



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



In the matter of: )  
)  
) ISCR Case No. 20-03544  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Andrew H. Henderson, Esq., Department Counsel  
For Applicant: Ryan C. Nerney, Esq.

08/12/2022

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**Decision**

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COACHER, Robert E., Administrative Judge:

The Government failed to establish certain disqualifying conduct and Applicant mitigated the remaining personal conduct security concerns. Eligibility for access to classified information is granted.

**History of the Case**

On December 17, 2021, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, personal conduct. The DOD acted 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 adjudicative guidelines (AG) effective on June 8, 2017.

On February 8, 2022, Applicant answered the SOR. A notice of hearing was sent to Applicant on March 21, 2022, setting the hearing for April 13, 2022. This hearing was convened as scheduled. The Government offered exhibits (GE) 1 through 8, which were admitted into evidence without objection. Department Counsel’s discovery letter and exhibit list were marked as hearing exhibits (HE) I-II. Applicant testified at the hearing.

His SOR answer contained as attachments exhibits (AE) A through L, which were admitted without objection. Post hearing, Applicant submitted AE M, which was also admitted without objection. Applicant's post-hearing exhibit index was marked as HE III. The Defense Office of Hearings and Appeals (DOHA) received the hearing transcript (Tr.) on April 21, 2022.

### **Findings of Fact**

In his SOR answer, Applicant admitted the first two SOR allegations with explanations and denied the remaining three allegations. (SOR ¶¶ 1.a-1.e) His admissions are incorporated as findings of fact. After a review of the pleadings and evidence, I make the following additional findings of fact.

Applicant is a 40-year-old employee of a federal contractor. He began working at his present job in February 2020. He is an armed security officer. He also works at a second job providing network telephone support. He is a few hours shy of obtaining his bachelor's degree. He enlisted in the U.S. Army in 2007 and served on active duty until 2016 when he separated with an honorable discharge. He held a security clearance when he was in the Army. He was located in Korea when he separated from the Army in 2016. In April 2016, he took a federal contractor position while he was still located in country. He remained in Korea until August 2017 when the events that are described below transpired. He is single and has no children. (Tr. 21-24; GE 1)

The SOR alleged that Applicant: (1) received nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) in August 2015, for the offenses of drunken misconduct and indecent exposure; (2) received a two-year debarment in August 2017, from all U.S. military facilities in South Korea for possession of opiates with intent to distribute; (3) falsified material facts on his May 2020 security clearance application (SCA) when he answered that his reason for leaving employment of a former employer was because the "contract ended," when he deliberately failed to state that he was barred from the military installation; (4) falsified material facts during his June 2020 personal subject interview with an authorized investigator when he stated, in reference to his Article 15, he was not one of the persons who removed their clothes and deliberately tried to conceal that his Article 15 offenses also included indecent exposure; and (5) falsified material facts during his September 2020 personal subject interview with an authorized investigator when he initially stated that he was unaware of the investigation that led to his debarment, but later in the interview admitted he was questioned by the military police in July 2017 regarding possession of opiates. (SOR ¶¶ 1.a – 1.e).

**SOR ¶ 1.a:** Applicant admitted that he accepted Article 15 punishment in 2015 when he was in the Army. He described this discipline in his May 2020 SCA as drunken misconduct. He named the command that initiated the action and the location where it took place. The events that led to the Article 15 began when Applicant was out drinking at a local bar in South Korea with some fellow soldiers on June 13, 2015, which carried over to the early morning of June 14, 2015. The bar had a roof-top area where the group was drinking. Applicant admitted that the group became very intoxicated. He

drank approximately 8 to 10 beers. At some point, the soldiers began disrobing their clothes. Several of the soldiers, including Applicant, took off all their clothes revealing their genitals. Later, a female soldier fell off the roof and was seriously injured. Applicant had nothing to do with the fall. Applicant called his senior noncommissioned officer to report what happened and the authorities responded. The Army conducted a full investigation of the incident and Applicant, along with the other participating soldiers, were interviewed and provided sworn statements (See GE 3). (Tr. 25-29; GE 3)

Applicant's sworn statement to the Army investigator included admissions that he was intoxicated that evening and took his clothes off while on the roof-top bar. One of the other male soldiers admitted that all three male soldiers on the roof top exposed their genitals at some point. As a result of the Army investigation, Applicant was offered Article 15 proceedings, which he accepted. He was charged with one specification under UCMJ Article 134 (often times referred to as the General Article, which includes general disorders that are deemed prejudicial to good and discipline). Specifically, the specification alleged that Applicant "engaged in activity that involved both the use of alcohol and the removal of clothing," to include exposing his underwear and genitals, in a public place. His commander found Applicant guilty of the specification and punished him with a suspended grade reduction, reduction of pay for two months, restriction to base for 45 days, and extra duties for 45 days. Applicant has had no similar incidents since then. (GE 3 (pp. 55-57, 59-61, 63-65); GE 4)

**SOR ¶ 1.b:** In August 2017, Applicant received a debarment order from all U.S. bases in South Korea for two years. Applicant admitted to receiving the debarment, but vigorously denied the underlying alleged offense that led to the debarment. In the summer of 2017, Applicant was completing his first year working for a government contractor on a U.S. base in South Korea. During the time frame of 2016 through December 2017, the Army Criminal Investigation Division (CID) conducted a wide scope investigation into drug activity on Applicant's base. Numerous military members were questioned as part of the investigation. Applicant was the only contractor named in the investigation. According to a law enforcement report (LE report) prepared in December 2017, concerning the drug investigation, Applicant was called in for questioning by CID agents on August 7, 2017. He was advised of his rights and declined to speak with the agents and requested counsel. According to Applicant's statement to his background investigator in September 2020, he answered the CID agent's questions about his drug involvement by denying any knowledge of drug activity and specifically denying his involvement in any such activity. A debarment order was prepared on August 10, 2017. (Tr. 35-36; GE 3, 7)

The LE report indicated that Applicant was questioned about possession of opiates with the intent to distribute. Aside from being named in the report, the report contains no evidence that Applicant engaged in the suspected drug activity. No other persons of interest or suspects named Applicant as being involved in the distribution of opiates. Army judge advocates were involved in probable cause determinations for the soldiers named in the report, but no such determination was made for Applicant. Applicant was never charged with any drug distribution offense either in South Korea or in the U.S. Applicant was never served with the debarment order. It only came to light

when he came onto the base to renew his expiring identification card (ID). Applicant credibly testified that when the debarment was issued there was only a month left on the contract for which he was hired. After speaking with his supervisor, he was told that because of the short time remaining on the contract, that it was not worth fighting the debarment action. He believed he left the contractor's employment on good terms. (35-41, 48, 50; GE 7)

When he returned to the U.S., he sought to purchase a firearm, but was prevented from doing so because his name showed up on law enforcement databases that precluded him from purchasing a firearm. He was told by his state's bureau of investigation that he was denied this right because his name appeared in the LE report listed above as a drug-related person of interest. In December 2017, he filed a request with the U.S. Army Crime Records Center to have his name removed from the report and resulting indexes. Upon receiving no reply, he filed a second request in June 2018. He also filed similar request with the Naval Criminal Investigative Service and the FBI. His name was removed from the databases in 2018 or 2019. He currently works in a position as an armed security guard. (Tr. 22, 41-44; AE B-C, I-J)

**SOR ¶ 1.c:** Applicant completed his May 2020 SCA concerning his employment history, specifically his employment with the defense contractor he worked for in South Korea from 2016 to 2017, by stating that his reason for leaving that employment was because his "contract ended." He credibly testified that he believed that was the reason for his leaving the position. Although he had been debarred from the base, which in his opinion was totally unjustified, he spoke with his then supervisor who told Applicant that the company would not fight the debarment because only one month remained on the company's contract. Applicant left on good terms with the contractor and believed he could be hired by it in the future. He disclosed the debarment during his background interview. He had no intentions of deliberately deceiving the government by giving the answer he gave on the SCA. His SCA answers in other areas show that he listed derogatory information when it was requested, e.g. prior discipline received by former employer (Section 13, # 6) and listing discipline he received in the Army (Section 15-Military History Summary, # 1). (Tr. 48-50; GE 1, 2; AE B)

**SOR ¶ 1.d:** As noted above, in 2015, Applicant received punishment under Article 15 of the UCMJ for a one specification of violation of Article 134, conduct prejudicial to good order and discipline. The prejudicial conduct was described in the specification as engaging in activity that involved both the use of alcohol and the removal of clothing, to include exposing his underwear and genitals, in a public place. Applicant admitted his drunkenness and disrobing in a sworn statement to the Army investigator. In completing his 2020 SCA, he listed the Article 15 as a prior disciplinary incident while in the military. He characterized his conduct as "drunken misbehavior." During his background interview, the investigator noted that when asked about the Article 15 incident, Applicant denied being one of the persons taking off his clothes at the bar. During his testimony, Applicant stated he did not recall making that statement to the investigator. He also admitted he failed to correct this statement when he had a chance to review the document. His reason for not correcting the document was that he had already provided truthful information during the Army investigation about taking his

clothes off and did not need to correct this incorrect information at this time. He had no intentions of providing deliberately false information to his background investigator. (Tr. 54-56, 65-68; GE 2, 3 (See p. 55-57, 63-65))

**SOR ¶ 1.e:** During one of three telephonic interviews Applicant had with his background investigator(s), in one occurring on September 30, 2020, he described his memories of how his 2017 debarment transpired when he sought to renew his ID on the South Korean base. He was never served with the debarment order (which is not a part of the record) before he attempted to renew his ID. It was only when he was at customer service and his name came up on the computer screen of the customer service representative that Applicant was made aware that he had been the subject of a debarment order. At that point, he did not know the reason for the debarment. Later in the same background interview, Applicant was asked by the interviewer if he had any drug activity to report. Applicant replied that he did not. The interviewer then brought up the drug investigation from 2017 in South Korea that led to Applicant's debarment. Applicant denied any drug involvement implied by the investigation and described how he was questioned by the military police in July 2017 and again denied any drug involvement or any knowledge of drug activity. He was allowed to leave after the questioning and no further information was provided to him until he was stopped from renewing his ID and told about the debarment. (GE 2 (p. 12))

During his hearing testimony, Applicant described his September 2020 background interview in the following exchange with his counsel:

Counsel: And you did discuss during [your] interview in September 2020 about the military police interview, correct?

Applicant: Yes.

Counsel: Were you ever asked during the September 2020 interview if the military police questioning in August 2017 was the cause of your debarment? Was that a direct question?

Applicant: Not that I recall.

Counsel: Did you voluntarily disclose during a subsequent interview in October 2020 that your belief was that the debarment was because of the opiate investigation?

Applicant: Yes.

Counsel: Did you ever omit or falsify any information related to the connection between the debarment and the military police interview or [the] investigation in 2017 during any of your September or October 2020 clearance interviews?

Applicant: No.

Counsel: Have you always attempted to be open and honest and forthright during any investigation, security clearance, or otherwise?

Applicant: Yes. (Tr. 57-59)

I found Applicant's testimony credible. The Government did not call any investigator to testify at Applicant's hearing to clarify the summarized statement prepared or to rebut any of Applicant's testimony.

In April 2022, Applicant sought out and participated in a clinical psychological evaluation conducted by Dr. E, Ph.D., a board-certified psychologist. The evaluation included a clinical interview, a review of records (including the SOR, Applicant's response, and all the Government exhibits), and psychological testing. As part of his evaluation Dr. E stated the following:

Because of the concern about [Applicant's] personal conduct and integrity in the current security clearance matter, I interviewed him carefully around the criteria associated with the range of personality disorders described in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). [Applicant] does not exhibit signs or symptoms of any of the 10 DSM-5 personality disorders. He does not have symptoms of any of the Cluster B personality disorders which are most commonly associated with unpredictable, poorly controlled, and disruptive thinking or behavior (i.e., antisocial personality disorder, borderline personality disorder, histrionic personality disorder, and narcissistic personality disorder). (AE M)

Applicant's psychological testing scores indicated that he was free from interfering psychological symptoms and not indicative of any substance-related conditions, personality dysfunction, or behavior dysregulation. Dr. E then concluded his evaluation by stating:

[Applicant] does not have any mental health or substance use condition that could impact his reliability, trustworthiness, or judgment in the context of safeguarding classified information or working in a cleared setting. Likewise, I found no personality indicators or behavioral patterns indicative of risk for personal conduct problems that could impair his willingness or ability to protect national security information. (AE M)

Applicant presented letters of support from three senior non-commissioned officers with whom he had served in the Army. All described Applicant's leadership and his traits of honesty and integrity. All have held or currently hold security clearances and they universally recommend that Applicant retain his clearance. Applicant provided copies of his Army evaluation reports, and his awards and recognition while in the Army. Applicant also presented certificates from the successful completion of a behavior modification course in 2021 and a drug and alcohol awareness course, also in 2021. He has also seen a therapist twice a month since August 2021. He testified that he has taken all these actions in an effort to better himself. (Tr. 84; AE E, G, H, K, L)

## Policies

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 used 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 overarching 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 an 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

AG ¶ 15 expresses the personal conduct security concern:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying conditions are potentially applicable:

(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;

(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;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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; and

(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:

(2) while in another country, engaging in any activity that is illegal in that country; and



(3) while in another country, engaging in any activity that, while legal there, is illegal in the United States.

Applicant provided a credible explanation for why he left the contractor's employment, which was because of the impending loss of the overall contract within one month. While Applicant was, in his view, wrongfully debarred, he was not precluded from working for that contractor in the future and left on good terms. Deliberate falsification was not established by the Government. AG ¶ 16(a) does not apply to SOR ¶ 1.c.

Applicant previously listed the Article 15 he received in 2015 while stationed in Korea on his May 2020 SCA. He described the reason for the disciplinary action was "drunken misconduct." During the 2015 Army investigation into the incident that led to the Article 15, he provided a sworn statement which included admissions to drunken conduct and his taking off his clothes in public. He did not recall denying to his background investigator that he was one of the persons who took off his clothes. It would make little sense to deny his actions when he was previously on record admitting the conduct. He admitted doing so in his hearing testimony. The Government did not call the investigator to testify at the hearing in order to clarify the summarized statement or rebut Applicant's testimony. I conclude that the Government failed to meet its burden to establish that Applicant provided deliberate or intentional false or material misleading information during his interview. AG ¶ 16(b) does not apply to SOR ¶ 1.d.

It is clear from Applicant's un rebutted testimony that when he spoke with the background investigator about his debarment he answered that he was unaware what the reason for the debarment was when he was notified about it in Korea. Later in the interview, he was asked if he had any drug involvement to report. He did not. He then was asked about the Army drug investigation in 2017 and he described what happened. Applicant credibly denied providing false or misleading information about this incident. A review of the summarized interview with Applicant on September 30, 2020, established that the questioning about this incident was ambiguous and inartful. The Government did not call the investigator to clarify the ambiguities. Once again, the Government has the burden to establish deliberate false or misleading information. It did not do so here. AG ¶ 16(b) does not apply to SOR ¶ 1.e.

Applicant's Article 15 from 2015 and his 2017 debarment satisfy the disqualifying conduct listed in AG ¶¶ 16(c) and 16(e).

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

(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.

Applicant's actions which led to his 2015 Article 15 were not frequent and happened under unfortunate, but unique circumstances. Nothing similar has ever happened since that incident seven years ago. Sufficient time has passed to determine that Applicant has changed his behavior. He has taken steps to alleviate any stressors that could lead to similar behavior by engaging in therapy, having a psychological assessment done, and participating in behavior modification and alcohol awareness classes. It is unlikely similar behavior will recur in the future. AG ¶¶ 17(c), 17(d), and 17(e) apply to SOR ¶ 1.a.

While Applicant was debarred from South Korean military bases in 2017 because his name came up during an investigation into drug activity there, no evidence was presented in the ensuing investigative report which implicated Applicant in any way of involvement with drug activity. Moreover, Applicant has always denied any involvement or knowledge about any drug activity. He has never been charged or suspected of drug involvement in any other context. AG ¶¶ 17(c) and 17(f), apply to SOR ¶ 1.b.

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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.

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 guideline and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

I considered Applicant's military service, his contractor service, his Army awards and decorations, his Army performance appraisals, and his regular therapy and recent psychological assessment. These all factored into my assessment that Applicant mitigated the personal conduct concerns that were established.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude the Government failed to establish personal conduct security concerns or Applicant mitigated the remaining personal conduct security concerns.

### **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: FOR APPLICANT

Subparagraphs: 1.a – 1.e: For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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Robert E. Coacher  
Administrative Judge