



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



In the matter of:)
)
) ISCR Case No. 22-01653
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Phillip Stackhouse, Esq.

August 31, 2023

Decision

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns regarding Guidelines D (sexual behavior) and J (criminal conduct). Clearance is granted.

Statement of the Case

On March 3, 2022, Applicant submitted a Questionnaire for National Security Positions (SF-86). On November 21, 2022, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D and J. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On November 25, 2022, Applicant submitted his Answer to the SOR. On January 31, 2023, his counsel submitted a letter of representation.

On March 29, 2023, the Defense Office of Hearings and Appeals (DOHA) assigned the case to another administrative judge; and on April 10, 2023, DOHA reassigned the case to me. On April 27, 2023, DOHA issued a notice of hearing

scheduling the hearing for May 24, 2023. The hearing was convened as scheduled. Department Counsel submitted Government Exhibits (GE) 1 and 2, which were received into evidence. Applicant testified, did not call any witnesses, and submitted Applicant Exhibits (AE) A through F, which were received into evidence. I held the record open until June 16, 2023, to afford Applicant an opportunity to submit additional evidence. Applicant through counsel timely submitted AE G through S, which were received into evidence. On June 5, 2023, DOHA received the hearing transcript (Tr.).

Findings of Fact

Background Information

Applicant is a 34-year-old electronics technician employed by a defense contractor since November 2022. (Tr. 15-17; GE 1) He seeks a Secret security clearance, which is a requirement for his continued employment. (Tr. 17-18, 56)

Applicant received his high school diploma in May 2007. (Tr. 19) He is attending college in pursuit of a Bachelor of Science degree in computer intellectual engineering and estimates that he has earned between 90 to 100 college credit hours. He anticipates graduating in December 2023. (Tr. 19-20) Applicant enlisted in the U.S. Navy in May 2010 and was discharged with a general discharge under honorable conditions as an Operations Specialist Second Class (OS2) (pay grade E-5) in January 2021. The highest rank he held was OS1 (pay grade E-6), discussed *infra*. While on active duty, he went on three deployments, one of which was in a hostile fire zone. (Tr. 20-22) Applicant is receiving a Veterans Affairs 90% disability rating. (Tr. 83)

Applicant married in January 2017. His wife is an active duty Retail Services Specialist First Class (pay grade E-6). Applicant and his wife have two minor children. (Tr. 22-26)

Sexual Behavior/Criminal Conduct

SOR ¶ 1.a alleged that Applicant was discharged from the U.S. Navy due to allegations of sexual assault by three women that occurred in or about 2018. He stated in his SOR Answer, "I deny the allegations that led to my discharge from the United States Navy. Supporting documents enclosed."

The fact that Applicant was discharged from the Navy is not in dispute. His Certificate of Release of Discharge from Active Duty (DD Form-214) indicates that he was discharged from the Navy as an OS2 in January 2021 with a general discharge under honorable conditions for reason of misconduct – serious offense. (GE 2) The events that led up to Applicant's discharge are discussed in further detail, *infra*.

SOR ¶ 2 alleged that Applicant was awarded non-judicial punishment (NJP) in about February 2020, under Article 15 of the Uniform Code of Military Justice (UCMJ) for violating Article 92, failure to obey a lawful order; Article 107, false official statements; Article 128, assault consummated by a battery; and Article 134, indecent

conduct. He received a reduction in grade to E-5. He stated in his SOR Answer, "I deny the allegations that led to my discharge from the United States Navy. Supporting documents enclosed."

In April 2019, three female sailors (FS1, FS2, and FS3) accused Applicant of unwanted touching. FS1 filed the first complaint; FS2 filed the second complaint; and FS3 filed the third complaint. At the time these complaints were made Applicant and all three of the female sailors were attached to the same Navy ship. FS1 obtained a military protection order (MPO) against Applicant in April 2019, and FS2 obtained an MPO against Applicant a few days later. FS1 accused Applicant of watching her in the female berthing area taking a shower in March 2019. FS1 reported this incident a week after it allegedly took place. All three female sailors accused Applicant of unwanted sexual touching such as groping their buttocks from June 2018 to March 2019 and reported the violations in April 2019. (Tr. 32-33, 57-72, 84; GE 2)

In May 2019, Naval Criminal Investigation Service (NCIS) interviewed Applicant, and he voluntarily provided his cell phone to be examined. During this interview, he was informed of the allegations against him and who made the allegations. After reporting these incidents, FS1 and FS2 were transferred from the ship, but FS3 chose to remain on the ship with Applicant. (Tr. 33-34; GE 2)

In December 2019, the ship's legal officer notified Applicant he was being awarded NJP, Article 15, UCMJ. The legal officer informed Applicant that the ship's immediate superior in the chain of command's opined there was not enough evidence to warrant a court-martial and recommended that the matter be dealt with at the command level, i.e. NJP. (Tr. 35; GE 2)

Applicant was charged with the following offenses under the UCMJ: (1) Article 92, failure to obey a lawful order; (2) Article 107, false official statement; (3) Article 128, assault consummated by a battery; and (4) Article 134, indecent conduct. (GE 2; SOR Answer; Tr. 73-76) Applicant explained that he was charged with Article 107 because his statement did not align with the accusations made against him. Applicant stated, "That was the false official statement, the club thing, like I said that I didn't go and they (three female sailors) said that I did." (GE 2; SOR Answer; Tr. 73-75) As a member attached to or embarked on a vessel, Applicant could not refuse NJP and demand a trial by court-martial, which would have afforded him greater rights to include, but not limited to representation by counsel. (10 U.S.C. § 815, Article 15) FS3 recanted her complaint prior to Applicant's Article 15 hearing. (GE 2)

On Wednesday, January 8, 2020, two days before Applicant's scheduled NJP on Friday, January 10, 2020, Applicant received notification from the Defense Travel Service (DTS), that he was booked on a flight Friday afternoon from his present location, which was a substantial distance to his ship's homeport location, to the homeport location. On January 10, 2020, the NJP took place on board his ship with his Commanding Officer (CO) presiding. (GE 2; SOR Answer) Applicant "pled not guilty to everything except the videos that were AirDropped accidentally in 2018." (Tr. 36, 76-78)

The AirDropped videos refer to a group of approximately 20 movies a shipmate transferred to Applicant in a group transfer in early 2018. Included in that group transfer was, “as the phone backs out, the last second you can see the silhouette of a guy’s genitalia.” A female sailor who observed the transfer of videos asked Applicant to forward the movies to her, which he did stating, “I was like, Sure. Select all the movies, push send – well, the box with the arrow. Another AirDrop popped up and I clicked it, not thinking nothing of it.” The female sailor later filed a complaint with her chain of command about receiving the video with the male genitalia image and the incident was resolved informally at the command level. The incident resurfaced a year and a half later at Applicant’s January 2020 NJP and was included as one of the charges against him. (Tr. 37-40, 71-72)

Applicant described his NJP hearing. He stated his CO did not ask him any questions nor did he look at him. His chain of command and various command personnel were present. None of the complaining witnesses were present. Applicant explained how the AirDrop was accidental. He was unable to call witnesses in support of his case because they were no longer on the ship or because of short notice were unable to provide supporting statements. His CO found him guilty of all charges and specifications and awarded him: (1) to be reduced from pay grade E-6 to E-5; (2) to forfeit one-half month’s pay per month for two months (suspended for 45 days); (3) to be restricted for 45 days (suspended for 45 days); and (4) to perform 45 days extra duty (suspended for 45 days). (SOR Answer; Tr. 78)

Applicant, who had a very successful Navy career up until that point and was in contention for Sailor of the Year, found the experience very demoralizing. (SOR Answer; Tr. 26-30, 41-42) After NJP, Applicant was told to immediately pack his bags and was placed on a flight to the shore command where his ship was homeported for administrative board separation processing. (Tr. 42, 78-79)

[Note – MILPERSMAN 1910-233 prescribes when mandatory separation processing is required: “a. Sexual Misconduct – Lewd and lascivious acts, rape, sexual assault, stalking, forcible sodomy, child sexual abuse, possession or distribution of child pornography, incestuous relationships, or any sexual misconduct that could be charged as a violation of or an attempt to violate reference (a) articles 120, 120a, 120b, or 120c [of the UCMJ]; or equivalent criminal statute as a result of either misconduct due to commission of a serious offense or civilian conviction....”]

However, mandatory processing does not equate to mandatory separation. An appropriate determination is made on each case based on its own merits.

On February 6, 2020, Applicant appealed his NJP to the officer exercising general court-martial jurisdiction (OEGCMJ). In his appeal, Applicant provided alibis with corroborating evidence that contradicted the statements of the complaining witnesses. Also included in Applicant’s appeal is a statement from a female sailor from his ship who was familiar with the complaining parties. She stated that FS1 and FS2 had to “change their stories so it would make sense” after Applicant produced credible

alibis contradicting as to when the incidents in question took place. She added that “[FS1] and [FS2] wanted to get off of the ship, by any means also. Whether it was to get pregnant, accuse someone of something or to get “hurt”.” See NJP appeal. (SOR Answer; GE 2; Tr. 42-44)

The shore command where Applicant’s ship was homeported convened an administrative board in April 2020. In contrast to his NJP, Applicant was afforded greater due process rights to include having appointed counsel to represent him and the right to call witnesses. Applicant was informed that his NJP appeal was denied by the OEGCMJ, “probably 15 minutes before the board (convened) that the Admiral said that the CO was in the best position to make that decision, so she (the Admiral) denied it (NJP appeal).” (Tr. 44-46, 79)

Due to Covid-related restrictions, in person board witnesses were not allowed and witness testimony was to be provided by telephone. Applicant stated, “I was actually notified like two minutes before we walked in that [FS3] recanted her statement. She wouldn’t be calling in. [FS2] wrote a letter. She’s not going to be calling in. Applicant stated that he did not see the contents of the letter. And [FS1] would be calling in.” He further stated during her testimony, FS1 denied that she said Applicant “came into the shower,” which is contrary to her statement to NCIS. (Tr. 46-48, 59-63, 68-69, 71, 80)

Using a preponderance of evidence standard, the following summarizes the findings and recommendation of the three-member board:

[Note: MILPERSMAN 1910-514 describes what is binding on administrative boards: “1. Policy a. When processing includes (1) any court-martial conviction; (2) a civilian conviction, or finding tantamount to a finding of guilty by a civil court system; or (3) an approved diagnosis of a medical officer; the board may not render its own findings because these matters have already been judicially/medically determined to have occurred. b. Unless there are additional reasons for separation, the board will proceed directly to the separation/retention recommendation phase of the hearing. c. The only exception is civil conviction from a foreign nation, which is not binding on administrative boards.” A prior NJP is not listed as binding on administrative boards.

Board findings - (1) UCMJ, Article 92, 1: comments of a sexual nature creating hostile work environment: **3-0 supports allegation**; (2) UCMJ, Article 92, Specification 2: sexual harassment, physical touching: **3-0 does not support allegation**; (3) UCMJ, Article 92, Specification 3: sexual harassment, sending lewd photo: **3-0 supports allegation**; (4) UCMJ, Article 92, Specification 4: sexual harassment, physical touching: **3-0 does not support allegation**; (5) UCMJ, Article 92, Specification 5: sexual harassment, physical touching: **3-0 does not support allegation**; (6) UCMJ, Article 128, Specification 1: sexual assault, physical touching: **3-0 does not support allegation**; (7) UCMJ, Article 128, Specification 2: sexual assault, physical touching: **3-0 does not support allegation**; (8) UCMJ Article 128, Specification 3: sexual assault,

physical touching: 3-0 does not support allegation; and (9) UCMJ, Article 134, Specification 1: indecent conduct, watching SVM undress: **3-0 does not support allegation.** The Article 107 NJP charges were not considered at Applicant's administration board. (Tr. 84) The board noted in their findings that the specific evidence they considered were: (1) NJP admission of guilt; (2) NCIS interviews; and (3) text messages. (SOR Answer)

Board Recommendation (Separation or retention):

By a vote of 2-1, the board recommended that Applicant be retained. In their comments, the board noted that the substantiated allegations referred to the female sailor's complaint regarding Applicant's inadvertently sending a lewd photo a year and one half before complaints were filed by FS1, FS2, and FS3. The lewd comment referred to a comment Applicant made to a male sailor well before the complaint filed by the three female complainants. (SOR Answer; Tr. 48-50)

Prior to this incident, Applicant had never been accused of sexual harassment, sexual assault, or been the subject of an Equal Employment Opportunity investigation. Before the NJP in question, he had never been to NJP. (Tr. 71-72, 80-81)

Applicant was quite relieved and felt vindicated by the board results. Post-board, he performed duties as directed at the shore command pending final review of the board results by the Bureau of Naval Personal (BUPERS). (Tr. 50-51) On December 22, 2020, Applicant was notified by his chain of command that he would be discharged in January 2021, discussed *supra*. Post-Navy, Applicant had to adjust to civilian life and considered his options to include attending school and finding a new career, being mindful of his obligation to his wife and two minor children. (Tr. 51-56, 81-82)

Character Evidence

Applicant submitted six character letters, all from women: (1) an active duty Navy lieutenant and former first class petty officer and supervisor; (2) a Government contractor, former first class petty officer and Navy veteran, and friend of Applicant and his wife; (3) an active duty Navy ensign who was the ship's administration leading petty officer; (4) a retired senior chief petty officer and former supervisor/mentor; (5) an active duty Navy lieutenant (junior grade) and Applicant's division officer and who was present at his NJP; and (6) an active duty first class petty officer, who a member of the ship's administrative division and was present at his NJP. The majority of these character references have first-hand knowledge of the charges against Applicant. All of the references lauded Applicant's professionalism, character, and integrity. They all support him being granted a clearance. (Tr. 84-87; AE A - F)

Applicant submitted his Evaluation Report(s) & Counseling Record(s) spanning his Navy career. His evaluations document sustained above average performance and are indicative of a sailor on an upward trajectory. (AE G – S) His personal awards include three Navy and Marine Corps Achievements Medals as well as numerous decorations and campaign ribbons. He qualified as an Enlisted Surface Warfare

Specialist. (GE 2) He also submitted a personal statement with his SOR Answer describing the impact this situation has had on him and his family. (SOR Answer)

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 AG ¶ 2 describing 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."

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 clearance 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

Sexual Behavior

AG ¶ 12 describes the security concern about sexual behavior:

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 provides the following conditions could raise a security concern and may be disqualifying in this case:

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

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

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

The record evidence establishes AG ¶¶ 13(a), 13(c), and 13(d). Further review is required.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant’s responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Department of the Navy v. Egan*, 484 U.S. 518 (1988). “Any doubt

concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2, [App. A] ¶ 2(b).

This case essentially poses a question as to which outcome one accepts between two separate administrative proceedings involving essentially the same set of facts, but with different results. The specific charges, specifications, and findings of the NJP and administrative board are discussed, *supra*. The Article 107 NJP charges were not considered at Applicant’s administration board. The board did not find that Applicant committed any of the charges and specifications that arose from April 2019 complaints filed by FS1, FS2, and FS3. They did, however, find that Applicant committed two of the Article 92 offenses that occurred approximately one and a half years before the April 2019 complaints, which he admitted and were handled at the command level. The board found that (1) he made comments of a sexual nature creating hostile work environment: 3-0 supports allegation; and (2) sexual harassment, sending lewd photo: 3-0 supports allegation.

Applicant was not afforded the same level of due process at his NJP as he was at his administrative board. At his board, he had counsel and had the opportunity to submit evidence in a setting in which the evidence was reviewed by three independent board members. The record does not contain any of the NJP proceedings but does include relevant administrative board proceedings. The Article 92 charges which the board found were substantiated are of limited security significance given they occurred well before the more serious April 2019 complaints.

As noted, *supra*, the administrative separation board did not find by a preponderance of the evidence that Applicant committed any of the offenses generated by the three complainants in April 2019. Stated differently, the board found that Applicant refuted the evidence of the of the three complainants that he engaged in any of the disreputable conduct of which he was accused. The basis for the administrative separation board’s conclusion was: (1) NJP admission of guilt (of the offenses that occurred before the April 2019 complaints; (2) NCIS interviews; and (3) text messages. The record does not contain any evidence of the deliberative process that BUPERS considered in not accepting the administrative board’s findings and recommendation.

The new evidence I received at Applicant’s hearing were six character letters submitted by female Navy personnel familiar with him in a supervisory capacity and several were familiar with the offenses and complainants. I also received his performance evaluations and heard his testimony, which I considered to be credible. Any new evidence received after the administrative board separation hearing supported the finding that he did not commit the offenses for which he was found guilty of at NJP. I did not have access to any of Applicant’s records pertaining to his NJP proceedings, his NJP appeal, his command’s forwarding endorsement of his administrative discharge proceedings, or of any BUPERS correspondence pertaining to their decision to disregard the findings and recommendation of the administration board.

In evaluating and contrasting the Applicant's NJP versus his administrative board proceedings, a number of concerns came to light during his hearing: (1) Applicant's command arranged for an airline ticket two days before his NJP was adjudicated transferring him off the ship; (2) FS1, FS2, and FS3 did not report the alleged unwanted sexual touching they claim occurred between June 2018 to March 2019 until April 2020; (3) none of the complaining witness appeared at Applicant's NJP; (4) given the short notice Applicant was given for his NJP, he was unable to call any witnesses or obtain witness statements; (5) Applicant testified that FS3 recanted her complaint; (6) Applicant produced credible alibis that rebutted the times and dates when the alleged assaults and shower viewing occurred; (7) a female witness familiar with the complainants came forward stating that FS1 and FS2 had to "change their stories so it would make sense" after Applicant produced his alibis. She added that FS1 and FS2 fabricated their stories to get off the ship, and succeeded in doing so; (8) Applicant and his counsel were not notified that his NJP appeal was denied until shortly before his administrative board convened; (9) During Applicant's administrative board, FS1 denied that Applicant came into the female shower, which is contrary to her previous statement; and (10) BUPERS chose to discharge Applicant despite the administrative board's findings and recommendation that he be retained.

AG ¶ 14 lists the following conditions that could mitigate security concerns:

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;
- (b) the behavior happened so long ago, so infrequently, or under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or 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; and
- (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.

I independently find that Appellant credibly denied the allegations of sexual misconduct which were not substantiated at his separation board. The Article 92 allegations that Applicant admitted to, and the board found against him occurred separate and apart from the more serious April 2019 allegations. AG ¶¶ 14(b) and 14(c) fully apply to his comments of a sexual nature creating hostile work environment and sexual harassment by sending a lewd photo.

Criminal Conduct

AG ¶ 30 describes the security concern about criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying in this case:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

(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.

The record evidence establishes AG ¶¶ 31(a) and 31(b). Further review is required.

AG ¶ 32 lists conditions that could mitigate security concerns:

(a) so much time has elapsed 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;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

For reasons discussed *supra*, AG ¶¶ 31(a), 32(c), and 32(d) 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 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), "[t]he ultimate determination" of whether to grant or continue national security eligibility "must be an overall common sense judgment based upon careful consideration" of the guidelines and the whole-person concept. My comments under Guidelines D and J are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 34-year-old electronics technician seeking a Secret security clearance. He successfully held a clearance during his ten years plus in the Navy. Until his NJP and administrative board, his Navy career was on an upward trajectory. This is amply documented by his performance evaluations and character letters. His former supervisors and shipmates emphasized his attributes of patriotism, morality, and judgment especially with regard to safeguarding classified and sensitive information. Applicant has continued his post-Navy career in support of the national defense. He is married to a Navy petty officer and has two minor children.

Applicant's command had no choice but to investigate and pursue diligently the reported allegations of sexual misconduct by three complainants. His command ultimately awarded him NJP based on the information they had and the guidance they received. As noted, refusing NJP and demanding a court-martial is not an option available to servicemembers attached to or embarked on a vessel. The NJP did not go well for Applicant, and he was found guilty of all charges and specifications. Flight arrangements had been made two days before his NJP to transfer him off his ship immediately following NJP. After arriving at the shore command where his ship was homeported, the shore command convened an administrative separation board to process him for separation. Being represented by counsel and having greater due process, Applicant fared substantially better at his board.

For reasons unknown, BUPERS overruled the board's findings and recommendation and discharged Applicant with a general discharge under honorable conditions. Various facts evolved throughout the proceedings to include a witness familiar with the three complainants coming forward and discrediting their motives and statement, one of the complaining witnesses recanted her statement, and another of the complaining witnesses altered her testimony before the board denying her statement that he came into the female shower area. In short, as the underlying facts of this rather

complex case evolved, Applicant refuted most of the allegations and successfully mitigated the two allegations that were substantiated.

I independently conclude and concur with the administration board's findings. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture. In doing so, I had the benefit of reviewing evidence that was not available at Applicant's NJP hearing but was available at his administration board except as noted, *supra*.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant mitigated sexual behavior and criminal conduct security concerns.

Formal Findings

The formal findings on the allegations set forth in the SOR are as follows:

Paragraph 1, Guideline D:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances in this case, it is clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Robert Tuidier
Administrative Judge