



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



In the matter of: )  
)  
) USA-M- Case No. 23-00008-R  
)  
Applicant for Security Clearance )

**Appearances**

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

02/13/2023

**Decision**

COACHER, Robert E., Administrative Judge:

The Government failed to establish security concerns under Guideline D. Applicant's eligibility for a security clearance is granted.

**Statement of the Case**

On May 16, 2022, the Department of Defense (DOD) Consolidated Adjudication Facility (CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline D, sexual behavior and Guideline E, personal conduct. The DOD acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Manual 5200.02, *Procedures for the DOD Personnel Security Program (PSP)*, effective on April 3, 2017 (DOD Manual 5200.02); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant did not submit a response to the SOR. On an unspecified date, the DOD CAF revoked Applicant's security clearance. On February 2, 2023, Applicant requested referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked under the provisions of Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960) and Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended. (Hearing Exhibit (HE) I)

The case was assigned to me on January 10, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 17, 2023, and the hearing was held as scheduled on February 2, 2023. The Government offered exhibits (GE) 1 through 4, which were admitted into evidence without objection. The Government's exhibit list was marked as HE II and its disclosure letter was marked as HE III. Applicant testified, but he did not offer any exhibits at the hearing. The record was held open until February 9, 2023, to allow Applicant to provide additional evidence. He timely submitted AE A-B, which were admitted without objection. DOHA received the hearing transcript (Tr.) on February 9, 2023.

### **Procedural Issues**

On December 2, 2022, Ronald S. Moultrie, the Under Secretary of Defense, Intelligence and Security (USD(I&S)) issued a policy memorandum titled, "Department of Defense Personnel Security Program Reform" ("Moultrie Memorandum"). Applicant timely requested, and the Moultrie Memorandum authorized him to utilize the procedures under DOD Directive 5220.6. (Tr. 4-5; HE I)

Department Counsel withdrew the SOR allegations concerning personal conduct under Guideline E. That withdrawal will be noted in my formal findings below. (Tr. 11-12)

Department Counsel requested that I take administrative notice of two provisions of the Uniform Code of Military Justice (UCMJ), Articles 120 and 120c, applicable to this case. Applicant did not object, and I will take administrative notice of these provisions. (Tr. 16, 22-23)

### **Findings of Fact**

After a thorough and careful review of the pleadings and evidence submitted, I make the following findings of fact.

Applicant is 30 years old. He is married (since 2013) and has two children, ages seven and four. He is working toward his associate's degree. He is a staff sergeant (E-6), on active duty, in the U.S. Army. Before 2020, when he enlisted in the Army, Applicant served in the Marine Corps from 2011 – 2020 he also served in the U.S. He made a lateral transfer from the Marine Corps to the Army because his career field (tanks) was being eliminated from the Marine Corps. He served on two deployed when

he was in the Marine Corps, including one involving combat. He received an honorable discharge from the Marine Corps. (Tr 26-29; GE 1, 4)

Under Guideline D, the SOR alleged the following: (1) that, in March 2017, Applicant stuck his hand between a coworker's legs, grabbed her buttocks, and touched her vagina over her uniform; (2) that, in October 2017, Applicant stuck his hand down his coworker's shirt and squeezed her breast; (3) that, in September 2018, Applicant exposed his genitals to a coworker while she was driving Applicant in her vehicle; (4) that, in April 2019, Applicant pulled the waistband of his basketball shorts down and pulled out his penis in front of his coworker. (SOR)

On April 26, 2019, a civilian sexual assault response coordinator (SARC) for the Navy notified the Naval Criminal Investigative Service (NCIS) that the SARC had received a complaint against Applicant by a female Marine including allegations of indecent exposure and unwanted sexual contact. The alleged victim (Sgt X) specifically alleged four incidents, occurring in March 2017, October 2017, September 2018, and April 25, 2019 (the incidents that are alleged in the SOR). Applicant admitted in his hearing testimony knowing Sgt X and being stationed with her in the past. The NCIS conducted an investigation, which concluded with a June 29, 2020 report of investigation (ROI) that closed out the case at that time. The investigation looked at possible violations of Article 120 (Abusive Sexual Contact) and Article 120c (indecent exposure) of the UCMJ. (Tr. 32, 39-40; GE 3; HE IV)

In the ROI, Sgt X's four different allegations against Applicant are briefly stated. It is unclear from the ROI if those allegations were what was directly stated to the SARC, which generated the referral to NCIS, or whether Sgt X was separately interviewed by the NCIS investigators. The ROI in evidence does not contain any formal statements by Sgt X, only the synopsis of information that formed the SOR allegations. The ROI refers to exhibits 1-13 contained in earlier interim ROIs, but those were not made a part of the ROI admitted in this case. Applicant was interviewed by NCIS investigators and denied the first three allegations (March 2017, October 2017 and September 2018), and admitted that his penis was exposed to Sgt X on April 26, 2019, but he asserted that the exposure was inadvertent and unintentional. (Tr.33-34; GE 3)

Applicant was not charged with any offenses under the UCMJ based upon the above allegations. He disclosed that he received a written letter of warning or counseling from his command in February 2020. He was allowed to rebut the information in the letter and did so. Based upon his rebuttal, the derogatory information was not included in his official records (fitness report). The information also did not preclude him from cross-service transferring to the Army in June 2020. (Tr.36-37; GE 3-4)

Applicant's hearing testimony was consistent with his earlier statement to the NCIS and to his background investigator in interviews he had in August and September 2020. He denied that the first three incidents happened and explained that the fourth incident, where his penis was exposed while riding in Sgt X's car, was inadvertent and

unintentional. Applicant could not state a motive that Sgt X would have to fabricate these allegations against him. He stated that he and Sgt X were both sergeants (E-5s) at the time of the alleged incidents, and neither had supervisory authority over the other. Sgt X did not testify at the hearing and no sworn statements authored by her were offered into evidence. (Tr. 33-34, 44-50, 53-56; GE 2-4)

In March 2020, Applicant was the subject of a military police incident report concerning an alleged threat to a military member or his dependent (Victims). It is unclear from the incident report to whom the alleged threat was directed. This incident is what formed the basis of the Guideline E allegations that were subsequently withdrawn by the Government. I cannot use any evidence associated with this incident as a basis for disqualification; however, I can use it to weigh Applicant's credibility, in determining the applicability of any mitigating conditions, or in my whole-person assessment. (Tr. 31-32; GE 2, 4)

Applicant's wife and the female-Victim exchanged heated words over the supervision of Applicant's children, which led to the alleged threat being made. The Victims filed a complaint because they claimed Applicant made a threat to grab his gun and shoot Victims if they talked to his wife in that manner again. When questioned by law enforcement, Applicant denied making any threats. There are no sworn statements attached to the incident report and the report is heavily redacted. (Tr. 31-32, 52; GE 2, 4)

It appears that the male-Victim made a statement that was summarized in the incident report where he described the alleged threat. Witness-1, who is unidentified by name or military affiliation, concurred with the male-Victim's statement and apparently provided both a written and verbal statement. Witness-2, who is identified only as "SGT" in the incident report stated he did not hear any verbal exchange. Witness-3, who is identified only as "SGT" in the incident report, stated that she heard Applicant make the threat about shooting one of the Victims. She provided a written and verbal statement. None of these statements were offered into evidence in this hearing. (GE 2)

Applicant related to his background investigator that two weeks after the incident described above, he was informed by his military supervisor that the investigation closed and no disciplinary action against him was forthcoming. He did not face UCMJ charges from this incident. Applicant also told his background investigator that he learned that the female-Victim had stated she had ruined military careers in the past and that she was going to file a complaint against Applicant. (GE 4)

Applicant has had no disciplinary incidents since joining the Army. He offered into evidence his Marine Corps fitness reports from June 2016 to March 2020. They reflect consistent performance ranging from a rating of "Qualified" to "Exceptionally Qualified." He presented his discharge certificate (DD-214), which reflects his honorable service and lists his awards and decoration, including a Navy and Marine Corps Achievement Medal; the Combat Action Ribbon; and the Marine Corps Good Conduct Medal-two devices, among others. He presented an Army efficiency report for the period of 2020-

2022, rating him as a top 10% noncommissioned officer (NCO) and highly qualified. He also offered two academic evaluation reports for schools he attended after joining the Army. He excelled in both schools. (AE A)

Applicant also presented character statements from two Army captains (Capt. C-1 and Capt. C-2), his current Army sergeant first class supervisor (SFC S), a Marine gunnery sergeant (GySgt S), who was his supervisor while he was still in the Marine Corps, and a former Marine sergeant who worked with Applicant and was stationed with him at the time of the sexual conduct allegations and who was present when the alleged threat by Applicant was made (Mr. K). None of these persons testified and were not subject to cross-examination and none expressed knowledge of the underlying facts of the case except Mr. K. I will consider these factors when giving weight to their statements. Their statements are summarized below:

1. SFC S: He has been Applicant's supervisor since 2020. He stated that Applicant is an excellent soldier, leader, and father. He has integrity and is of stout character. (AE B1)

2. Capt. C-1: He has been Applicant's commander for the past 11 months. He described Applicant as an outstanding NCO. Applicant fully supported the command's sexual harassment/assault response and equal opportunity programs. He has always properly handled classified information. He supports Applicant retaining his security clearance. (AE B2)

3. GySgt S: He was the senior enlisted advisor from April 2019 to September 2020 at a base where Applicant was stationed. He supervised Applicant for approximately 12 months. He stated that Applicant demonstrated a strong work ethic, professionalism, and leadership. (AE B3)

4. Capt. C-2: He was Applicant's commander for approximately two years. He described Applicant's excellent care for the soldiers under his authority during a difficult equipment recovery mission. He found Applicant to be professional and someone who exercised good judgment. He would trust him with classified information. (AE B4)

5. Mr. K: He is a former Marine who was stationed with Applicant when the fourth incident alleged by Sgt. C occurred. He was also present with Applicant at the event where the alleged threat was made. Applicant and his family were visiting Mr. K and his family when the incident occurred. Mr. K admitted that he is a close friend of Applicant. He considers Applicant an outstanding gentleman who would help anyone who needed it. Mr. K has no direct knowledge of alleged sexual contact four as described by Sgt. C. He observed that Applicant and Sgt. C had a normal professional relationship. He was present when the dispute happened between Applicant, his wife and a neighbor couple. He did not hear Applicant make a threat that day. He believes it would be out of character for him to do so. He told the investigators that he did not hear Applicant make any threats. (AE B5)

## Policies

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 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a careful weighing 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain a favorable security decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an 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.

Section 7 of EO 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## Analysis

### Guideline D, Sexual Behavior

The security concern relating to the guideline for sexual behavior is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

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

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) a pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop; and
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

This case basically comes down to a question of Applicant's credibility against the veracity of Sgt. X's complaints. If Sgt. X's complaints are believed, Applicant's denials are not credible. On the other hand, if Applicant's denials and his claim of an unintentional exposing of his penis are credible, then the sexual behavior concerns would not be established. Here are the factors I considered in making this overall credibility-veracity determination:

1. Sgt X was a non-commissioned officer in the Marine Corps., who would subject herself to discipline for making a false official statement concerning the allegations at issue here;
2. No apparent motive exists for Sgt. X to make false allegations against Applicant;
3. Sgt X did not immediately report the first three incident to her command, a SARC representative, or law enforcement. Those incidents allegedly occurred in March

2017, September 2017, and September 2018. They were not reported until April 2019, after the alleged fourth incident;

4. If Sgt. X's version of the facts is believed, then she continued to associate with Applicant off duty by providing him rides in her vehicle even though he sexually assaulted her, without her consent, on more than one occasion;

5. The Government did not provide a sworn statement written by Sgt. X. Sgt X did not testify and was not subject to cross-examination;

6. Applicant testified at his hearing after being advised of the penalties of providing false testimony in accordance with 18 USC § 1001. He was subject to cross-examination by the Government. His testimony was consistent with earlier statements to NCIS investigators and his background investigator;

7. Applicant has a motive to provide false testimony. That motive is to help himself because his security clearance is at stake;

8. In March 2020, Applicant was involved in another dispute where his statement conflicted with other witnesses as to whether he made a serious threat to person. The Victim and two witnesses claimed Applicant made a serious threat. One witness denied witnessing any interaction, and Applicant denied making a threat. Only summarized, redacted statements to military investigators were made part of this record. The witnesses were not identified and any motive for false testimony from them was not explored. One of the supporting witnesses was likely the female-Victim, but she was not identified in the incident report. Applicant told his background investigator that his command closed the case without disciplinary action imposed against him. There is no evidence of any disciplinary action taken against Applicant for this incident.

After specifically considering the factors outlined above, as well as all the other evidence in this case, and after having observed Applicant's demeanor during his testimony, I have determined that Applicant's testimony carries more weight than Sgt. X's allegations. As such, I conclude that none of the above disqualifying conditions apply in this case. Applicant denied the first three allegations, so none of the conditions would apply to them. Applicant admitted that the April 2019 exposure was unintentional making it non-criminal in nature. There is no high-risk sexual behavior or conduct that makes him vulnerable to coercion, exploitation or duress. Since no disqualifying conditions apply, there is no need to address mitigating conditions.

### **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 security clearance 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 considered Applicant's military service, including his deployments, and his letters of recommendation. I also considered that his command took no UCMJ action against him for the alleged sexual misconduct or the alleged threat.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude that the security concerns against Applicant were not established by the evidence.

### **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: For APPLICANT

Subparagraphs 1.a – 1.d: For Applicant  
(The SOR was written in a narrative format. My reference to subparagraphs 1.a-1.d equates to the four alleged sexual contact incidents in chronological order)

Paragraph 2, Guideline E: WITHDRAWN

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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Robert E. Coacher  
Administrative Judge