



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 20-03464
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

May 28, 2021

Decision

GLENDON, John Bayard, Administrative Judge:

Applicant failed to mitigate security concerns regarding criminal conduct and sexual behavior. Based upon a review of the pleadings, the documentary evidence, and the testimony, national security eligibility for access to classified information is denied.

Statement of the Case

On July 18, 2018, Applicant submitted a security clearance application (SCA). On February 19, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines J (Criminal Conduct) and D (Sexual Behavior). The CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended (Exec. Or.); Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016) (AG) effective for all adjudicative decisions within DoD on or after June 8, 2017.

On March 15, 2021, Applicant responded to the SOR (Answer). He requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On May 7, 2021, the case was assigned to me. On May 12, 2021, Applicant orally advised DOHA that he required an immediate hearing and decision because his employer planned to terminate his employment on June 1, 2021, if he had not received a security clearance on or before that date. Accordingly, he waived his right to advance notice of 15 days prior to his hearing, pursuant to Directive ¶ E3.1.8. On May 13, 2021, DOHA advised Applicant by email that his hearing would be conducted by video-conference on May 17, 2021, using the Defense Conference Service. On May 13, 2021, Applicant agreed to the hearing date and time via email.

I convened the hearing as scheduled. Department Counsel presented ten proposed exhibits, marked as Government Exhibits (GE) 1 through 10 which were admitted without objection. I marked his exhibit list as Hearing Exhibit I. (Tr. at 9.)

Applicant attached two exhibits to his Answer. I marked them as Applicant Exhibits (AE) A and B. Applicant offered a third exhibit at the hearing, which I marked as AE C. I left the record open until May 19, 2021, to provide Applicant the opportunity to submit additional documentary evidence. On May 19, he emailed three character reference letters, which I marked as AE D-F and additional copies of AE A through C. AE D-F was admitted without objection. DOHA received the hearing transcript (Tr.) on May 24, 2021. (Tr. at 9.)

Findings of Fact

Applicant's personal information is extracted from his SCA unless otherwise indicated by a parenthetical citation to the record. After a thorough and careful review of the pleadings, Applicant's testimony, and the documentary evidence in the record, I make the following findings of fact.

Applicant is 36 years old. In June 2003, he received a high school diploma. He married in December 2003. His wife left him in 2017 and their divorce was concluded in 2018. They have two teenage children. Applicant presently lives with a cohabitant and her daughter. (Tr. at 15-16, 26-27.)

Applicant enlisted in the U.S. Army in 2007. He deployed on two occasions to war zones and served as an Explosives Ordnance Disposal (EOD) Tech. In May 2017, however, he was discharged with an Other than Honorable characterization of service (OTH) in lieu of Trial by Court-Martial. He had previously been convicted in a General Court-Martial. His conviction was overturned on appeal, all of which is described further below. (Tr. at 19-28; AE A-C.)

After his discharge, Applicant worked as a security guard. Starting in August 2017, he took some classes at a technical training school. In January 2018, he began working for his security clearance sponsor as a technician. (Tr. at 27.)

Criminal Conduct and Sexual Behavior

The SOR alleges criminal sexual misconduct by Applicant at a birthday party of a family friend on January 4-5, 2014. Certain events leading up to this incident provide important background information and context.

In 2011-2012, Applicant deployed to a war zone. During a layover on his return in October 2012, he and his fellow soldiers were given a direct order not to drink any alcohol. Applicant, who was a sergeant (E-5) at that time, nevertheless joined a group of more senior non-commissioned officers at a party on October 4, 2012, where he and the others drank alcohol. Applicant testified at the DOHA hearing that he only had one drink. His violation of the order was reported. In January 2013, he received an Article 15 Non-Judicial Punishment for violating Articles 90 and 92 of the Uniform Code of Military Justice (UCMJ) (disobedience of a direct order). His punishment included counseling and 45 days of extra duty. (Tr. at 12, 16, 29-32; GE 6.)

The Consolidated Adjudications Facility, Army Division, (CAF) adjudicated whether Applicant's misconduct warranted suspension of his top secret clearance eligibility and access to sensitive compartmented information (SCI). On November 7, 2013, the CAF reaffirmed Applicant's eligibility and SCI access. The CAF also issued a "Warning Notice" to Applicant stating that a "subsequent alcohol-related incident may result in the suspension of your security clearance." Applicant acknowledged receiving the warning. (Tr. at 47; GE 6 at 1.)

Less than two months after this warning, Applicant was arrested for sexual assault at the end of a long evening of heavy alcohol drinking at the above-mentioned January 4, 2014 birthday party. On May 8, 2014, charges were preferred against Applicant consisting of two specifications in violation of Article 120 of the UCMJ – rape, sexual assault, and other sexual misconduct. (GE 4 at 2.)

The record at Applicant's General Court-Martial, as summarized by the appellate court in its decision, sets forth a narrative of the events of that evening that sharply differs from Applicant's version presented at his DOHA hearing. The record reflects that Applicant, his then-wife, and their children attended the birthday party of the wife of another sergeant (SGT) at SGT's home. One other couple attended the party. SGT's wife (W) celebrated her birthday by drinking heavily, starting in the morning and continuing throughout the afternoon and late into the evening. The spouse of the third couple assisted W to her bedroom after W had vomited. She covered W with a blanket in her bed, and W fell asleep. She was wearing leggings and a long shirt. (GE 4 at 2.)

Applicant's wife and children retired to a second bedroom in SGT's house and had fallen asleep. Late in the evening, SGT fell asleep or passed out on a sofa in his living room after drinking an excessive amount of alcohol. The third couple decided to leave the party. The husband of the third couple, also an Army NCO, slapped SGT in the face trying to wake him to say goodnight. He was unable to wake SGT. He and his wife then left the party, leaving Applicant alone, W asleep in her bedroom, and her husband passed out on

the living room sofa. At the DOHA hearing, Applicant did not materially dispute the above statement of the facts. (Tr. at 13-45; GE 4 at 2.)

W testified at the Court-Martial that she felt someone climb into her bed behind her and start touching her body. She thought it was her husband. The person then pulled down her leggings and underwear and penetrated her vagina with his fingers. At that point, she was awake enough to realize that the person in her bed was not her husband. She testified that she looked behind her and saw Applicant. She ran from her bedroom into the living room with her pants pulled down and unsuccessfully tried to wake up her husband. Applicant followed W into her living room, pushed her down onto a second sofa, and again inserted his fingers into her vagina. SGT then woke up, and Applicant retreated to another part of the house. (GE 4 at 2.)

A forensic biology expert testified that Applicant's left hand contained a large amount of W's DNA. The expert opined that W's DNA was "more than likely or a possibility of being from a biological fluid." The expert also did not rule the possibility that the DNA on Applicant's left hand could have come from a "heavy touch" of W and suggested that a handshake could possibly produce the transfer of DNA from one person to another. (GE 4 at 2.)

At the DOHA hearing, Applicant testified about the events of that evening. He said that he and his family arrived at the party at about 5 pm. He had started drinking alcohol at his home and continued to drink "heavily" the rest of the night, consuming beer, tequila, and vodka. Applicant admitted that he was an alcoholic at that time. Applicant testified that he had "a really good relationship with the [SGT]." They worked together and trained together. Applicant knew SGT for about a year and knew W just as long. Applicant described W as "flirtatious," "real vulgar and real flirtatious with most people," including Applicant. At the DOHA hearing, he described SGT and W as "questionable characters." (Tr. 37-40.)

Applicant testified further that his spouse and children left the others at the party and went to a bedroom in W's house to watch TV. He was unaware of her "status," *i.e.*, whether she then slept or stayed awake. He denied knowing that W had gone to bed. He testified that SGT was passed out on his living room sofa. Applicant was alone and intoxicated in the residence, but he was awake. He denied entering W's bedroom and sexually assaulting her. He also denied sexually assaulting her in her living room. He could not recall where he was at the time of the alleged incidents. He did not see her run into the living room with her pants pulled down. Applicant testified that he spent his time late that evening sitting at the table in the dining room, which was part of the living room, playing music on his phone. Then, SGT was suddenly yelling at him and assaulted him causing bruising and injuries. He has no idea why SGT thought Applicant had assaulted his wife, though he later admitted in his testimony that he understood that SGT's actions were based on what W told her husband about Applicant's actions. He never heard W try to wake up her husband. He testified that he has no idea why she made the accusations against him. He also has no idea why his left hand had W's DNA on it. Applicant's only

explanation for what happened that night was that he “put himself in a bad situation with questionable characters.” (Tr. at 13-45.)

The official records presented at the DOHA hearing reflect that the military police were called, and they arrested Applicant based upon W’s accusations. The U.S. Army Criminal Investigation Command conducted an investigation. The investigators concluded that there was probable cause to believe that Applicant had engaged in an unlawful sexual act with W while she was impaired and incapable of apprising the sexual act due to the consumption of alcoholic beverages. The Trial Counsel in the Office of the Staff Judge Advocate (SJA) concurred, concluding that probable cause existed to believe that Applicant committed the offense of Sexual Assault in violation of Article 120 of the UCMJ. (Tr. at 23; GE 2 at 7; GE 3 at 2, 5.)

The General Court-Martial began on November 4, 2014. Applicant pleaded not guilty to two specifications of Sexual Assault and did not testify. On November 5, 2014, the members found Applicant guilty on both specifications and sentenced him to serve six years in prison and to be dishonorably discharged from the Army. He was also sentenced to be reduced to the grade of E-1 and to forfeit all pay and allowances. On September 1, 2015, the convening authority reduced Applicant’s sentence to four years and upheld the remaining sentence. (GE 9.)

Applicant appealed his conviction. On January 30, 2017, the Army Court of Criminal Appeals overturned the conviction. The Court ruled that the military judge gave an erroneous jury instruction regarding Applicant’s propensity to commit acts of sexual misconduct based upon the allegations in the other specification in the charges. The Court authorized a rehearing. (GE 4 at 3-4.)

On March 20, 2017, Applicant requested a discharge in lieu of Trial by Court-Martial (Request) pursuant to Army Regulation 635-200, Chapter 10. On March 27, 2017, W submitted through her special victim counsel a memorandum in which she declined to participate in any further court-martial proceedings, rendering a retrial unfeasible. At that point, Applicant had served two and one-half years in prison. If convicted again on retrial, he could only be sentenced to the remainder of his original sentence. The SJA recommended on April 11, 2017, that Applicant’s Request be granted with an Other than Honorable characterization of service. The Commanding General approved the Request on April 21, 2017. Applicant’s DD214 reflects that his discharge from the Army on May 9, 2017, was “In Lieu Of Trial by Court-Martial” and was “Under Other Than Honorable Conditions.” (Tr. at 13, AE A–C.)

In 2016, while Applicant was incarcerated, his wife left him for another man. Applicant testified at the DOHA hearing that she did not want to be with him because he could not provide for her due to his incarceration. His children now treat him differently. He feels that he has lost everything by making the mistake of being around people who drank excessively and just wanted to party. He no longer drinks to excess and only drinks on special occasions. While incarcerated, he attended Alcoholics Anonymous meetings and received help for his alcoholism, though he stopped attending meetings in July 2017,

about two months after his discharge. He also mentioned in his DOHA testimony that he was currently taking PTSD medication. He said that he abused alcohol in 2013-2014 to cope with his post-deployment issues. (Tr. at 14-15, 22, 27-28, 42-43, 47, 49-50.)

Credibility

At the DOHA hearing, Applicant's denial of any sexual misconduct in January 2014 rested on his credibility with the support of his character references, discussed below. In addition to a general demeanor assessment, Applicant's credibility was tested by questions and his testimony regarding a material omission in his 2018 SCA. He provided a negative response to the initial question in Section 25, which is titled Investigations and Clearance Record. The question asks:

Has the U.S. Government (or a foreign government) **EVER** investigated your background and/or granted you a security clearance eligibility/access?
(Emphasis in the original.)

Applicant was, in fact, investigated and granted a security clearance in 2007 at the time he enlisted or soon thereafter. At the time of his NJP in 2012, he held a top secret clearance and had been granted access to SCI, which required at least one and perhaps two further investigations. As noted above, the CAF issued a Warning Notice to Applicant. The notice advised him that any additional alcohol-related misconduct could result in the suspension of his clearance and SCI access. Applicant testified that as an EOD Tech he was required to have both a clearance and access. (Tr. at 32-35.)

When Applicant was asked why he provided an incorrect answer to the simple question quoted above, he could not provide a response. He testified: "I don't understand why I would write that." When asked if he intentionally omitted information about his past investigations and clearance status to shield himself during his 2018 background investigation from further inquiry about his 2013 NJP and the CAF's Warning Notice, he denied any such intent. He could not explain why he did not understand the simple language of the question in Section 25 of his SCA quote above and why he responded incorrectly. (Tr. at 32-35.)

Applicant's credibility was also tested by his testimony at the DOHA hearing regarding a critical element in his Chapter 10 Request for discharge. Under Army Regulation 635-200 ¶ 10-2.e, a soldier requesting a discharge must acknowledge in his request that he understands the elements of the offense he is charged with committing and that he is guilty of the charge or a lesser included offense. In his testimony at the DOHA hearing, Applicant made no mention of having admitted his guilt to the sexual assault in the Request nor did he submit a copy of the Request. He testified that he admitted in his Request to drinking to excess, though he was not charged with that as a crime. The only documentation he provided was the approvals of his Request by the SJA and the convening authority and his DD214. (AE A-C.)

Character Evidence

Applicant's DD214 reflects that he was awarded numerous medals and ribbons for his service in Afghanistan and Iraq. He was trained in explosive ordnance disposal, and at the time of the sexual assault incident, he served in an EOD unit performing extremely dangerous work to protect others. (AE C.)

After the hearing, Applicant submitted three personal reference letters. His former first-line supervisor/team leader in the Army provided a passionate defense of Applicant's behavior, both his behavior in the incident preceding the NJP and with respect to the sexual assault charges. He believes that Applicant was pressured to drink alcohol by his platoon commander upon his return from deployment. The former supervisor wrote that he testified at the NJP in support of Applicant. He also believes Applicant's claims of innocence on the sexual assault accusations. He pointed to the fact that the Army did not retry the case following the appeal and argued that, in his view, this demonstrates the weakness in the Army's case against Applicant. He also wrote that he knows Applicant's "moral compass" and does not believe he would ever commit the sexual assault of which he is accused. He described Applicant as a "model, trustworthy individual." (AE D.)

Applicant's two other references are his direct supervisor and his manager at his current employer. Both references endorsed Applicant's integrity, character, and competence in performing his duties safely. His direct supervisor noted that Applicant has held clearances throughout his Army and post-discharge employment and has never had a security violation. The supervisor also described Applicant as open and honest. He argued that Applicant's Court-Martial was not fair because the Army's criminal justice system presumes guilt in sexual assault cases, an argument that Applicant also made at the DOHA hearing. (Tr. at 14, 28; AE E, F.)

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 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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.” 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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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.

Analysis

Guideline J, Criminal Conduct

The security concern under this guideline is set out in AG ¶ 30 as follows:

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 guideline at AG ¶ 31 contains five potentially disqualifying conditions that could raise security concerns. Two conditions apply to the facts found in this case:

(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

(e) discharge or dismissal from the Armed Forces for reasons less than "Honorable."

The record established by substantial evidence that Applicant committed two serious felonies in January 2014 involving sexual assaults on W. Both the SJA Trial Counsel and the Convening Authority concluded that there was probable cause to believe that Applicant sexually assaulted W twice in the evening of January 4-5, 2014. Applicant offered no explanation, credible or otherwise, as to why W accused him of sexually assaulting her twice if he did not commit these crimes. Also, it was undisputed that Applicant was discharged from the Army in 2015 for reasons less than Honorable, specifically under Other than Honorable Conditions due to misconduct. AG ¶¶ 31(b) and 31(e) apply. Accordingly, further review is required.

The guideline in AG ¶ 32 contains four conditions that could mitigate security concerns arising from Applicant's criminal conduct. Three of the conditions potentially apply:

(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) is only partially established. Applicant's criminal conduct occurred more than seven years ago. His crimes occurred at a time when he was drinking heavily and were possibly the result of his loss of judgment and control due to his intoxicated condition. He now drinks alcohol moderately on rare occasions. Accordingly, the circumstances are unusual in view of his current level of alcohol consumption. On the other hand, Applicant's denial of responsibility for his criminal behavior lacks credibility, which makes it difficult to conclude that such behavior is unlikely to recur. Moreover, his

criminal conduct and his denial of such conduct cast serious doubts on his reliability, trustworthiness, and good judgment.

AG ¶ 32(c) is not established. There is substantial, reliable record evidence that Applicant committed the crimes of sexual assault with which he was charged. The fact that his conviction was overturned on appeal on an erroneous jury instruction does not establish that there is no reliable evidence to support the accusation that he sexually assaulted W. Applicant could provide no reason why W would fabricate serious charges against him. Applicant and his spouse were friends of W and her husband and were one of two couples invited to celebrate her birthday at her house.

Applicant's evidence in support of his denials of any criminal conduct was limited to his testimony with support from his references. I did not find Applicant's testimony about his innocence to be credible. His demeanor at the DOHA hearing was uncomfortable and his testimony was vague as to all relevant details. He could provide no explanation as to why W would falsely accuse him of sexually assaulting her twice. In addition, he was the only person in W's residence with the opportunity to sexually assault her. I also found Applicant's testimony on two other matters to be untrustworthy. He could not explain his negative response on his 2018 SCA as to whether he had ever been investigated for security clearance eligibility in the past. Also, his lack of candor about the details of his Request regarding his admission of a crime of which he had been accused, *i.e.*, sexual assault, undercuts his credibility.

AG ¶ 32(d) is only partially established. A significant amount of time has passed since the criminal conduct and Applicant has not been accused of any further criminal conduct of any nature. Applicant served two and one-half years in prison before his conviction was overturned. He pursued technical training and has been employed with a U.S. Government contractor since 2018. His supervisor and manager wrote that he performs his job effectively and with great care for the safety of others. On the other hand, his refusal to accept responsibility for his criminal conduct undercuts all of his evidence of rehabilitation.

Sexual Behavior

The security concern under this guideline is set out in 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.

The guideline at AG ¶ 13 contains five potentially disqualifying conditions that could raise security concerns. Three conditions apply to the facts found in this case:

(a): sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(c): sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

(d): sexual behavior of a public nature or that reflects lack of discretion or judgment.

The record evidence established that Applicant committed the sexual assaults. It is undisputed that his conviction was overturned on appeal due to an erroneous jury instruction that was inconsistent with his presumption of innocence. The Army could have retried Applicant if W had been willing to testify again. Without her testimony, the Army took the next best course of action and accepted Applicant's Request for discharge in Lieu of Trial by Court-Martial. Nothing in those facts supports a conclusion that the Army had lost confidence in its original prosecution. At the DOHA hearing, the Government met its burden to prove the criminal sexual behavior with substantial evidence. In addition, the charges against Applicant carry a significant stigma that renders him vulnerable to coercion, exploitation, and duress. Lastly, Applicant's sexual behavior in the home of SGT, a friend and fellow NCO, while under the influence of alcohol reflects a serious lack of discretion and judgment. The above AGs apply. Accordingly, further review is required.

The guideline in AG ¶ 14 contains four conditions that could mitigate security concerns arising from Applicant's drug involvement. Two of the conditions potentially apply:

(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

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

AG ¶ 14(b) is only partially established. The analysis set forth above under AG ¶ 32(a) applies equally under this mitigating condition.

AG ¶ 13(c) is not established. Although Applicant's sexual behavior occurred a number of years ago, the seriousness of the nature of his sexual behavior renders it an ongoing basis for coercion, exploitation, or duress.

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 and applying the adjudicative factors in AG ¶ 2(d). These 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.

I have incorporated my comments under Guidelines J and D in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Some factors warrant additional comments. I have given significant weight to Applicant's excellent record in the Army serving our country in two war zones performing very dangerous work. I have also weighed the fact that Applicant has a history of abusing alcohol, which is likely related to his PTSD following two deployments. Nevertheless, there is no dispute that he violated a direct order not to drink alcohol nor is there a dispute that he was highly intoxicated the night of the sexual assault. In the absence of any alternative explanation as to why W accused Applicant of sexually assaulting her twice, his denial is not credible. I found his demeanor at the DOHA hearing to be uncomfortable and his denials of sexual misconduct to be unconvincing. Overall, the record evidence as described above leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the disqualifying and mitigating conditions under Guidelines J and D and evaluating all the evidence in the context of the whole person, I conclude Applicant has failed to satisfy his burden to mitigate security concerns arising from his past criminal conduct and sexual behavior.

Formal Findings

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

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

Conclusion

In light of the entire record, I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant's eligibility for access to classified information. Clearance is denied.

John Bayard Glendon
Administrative Judge