



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



In the matter of:	)	
	)	
	)	ISCR Case No. 20-01647
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Mark Lawton, Esq., Department Counsel  
For Applicant: *pro se*

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06/07/2023

**Decision**

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for a security clearance to work in the defense industry. Applicant failed to mitigate the security concerns raised by his intentional failure to obey a lawful order, which ultimately lead to his retirement from the U.S. Navy. Clearance is denied.

**Statement of the Case**

On January 7, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under the personal conduct guideline. The DOD CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive), and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on June 8, 2017. DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue Applicant’s security clearance

and recommended that the case be submitted to an administrative judge for a determination whether to revoke Applicant's security clearance.

Applicant timely answered the SOR and requested a hearing. At the hearing on October 6, 2022, I included in the record as Hearing Exhibit (HE) I, the disclosure letter the Government sent the Applicant, dated April 28, 2021. I also included as HE II, the receipt showing that Applicant also received an electronic copy of the exhibits from DOD SAFE on September 22, 2022. I admitted Government's Exhibits (GE) 1 through 3, and Applicant's Exhibits (AE) A, without objection. DOHA received the transcript (Tr.) on October 19, 2022.

### **Procedural Matters**

Without objection from the parties, I amended SOR ¶ 1.b. to correct a clerical error.

### **Findings of Fact**

Applicant, 45, has worked for his employer, a federal contracting company since February 2019. He previously served in the U.S. Navy from September 1997 to November 2018. He was first granted access to classified information in 2014. He completed his most recent security clearance application in August 2019 and disclosed that he retired from military service as a senior chief petty officer (E-8) following allegations of misconduct. The incidents prompting his retirement are alleged in the SOR.

Between June 2016 and November 2018, Applicant served onboard an aircraft carrier. In June 2017, the command investigated allegations that Applicant violated the Navy's sexual harassment and fraternization policies by making inappropriate comments to an unidentified junior sailor and engaging in an inappropriate text message conversation with another unidentified junior sailor. While the investigation did not substantiate some of the more egregious allegations, the carrier's commanding officer (CO) determined the nature of the substantiated allegations warranted Applicant receiving a non-punitive letter of caution in July 2017. (GE 1; GE 3, pp. 30-31) In the letter, the CO admonished Applicant:

I have determined the substantiated statements are sufficiently concerning and your failure to maintain a proper and professional relationship with another of your junior sailor must be affirmatively addressed to ensure your future conduct complies with the Navy's established policies and my expectations....

Your text message exchange with a junior sailor was inappropriate and undermined your status as a senior chief petty officer especially when other junior sailors learned of the exchange. You must work further to develop your military bearing and professionalism to ensure it rises to the

level of what is expected of a Senior Chief Petty Officer with nearly 20 years of experience...

I demand far greater judgment and performance from leaders serving onboard [this air-craft carrier]. Accordingly, you are being counseled on your expected conduct. This letter is addressed to you as a corrective measure and does not become a part of your official record.... (GE 3, pp 30-31)

Although the letter was considered non-punitive, it constituted a lawful order from his CO that Applicant was required to obey. (Tr. 34)

In October 2017, the carrier's executive officer and the command master chief received an anonymous complaint that Applicant was having an inappropriate relationship with a junior sailor (JS1). The deputy command judge advocate (DCJA) launched a second investigation into Applicant's conduct. The investigation substantiated that Applicant had an unduly familiar relationship with JS1, in violation of the Navy's fraternization policy and the July 2017 letter of caution. The investigation also determined that he sexually harassed, a second sailor, JS2, by making inappropriate comments towards her, touching her inappropriately on multiple occasions, and making inappropriate comments about her to other sailors. (GE 3, pp. 46, 69-73)

The DCJA also investigated allegations that Applicant sexually harassed a third sailor, JS3. JS3 separated from the Navy before the investigation began and she could not be contacted. However, the DCJA considered the allegations regarding JS3 another "data point in Applicant's pattern of inappropriate and unprofessional behavior." The DCJA recommended that Applicant be taken to Captain's Mast; that he be removed from any supervisory role and that he be detached from for cause. The DCJA also recommended the CO take any "additional actions as necessary to end Applicant's career in the Navy." (GE 3, pp 45-73)

In December 2017, Applicant was charged with six specifications of violating Uniform Code of Military Justice (UCMJ) Article 92: failure to obey an order. He pled guilty to five specifications: (1) having an unduly familiar relationship with JS1; (2) violating the Navy's sexual harassment policy by wrongfully touching and making unwanted comments of a sexual nature regarding the appearance of JS2; (3) violating the July 2017 letter of caution by continuing to engage in an unduly familiar and unprofessional relationship with JS1; (4) violating the July 2017 letter of caution by continuing to engage in an unduly familiar and unprofessional relationship with JS2; and (5) violating the Navy's sexual harassment policy by wrongfully making unwanted sexual advances, and making inappropriate comments to JS3. He was found not guilty of a sixth charge of making offensive or racial comments in violation of the Navy's equal opportunity program. He was sentenced to 45 days restriction (25 days suspended for six months). Applicant appealed the sentence, specifically requesting reconsideration of his detachment for cause as a separate administrative action as being unjust and disproportionate. (GE 3, pp 3-9)

The CO recommended denial of the appeal. In support of his recommendation, the CO noted that Applicant admitted to engaging in the conduct for which he was found guilty at Captain's Mast. The CO also believed that the punishment was both just and proportional to Applicant's misconduct. In response to Applicant's request for reconsideration of being detached for cause, the CO noted that detachment for cause is not a punishment issued at Captain's Mast but explained that detachment for cause was appropriate in Applicant's case. (GE 3, pp 10-12)

The CO explained that Applicant's conduct had been an ongoing issue since he was a second-class petty officer (E-5). He described Applicant's behavior as being particularly egregious given that he received the July 2017 letter of caution months before the October 2017 investigation. The CO further described Applicant's behavior as "so wholly toxic, unprofessional, and not in keeping with Navy Core Values that he cannot continue to act in a senior leadership role in any capacity onboard the carrier." The CO commented that Applicant demonstrated a complete misunderstanding of the Navy's expectations and standards for leadership and professional behavior. The command denied Applicant's appeal. (GE 3, pp 10-12)

In May 2018, Applicant requested permission to retire in lieu of an administrative separation termination. His command supported the request, recommending a discharge classification as general under honorable conditions. The request was approved, and he retired in November 2018 with 21 years of service. (GE 3, 15-17)

The SOR alleges that Applicant failed to obey the order in the July 2017 letter of caution to discontinue his inappropriate relationships with junior sailors, resulting in the December 2017 investigation into additional allegations of misconduct. (SOR ¶ 1.a) The SOR also alleges that the December 2017 investigation resulted in a Captain's Mast in which Applicant was charged with and pleaded guilty to failure to obey a lawful order regarding the Navy's fraternization policy (SOR ¶ 1.b); two violations of the Navy's sexual harassment policy (SOR ¶ 1.c. and 1.e); failure to maintain proper and professional relationships with junior sailors (SOR ¶ 1.d); and that he was ultimately granted permission to retire from the Navy with a general discharge under honorable conditions in lieu of appearing before an administrative separation board (SOR 1.f).

In his answer to the SOR and at hearing, Applicant admitted to engaging in the underlying conduct, which is why he decided to plead guilty to the charges at Captain's Mast. He continues to deny that his actions constituted sexual harassment. Applicant argued that if the Navy truly deemed his conduct to be sexual harassment that he would have been criminally charged, reduced in rank, and detached for cause. He further explained that he requested permission to retire because he was tired of having to prove his innocence and did not have the data necessary to prove his case. He felt as if he had no way of winning. (Tr. 46-48; Answer)

Applicant claims that he has not engaged in any similar behaviors at his current job, and that he will not engage in similar behavior in the future.

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an Applicant's eligibility for access to classified information.

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 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 protect 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 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).

## **Analysis**

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 information. Of special interest is any failure to cooperate or provide truthful answers during national security investigative or adjudicative process. (AG ¶ 15)

Applicant admits that he disobeyed the order his CO gave him in the July 2017 letter of caution by continuing to have inappropriate contact with junior sailors, that his behavior resulted in his pleading guilty to five specifications of violating Article 92 of UCMJ at Captain's Mast and led to his retirement from the U.S. Navy in November 2018 in lieu of appearing before an administrative board. Personal conduct disqualifying condition ¶ 16(d) applies:

Credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself 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. This includes, but is not limited to, consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of propriety information, unauthorized release of sensitive corporate or government protected information;
- (2) any disruptive, violent, or other inappropriate behavior;
- (3) any pattern of dishonest or rule violations; and
- (4) evidence of significant misuse of Government or other employer's time or resources.

None of the personal conduct mitigating conditions apply. Even though the conduct resulting in Applicant's retirement from the Navy happened almost six years ago, it is not mitigated by the passage of time, nor can it be considered minor. Applicant demonstrated a pattern of behavior showing blatant disregard for rules and regulations. Furthermore, he continues to minimize and does not accept responsibility for his misconduct. He willfully acted in direct contravention of Navy policies that were well known to him (e.g., sexual harassment and fraternization) and in direct violation of a lawful order to correct his behavior. However, he continues to believe that his behavior was not as serious as determined by his chain of command. This attitude raises ongoing doubts about his ability to follow the rules and regulations that apply to the handling and safeguarding of classified information.

### **Whole-Person Concept**

I have also evaluated Applicant's conduct under the whole-person factors at AG ¶ 2(d). Applicant failed to meet his burdens of production and persuasion to overcome the negative whole-person assessment established in the record.

### **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, Personal Conduct:	AGAINST APPLICANT
Subparagraphs 1.a – 1.d:	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 eligibility for a security clearance. Clearance is denied.

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Nichole L. Noel  
Administrative Judge