



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



In the matter of:)	
)	
)	ISCR Case No. 20-01273
)	
Applicant for Security Clearance)	

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: *Pro se*

01/11/2022

Decision

Curry, Marc E., Administrative Judge:

Applicant's episodes of sexual misconduct and adverse personal conduct while in the Army, as well as his financial problems, generate security concerns which he was unable to mitigate. Clearance is denied.

Statement of the Case

On September 8, 2020, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline D, sexual behavior, Guideline E, personal conduct, and Guideline F, financial considerations. The SOR explained why the DOD CAF was unable to find it clearly consistent with the national interest to grant security clearance eligibility. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive) and the National Security Adjudicative Guidelines (AG), effective June 8, 2017.

On November 18, 2020, Applicant answered the SOR, admitting the allegations in subparagraphs 1.b, 2.a, and 3.c through 3.h, denying subparagraphs 3.a, 3.i, and 3.j, and admitting in part and denying in part, subparagraphs 1.a, 2.b, and 3.b. He requested a hearing, whereupon the case was assigned to me on May 7, 2021. On July 21, 2021, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing scheduling the case for August 2, 2021. The morning of the hearing, Applicant requested a continuance. Department Counsel did not object, and I continued the matter. The parties agreed on a reschedule date of August 26, 2021. On August 17, 2021, DOHA rescheduled the hearing. As the parties agreed to the hearing date, there was no ten-day notice issue.

The hearing was held as rescheduled. I received ten Government exhibits (GE 1 – GE 10), seven Applicant exhibits (AE A – AE G), and considered Applicant’s testimony. I also incorporated a copy of the discovery letter that Department Counsel mailed to Applicant (Hearing Exhibit I). At the close of the hearing, I left the record open until September 3, 2021 to allow Applicant to submit additional exhibits, but no post-hearing documents were received. The transcript (Tr.) was received on August 31, 2021.

Findings of Fact

Applicant is a 49-year-old single man with three adult children. His two marriages ended in divorce. (Tr. 24; GE 1 at 24) Applicant’s most recent marriage ended in 2009. (GE 2 at 8) Applicant earned an associate degree in 2012. (Tr. 25) He is a veteran of the U.S. Army. He served on active duty from 1993 to 2000, and in the Army Reserve from 2000 to 2005, before returning to active duty between 2005 and 2009. (GE 1 at 17-19) He was honorably discharged. (AE B) In 2009, Applicant re-enlisted in the Army Reserve, where he served through 2018 when he received a medical discharge. (Tr. 95). He has been working for his current full-time employer for three years in the field of information technology. (Tr. 70)

Applicant is highly respected on the job. Per the company’s senior network engineer, Applicant “has always shown a desire to lean [sic] and do a good job.” Moreover, while working for his employer, Applicant has achieved significant milestones, and “has conducted himself professionally . . .” (AE E at 2) Per a coworker, Applicant is a valued asset to the team whose character is above reproach. (AE E at 1)

In February 2007, a female private first class, subordinate to Applicant in rank, accused him of sexually assaulting her in the barracks while she was unconscious from intoxication. When the episode occurred, Applicant was the assigned supervisor in charge of quarters. (Tr. 43) His job was to keep soldiers and property safe. (Tr. 45) Subsequently, Applicant was tried by general court-martial and charged with rape, sodomy by force and without consent, adultery, and dereliction of duty. (AE A) Applicant admitted to having sexual relations with the female soldier, but contended that it was consensual and limited to oral sex. (Tr. 47) Applicant was found guilty of dereliction of duty, rape, and adultery. As for the sodomy charge, the Army amended it, omitting the phrase, “by forcible [sic] and without the consent of the said Private First Class,” whereupon Applicant

pleaded guilty to the amended charge. (AE A at 1) On June 12, 2007, Applicant was sentenced to nine months of confinement and reduction in rank from E-4 to E-1 for six months. (GE 10 at 1, 8) After being released from confinement, Applicant was discharged honorably in 2009 and allowed to enlist in the reserves. (AE B)

In November 2008, the U.S. Army Criminal Investigation Division (CID) determined that Applicant committed the offenses of making a false statement, larceny of government funds, and false claims when he submitted fraudulent documents to the Defense Finance and Accounting Service, claiming his dependents were residing in one state when they actually lived in another. (GE 7 at 2) He submitted these claims for April 6, 2006 through December 20, 2007. (GE 7 at 2) According to the investigation, Applicant's actions allowed him to receive approximately \$18,126 in unauthorized pay and allowances. (GE 7 at 2) Applicant denied this allegation. He testified that his then wife and child relocated from the state where they had all been living together in order to live with family members in another state. Moreover, per Applicant, when he proved to the relevant authority that his family members were, in fact, living in another state, the Army concluded that his claims were properly submitted and authorized. (Tr. 75) Applicant provided no proof of this contention.

While on reserve duty in November 2011, Applicant was accused by a female soldier of touching her buttocks without permission. (Answer at 2) A subsequent investigation substantiated the female soldier's allegation, leading to Applicant being charged with wrongful sexual contact under the UCMJ. Consequently, Applicant was reprimanded. (Answer at 2)

Applicant characterized his behavior in this instance as "a foolish and inappropriate attempt at a joke," that "was taken out of context to the extreme." (Answer at 2) Moreover, he testified that he has not engaged in any sexual misconduct in nearly ten years, and that his past sexual misconduct is not reflective of his current character. (Tr. 89)

Since 2009, Applicant has incurred \$54,000 of delinquent debt. Approximately \$25,000 of Applicant's delinquent debt is comprised of overdue child support, as alleged in subparagraph 3.b. (GE 3 at 2) Applicant began falling behind on child support payments shortly after his divorce was finalized in 2009. Applicant contended that he could not afford the payments because they constituted 50 percent of his income. (Tr. 30; GE 2 at 8) He further contends that he has been satisfying his child support delinquency through a wage garnishment. (Tr. 54) There is no record evidence that Applicant's wages are being garnished to pay child support. As of July 2021, the past-due balance was \$21,741. (GE 5 at 3)

The debt alleged in subparagraph 3.c is an auto loan totaling \$10,374. Applicant purchased the vehicle in 2016. Unable to afford it after a contract job abruptly ended, he allowed it to be voluntarily repossessed later that same year. He has made no payments on this delinquency since the repossession. (GE 4 at 3; Tr. 58)

Subparagraphs 3.d, and 3.f through 3.h are student loan accounts with overdue payment amounts totaling approximately \$1,570, and collective balances totaling approximately \$38,000. In 2017, he obtained a forbearance. (Tr. 59) As of July 2021, none of the accounts were in delinquent status. (GE 5 at 3-5)

The delinquency alleged in subparagraph 3.e, totaling \$8,944, is the balance due on a car. As with the car that Applicant purchased in 2017, he fell behind on the payments after an employment contract ended, compelling him to seek voluntary repossession. (Tr. 32) His current job, which he has held since 2018, is more stable than his previous jobs. (Tr. 32) Consequently, Applicant has not experienced any erratic disruptions in pay, like he experienced when contracts ended on previous jobs. Applicant has nevertheless made no payments toward the satisfaction of the car delinquency since it was repossessed. (Tr. 58)

The debt alleged in subparagraph 3.i, totaling \$377, is a delinquent insurance bill. Applicant contends that he satisfied it several years ago. (Tr. 13) He provided no documented proof of payment.

The debt alleged in subparagraph 3.j is a collection agent for a phone company, totaling \$260. Applicant contends that he satisfied it, but provided no documented proof.

Currently, Applicant has approximately \$250 deposited in his checking account and \$250 deposited in a savings account. Although he has not formally received any financial counseling, he has read a book on financial management. (Tr. 69)

In 2006, when Applicant was in the military, the U.S. Army Central Personnel Security Clearance Facility issued an intent to revoke his access to classified information and eligibility for access to sensitive compartmented information, alleging financial considerations security concerns. (GE 9 at 13) Subsequently, Applicant was issued a security clearance conditioned upon his compliance with debt repayment arrangements. (GE 9 at 10)

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(c), 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 Executive Order 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).

Under the whole-person concept, 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).¹

¹ The factors under AG ¶ 2(a) 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.

Analysis

Guideline D: Sexual Behavior

The security concerns about sexual behavior are set forth in AG ¶ 18:

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 . . . may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information.

Applicant was convicted of sexually assaulting a subordinate. The egregiousness of this offense was compounded by the fact that he was married at the time and was in charge of the base quarters where the assault occurred. Under these circumstances, AG ¶ 13(a), "sexual behavior of a criminal nature . . .," and AG ¶ 13(d), "sexual behavior . . . that reflects lack of discretion or judgment," applies.

Nearly ten years have elapsed since Applicant has engaged in any sexual misconduct. Conversely, it is extremely disturbing that nine months of incarceration after his first episode of sexual misconduct did not deter him from committing another act of sexual misconduct in 2012. Moreover, I am not persuaded that patting a coworker on the buttocks while at work could under any circumstances be taken out of context, as Applicant contends in this case, particularly given the false residency papers he submitted, as addressed below, which further calls his credibility into question. None of the mitigating conditions under AG ¶ 14 apply.

Guideline E: Personal Conduct

Under this guideline, "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." (AG ¶ 15) The allegation that Applicant submitted false residency documents in an attempt to receive unauthorized pay and allowances raises the issue of whether AG ¶ 16(d)(1) "untrustworthy . . . behavior . . ." applies. Applicant denies this allegation, contending that the claims at issue were properly submitted. Applicant provided no documentary evidence supporting this contention. Under these circumstances, I conclude that AG ¶ 16(d)(1) applies.

Applicant's sexual assault of an intoxicated soldier, cross-alleged under Guideline E, triggers the application of AG ¶ 16(d)(2), "any disruptive, violent, or other inappropriate behavior." Applicant's false residency claim, together with his sexual misconduct, triggers the application of AG ¶ 16(d)(3), "a pattern of dishonesty or rule violations." Given the nature and seriousness of these allegations, I conclude that they continue to raise questions about Applicant's security worthiness. None of the mitigating conditions apply.

Guideline F: Financial Considerations

Under this guideline, “failure to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified or sensitive information.” (AG ¶ 18) Applicant’s history of delinquent debt triggers the application of AG ¶ 19(a), “inability to satisfy debts,” and AG ¶ 19(c), “a history of not meeting financial obligations.” Applicant’s student loan accounts are no longer in delinquent status, as they are currently in forbearance. Consequently, I resolve SOR subparagraphs 3.d, and 3.f through 3.g in his favor.

Applicant’s child support obligations remain delinquent in excess of \$20,000. The delinquencies stemming from the car repossessions remain outstanding and unaddressed. Applicant’s contention that he paid the insurance bill and the phone bill, as alleged in subparagraphs 3.i and 3.i, are unsubstantiated. Under these circumstances, none of the mitigating conditions apply, and Applicant has failed to mitigate the financial considerations security concerns.

Whole-Person Concept

In adjudicating this case, I considered the recurrence of issues that generated security concerns. Particularly, Applicant committed another incident of sexual misconduct three years after being convicted of rape, and his financial problems had previously posed a security issue when he was in the military. Upon considering the relevant guidelines in the context of the whole-person concept, I conclude that Applicant has failed to mitigate the security concerns at issue in this case.

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 D:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraphs 3.a – 3.c:	Against Applicant
Subparagraph 3.d:	For Applicant

Subparagraph 3.e:	Against Applicant
Subparagraphs 3.f – 3.h:	For Applicant
Subparagraphs 3.i – 3.j:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge