DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	
[NAME REDACTED]	)	ISCR Case No. 19-02977
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Andrea M. Corrales, Esq., Department Counsel
For Applicant: Andrew P. Bakaj, Esq.

11/13/2020

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Decision

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MALONE, Matthew E., Administrative Judge:

Applicant did not provide sufficient information to overcome the security concerns raised by his 2016 conviction of misdemeanor sexual battery and his 2017 arrest for violating the terms of his probation stemming from his conviction. Applicant's request for continued eligibility for access to classified information is denied.

Statement of the Case

On January 10, 2018, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to renew his eligibility for access to classified information, a requirement of his employment with a defense contractor. Based on the results of a background investigation initiated by his e-QIP submission, Department of Defense (DOD) adjudicators could not determine, as required by Security Executive Agent Directive (SEAD) 4, Section E.4, and by DOD Directive 5220.6, as amended (Directive), Section 4.2, that it is clearly consistent with the interests of national security for Applicant to have a security clearance.

On December 18, 2019, the DOD CAF issued a Statement of Reasons (SOR) alleging facts that raise security concerns addressed under Guideline D (Sexual Behavior) and Guideline J (Criminal Conduct). The adjudicative guidelines (AG) cited in the SOR were issued by the Director of National Intelligence on December 10, 2016, to be effective for all adjudications on or after June 8, 2017.

Applicant timely responded to the SOR (Answer) and requested a hearing before an administrative judge with the Department of Defense Office of Hearings and Appeals (DOHA). On January 15, 2020, Applicant's counsel contacted Department Counsel and requested, instead, that this case be decided based solely on the written record. On August 3, 2020, as provided for by paragraph E3.1.7 of the Directive, Department Counsel issued to Applicant a File of Relevant Material (FORM). The FORM contained eight documents (Items 1 – 8) on which the Government relied in making the SOR allegations.

Applicant received the FORM on August 10, 2020. He timely submitted a written response thereto (FORM Response), which included a 24-page brief by Applicant's counsel supported by 13 exhibits identified as Applicant's Exhibits (AX) A – M. The record closed on September 22, 2020, when Department Counsel submitted the Government's rebuttal to the FORM Response (Rebuttal) and waived objection to AX A – M. I received this case for decision on October 14, 2020.

Findings of Fact

Under Guideline D, the SOR alleged that on May 8, 2016, Applicant was arrested and charged with felony abduction with intent to defile; that on August 25, 2016, he pleaded guilty to misdemeanor sexual assault, for which he was sentenced to 12 months of incarceration (four months suspended), placed on probation for two years, and ordered to complete a psychosexual evaluation and psychoeducational services (SOR 1.a). (FORM, Item 1)

Under Guideline J, the SOR alleged that Applicant was arrested on June 28, 2017, and charged with violating the terms of his probation after failing to complete psychoeducational services; that he was found guilty of that charge on July 25, 2017; and that he was sentenced to 120 days in jail, 110 of which were suspended (SOR 2.a). Additionally, the conduct alleged at SOR 1.a was cross-alleged as criminal conduct (SOR 2.b). (FORM, Item 1)

In response to the SOR, Applicant admitted, with explanations, all of the allegations. As to SOR 2.a, while he admitted that allegation, he proffered an affirmative defense by averring that he appealed his conviction and the charge was dismissed in August 2018. (FORM, Item 2) In addition to the facts established through Applicant's admissions, I make the following findings of fact.

Applicant is a single, 31-year-old employee of a defense contractor for whom he was worked as senior research engineer since December 2017. He received a bachelor's degree in computer science in August 2011 and a master's degree in the same field in

August 2015. Between June 2011 and November 2017, Applicant worked in information technology (IT) positions for a nationally-known defense contractor and for two other smaller federal contractors. He has held a security clearance since at least 2011. His performance while working for his current employer has been excellent, and through professional associations, social media and podcasts, he is active in networking, mentorship, and professional development of fellow engineers in his field. Applicant is also active as a volunteer in various community organizations. (FORM, Items 1 and 2; FORM Response, AX D – F)

On the evening of May 7, 2016, Applicant was at a bar within walking distance of his apartment. He went to the bar after consuming between five and seven alcoholic beverages. Late in the evening, he encountered a woman who was obviously intoxicated. The woman, who was an active duty member of the military, initially thought Applicant was gay and decided to accept his offer to go to his apartment because she wanted to get away from two other men at the bar who had been trying to pick her up. The woman accompanied Applicant to his apartment with the understanding that they would just hang out and talk, and that the woman would sleep it off there. When they arrived, the woman became apprehensive after seeing a "stripper pole" was installed in the apartment. She asked where she should sleep and Applicant replied, "In my bed." She then tried to go to sleep on the couch, but Applicant later came out of the bedroom wearing only his boxer shorts and climbed on top of the woman (hereinafter, the victim) and started kissing her. When she was able to get off the couch, Applicant grabbed her and pushed her to his bedroom and onto his bed. Several times she tried to get away from him and he would push her back onto the bed. At one point, Applicant told the victim, "you know what I want and you're going to give it to me." Eventually, through physical force, the victim was able to get her things and leave the apartment. She was upset and disoriented (she did not know the building's street address or Applicant's apartment number) because of her level of intoxication, but she was able to get help at another apartment two floors down from Applicant's and called the police to report that Applicant had tried to rape her. (GX 6; FORM Response, AX C)

When the police arrived, they met the victim at the apartment two floors down from Applicant's where the victim had sought help. The police observed that she was very intoxicated. She could not remember precisely which apartment she had been in, so the officers decided to take her to a common area on another floor and continue interviewing her there. As an elevator arrived to take the victim and two police officers to that floor, they encountered Applicant in the elevator and the victim recognized him. The police then began talking to him, eventually taking the victim and Applicant to Applicant's apartment, where they continued speaking to the parties separately. Information gathered by the police that evening included statements from both Applicant and the victim, and photographs of bruises and red marks on the victim consistent with having struggled as she described, including a scratch on her thigh when Applicant tried to lift up her skirt. Additionally, the police noted that Applicant gave conflicting statements about what happened, changing his version of events when confronted with certain aspects of the victim's claims. For example, Applicant could not explain why the sheets on the bed were messed up. He initially stated that the victim went into the bedroom and sat on the bed, but that he brought her out to the couch. He also denied he and the victim did anything

on the bed but sit there side by side. Additionally, Applicant knew the victim was highly intoxicated and stated that intoxicated women, such as the victim, were "easy targets" or words to that effect, meaning that it was easier to get them to have sex. In response to the FORM, Applicant averred that he was misunderstood, stating:

> What I was trying to convey was that I was describing her as an 'ideal partner' – because she was attractive to me and she, from what I gathered, was interested in me. In fact, to support my belief that she was interested in me, [the victim] willingly accompanied me to my residence. (FORM Response, AX C ¶ 10)

Applicant did not address how the victim's state of intoxication affected his perception that she was genuinely attracted to him or, more importantly, her willingness to go with him to his apartment. (GX 6; FORM Response, AX C ¶ 10)

Based on all of the information gathered by the police, a warrant for Applicant's arrest was sworn by the victim. On May 8, 2016, Applicant was taken into custody and charged with felony abduction with intent to defile. Conviction for that offense in the state where he was charged carries with it a sentence of at least 20 years in prison. On August 25, 2016, Applicant entered an *Alford* plea in response to a reduced charge of misdemeanor sexual battery. He was adjudged guilty and sentenced to 12 months in jail, with four months of that sentence suspended for two years. He also was placed on supervised probation for two years (expected completion on August 25, 2018) with five conditions attached: be of good behavior; complete a sex offender evaluation and any treatment recommended therefrom; complete 250 hours of community service by September 2017; have no contact with the victim; and waive his right to appeal. (FORM, Items 2, 4, and 7)

Applicant completed his community service as required on June 28, 2017; however, his sex offender evaluation resulted in a recommendation that he "participate in psychoeducational services for people who have engaged in inappropriate sexual behavior." On May 18, 2017, Applicant and his probation officer reviewed that recommendation; however, Applicant told his probation officer that he would not participate in those services because the named provider could not provide a definitive schedule for completion of the psychoeducational services. He further indicated he wanted to get his own service provider for that part of his probation. On May 19, 2017, the probation officer reported this information to the judge who had sentenced Applicant. (FORM, Item 7)

As alleged at SOR 2.a, Applicant was charged with violating the terms of his probation and ordered to show cause why the court should not impose the suspended portion of his original jail sentence. On July 25, 2017, he appeared in general district court and pleaded not guilty; however, he was found guilty at a bench trial and sentenced to 120 days in jail. Applicant immediately appealed his conviction to the circuit court, where he would have the opportunity for a jury trial. On August 3, 2018, after his trial date had been continued four times, the charges were dismissed. Applicant claims that he never refused to comply with the terms of his probation. Instead, he claimed to be concerned

about timely completion of the recommended psychosexual education services and still be able to complete his community service obligations. Applicant claims he told his probation officer that he was trying to find a suitable service provider other than the one designated by the probation office, and that he subsequently completed the class. The probation officer's letter to the court stated that Applicant was not cooperating with the probation officer as required. Neither party submitted any information that shows Applicant completed the classes recommended in the sexual offender evaluation or when that may have occurred. (FORM, Items 4 and 7; FORM Response, AX C ¶¶ 17 – 19)

In response to the information presented in support of SOR 1.a and 2.b, Applicant now denies engaging in the criminal conduct or sexual behavior alleged. He claims he met the victim outside the bar as he was waiting for a ride to meet friends somewhere else. After a brief conversation, he claims they decided to walk to his nearby apartment where things became amorous. Applicant avers he and the victim first sat on the couch in his living room to make out, then moved without complaint by the victim to his bedroom. (In his statement to the police, Applicant stated that she went into the bedroom first and he brought her out to the couch.) Applicant further has responded that, as things became more sexual on the bed, the victim suddenly "began screaming and flailing about . . .[and that] she was in a wild rage." He claims he then helped her find her way out, but that he also was concerned for her well-being and was on his way downstairs to look for her when he encountered the victim and the police. (FORM Response, AX C ¶¶ 9 and 10.)

When Applicant submitted his January 2018 e-QIP, he disclosed his May 2016 arrest and subsequent conviction, indicating that he entered an *Alford* plea in response to the charge of misdemeanor sexual battery. In response to the FORM, Applicant argues, in part because an *Alford* plea does not specifically acknowledge guilt, that he did not commit the crime for which he was convicted. He further argues that his entry of an *Alford* plea was made solely to avoid the expense and risk of a trial on the original felony charge, which he felt he could not win because of racial and social biases he presumed would impede his access to a fair trial. An *Alford* plea is one in which a defendant pleads guilty and accepts the punishment of the court while still claiming to be innocent of the charges against him or her. Defendant entering an *Alford* plea acknowledges, and the court must also conclude, that the evidence supports a conclusion of guilt beyond a reasonable doubt. *North Carolina v. Alford*, 400 U.S. 25 (1970). *See also* ISCR Case 07-03307 at 8, n. 7 (App. Bd., Sept. 26, 2008; reversed administrative judge's conclusion that Applicant's Alford plea plus his denials supported a finding that Applicant did not sexually assault his daughter. S*ee also*, ISCR Case 15-07009 at 2, n. 2 (App. Bd., July 25, 2017).

As noted at the outset, Applicant is an accomplished computer engineer and an excellent employee. He is active in the IT sector as a mentor and is involved in several professional mutual-support endeavors. In support of his case, he submitted five letters of support and recommendation, one of which was from Applicant's supervisor for his community service between 2016 and 2018. He observed Applicant to be trustworthy, reliable, and professional. The author has reviewed the SOR allegations and the FORM with its supporting documents, but he has no firsthand knowledge of the events surrounding Applicant's arrest. Notwithstanding that information, the author recommends Applicant for a position of trust. (FORM Response, AX M) The other four letters were

authored by his parents, brother, and sister. Each is also familiar with the Government's information in support of the SOR; however, none of them have any firsthand knowledge of the events at issue here. They each speak highly of Applicant's character and provide examples of his integrity, hard work, and dedication to family. Knowing him as they do, they are convinced of his innocence and are equally convinced that he was wrongly arrested and prosecuted because of systemic racism and the fallout from the #MeToo Movement that might result in an unfair disadvantage for the accused in cases such as this. (FORM Response, AX I – L)

For his part, Applicant laments the effects his arrest and prosecution have had on his personal life, and he says he has learned some lessons from that experience:

> The experience I have endured has been horrific. One evening I literally thought a pretty girl was interested in me, and her reciprocal actions made me think all was okay. Unfortunately, all did not turn out well and my life has been in tatters since. Of course, there are lessons to be learned. I articulated that one thing I should have done was immediately contacted (sic) a lawyer, but that pertains to actions after the fact. What I should not have done was flirt or otherwise attempt to engage in a relationship with a female who was inebriated. This is where I take responsibility for my actions. This should not have happened, and now a painful lesson has been learned. (FORM Response, AX C ¶ 20)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). (*See* Directive, 6.3) Decisions must also reflect consideration of the factors listed in ¶ 2(d) of the guidelines. Commonly referred to as the "whole-person" concept, those factors are:

> (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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. A security clearance decision is intended only to resolve whether it is clearly

consistent with the national interest for an applicant to either receive or continue to have access to classified information. (Department of the Navy v. Egan, 484 U.S. 518 (1988))

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion. (*See* Egan, 484 U.S. at 528, 531) A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. (*See* Egan; AG ¶ 2(b))

Analysis

Sexual Behavior

Available information shows that Applicant sexually assaulted an intoxicated woman in May 2016. He knew she was intoxicated, which he believed would make her more compliant to his sexual advances. When she did not comply and made clear that she did not want to have sex with him, he used physical force to try to stop her from leaving his apartment. This information reasonably raises a security concern that is stated at AG ¶ 12 as follows:

> 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. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

Additionally, the Government's information requires application of the disqualifying conditions at AG ¶¶ 13(a) (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*) and 13(d) (*sexual behavior of a public nature OR that reflects lack of discretion or judgment*) (Emphasis added). Applicant was prosecuted and for his actions, and his conduct that evening reflected a significant failure of judgment and discretion. I also have considered the following pertinent AG ¶ 14 mitigating conditions:

> (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
>
> (e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

As to AG ¶ 14(e), I infer from the fact that he is no longer on probation that Applicant eventually completed all of the conditions thereof, including the psychoeducational services ordered from his sexual offender evaluation. However, there is no information in the record about the actual results of his evaluation or the content of the psychoeducational services that shows it meets any of the criteria addressed in AG ¶ 14(e).

As to AG ¶ 14(b), although the record reflects only this one incidence of sexual misconduct that occurred four years ago, Applicant's behavior still reflects adversely on his judgment, reliability and trustworthiness. At the time of this incident, Applicant stated his belief the victim was "an easy target." Applicant's re-characterization of that statement, namely that the victim looked like "an ideal partner," is most accurately viewed, given all of the information probative of this issue of fact, as disingenuous and self-serving. It further shows that Applicant has not yet taken full responsibility for his actions and that he lacks the good character required of one entrusted with classified information.

Whether such circumstances are unlikely to recur turns on whether Applicant has demonstrated that his judgment is now properly attuned to the impropriety of his conduct in May 2016. After spending time in jail and on probation for inappropriate sexual behavior of a criminal nature, one would think that would be the case. Nonetheless, while Applicant appears to accept responsibility for his actions, he also tries to cast himself as a victim who was wrongfully accused. His response to the Government's information indicates that he does not recognize the severity of his actions and has not accepted responsibility for what happened. With all of the foregoing in mind, I cannot conclude that Applicant will not engage in similar conduct in the future. Accordingly, AG ¶ 14(b) does not apply. I further conclude that, on balance, Applicant did not mitigate the security concerns established by the Government's information about his sexual behavior.

Criminal Conduct

The Government's information in support of SOR 2.b (and by reference SOR 1.a) established that Applicant's conduct in May 2016 met the elements of the crime of sexual assault in the state where that conduct occurred. Additionally, the information presented in support of SOR 2.a established that Applicant chose not to cooperate with his probation officer regarding recommended psychoeducational services. This information reasonably raised a security concern about criminal conduct stated at 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.

More specifically, available information requires application of the disqualifying conditions at 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 31(d) (*violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program*).

I also have considered the following pertinent AG ¶ 32 mitigating conditions:

> (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;
>
> (c) no reliable evidence to support that the individual committed the offense; and
>
> (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.

AG ¶¶ 32(a) and 32(d) do not apply for the same reasons the AG ¶ 14(b), discussed above, does not apply. Additionally, Applicant's acceptance of responsibility for the conduct documented herein is, at best, equivocal. As such, it undermines confidence in his judgment. He laments the effects his arrest and prosecution have had on him, and he regrets only that he "attempted to engage in a relationship with a female who was inebriated." Despite his *Alford* plea, at no point in this adjudication has Applicant acknowledged the substantial evidence that he committed a crime by physically restraining a woman in an attempt to have non-consensual sex with her. In response to the FORM, Applicant also expressed his belief that he could not receive a fair trial because of systemic racism (he is African-American and the victim is white) and because of the #MeToo Movement that was at its height at the time of his arrest. It cannot be disputed that these factors have, for too long, degraded the fairness of our criminal justice system and society in general. Nonetheless, the facts established by this record, including Applicant's own admissions, show that Applicant committed the crimes addressed in the SOR.

In view of all of the available information, it is not likely that he was charged and convicted for reasons of racial or gender bias. He was prosecuted because of the factual evidence. Here, the facts contained in the criminal complaint were gathered in the hours immediately following the victim's escape from Applicant's apartment. Also, the victim

thought Applicant was gay and did not go to his apartment to have sex; thus, this was hardly an instance of a white woman crying "rape" against a black man because she felt some bigoted embarrassment for her own actions. As a person of color, Applicant may often have good reason to be fearful that racial biases might be used against his person or property; however, that did not happen here. The factual record in this case is straightforward, and it does not appear from the available information that Applicant was treated harshly or unfairly.

In considering the applicability of AG ¶ 32(c), I note that in response to the SOR, Applicant admitted, with explanation, SOR 2.a, arguing that the charge was dismissed. Nonetheless, in the context of security clearance adjudications such as this, the ultimate court disposition is not dispositive. The fact remains that Applicant's failure to comply with all of the terms of his probation was sufficient for a charge of probation violation for which he was initially convicted and sentenced to the serve the previously-suspended portion of his jail sentence. It was only after a year of trial continuances during which he eventually completed the terms of his sentence that the charge was dismissed, an event that does not lessen the security significance of the original charge. AG ¶ 32(c) does not apply.

The applicability of AG ¶ 32(c) to SOR 2.b is equally problematic. Applicant also admitted this allegation in response to the SOR. In response to the FORM, however, he denied that he committed the crime of sexual assault. In addition to his denial, he cited his use of an *Alford* plea to avoid admission of guilt, claiming instead that he felt he did not have the resources with which to contest the charge at trial and such a plea would preserve his claims of innocence. Balanced against this claim is the fact that the court was required to conclude, which it did, that the state's evidence was sufficient to support a finding of guilt beyond a reasonable doubt. Applicant was adjudged guilty and sentenced to a period of incarceration along with probation, clinical evaluation, and community service. Department Counsel's evidence in support of SOR 2.b leaves little doubt about Applicant's conduct, and it precludes application of AG ¶ 32(c) to SOR 2.b. On balance, I conclude that Applicant has not mitigated the security concerns under this guideline.

In addition to my evaluation of the facts and my application of the appropriate adjudicative factors under Guidelines D and J, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Only the factor at AG ¶ 2(d)(3) (*frequency and recency of the conduct*) benefits Applicant because the sexual assault occurred once more than four years ago. This may also be said of the probation violation in 2017. In addition, I note that Applicant is an accomplished IT professional whose outstanding on-the-job performance is reflected in his most recent performance evaluations. I have also considered that he is active in his community and in professional networking initiatives. It is also noteworthy that the organization for whom he worked as part of his court-ordered community service saw fit to recommend Applicant for a position of trust despite the adverse information in Applicant's background. Nonetheless, Applicant's sexual behavior and criminal conduct raised reasonable security concerns that precluded a conclusion that Applicant should continue to have access to classified information. In response to the Government's information, Applicant has not established that his judgment and trustworthiness are no longer of concern despite all that has

transpired. As a result, I am left with significant doubts about his suitability for access to classified information. Because the protection of the national interest is the principal goal of these adjudications, those doubts must be resolved against the Applicant.

Formal Findings

Formal findings 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 D:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant

Conclusion

In light of all available information, it is not clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for security clearance eligibility is denied.

MATTHEW E. MALONE
Administrative Judge