



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



In the matter of:)	
)	
)	ISCR Case No. 21-01371
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: Wojciech Z. Kornacki, Esq.

09/27/2023

Decision

PRICE, Eric C., Administrative Judge:

Guideline D (sexual behavior), Guideline J (criminal conduct), and Guideline E (personal conduct) security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) in November 2020. On September 8, 2021, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines D, J, and E. The action was taken under Executive Order (Exec. Or.) 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 within the DOD on June 8, 2017.

Applicant responded to the SOR on February 24, 2022, and requested a hearing before an administrative judge. (Answer). The case was assigned to me on August 17,

2022. On February 13, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice scheduling the hearing for March 16, 2023. Applicant's hearing was held as scheduled using the DOD Microsoft Teams video teleconference system.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through 3. Applicant testified and offered Applicant Exhibits (AE) A through G. AE G is identical in all respects to Applicant's Answer, except it also includes page numbers. My case management order, the Government's pre-hearing disclosure letter and exhibit list, and Applicant's counsel's notice of appearance, Roommate list and exhibit list were marked as hearing exhibits (HE) I through VI. The record was held open until March 24, 2023, to permit Applicant the opportunity to submit additional documentation, which he did. That document is marked as AE H. There were no objections, and all proffered exhibits were admitted in evidence. DOHA received the hearing transcript (Tr.) on March 27, 2023.

Some details have been excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

Applicant is a 32-year-old engineering technician employed by a DOD contractor since January 2021. He earned an associate degree in January 2019. He has not been married and has no children. (GE 1; AE A, G at 60; Tr. 29-30, 41, 59-62, 106, 110)

Applicant served in the United States Air Force from March 2010 to November 2020 and was discharged under other than honorable conditions. He was a highly qualified airman and attained the rank of staff sergeant (E-5). He deployed many times and had extensive combat experience. He was awarded numerous medals, awards and decorations including the Distinguished Flying Cross and multiple Air Medals. He received favorable performance evaluations, and successfully completed extensive military training and education. He served honorably during his initial term of service from March 2010 to July 2017. He has held a security clearance since 2010. (Answer; AE A, G at 35-38, 63-80; Tr. 29-34, 40)

In October 2019, Applicant was charged with one sexual act and one attempted sexual act upon a female airman, unlawful entry, and indecent exposure in violation of Articles 80, 120, 120c, and 129 of the Uniform Code of Military Justice (UCMJ). Those charges were referred for trial by General Court-Martial in November 2019. On May 6, 2020, he entered pleas of not guilty to all charges. In October 2020, he requested a "Discharge in Lieu of Trial by Court-Martial" pursuant to Air Force regulations. His request was approved in November 2020, and he was discharged under other than honorable conditions. (Answer; AE G at 3-7, 10-17, 32-112; GE 1-3)

Sexual Behavior, Criminal Conduct, and Personal Conduct

The SOR alleges and cross-alleges sexual misconduct by Applicant (SOR ¶¶ 1.a, 1.b, 2.a, and 3.a) and that he was discharged from the Air Force under other than honorable conditions in lieu of trial by court-martial (SOR ¶¶ 2.b and 3.a). In his answer to the SOR, Applicant admitted the allegation in SOR ¶ 2.b and denied all other allegations with explanation. His admission is incorporated herein as a finding of fact.

In April 2019, a complaining witness (CW1) told investigators that Applicant had grabbed her waist and attempted to kiss her without her consent in about June 2018. (SOR ¶¶ 1.a, 2.a, 3.a) She stated the following. While socializing at a bar with members of her new unit she met Applicant. When she went outside to smoke, Applicant followed her. He asked to kiss her, and she replied, “no, we work together” and “no.” He then “grabbed [her] around her waist and attempted to kiss her.” (AE H; GE 2 at 2) She put her hands on his chest, pushed him away and he went back into the bar. She saw Applicant around the squadron afterward but “[he] avoided her at all costs.” (AE H) She disclosed this incident and incidents with two other males in her unit to her supervisor while discussing reasons she wanted a transfer. (GE 2 at 2; AE H) After the hearing, Applicant submitted a more detailed summary of CW1’s statement to investigators reflecting that she had not intended to report the incidents with Applicant and the two other male squadron members, and only wanted to better inform her supervisor why she thought changing platforms was the right decision for her. (AE H)

Applicant denied that he groped CW1, grabbed her around the waist, asked or attempted to kiss her, and did not recall any inappropriate physical contact or that CW1 pushed him. (Answer: AE G at 10-12; Tr. 35, 55-56) He said it was “possible” that they hugged at the end of the evening in a show of friendship but did not specifically recall doing so. (Tr. 56) He confirmed that he first met CW1 on the evening in question. (Tr. 35, 48-49, 51, 111) He said that they were out with a group of friends but were “pretty much just conversing amongst ourselves, talking, chatting, as well as like, the group was with us but we were more chatting amongst ourselves.” (Tr. 35, 53) He did not recall how many drinks he consumed that evening but said he had been socially drinking over a period of several hours and probably drank several beers, and one or two cocktails. (Tr. 51-53) He testified that when CW1 went outside to smoke he followed her because “[he] figured we’d continue our conversation and also so she wouldn’t have to be standing out there by herself.” (Tr. 54) He testified that they went back inside the bar together, rejoined their colleagues, and went their separate ways at the end of the evening. (Tr. 35, 56-57) He said that he and CW2 were in the same squadron for 10 months after the alleged incident without tension between them, and that they “had different duties in the plane, but I’m sure we flew together, deployed together and so on.” (Tr. 57) He did not recall any social interaction with her after the June 2018 evening in the bar. (Tr. 62-63)

Applicant challenged the veracity of CW1’s allegations, noting that she waited more than nine months to report the alleged incident and did so in support of her request to be reassigned. (AE G at 10-12; Tr. 34-35, 55-56) He said that she also made uncorroborated allegations that an airman texted her an unsolicited picture of his genitalia

and that another airman inappropriately touched her buttocks. (AE G at 11, 101-103; Tr. 128-129) He submitted a November 2021 letter from Technical Sergeant (TSgt) H, who had served with Applicant from 2015 to 2020 and had been his roommate from late 2016 to early 2020. TSgt H wrote that "I am aware of the allegations made against [Applicant] and I believe them to be false in nature. I believe [Applicant] fell victim to someone who accused multiple other people of similar allegations and that [Applicant] told the whole truth during his testimonies." (Answer at Ex. 9; AE G at 91-92; Tr. 35) Applicant said that he was not questioned by investigators about CW1's allegations against him. (Tr. 58-63) CW1's allegations were investigated but were not included in the charges preferred against Applicant in October 2019 and later referred to general court-martial. (AE G at 101-103; GE 2 at 1; Tr. 128-129)

In May 2019, investigators interviewed CW2, and she said that Applicant groped and sexually assaulted her on March 1, 2019. (SOR ¶¶ 1.b, 2.a, 3.a) She provided the following account to investigators. Applicant asked if he could stay at her residence after a night out and she agreed. While in a taxi enroute to her residence she vomited. She fell while exiting the vehicle at her residence, scraped her arm and dirtied her clothes. She went to take a shower, and while removing her clothes, Applicant entered the bathroom naked, grabbed her, and tried to pull her close. CW2 told him to stop, he then grabbed her buttocks, pushed her close to a counter and tried to kiss her, while fondling and kissing her breasts. She repeatedly told him to "stop" and "no" to which he replied, "[y]ou know you want [to engage in sexual activity with me]." CW2's roommate [Roommate] came out of her room, encountered CW2 and Applicant, told him to leave and then escorted him out of the residence. Applicant then repeatedly knocked on the door, rang the doorbell and asked to come in to apologize. (GE 2 at 2)

Roommate's statement to investigators is summarized as follows. In about March 2019 she saw an intoxicated CW2 leaning on a male later identified as Applicant at the residence she shared with CW2. She then helped CW2 to the shower. CW2 told her that "I don't want [Applicant] here, we need to make him leave." Roommate thanked Applicant and asked him to leave, but he swiftly walked into the bathroom occupied by CW2 and locked the door. Roommate heard CW2 say, "Hey I'm naked, you need to get out." Seconds later the bathroom door opened, and Roommate saw CW2 attempting to cover her naked body with a towel. Applicant ran out of the bathroom nude, covering his penis with his hands, and then hid behind a Christmas tree. CW2 appeared sick and ran into the bathroom to vomit. Applicant swiftly followed her and locked the door. Roommate heard CW2 say, "I'm throwing up, don't touch me. Go home." Roommate then escorted Applicant from the bathroom and outside the residence. CW2 later told Roommate that "she never felt so close [to] being raped," and that Applicant had picked her up, placed her on the counter, and attempted to perform oral sex on her. (GE 2 at 2)

Applicant denied any nonconsensual sexual behavior with CW2. He specifically denied groping CW2, grabbing her buttocks, fondling or kissing her breasts, attempting to perform oral sex on her, telling her that "[y]ou know you want [to engage in sexual activity with me]". He also testified that CW2's statement to investigators was untruthful. (Answer; Tr. 76-78, 83-84)

Applicant recounted the evening as follows. He and CW2 attended a colleague's promotion party and after several hours of drinking she asked him to stay the night at her residence. (Answer; AE G at 105; Tr. 36, 66-68) He explained that he and CW2 had been close friends since their deployment, that their relationship had been platonic prior to that evening, and that he sometimes slept on her couch. (Tr. 36, 68-69) While in a taxi on the way to CW2's residence, the driver was concerned that CW2 might vomit, so the driver stopped the vehicle and CW2 got out to vomit. Applicant did not recall seeing CW2 vomit but because of concern for her safety, he exited the vehicle, helped her move away from traffic, and watched for approaching vehicles. (Tr. 70-72, 117)

Applicant said that "[CW2] kind of stumbled [while exiting the taxi at her residence] and I caught her . . . to prevent her from hitting her head or whatever . . . I believe she hit her knee or elbow or something like that, but nothing too severe." (Tr. 72) He recounted events at CW2's residence as follows. She went to the bathroom alone after they entered her residence. (Answer; AE G at 106; Tr. 73, 80) He met and spoke with Roommate for several minutes and decided to go home. (Tr. 78-80, 117) When he went to say goodbye to CW2, she opened the door naked and "invited [him] inside the bathroom [and] to join her in a shower". (Answer; AE G at 106; Tr. 37, 78-81, 83) They then mutually kissed, and she helped him undress. (Answer; AE G at 106; Tr. 75-77, 80-81, 83) CW2 suggested that they go to her bedroom because she did not want Roommate to hear them or to judge her for engaging in sexual activity after her recent breakup. (Answer; AE G at 106; Tr. 78-79) While naked and on their way to CW2's bedroom they encountered Roommate, who scolded them both about their behavior, so he and CW2 returned to the bathroom to get their clothes. (Answer; AE G at 106; Tr. 36-40, 82-83) Roommate told him it was a good idea to leave, and he agreed because CW2 "was sick and obviously drunk". (Tr. 81-82, 85, 120-121) He denied that Roommate told him to leave or forced him to leave. (Tr. 81-82)

After Applicant left CW2's residence, he and CW2 exchanged the following text messages.

Applicant: Hey, your roommate said you wanted me out. I just wanted to speak to you before tomorrow – I get that we were drunk and [stuff] but hope you [contact me] tomorrow.

CW2: I was in the shower! Did you [taxi] home ok?

Applicant: Yea – Sorry for being so forward – I was in the wrong and should of recognized it – Hope if there's any hard feelings we can chat tomorrow or just brush it off as a drunk night

CW2: Dude we were both ducked (sic). Up lol. Make it home ok?

(AE G at 111)

Applicant explained that he sent the apologetic text because he didn't want their kissing and disrobing to negatively affect their friendship or relationship at work. "And I apologized in regards to kissing her as we were both colleagues and friends and I didn't want her to ruin things and be enemies. And since of her being a colleague I didn't want her to feel awkward in the future at work." (Tr. 38) He also said that "[w]e were both drunk and both decided to make a bad choice or maybe a choice that we might have regretted as in affecting our friendship and such." (Tr. 123) He thought that she had accepted his explanation based upon her communications that night and later that weekend, and subsequent social interaction. (Tr. 38-39, 86-87, 122) Evidence of their social interaction after the alleged misconduct included a photograph from about April 2019 that showed 19 people standing together in a social setting, eight of whom were positioned between Applicant and CW2. (Answer; AE G at 113; Tr. 90-91, 114-116)

Applicant said that he did not know why CW2 or Roommate would lie about what happened that night. (Tr. 77, 104) He claimed that CW2 and her boyfriend had broken up less than a week earlier and believed they got back together after she made the allegations against him. (Answer; AE G at 105; Tr. 91, 123-125) He said that there were inconsistencies between CW2's and Roommate's statements reflected in other documents associated with the court-martial charges but did not specify what the discrepancies were or submit corroborating documentary evidence. (Tr. 83-84) Applicant did not provide a statement to investigators or any testimony regarding CW2 or her allegations during the court-martial proceedings. (Tr. 84-85, 92-93)

Applicant estimated that he drank four to eight beers that evening. (Tr. 118-119) He said that he felt the effects of the alcohol but "had full memory of the night [and] felt in control of his faculties". (Tr. 119-120) He saw CW2 drinking beer and shots but said she "seemed coherent enough", "was able to talk socially and interact", "order [a taxi] on her phone without any issues", "was slightly drunk [but he] didn't see anything abnormal or different about it," and that she was more drunk than him. (Tr. 69, 121)

Applicant admitted that he was discharged from the Air Force under Other Than Honorable Conditions in November 2020, in lieu of trial by court-martial for charges preferred as a result of misconduct alleged in SOR ¶ 1. (SOR ¶ 2.b, cross-alleged under SOR ¶ 3.a) In October 2019, he was charged with one sexual act and one attempted sexual act upon CW2, unlawful entry into CW2's bathroom, and indecently exposing himself to CW2 and her Roommate in violation of Articles 80, 120, 120c, and 129, UCMJ. Those charges were referred for trial by General Court-Martial in November 2019. On October 1, 2020, Applicant requested a Discharge in Lieu of Trial by Court-Martial pursuant to Air Force Instruction 36-3208, Chapter 4. (AE G at 112) His request was submitted after consultation with his military and civilian attorneys and included acknowledgments that he: (1) understood the elements of the offenses with which he was charged; (2) had received a copy of the investigation; (3) was aware that his voluntary request could result in an "other than honorable discharge," and (4) that he was advised of the "possible effects of discharge under these circumstances." (Answer at Exhibit 29; AE G at 112; Tr. 94-95, 125-127) His request did not include an admission of guilt or statements of fact regarding the allegations or statements of CW2, Roommate or CW1.

(Answer at Exhibit 29; AE G at 112; Tr. 94-95) His request was approved by an Air Force lieutenant general in November 2020 after consideration of supporting documents, and the recommendations of a staff judge advocate and subordinate commanders. He directed Applicant's discharge be "Under Other than Honorable Conditions." (Answer at 13-14; AE G at 37, 112; GE 3; Tr. 32)

Applicant acknowledged that a court-martial conviction could have resulted in imprisonment and a punitive discharge, and a requirement that he register as a sex offender. He testified that an administrative discharge enabled him to maintain some veteran's benefits based upon his previous period of honorable service. He said that he felt confident that he would have been acquitted had the case proceeded to trial, but decided "the risk was not worth the reward[.]" (Answer; AE G at 36-37, 101-104, 112; Tr. 32, 39-40, 93-94, 101-103)

Alcohol Use

Applicant acknowledged that "[b]oth incidents of alleged misconduct revolved around alcohol," and said that he has made a point to separate himself from similar situations and has surrounded himself with people that have his best interests in mind to avoid future issues. (Tr. 129-131, 142-144) He said that prior to the allegations he would drink about 10 beers, once or twice a week in part because of a culture of "socialization through intoxication" viewed as critical to bonding with others in his unit, particularly those with shared combat experience. (Tr. 43, 129-133) He has significantly modified his behavior since the allegations were made. He abstained from drinking alcoholic beverages for approximately six months and has more recently consumed alcohol about twice a month – usually five to six beers over a period of several hours. (Tr. 134-136) He has not been referred for and has not sought or received counseling or treatment for his alcohol use. (Tr. 129-131)

Character Evidence and Credibility

Applicant submitted numerous letters of recommendation and character references from commissioned officers, non-commissioned officers and others including his current supervisor, colleagues, friends, and neighbors that favorably commented on his honesty, integrity, trustworthiness, judgment, patriotism, dependability, work ethic, professionalism, leadership, handling of classified information, adherence to rules and regulations, commitment to U.S. national security and his mission, and superior performance in combat that saved lives of friendly forces. Many of the letters directly recommend or support approval of his continued access to classified information. (Answer; AE B-F, G at 87-100)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an

individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994); see also ISCR Case No. 18-00496 at 3 (App. Bd. Nov. 8, 2019) (citations omitted). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-

20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see also AG ¶ 2(b).

Analysis

Guideline J, Criminal Conduct`

SOR ¶ 2.a cross-alleges the sexual behavior alleged in SOR ¶¶ 1.a-1.b, that Applicant groped CW1 in June 2018, and groped and sexually assaulted CW2 in March 2019. SOR ¶ 2.b alleges that he was discharged from the U.S. Air Force under Other Than Honorable Conditions in lieu of trial by court-martial for charges preferred because of that misconduct.

AG ¶ 30 expresses the security concern pertaining to 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.

The record evidence including statements from CW1, CW2 and Roommate provide substantial evidence that Applicant sexually assaulted and groped CW2, and that he grabbed CW1 around the waist and attempted to kiss her without her consent. Applicant's admission and other record evidence establish that he was discharged from the Air Force under other than honorable conditions in lieu of trial by court-martial. The record evidence establishes the following disqualifying conditions under AG ¶ 31:

(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."

Three mitigating conditions under AG ¶ 32 are potentially applicable in this case:

(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;

(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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board 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.

Applicant presented no testimony or evidence that corroborated his denials of nonconsensual physical contact with CW1 and nonconsensual sexual contact with CW2. And he presented no evidence that rebutted or disputed the inculpatory assertions in statements made by CW1, CW2, and Roommate. The evidence in support of his denials of any criminal conduct was limited to his testimony, support from his favorable character evidence, his military service, and TSgt H's opinion that the allegations were false.

It is undisputed that: (1) Applicant, CW1 and CW2 consumed a quantity of alcohol over a period of hours before the misconduct alleged in the SOR; (2) CW2 was visibly intoxicated, fell upon exiting a taxi at her residence and immediately went to her bathroom alone; (3) before Applicant entered CW2's bathroom he met and spoke with Roommate and decided to go home; (4) after he entered CW2's bathroom he kissed her and they were both nude; (5) he then encountered Roommate again and she encouraged him to leave CW2's residence, which he did, and (6) that after he left CW2's residence he apologized for his conduct.

I do not find Applicant's claims that CW2 opened her bathroom door, invited him to join her in the shower, and then consensually engaged in sexual activity with him credible. His claims are unsupported by other evidence and directly contradicted by CW2's and Roommate's statements. CW2, Applicant's close friend and colleague, detailed his nonconsensual sexual misconduct. CW2's statement was corroborated, in large part, by Roommate, who also provided her own account of Applicant's and CW2's words and actions. After Applicant entered CW2's bathroom, Roommate heard CW2 say "[h]ey I'm naked, you need to get out" and "I'm throwing up, don't touch me. Go home." (GE 2 at 2) When the bathroom door opened, Roommate saw CW2 attempting to cover her naked body with a towel, saw Applicant, then nude, run out of the bathroom and attempt to hide, and subsequently escorted him from the residence. His assertions that CW2 may have falsely accused him of sexual misconduct because of her break-up and subsequent reconciliation with a boyfriend, and concerns that her roommate would negatively judge her for engaging in sexual activity with Applicant were neither corroborated nor credible. Additionally, it is noteworthy that Applicant requested a discharge in lieu of trial by court-martial on charges related to misconduct alleged by CW2

and Roommate, because he concluded, with advice of counsel, that the risk of conviction and punishment for those crimes was unacceptable.

I also find CW1's rendition of events more credible than Applicant's. It is undisputed that: (1) CW1, then new to the squadron, first met Applicant the day of the alleged misconduct; (2) they both consumed alcoholic beverages and chatted collegially; (3) she left a bar to smoke and he, without invitation, followed her outside where they were alone, and (4) that there is no evidence they socially interacted or even spoke again for the next 10 months she was assigned to the same squadron. CW1 said that: (1) while outside the bar Applicant asked to kiss her and she twice told him no; (2) he then "grabbed [her] around her waist and attempted to kiss her;" (3) she pushed him away and he went back inside the bar, and (4) that when she subsequently saw him around the squadron "[he] avoided her at all costs." Applicant denied any physical contact with CW1, except possibly a friendly goodbye hug at the end a collegial evening and did not recount any conversations or recall any other social interaction with her though he was "sure [they] flew together, deployed together and so on." (Tr. 57, 62-63) His lack of recollection of professional or social interaction with CW1 in the 10-month period they served together after first meeting and spending several hours in collegial conversation is less credible than her claims that he inappropriately touched her outside the bar and avoided her thereafter. I gave little weight to TSgt H's opinions because he provided no evidentiary basis for his belief that CW1 lied about the offense and because there is no evidence Applicant provided a statement or testimony regarding the misconduct alleged at any time before TSgt H's November 2021 letter.

As discussed above, I did not find Applicant's denials that he committed the misconduct alleged in the SOR credible. I found his testimony and demeanor at the hearing to be unconvincing and inconsistent with someone who was reliably telling the truth. In addition to matters discussed above, his acknowledgement that both incidents revolved around alcohol and that he had significantly modified his alcohol consumption and social behavior to avoid similar future situations was inconsistent with his denials and claims that he was in full control of his own mental faculties during both alleged incidents. I found his minimization of visible manifestations of CW2's intoxication, fanciful rendition of their sexual interaction, and explanations for his attempts to apologize to her unconvincing. I also found his demeanor and answers to questions about his relationship and contact with CW1 after the alleged incident with her somewhat nonresponsive and evasive.

AG ¶¶ 32(a) and (d) are not fully established. Applicant's criminal conduct occurred more than four years ago, his other than honorable discharge in lieu of trial by court-martial from the Air Force was more than two years ago, and there have been no additional incidents. The criminal conduct alleged in the SOR occurred after he had consumed a substantial quantity of alcohol and he has since modified his alcohol consumption and social behavior. However, his denials of misconduct lack credibility and are contradicted by statements from CW1, CW2 and Roommate, and uncorroborated by other reliable evidence. His failure to take any responsibility for his misconduct "undercuts a conclusion of reform and rehabilitation," ISCR Case No. 20-00331 at 7 (App. Bd. Aug.

2, 2021) and makes it difficult to conclude that such behavior is unlikely to recur. His criminal conduct, failure to acknowledge or accept responsibility for his misconduct, and request for discharge in lieu of trial by court-martial and other than honorable discharge cast doubt on his current reliability, trustworthiness, and good judgment.

AG ¶ 32(c) is not established. Statements from CW1, CW2, and Roommate, corroborated in part by Applicant, provided substantial, reliable evidence that he committed the criminal conduct alleged in the SOR. Notwithstanding his strong character evidence and combat record, Applicant's testimony was insufficient to overcome the evidence against him.

Guideline D, Sexual Behavior

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

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The record evidence including statements from CW1, CW2 and Roommate provide substantial evidence that Applicant sexually assaulted and groped CW2, and that he grabbed CW1 around the waist and attempted to kiss her without her consent. The record evidence establishes the following disqualifying conditions under AG ¶ 13:

- (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 following mitigating conditions under AG ¶ 14 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 judgment;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress; and

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

AG ¶ 14(b) is not fully established for the reasons set out in the above discussion of AG ¶¶ 32(a) and (d).

AG ¶ 14(c) is not established. Applicant's continued false denial of the sexual-criminal conduct shows he is still vulnerable to exploitation, manipulation, and duress.

AG ¶ 14(d) is not established because the sexual behavior alleged in the SOR was nonconsensual, not private, and not discreet.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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.

SOR ¶ 3.a cross-alleges the conduct alleged in SOR ¶¶ 1-2. The record evidence discussed above potentially supports application of the following disqualifying conditions under AG ¶ 16.

(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;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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 . . . any disruptive, violent, or other inappropriate behavior . . . ; 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: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Neither AG ¶¶ 16(c) nor 16(d) apply because the evidence is “sufficient for an adverse determination” under Guidelines J and D. AG ¶ 16(e) applies.

The following mitigating conditions under AG ¶ 17 are potentially applicable:

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶¶ 17(c) and (d) are not fully established for the reasons set out in the above discussion of AG ¶¶ 32(a) and (d).

AG ¶ 17(e) is not established by evidence and for the reasons set out in the discussion of AG ¶¶ 32(a), 32 (d), and AG ¶ 14(c), above. Applicant's continued false denial of the sexual-criminal conduct shows he is still vulnerable to exploitation, manipulation, and duress.

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), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

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

I considered the following factors: Applicant's military and federal contractor service; he was a highly qualified and successful airman with an extraordinary combat record, and that he earned multiple awards and decorations including the Distinguished Flying Cross and numerous Air Medals; he has held a security clearance since 2010, without reported incident; his numerous and favorable letters of recommendation and character references; and he has modified his alcohol consumption and taken steps to better control his environment.

The evidence against mitigation is more persuasive. Two servicemembers credibly accused Applicant of aggressive, nonconsensual sexual behavior that constituted criminal conduct including the sexual assault of CW2, his clearly intoxicated close friend, after he had consumed substantial amounts of alcohol. I considered that he requested a discharge in lieu of trial by court-martial on criminal charges including the sexual assault of CW2, with knowledge of the evidence against him and because he concluded the risk of conviction and punishment was unacceptable to him. His request for discharge was approved by a general officer after consideration of the criminal investigation, recommendations of Applicant's chain of command and a judge advocate. The general officer directed that he be discharged from the U.S. Air Force under other than honorable conditions. As discussed above, I did not find Applicant's denials that he committed the misconduct alleged in the SOR credible. Applicant has not accepted responsibility or demonstrated remorse for his criminal misconduct but has instead accused his victims of lying about that misconduct.

After weighing the applicable disqualifying and mitigating conditions under Guidelines D, J, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his criminal conduct, sexual behavior, and personal conduct. Overall, the record evidence leaves me with questions and doubts as to his eligibility and suitability for a security clearance.

Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline D:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for a security clearance is denied.

Eric C. Price
Administrative Judge