealed, and on December 29, 2014, an appeals referee found that Applicant had voluntarily left his position at the college, and that he was disqualified from receiving unemployment benefits. Applicant appealed the decision of the referee. Although he admitted that he had flirted with the female contract employee, he maintained that she initiated the contact and that their interactions were consensual. The college's witness was unable to provide sufficient information about the complaint to establish that Applicant had engaged in any unwelcome sexual advances or that he created a sexually objectionable environment. The Board of Review accepted Applicant's version of consensual flirtatious behavior and, on March 6, 2015, reversed the denial of unemployment benefits. (GE 3; AE B; Tr. 74-76.) Applicant denies that he committed any sexual harassment and submits that the female contractor wrongly accused him in an effort to get her job back. (Tr. 80.)

Applicant was still unemployed when, on December 3, 2015, he completed and certified to the accuracy of an SF 86 for his current employer. He listed his previous employment at the college, and indicated, "Left by mutual agreement following charges or allegations of misconduct." He added, "Accused of harassment for which I was absolved of any wrong-doing post-separation." Applicant responded "No" to the following inquiries: "**In the last seven (7) years** do you have another reason for leaving to report for this employment?" and "For this employment, **in the last seven (7) years**, have you received a written warning, been officially reprimanded, suspended, or disciplined, for misconduct in the workplace, such as a violation of security policy?" (GE 1.) Applicant began working for his defense contractor employer on January 12, 2016. (GE 2; Tr. 35.)

[3] Applicant now denies that he offered to resign a second time. He testified that his supervisor came to him and told him that his resignation was accepted. (Tr. 79.) However, the board that reviewed his appeal of the denial of unemployment benefits found that Applicant submitted his resignation again during a meeting with his supervisor in mid-September 2014. (AE B.)

Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM) on March 3, 2016. Concerning the circumstances under which he left his employment with the college, Applicant indicated that the college subcontracted janitorial services, and he was required to oversee the janitorial staff. Applicant explained that a female janitor hired in the summer of 2014 had addressed him as "honey or Papi," and he had told her it was unacceptable and could not continue. After her work continued to suffer, he raised the issue of her work performance with her supervisor, and she was replaced. Only then did she file a sexual harassment complaint against Applicant.[4] Applicant explained that he offered his resignation because he knew that the college had a zero-tolerance policy. He considered himself to be absolved of all wrong doing after he prevailed in his appeal of the denial of unemployment benefits. Nonetheless, he was embarrassed by the incident, which he asserted was known about by his supervisor at the college, his neighbors, and his twin brother. The OPM investigator then asked him whether there were any other issues involving his employment with the college to disclose, and he answered "No." (GE 2; Tr. 86.)

On April 26, 2016, Applicant was re-interviewed to discuss information developed after his March interview concerning his record of disciplinary infractions at the college. Applicant did not dispute that he had been suspended three times. He claimed he did not disclose the information because he did not know the specific dates of the suspensions and "thought the best way for him to grow was to move on." He had not kept any records regarding his disciplinary issues and was unable to provide all the information required on his case papers. Applicant then detailed that he had a conversation with "a young lady" about dancing for which he was issued a verbal warning (not alleged in SOR). Regarding the sexual harassment that led to his first suspension, Applicant explained that he was working on inventory and handing tags to a student worker, who complained that he had looked up her skirt. Applicant asserted it was physically impossible for him to have done so because he had neck issues,[5] but he was suspended for two weeks. According to Applicant, he and the student worker had a flirtatious relationship. About his second suspension, Applicant admitted that he had touched the hair of the subcontractor, but he asserted that the woman had laughed at the time. As for the incident that led him to resign from the college, the OPM investigator asked Applicant to address a complaint of the female contractor that he had asked her to clean his home. Applicant told the OPM investigator that he thought the woman might need the work. About general complaints from female staff at the college avoiding him because he had habit of asking them for dates, Applicant denied any validity to their claims. He explained that his friendliness was mistaken by some women who assumed there was more to it. (GE 2.)

Applicant was given an opportunity to review the summaries of his OPM interviews.[6] On October 16, 2017, he provided a detailed response in which he corrected some inaccuracies and offered some explanations. About his failure to disclose his employment

[4] Applicant testified similarly about the circumstances at his security clearance hearing. (Tr. 78-79.)

[5] Applicant submitted as AE J medical records from 1996 showing some damage to cervical discs. (AE J.)

[6] The signature page was not included in GE 2, so it is unclear when he responded to the interrogatories.

suspensions on his SF 86, Applicant indicated that he had destroyed all related records "following discharge from the employer," and did not think this employment history would ever be required in the future. Regarding the incidents themselves, Applicant indicated that enthusiasm about dancing should hardly be cause for verbal discipline. About student Ms. X's complaint that he had looked up her skirt during inventory, he denied that he had any interest in that type of behavior and that he had ever made any sexual overtures toward this student or other former co-workers. He added that even though the student worker knew that inventory work was scheduled and what it required, she showed up wearing a skirt. He asserted that he would have made a request for another co-worker to assist, but no one was available. Applicant explained that the incident of flicking a co-worker's ponytail was innocent and not offensive to the female co-worker. About the August 2014 complaint, Applicant indicated that it involved him asking about house-cleaning services, and he inquired only because she had left business cards for such services in his office. Applicant described himself as "a friendly, gregarious person who apparently has his friendly intentions misinterpreted by others." (GE 2.)

At his hearing in March 2018, Applicant admitted his disciplinary record at the college. He attributed the incidents to him being an "old-fashioned individual" and to his lack of awareness that close proximity or a touch of an arm is considered offensive to some persons. He denied any intention of untoward behavior and any intention to mislead during the security clearance process. (Tr. 30-33.)

Applicant found the need to isolate himself at his present job to avoid unintentionally causing offense. (Tr. 32.) Within two months of his employment with the defense contractor, he received "an informal written warning" for inappropriately touching a young female on the hand. Applicant testified about the incident that, after a period of being comfortable with her, he touched her on the hand as they were talking because he uses his hands expressively, or it was "maybe just totally unconscious sorts of interactions." Applicant denied realizing that the woman found his touch offensive until it was brought to his attention at a meeting with human resources. (Tr. 35-36.) Applicant received a second written warning early in 2018 for inappropriate physical contact with another co-worker. He described the incident as follows:

> And then there was a second event earlier this year where one of my associates that regularly plans my travel services and I were sitting side by side and we were working on some travel arrangements and I felt we were good friends. And we were horsing around and then again, I had physical contact with her that was unintentional and apparently somebody witnessed that and filed a complaint on her behalf. . . .Allegedly, I touched her on the leg while we were sitting side by side. (Tr. 36-37.)

Applicant denied any further incidents in his present job and added, "And I want to underscore that this young lady and I have regular interactions, consider ourselves friends. So the whole thing came as a surprise to me." Applicant thought he was being extra-careful, but he also admitted that he had felt "a high degree of comfort around them." (Tr.

36-38.) Applicant was required by his employer to watch a sexual harassment video. (Tr. 88.)

Concerning his failure to report on his SF 86 or discuss during his first OPM interview that he had been disciplined by the college in 2009, 2010, and 2012, Applicant testified in March 2018:

> Again, as I shared earlier that I did not have any of the records that are presented here in this employee package that was secured from [the college]. And I would not have been able to have spoken accurately about any of those things. And at course at this point, I didn't know what to do. And since the department representative was acting on your behalf, again I did not know how to proceed. I didn't have anyone to ask to inquire what to do. And again, it wasn't for the sake of trying to hide anything. It just was a lack of information on my part. (Tr. 83.)

Applicant testified that he did not think at the time to look for the decisions of the state's employment security appeals division (AEs A-B) that could have helped him recall the details. He did not even remember that he had them until he was preparing for his security clearance hearing and stumbled upon them in a box of old files. When asked to explain his negative response to the investigator's inquiry about whether there were any other issues at the college to disclose, Applicant reiterated that it was a lack of knowledge and not for lack of disclosure. He did not want to "open the door to something that [he] couldn't provide all the details about." He had destroyed his records and tried to move on. (Tr. 83-87.)

Character references

Applicant presented character references from a neighbor and some church friends, who attest to his voluntary, active involvement in the church's community outreach efforts.[7] Applicant has been honest and trustworthy in his interactions with them. (AEs D-G.) The executive director of the church's outreach program indicated that Applicant has had good relationships with other volunteers and with the people served by the program. (AE F.) A pastor who has known Applicant for more than 30 years opined that Applicant has the highest moral caliber and is entirely reliable. (AE I.) The neighbor, a licensed master social worker, indicates that Applicant shows good judgment and determination when presented with a difficult task. Applicant has an "old school" personality in that he does not hesitate to compliment others. However, the social worker also indicated that some people "could and may interpret that kindness in a negative manner." In her opinion, Applicant "is always sincere and caring along with personable and professional at all times." She has trusted Applicant with sensitive information, and she has had no issues about his ability to keep sensitive matters to himself. (AE G.) A longtime friend, who met Applicant 32 years ago through their interactions as church youth counselors, indicates that Applicant cannot be

[7] It is unclear to what extent, if any, the character references are aware of the issues concerning Applicant's employment at the college, since none mention any issues.

coerced into committing a wrong act. In this friend's opinion, Applicant is very patriotic. (AE H.)

A former co-worker in the college's distance learning department attests that Applicant performed his duties reliably and effectively. He worked to maintain relationships with vendors and keep contractual agreements current. He was also trustworthy with regard to confidentiality requirements. (AE C.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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 national security eligibility will be resolved in favor of the 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 about potential, rather than actual, risk of compromise of classified information. Section 7 of EO 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 E: Personal Conduct

The security concern about personal conduct is articulated 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 investigations or adjudicative processes.

Even when viewed in a light most favorable to Applicant, the evidence establishes the security concerns underlying AG ¶ 15. Applicant was suspended by his then employer, a college, for ten days without pay in July 2009 for violating the college's sexual harassment policy. He behaved inappropriately toward a 20-year-old student worker over the previous two years and conducted himself inappropriately while performing inventory. In August 2010, he was suspended for five days, again for violating the college's sexual harassment policy after he inappropriately touched the hair of a female cleaning contractor in June 2010. He was suspended by the college for ten days for having inappropriate communications with a 17-year-old student in December 2012 concerning his search for a Ukrainian wife and expressing to the student that he would have liked to have dated her if he was younger. In August 2014, Applicant engaged in what he termed as flirtatious behavior with a cleaning contractor, but she filed a complaint with the college of unwanted interactions with him that he has discrepantly explained were in response to her flirtatious behavior toward him and in retaliation for her losing her job. He resigned from his employment believing he would be discharged because he had been repeatedly warned by his then employer to avoid personal conversations with female staff. The evidentiary record is not very detailed with regard to the unwanted and inappropriate conversations that led the college to suspend Applicant on three separate occasions. Even so, his record of failing to conform his behavior to workplace requirements implicates disqualifying condition AG ¶ 16(d), which states:

> (d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(2) any disruptive, violent, or other inappropriate behavior; and

(3) a pattern of dishonesty or rule violations.

The SOR also alleges that Applicant falsified his December 2015 SF 86 by responding negatively to an employment inquiry concerning whether he had received any written warnings, been officially reprimanded, suspended, or disciplined for misconduct in the workplace in the last seven years. A reasonable inference of deliberate falsification could be inferred because he was suspended three times from his employment at the college before the 2014 incident that factored into his decision to resign from his job. Applicant denies any intention to mislead, claiming that he answered "no" to the SF 86 inquiry because he did not have the details of the suspensions, including the specific dates and circumstance that led to him being suspended. He had destroyed his copy of his disciplinary record at the college, and did not recollect that he had kept the decisions of the state's employment security appeals division on his unemployment claims that contained relevant and material information about his employment discipline.

The DOHA Appeal Board has explained the process for analyzing falsification cases, stating:

> (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission. ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

Applicant disclosed on his SF 86 that he left the employment of the college after accusations of sexual harassment for which he was absolved. In reversing the denial of unemployment benefits to him in March 2015, a state review board made a finding that Applicant engaged in consensual, flirtatious behavior with the female cleaning contractor who lodged the August 2014 sexual harassment complaint. During his March 2016 interview with the OPM investigator, he explained that he took the "appeal adjudicator's comment regarding the unwarranted discharge as being absolved of any wrongdoing after he left the company."

Nothing about the review board's decision could reasonably be read as vitiating his previous work suspensions or absolving him from all misconduct in the previous incidents that led to his suspension on three separate occasions. Applicant's SF 86 representation that he had been absolved of all wrongdoing, coupled with his negative response to the discipline question on his SF 86, leave an inaccurate impression about his employment at

the college. His credibility on this issue is also undermined by his lack of candor during his March 2016 interview when, after discussing the circumstances in 2014 that led him to resign from his employment at the college, he falsely denied that he had any other issues at that employment.[8] Applicant knew he had been suspended. He was able to recall some details about the circumstances underlying the suspensions when he was re-interviewed in April 2016. Applicant's desire to move on from the problems at the college and to avoid having to discuss them does not justify his knowing omission of his work suspensions from his SF 86. AG ¶ 16(a) is established. It provides:

> (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.

AG ¶ 16(e) is also established. Sexual harassment or unwelcome flirtatious behavior is conduct that, if known, could affect a person's professional, or community standing. It is unclear to what extent his current employer and his friends, including his church acquaintances and friends, know about his disciplinary issues at the college. Applicant demonstrated a willingness to conceal his disciplinary record in response to legitimate inquiries during the security clearance process. He indicated during his March 2016 interview that the 2014 incident was embarrassing to him. AG ¶ 16(e) provides:

> (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.

[8]Applicant's knowing false statement to the interviewer could have been disqualifying under AG ¶ 16(b), but it was not alleged. AG ¶ 16(b) provides:

> (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.

Conduct not alleged can still be considered for other purposes, such as assessing an applicant's credibility and factors in mitigation. 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.

Application of the aforesaid disqualifying conditions triggers consideration of the potentially mitigating conditions under AG ¶ 17. Five of the seven disqualifying conditions warrant some consideration and could potentially apply in whole or in part. They are:

> (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
>
> (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;
>
> (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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
>
> (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and
>
> (f) the information was unsubstantiated or from a source of questionable reliability.

AG ¶ 17(a) is not established. Applicant had an opportunity to correct the SF 86 falsification about the employment discipline imposed by the college during his March 2016 interview. Instead, he falsely denied that he had any other issues at that employment. AG ¶ 17(c) has limited applicability in that some of the accusations made against him by female co-workers, which factored into one or more of his suspensions, were not particularly egregious. A state appeals referee considered some of the comments that factored into Applicant's suspension in August 2010 to have been harmless and not harassment, such as the comment to a then co-worker that she had nice feet.

However, the appeals referee also indicated that Applicant's intentional contact with the hair of the female contractor in 2010 violated the proper boundaries between the subcontractor and Applicant, who was in a position to affect her livelihood. Had the college suspended Applicant after that incident, the referee would have denied unemployment benefits for Applicant. Applicant's sexual harassment may not have been particularly egregious, but he does not deny that he flirted with female co-workers (some decades younger) after he had been told to avoid personal, non-work related communications. His repeated inability or unwillingness to maintain an appropriate separation between work and personal matters is viewed seriously. He was suspended from the college in July 2009 for sexual harassment involving a 20-year-old student. After being warned that any further inappropriate behavior with female staff members would result in more severe disciplinary action, he had inappropriate physical contact with a female contactor in 2010. He made a 17-year-old student uncomfortable in December 2012 by his conversations about dating and looking for a wife. Regarding the August 2014 complaints made by a subcontract

female cleaning employee, it is noted that the state review board was provided no evidence to counter Applicant's assertion that he and the complainant engaged in consensual, flirtatious behavior. Whether or not Applicant believed that his comments would not be unwelcomed by the cleaning contractor, he exercised poor judgment by engaging in flirtatious behavior with her after he had been told by his employer to avoid such behavior. More recently, in December 2015, Applicant certified to the accuracy of his SF 86 statements after being informed in writing that a knowing and willful false statement could be punished by a fine or imprisonment or both under Title 18, Section 1001, of the United States Code. His false response to the employment discipline question constituted criminal conduct that raises serious concerns about his judgment and trustworthiness.

Applicant has not shown adequate reform under AG ¶ 17(d), either of his inappropriate conduct with female co-workers or of his SF 86 falsification. He has yet to meaningfully acknowledge his responsibility for his personal conduct. Despite his mandatory completion of EAP counseling and sexual harassment training, he blames the student worker for the 2009 inventory incident, claiming that they had a flirtatious relationship, and she arrived for work wearing a skirt, despite knowing the requirements of inventory work. He shows little recognition of the fact that he violated the boundaries that he had to maintain because he was in a position to affect the livelihood of the female contractors in the 2010 and 2014 incidents. Perhaps most significantly going forward, he has been disciplined twice by his current employer for similar concerns involving female co-workers, most recently in early 2018 for improperly touching a female co-worker's knee while sitting beside her. Applicant is seemingly incapable of understanding the effects of his personal behavior on his co-workers. Regarding his SF 86 omission, Applicant shows little reform by continuing to assert that his omission was somehow justified because he did not have the records of his suspensions.

Regarding AG ¶ 17(e), Applicant cannot reasonably be expected to detail his work suspensions and the conduct that led to the disciplinary action to friends and associates that may have no legitimate need to know. At that same time, he has admitted that the 2014 complaint that led to his resignation is embarrassing for him. Even taking Applicant at his word that his brother and neighbors know about the 2014 incident, it is not clear that they know about his earlier suspensions. None of his character references commented about the suspensions, although a neighbor indicated that Applicant's friendliness and kindness could be interpreted by some in a negative manner. Issues of vulnerability are minimized somewhat, however, because the Government is aware of some of the details about his personal conduct involving female former and present co-workers and contactors.

AG ¶ 17(f) has minimal applicability. It is unclear whether Applicant committed sexual harassment of the cleaning contractor in August 2014. She complained that Applicant came onto her and invited her into his home. Applicant has variously asserted that he flirted with her in response to her advances because he was flattered by her attention, but also that he told her it was inappropriate to call him honey and she filed an unfounded sexual harassment complaint in an effort to regain her job. He exercised questionable personal judgment, given he was in a position to affect her livelihood, and he

had been told not to engage female co-workers in personal conversations. For the reasons noted, Applicant's personal conduct remains a security concern.

Whole-Person Concept

In the whole-person evaluation, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d).[9] Some of the factors in AG ¶ 2(d) were addressed under Guideline E, but some warrant additional comment.

Applicant's work for the college was competent and in some aspects superior. He is well regarded by his neighbors, church friends, and church clergy. Yet, it is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). Sexual harassment can substantially interfere with a person's work performance or create an intimidating, hostile, or offensive work environment. Unwanted comments or inappropriate behavior at the workplace need not meet the legal definition of sexual harassment to engender security concerns. In that regard, Applicant's record of suspensions in his previous employment and his discipline in his present job for inappropriate behavior toward female co-workers cast serious doubt about his current security worthiness. His lack of candor about his disciplinary record when completing his SF 86 reflects an unacceptable tendency to act in self-interest and creates significant doubt about whether the Government can rely on his representations. After considering all the evidence, I am unable to conclude that it is clearly consistent with the national interest to grant Applicant a security clearance.

Formal Findings

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

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant

[9] The factors under AG ¶ 2(d) 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.

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Elizabeth M. Matchinski
Administrative Judge