



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



In the matter of:	)	
	)	
	)	ISCR Case No. 22-00832
	)	
Applicant for Security Clearance	)	

**Appearances**

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

03/22/2023

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**Decision**

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DORSEY, Benjamin R., Administrative Judge:

Applicant did not mitigate the sexual behavior, criminal conduct, or financial considerations security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On May 20, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline D (sexual behavior), Guideline J (criminal conduct), and Guideline F (financial considerations). Applicant provided a response to the SOR (Answer) on June 13, 2022, and requested a hearing before an administrative judge. The case was assigned to me on December 1, 2022.

The hearing was convened as scheduled on March 2, 2023. I admitted Government Exhibits (GE) 1 through 9 without objection. At the hearing, Applicant testified but did not provide documentary evidence. At Applicant’s request, I held the record open until March 16, 2023, to allow him to provide documentary evidence. He timely submitted AE A, which I admitted in evidence without objection. I received a transcript (Tr.) of the hearing on March 9, 2023.

## Findings of Fact

Applicant is a 46-year-old employee of a government contractor for whom he has worked since July 2021. He also worked part-time for another government contractor from 2018 until November 2021. He married in 2003, but his wife passed away in November 2022. He was living separate and apart from his wife at the time of her death. He has two children, ages 19 and 17. He earned a high school diploma in 1994. He has taken some college and technical courses, but he has not earned another degree or certificate. He served on active duty in the Navy from 1998 until 2006, earning an honorable discharge. He served in the Navy Reserve from 2006 until 2012, when he returned to active duty with the Navy until July 2020, when he was released with a bad-conduct discharge. (Tr. 22-27, 55-57; GE 1, 6)

In April and May 2018, while working at the DOD Inspector General (DOD IG) Hotline Center, on two separate occasions, Applicant used his cell phone to take under-the-dress photographs of two of his female colleagues (collectively the “victims”) without their knowledge or consent. One of the victims notified the U.S. Naval Criminal Investigative Service (NCIS), which opened an investigation into the incident. Based upon the NCIS investigation, the Navy charged him under the Uniform Code of Military Justice (UCMJ) Article 120c (other sexual misconduct: indecent viewing, visual recording, or broadcasting). In 2019, after a court-martial, he pleaded guilty and was convicted of this charge. He was sentenced to eight months confinement and reduction in rank. He was released with a bad-conduct discharge. In SOR ¶ 1.a, the Government alleged Applicant’s 2018 behavior in taking the photographs. In SOR ¶ 2.a, it alleged his conviction and sentence pursuant to UCMJ Article 120c. It also alleged a violation of UCMJ Article 92, failure to obey an order or regulation charge and conviction and his bad-conduct discharge in SOR ¶ 2.a. In the Answer, Applicant admitted the allegations in SOR ¶¶ 1.a and 2.a. His admissions are adopted as findings of fact. Other than his admission, there is no evidence of a 2019 UCMJ Article 92 charge or conviction. (Tr. 18-21; 27-32; Answer; GE 1-3, 6; AE A)

Applicant claimed that he was going through a bad time between 2015 and 2018. He claimed he and his wife were having marital problems. He claimed he was dissatisfied with his job and did not want to be there. He claimed that there was nothing sexual about the pictures he took, but that he was acting out to get caught. He thought that if he got in trouble, the Navy would move him to a different role. He was having trouble with his life and did not know how to handle it. He claimed his time in confinement gave him clarity and he is now in a better place. He claimed that he took “multiple hours” of behavioral counseling where he learned that he had post-traumatic stress disorder (PTSD) and depression. He did not specify the dates of his counseling sessions. He did not provide documentation related to this counseling, a diagnosis, or a prognosis. He claimed that he now understands how to appropriately deal with stress, and that he will not engage in this type of behavior again. (Tr. 18-21; Answer)

Sometime in the summer of 2017, Applicant filmed his wife while she was unclothed in her bedroom without her knowledge or consent. He used an iPad and filmed her through the crack between her bedroom door and the floor. He claimed he

was trying to catch her being unfaithful because he suspected she was with another man. Any adverse information not alleged in the SOR, such as Applicant filming his wife without her knowledge or consent, will not be considered for disqualification purposes; however, it may be considered in assessing an applicant's credibility; in evaluating an applicant's evidence of extenuation, mitigation, or changed circumstances; in considering whether the applicant has demonstrated successful rehabilitation; and in applying the whole-person concept. (ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017)). (Tr. 32-35; GE 2)

In about April 2018, Applicant was counseled at work for making inappropriate comments to a female colleague regarding her appearance. His inappropriate comments made his female colleague feel uncomfortable, so she filed a complaint against him. Applicant's supervisor told him that he would be reassigned if anything similar happened again. The Government did not allege this information in the SOR. (GE 2)

While Applicant claimed to be remorseful for his actions, he also deflected the blame and responsibility for his actions to others. He claimed the court-martial process was unfair as he was not allowed to tell his side of the story. He claimed that he had been caught up in the "Me Too" movement and was judged more harshly than appropriate because of the timing of his offenses. He claimed that the victims were coerced into requesting that he receive a harsher sentence than they otherwise might have. He also claimed that he would not receive a fair outcome from his security clearance adjudication. In short, he casts himself as the victim and has not fully taken responsibility for his illegal actions. (Answer; AE A)

In the SOR, the Government alleged Applicant's six delinquent financial accounts totaling approximately \$29,000 (SOR ¶¶ 3.a through 3.f). Applicant admitted the SOR allegations in SOR ¶¶ 1.a through 1.c and 1.e. His admissions are adopted as findings of fact. He denied the allegations in SOR ¶¶ 1.d and 1.f. Despite his denials, the allegations in SOR ¶¶ 1.d and 1.f are established by the Government's 2020, 2021, and 2023 credit reports. (SOR; Answer; GE 4-7)

The judgments entered in April 2018 and January 2020 in favor of Applicant's homeowner's association alleged in SOR ¶¶ 3.a and 3.b have not been resolved. Applicant claimed that he made a payment of about \$4,000 toward these judgments sometime in 2022. He also claimed that he is paying a little bit extra towards these obligations every month. He provided no documentation to corroborate these payments. He is unsure how he fell behind on payments to his homeowner's association but suspected his wife was supposed to pay this obligation and failed to do so. He claimed he will continue to pay a little extra every month until these judgments are resolved. (Tr. 20, 35-38, 60-61; Answer; GE 8)

The delinquent car loan in the amount of \$6,499 alleged in SOR ¶ 3.c has not been resolved. Applicant claimed that he fell behind on this loan when he was confined. He claimed his wife was supposed to make payments on this loan while he was incarcerated but she did not. However, in his November 2020 security interview, he also

claimed that he did not want the car any longer. He claimed that he made payments again once he was no longer incarcerated, but he was not able to catch up on his delinquency. He claimed that he will pay this account through payment arrangements when he is able to do so. The 2023 credit report reflects a last payment date of February 2020. He provided no documentation about the resolution of this debt. (Tr. 20, 38-43, 60-61; Answer; GE 4-7, 9)

The delinquent credit card in the amount of \$2,927 alleged in SOR ¶ 3.d has not been resolved. Applicant claimed that he did not open this account and he disputed it with the credit reporting agencies several times. The account was opened in September 2015. He claimed that his wife had power of attorney for him while he was deployed and may have opened it without his knowledge. The last time he deployed was between February and October 2014. He did not provide documentation to corroborate his disputes with the credit reporting agencies or the creditor, nor did he offer any other resolution of this debt. The Government's 2020, 2021, and 2023 credit reports do not reflect a dispute with respect to this account. This account appears on all three credit reports. The 2023 credit report reflects a last payment date of September 2016. (Tr. 20, 40, 43-46, 59-60; Answer; GE 4-7)

The delinquent car loan in the amount of \$9,909 alleged in SOR ¶ 3.e has not been resolved. Applicant claimed that he took out this loan to purchase a car for his wife because she could not afford to pay for it herself. He opened the account in April 2017 and last made a payment on it in July 2019. He claimed that he did not know the loan was delinquent because his wife was receiving the statements for it. He also claimed that he could not afford to pay for the vehicle, but he agreed to open the account for his wife as an act of kindness. He claimed that he will pay this account through payment arrangements when he is able to do so. (Tr. 20, 44-45, 60-61; Answer; GE 4-7)

The delinquent telecommunications account in the amount of \$2,027 alleged in SOR ¶ 3.f has been resolved. Applicant claimed that he did not open this account. He claimed that he disputed it with the credit reporting agencies. Although he did not provide documentation to corroborate his dispute, the debt no longer appears on his 2023 credit report. While this account's absence on a subsequent credit report could be for reasons other than a favorable resolution, his claimed dispute, combined with the absence of the account on a subsequent credit report, provide sufficient evidence of a favorable resolution. (Tr. 20, 45-47, 58-59)

Applicant owes the IRS about \$900 in delinquent federal income taxes for the 2018 tax year. He owed about \$3,000 until 2022, when he made a payment of about \$2,100. These delinquent federal taxes were not alleged in the SOR. (Tr. 47-48)

Applicant earns between \$83,000 and \$84,000 in annual wages. He earns about \$5,200 per month. He receives a monthly Veterans Affairs (VA) disability payment of \$2,215. While working his part-time job, he also earned about \$22 to \$23 per hour for the 16-30 hours per week he worked. He claimed that he has about \$4,000 combined in his checking and savings account. He provided no documentation to corroborate his

income, benefits, or account balances. He provided no evidence that he has sought financial counseling. (Tr. 25-26, 53-58)

## **Policies**

This case is adjudicated 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), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines 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(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."

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 the 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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 D, Sexual Behavior**

The security concern for sexual behavior is set out in AG ¶ 12:

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.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted; and
- (d) sexual behavior of a public nature or that reflects lack of discretion or judgment.

Applicant engaged in criminal sexual behavior when he took under-the-dress photographs of two female colleagues. He was convicted and spent time in confinement. His actions, while surreptitious, were performed in public and reflected a lack of judgment. The above disqualifying conditions are applicable and the burden shifts to Applicant to provide evidence in mitigation.

Conditions that could mitigate sexual behavior security concerns are provided under AG ¶ 14. The following are potentially applicable:

- (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 good judgment;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress;

(d) the sexual behavior is strictly private, consensual, and discreet;

(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.

While Applicant last engaged in this behavior almost five years ago, he has not provided sufficient evidence that it is unlikely to recur and that it does not cast doubt on his current reliability, trustworthiness, or good judgment. He engaged in this behavior multiple times, including with his wife prior to the incident with his colleagues. He engaged in this behavior because he was experiencing stress at work and with his marriage. Neither of these circumstances is unusual. He has minimized the severity of his actions and refused to accept full responsibility for his deceitful and dehumanizing behavior. AG ¶ 14(b) does not apply.

Applicant provided no evidence that either his employer or family are aware of his criminal behavior. Information of a criminal and sexual nature such as this, if made known, could be embarrassing and could result in a loss of employment. It could therefore be used as a basis for coercion, exploitation, or duress. AG ¶ 14(c) does not apply.

Applicant's behavior was not private or consensual. AG ¶ 14(d) does not apply.

While Applicant claimed that he underwent behavioral counseling, he provided no evidence that he is currently enrolled or that he completed a treatment program. He presented no evidence of a treatment plan or a favorable diagnosis. AG ¶ 14(e) does not apply. None of the sexual behavior mitigating factors are applicable. The sexual behavior security concerns raised by Applicant's behavior are not mitigated.

## **Guideline J, Criminal Conduct**

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(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.”

In 2018, Applicant engaged in criminal conduct when he took under-the-dress photographs of his colleagues. In 2019, he pleaded guilty to a UCMJ Article 120 charge related to this behavior. As a result of this behavior, he was discharged from the Navy for bad conduct. He was not charged with or convicted of a crime under UCMJ Article 92. I find in his favor with respect to that portion of the allegation under Guideline J. Otherwise, the evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(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; 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.

For the reasons set forth in the analysis of AG ¶ 14(b), Applicant provided insufficient evidence that his criminal behavior is unlikely to recur. For those same reasons, his behavior casts doubt on his reliability, trustworthiness, and good judgment. AG ¶ 32(a) does not apply.

The almost five years that have passed without recurrence of criminal activity provide some evidence of successful rehabilitation. Applicant provided no evidence of restitution, job training, good employment record, or constructive community involvement. He has taken some technical classes since his conviction. AG ¶ 32(d) partially applies. However, the presence of some mitigating evidence does not compel a favorable adjudication. Instead, I must weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable, or vice versa. Despite the five years that have passed without criminal conduct, given the seriousness of his crime and his failure to fully take responsibility for it, I cannot find that the criminal conduct security concerns are mitigated.

### **Guideline F, Financial Considerations**

The security concern for financial considerations is set out in AG ¶ 18:

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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

- (a) inability to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant has five delinquent debts totaling about \$27,000. Several of these debts have been delinquent for years. The evidence is sufficient to raise the above disqualifying conditions, thereby shifting the burden to Applicant to provide evidence in mitigation.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

At the outset, Applicant has successfully disputed the debt listed in SOR ¶ 3.f. I find in his favor with respect to that allegation. Applicant's other financial delinquencies are ongoing and therefore recent. He has an additional delinquent federal tax debt that is not listed in the SOR. His behavior in failing to pay his debts is not infrequent. The evidence does not show that his debts are resolved or are under control. He has not

established a track record of financial responsibility. I cannot find his financial issues are unlikely to recur. AG ¶ 20(a) does not apply.

Some of Applicant's financial issues arose because he was incarcerated for committing a crime and because he failed to pay adequate attention to his finances. These conditions were not beyond his control. Despite his assertion that he has made payments on some of the SOR debts, he provided no documents to corroborate these payments. It is reasonable to expect Applicant to present documentation about the resolution of specific debts. See ISCR Case No. 15-03363 at 2 (App. Bd. Oct. 16, 2016). AG ¶ 20(b) and AG ¶ 20(d) do not apply.

In addition to the debt listed in SOR ¶ 3.f, Applicant disputed the legitimacy of the debt in SOR ¶ 3.d. He claimed he never opened the account listed in SOR ¶ 3.d. He did not provide documentary corroboration that he disputed the debt with the creditor or the credit reporting agencies. The Government's credit reports do not show that Applicant disputed this debt. As opposed to the debt in SOR ¶ 3.f, the debt in SOR ¶ 3.d appears in a credit report subsequent to his alleged dispute. He has not provided sufficient evidence of his actions to resolve his dispute with the creditor in SOR ¶ 3.d. AG ¶ 20(e) partially applies as it applies to the debt in SOR ¶ 3.f. None of the other financial considerations mitigating conditions fully apply.

### **Whole-Person Concept**

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 relevant 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 guidelines and the whole-person concept. I have incorporated my comments under Guidelines D, J, and F in my whole-person analysis. I have also considered Applicant's personal circumstances and his military service, despite receiving a bad-conduct discharge.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not

mitigate the sexual behavior, criminal conduct, or financial considerations 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 D:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant (Except for the alleged UCMJ Article 92 charge, which I find for Applicant)
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant
Subparagraph 1.f:	For Applicant

### **Conclusion**

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Benjamin R. Dorsey  
Administrative Judge