



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



In the matter of: )  
)  
) ISCR Case No. 23-00483  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Nicole Smith, Esq., Department Counsel  
For Applicant: *Pro se*<sup>1</sup>

11/16/2023

---

**Decision**

---

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines E (Personal Conduct), D (Sexual Behavior), and J (Criminal Conduct). Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application on September 28, 2022. On March 31, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS), sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines E, D, and J. The DCSA CAS acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

---

<sup>1</sup> Applicant was assisted by Luke S. Rose, Esq., in his response to the SOR, but he was *pro se* at the hearing.

Applicant answered the SOR on July 24, 2023, and requested a hearing before an administrative judge. His answer to the SOR included Applicant's Exhibits (AX) A through L. Department Counsel was ready to proceed on August 31, 2023, and the case was assigned to me on September 11, 2023. On September 20, 2023, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on October 12, 2023. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified, but he did not submit any documentary evidence or present the testimony of any other witnesses. I have taken administrative notice, without objection by either party, of Articles 32, 92, 107, 120, and 134, Uniform Code of Military Justice (UCMJ); 10 U.S.C. §§ 832, 892, 907, 920, and 934, and the applicable Rules for Courts-Martial that were in effect at the time of the conduct alleged in this case. The record closed on October 12, 2023. DOHA received the transcript (Tr.) on October 20, 2023. On November 8, 2023, I opened the record to admit documentary evidence establishing jurisdiction over this case. (Hearing Exhibit I) The record closed on November 13, 2023.

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted the allegation in SOR ¶ 1.c. He denied the allegations in SOR §§ 1.a, 1.b, and their cross-allegations in SOR ¶ 2.a and 3.a. His admission is incorporated in my findings of fact.

Applicant was employed by a defense contractor from February 2018 to November 2020. He was unemployed from November 2020 until he was hired a non-federal employer in July 2021. He has been offered employment by another defense contractor, contingent on a favorable adjudication of his application for a security clearance. (GX 2 at 1; Hearing Exhibit I)

Applicant served on active duty in the U.S. Navy from February 2001 to June 2017, and received an other than honorable discharge. During his Navy service, he was awarded the Navy and Marine Corps Commendation Medal, two awards of the Navy and Marine Corps Achievement Medal, three awards of the Navy Good Conduct Medal, and various service medals and qualification badges. (GX 5 at 4)

Applicant married in August 2003, divorced in April 2010, and remarried in November 2017. He has two children, ages 18 and 15, from an extramarital relationship. He is the biological father of the older child. The younger child has the same mother but another father, and Applicant adopted the younger child because his mother was not taking proper care of him. (Tr. 22) Applicant is an active member of his church and participates in charitable activities in his community.

Applicant received a bachelor's degree in December 2020 and a master's degree in December 2022. While on active duty, he completed medical training and was certified as an emergency medical technician. (AX I) While serving aboard a Navy ship, he organized a program in which he and fellow sailors participated in the Reading Enhances All Children (REACH), reading to and mentoring orphan children, at least twice a month

when they were in port. He received a volunteer service medal for his efforts. (Tr. 20; Response to SOR at 8) The medal apparently was a civilian award, because it is not reflected on his DD 214 (Certificate of Release or Discharge from Active Duty).

In June 2015, while Applicant was serving as a chief petty officer (pay grade E-7) on a ship, he was sexually involved with a female sailor (pay grade E-3) who was his subordinate. He testified that his sexual relationship with the female sailor continued for about two years, and that it involved frequent sexual activity in numerous places aboard the ship. (Tr. 32; GX 2 at 2) When he was interviewed by a security investigator in November 2022, he told the investigator that he became sexually involved with his subordinate because he was lonely and did not exercise the strength to resist his sexual urges. (GX 2, personal subject interview at 15)

In July 2016, Applicant was charged with rape and sexual assault, in violation of Article 120, (UCMJ), making a false official statement in violation of Article 107, UCMJ, and obstructing justice in violation of Article 134, UCMJ. (GX 4) He testified that the sexual conduct for which he was charged with rape occurred in an office aboard the ship and while he and the female sailor were both on duty. He maintained that it was consensual. He testified that when the female sailor told him she was pregnant by another sailor, he told her that he did not want to be involved in a “love triangle.” (Tr. 15-16, 34.)

The charge of making a false official statement arose when Applicant was five minutes late for duty as officer of the deck, and he told the chief petty officer whom he was relieving that he was late because he was performing duties on the flight deck. The charge of obstructing justice alleged that Applicant asked the sailor by whom the female seaman was pregnant not to report his actions, and that Applicant attempted to physically restrain the female sailor’s other sexual partner from reporting them. In March 2017, he was charged with an additional offense of violating a lawful general order, *i.e.*, a Navy regulation prohibiting fraternization with a subordinate, in violation of Article 92, UCMJ. (GX 5).

After a pretrial hearing, Applicant admitted his guilt of the violations of Articles 107 and 92, and he requested separation in lieu of trial by court-martial.<sup>2</sup> (GX 5 at 3) His request was granted, and all charges were withdrawn and dismissed. He received an other than honorable discharge in June 2017.

In November 2020, Applicant, then employed by another defense contractor, was terminated for timecard fraud, alleged in SOR ¶ 1.a. The alleged fraud consisted of taking paid time off without recording it on his timecard. This job was his first civilian job after leaving the Navy, and he was unfamiliar with the timecard process. He explained that he was a salaried employee rather than an hourly employee, and he was not required to log

---

<sup>2</sup> The SOR ¶ 1.b alleges that Applicant was accused of rape and sexual assault and was indicted by a grand jury for those charges. There is no grand jury in cases processed under the UCMJ. Instead, there is a pretrial hearing under Rule for Court-Martial 309(a) or an investigation under Article 32, UCMJ, or both. Unlike a grand jury, in which a defendant is not present, an accused military member is entitled to be present during a pretrial hearing, be represented by counsel, cross-examine witnesses, and present evidence.

in and log out daily. He presented documentary evidence that he had sent his supervisor email requests for paid time off and received email approval, but he admitted that he did not enter his paid time off on his timecards. (Tr. 18; 47 GX 3 at 6-7) He admitted that his pay vouchers listed paid time off used and the unused balances, and that he saw that his paid time off was not reflected. He testified that when he asked another worker why his paid time off was not reflected on his pay voucher, the other worker told him that sometimes it took a month or two before it was reflected on the pay voucher. (Tr. 50) He admitted that he should have notified his personnel office that his paid time off was not being reflected on his pay voucher. (Tr. 50) There is no evidence that he was overpaid because of the inaccurate timecards.

### **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, an administrative judge applies these guidelines 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 and 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 that 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 made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” 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). 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.

## **Analysis**

### **Guideline E, Personal Conduct**

SOR ¶ 1.a alleges that Applicant was terminated from a previous employment due to timecard fraud. The evidence shows that Applicant requested approval of paid time off and his supervisor approved it, but that he did not properly record his paid time off on his timecards. It also shows that he was unfamiliar with the process, since this was his first civilian job after leaving the Navy. While the evidence shows negligence on Applicant’s part, it falls short of establishing fraud.

SOR ¶ 1.b alleges that Applicant, while serving as a non-commissioned officer, was accused of rape and sexually assault **by** an enlisted shipmate and that he was indicted by a grand jury for his conduct. It apparently was intended to allege rape **of** and sexual assault **on** an enlisted shipmate. Furthermore, the allegation that he was indicted by a grant jury is not established, because there is no grand jury in military prosecutions.

SOR ¶ 1.c alleges that Applicant “resigned” from the Navy in lieu of trial by courts-martial after admitting that he made a false official statement in violation of Article 92, UCMJ and violated a general order in violation of Article 107, UCMJ, and that he received an other than honorable discharge. The SOR incorrectly transposed Article 92 and Article 107. Violation of an order is proscribed by Article 92, not Article 107. A false official statement is proscribed by Article 107, not Article 92.

At the hearing, Applicant denied making a false official statement, but his denial is contradicted by his admission of guilt in his request for discharge in lieu of court-martial. I conclude that this allegation is established, except for the allegation that Applicant

resigned. Enlisted members of the military cannot resign, but they may request separation, as Applicant did in this case.

The security concern under this guideline is set out in AG ¶ 15: “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. . . .”

Notwithstanding the defects in the pleadings in this case, the evidence is sufficient to establish two disqualifying conditions under this guideline:

AG ¶ 16(e): personal conduct . . . that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes . . . engaging in activities which, if known, could affect the person's personal, professional, or community standing; and

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.

Two mitigating conditions are relevant:

AG ¶ 17(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; and

AG ¶ 17(f): the information was unsubstantiated or from a source of questionable reliability.

Applicant's sexual misconduct with a subordinate aboard a Navy ship was not minor. It was not infrequent and did not happen under unique circumstances. However, it happened more than eight years ago, and there is no evidence of similar misconduct since June 2015. His chain of command did not believe that his misconduct warranted a court-martial and allowed him to leave the Navy without a criminal conviction, albeit with an other than honorable discharge. He appears to have gained control of his promiscuous sexual tendencies. I conclude that AG ¶ 17(c) is established for this incident.

The record contains no evidence regarding the false official statement, other than Applicant's admission in his request for separation in lieu of court-martial. Giving a false

excuse to another chief petty officer for being five minutes late for duty was minor and apparently was infrequent. AG ¶ 17(c) is established for this incident.

Applicant denied the allegation of obstructing justice, and there is no evidence in the record supporting the allegation. AG ¶ 17(f) is established for this incident.

Applicant's inattention to the rules for documenting paid time off was minor. His email exchanges with his supervisor, who approved the time paid off, refutes the allegation of fraud. AG ¶ 17(f) is established for this incident.

## **Guideline J, Criminal Conduct**

The SOR cross-alleges the conduct alleged in SOR ¶¶ 1.b and 1.c under this guideline. The concern under this guideline is set out in AG ¶ 30: "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 evidence establishes two disqualifying conditions under this guideline:

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

AG ¶ 31(e): discharge or dismissal from the Armed Forces for reasons other than "Honorable."

Two mitigating conditions are relevant:

AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 32(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.

AG ¶ 32(a) is established for the reasons set out in the above discussion of Guideline E. AG ¶ 32(d) is partially established. There has been a considerable passage of time without recurrence of criminal activity. Since Applicant's discharge from the Navy, he has earned a bachelor's degree and a master's degree. He is active in his church and his community. However, he offered no evidence of the quality of his performance as an employee of a defense contractor before was

terminated for timecard fraud, and no evidence of the quality of his performance in his current non-federal job.

### **Guideline D, Sexual Behavior**

SOR ¶ 3.a cross-alleges the conduct alleged in SOR ¶¶ 1.b and 1.c under this guideline. The concern under this guideline is set out in AG 12:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. . . .

The following disqualifying conditions under this guideline are relevant:

AG ¶ 13(a): sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

AG ¶ 13(b): pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;

AG ¶ 13(c): sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

AG ¶ 13(d): sexual behavior of a public nature or that reflects lack of discretion or judgment.

Applicant's sexual conduct violated military criminal law. When interviewed by a security investigator, he attributed his conduct to his loneliness and failure to exercise the strength to resist his sexual urges. His conduct was compulsive, self-destructive, and high-risk. It made him vulnerable to coercion, exploitation, or duress, and it reflected lack of discretion or judgment. Accordingly, I conclude that all the above disqualifying conditions are established:

The relevant mitigating condition is AG ¶ 14(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." I conclude that this mitigating condition is established by the passage of time and the reasons set out in the above discussion of Guideline E.

### **Whole-Person Concept**

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-



person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An 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.

I have incorporated my comments under Guidelines E, J, and D in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment. Applicant was candid, remorseful, and credible at the hearing. His behavioral history is mixed. He demonstrated bad judgment when he had an extramarital relationship that resulted in the birth of a son in 2008, but then he exhibited compassion by adopting the older son of the same woman with whom he had an affair. He demonstrated bad judgment by his sexual conduct with a subordinate while on active duty, but demonstrated compassion by his work with orphans while his ship was in port.

After weighing the disqualifying and mitigating conditions under Guidelines E, D, and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his personal conduct, sexual behavior, and criminal conduct.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant
Paragraph 2, Guideline D (Sexual Behavior):	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraph 3.a:	For Applicant

## **Conclusion**

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman  
Administrative Judge