



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



In the matter of:)
)
 [REDACTED]) ISCR Case No. 22-00177
)
 Applicant for Security Clearance)

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: Allison R. Weber, Esq.

06/20/2024

Decision

MARINE, Gina L., Administrative Judge:

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

Statement of the Case

On August 9, 2020, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP). On August 10, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) sent Applicant a Statement of Reasons (SOR) alleging security concerns under Guidelines D, E, 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) implemented by the DOD on June 8, 2017.

On September 1, 2022, Applicant responded to the SOR (Answer) and requested a hearing before an administrative judge. The Government was ready to proceed on September 27, 2022. The case was assigned to me on April 28, 2023. On June 21, 2023, the Defense Office of Hearings and Appeals (DOHA) notified Applicant his hearing was scheduled for August 2, 2023. I convened the hearing as scheduled via video conference.

During the hearing, Applicant and seven witnesses testified. I admitted Applicant's Exhibits (AE) A through H and Government Exhibits (GE) 1 through 3 into evidence without objection. I admitted GE 4 over Applicant's objection. AE A through D were originally attached to the Answer. I appended four administrative documents to the record as Hearing Exhibits (HE) I through IV. DOHA received the hearing transcript (Tr.) on August 14, 2023. On February 13, 2024, I reopened the record, *sua sponte*, for good cause, to receive additional relevant and material evidentiary documents from Applicant, which I admitted into evidence as AE I and J without objection. On February 20, 2024, Applicant's motion for an expedited decision was granted for good cause. The record closed on March 1, 2024.

Procedural Issue

I, *sua sponte*, note apparent transcription errors in the hearing transcript on pages 112, 127, 154, 156, 181, 188, 190, 193, 195, 219, none of which were considered in rendering my decision. The noted errors did not affect my ability to properly evaluate the case, the relative positions of the parties, or my decision. Neither party questioned the accuracy of the hearing transcript nor identified any errors in the transcript.

SOR Amendment

In Applicant's Answer, he denied the abusive sexual contact allegations in SOR ¶ 1.a. and SOR ¶ 2.a and identified a typographical error in SOR ¶ 2.a. During the hearing, upon the Government's motion and without objection, SOR ¶ 1.a and SOR ¶ 2.a. were amended to conform to the record, and SOR ¶ 2.a was amended to correct a typographical error, as follows:

- (1) "abusive sexual contact to include," was stricken from the facts alleged in SOR ¶ 1.a;
- (2) "Article 120 (Abusive Sexual Contact)," was stricken from the facts alleged in SOR ¶ 2.a; and
- (3) the number "14" alleged in SOR ¶ 2.a was amended to the number "134."
(Tr. at 95-98)

Findings of Fact

Applicant, age 30, received a bachelor's degree in criminology in May 2015. He served as an enlisted member of the U.S. Coast Guard (USCG) from September 2015 until September 2016, when he was honorably discharged to accept a commission as an

officer in the U.S. Marine Corps (USMC). He served as a second lieutenant from November 2016 until June 2020, when he was administratively discharged in lieu of court-martial with an Other Than Honorable characterization of service (OTH) for misconduct in violation of Articles 92, 133, and 134, Uniform Code of Military Justice (UCMJ). (AE B, E; GE 1; GE 3 at 96, 138; Tr. at 135, 207-208)

Applicant maintained a security clearance from July 2017 until his military discharge. He submitted his August 2020 EQIP to regain eligibility for access to classified information in connection with employment as a defense contractor. He was employed as a contract security officer by his prior sponsor from July 2020 through August 2021. He has been employed as a cybersecurity analyst by his current sponsor since August 2021. In December 2021, after completing coursework toward a master's degree in another program, he received a second bachelor's degree in cybersecurity management policy. (AE B, E; GE 1; Tr. at 135, 208-209)

USMC Background

Applicant's military occupational specialty (MOS) was Military Police Officer (MPO) I. He completed Officer Candidate School (OCS) in November 2016, The Basic School (TBS) in June 2017, and the MPO Basic Course in November 2017. Prior to entering OCS, he understood the issues of sexual harassment and fraternization "were held of significance to good order and discipline in the [USMC]." While in the USMC, he underwent additional sexual harassment training on dates not specified in the record. (GE 3 at 96, 118, 119; Tr. at 61, 80, 139-140, 150-151)

From about November 2017 through June 2020, Applicant served at an overseas installation in Country 1; and, on one or more occasions, he served on temporary duty (TDY) in Country 2. Prior to November 2018, he served as platoon commander, company executive officer, and, at times, due to the needs of the USMC, company commander. Pending the investigation into allegations of his misconduct that began in November 2018, as further discussed below, he retained his security clearance and was reassigned "to the higher headquarters," a "pretty significant billet," where he served as "the combat officer, but also the anti-terrorism officer for the sitting colonel." (Answer (Ans.) at 11; AE D at 1; GE 3 at 149-150; Tr. at 72, 74, 142-143, 195, 211-212)

USMC Policy on Sexual Harassment and Fraternization

Upon Applicant's arrival at OCS in July 2016, he certified he understood: the USMC policy prohibiting sexual harassment; any instances of non-adherence to the policy may result in disciplinary or administrative action; and the definition of sexual harassment as:

a form of sex discrimination involving unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment. (GE 3 at 118)

Applicant also certified he understood: the USMC policy prohibiting fraternization; fraternization is “prejudicial to good order and discipline” and violates “long-standing traditions of naval service”; fraternization may be charged as an offense under the UCMJ; violation of the policy may result in adverse action, including processing for administrative discharge, and court-martial; and the definition of fraternization as: “personal relationships between officer and enlisted members that are unduly familiar and that do not respect the differences in grand or rank,” not including familial relationships. (GE 3 at 119)

Several of Applicant’s witnesses, with current or previous USMC service, corroborated the significance of the USMC’s sexual harassment and fraternization policies, ongoing annual sexual harassment training, and the seriousness with which the USMC addresses sexual harassment and fraternization. (Tr. at 48-49, 61, 80-81)

USMC Discharge

Between about November 2018 and May 2019, Applicant’s command and the Naval Criminal Investigative Service (NCIS) investigated allegations of his misconduct involving violation of “the [USMC] Prohibited Activities and Conduct order (MCO 5354.1E) for harassment, sexual harassment, and the use of racial slurs.” Specifically, that Applicant: (1) “made sexual comments and innuendos around junior Marines”; (2) made “unwelcome sexual advances”; (3) used the N-word racial slur (N-word) “on multiple occasions in the presence of junior Marines”; (4) had “consensual sexual relations with at least one enlisted Marine”; and (5) maintained “overly familiar communications with junior Sailors and Marines.” (AE C; GE 3 at 81, 83, 150)

On May 29, 2019, five charges under the UCMJ including 14 specifications were preferred against Applicant. In consultation with his military defense counsel, Applicant reviewed the evidence, including witness statements obtained during the command and NCIS investigations, and “each and every element” of the UCMJ charges, before deciding it was in his “best legal and personal interest” to resign in lieu of court-martial. (AE C, I; Tr. at 143, 149, 185-186)

On June 14, 2019, while pending a preliminary hearing under Article 32, UCMJ, Applicant submitted his request for resignation (RFR) in lieu of court-martial. In his RFR, he acknowledged guilt to three UCMJ charges including eight specifications and proffered a personal statement, as further discussed below. He acknowledged he understood: if his RFR was accepted, he may subsequently receive an OTH; and he may expect to encounter substantial prejudice in civilian life “in situations where the nature of his service rendered in, or the character of separation from, the Armed Forces may have bearing.” He respectfully requested to be discharged with a General Under Honorable Conditions characterization of service (General). (AE C; GE 3 at 87; Tr. at 143)

On March 24, 2020, in concurrence with Applicant’s chain of command, the Commandant of the Marine Corps recommended approval of Applicant’s RFR and that he be separated with an OTH with separation code “Resignation Allowed in Lieu of Court-Martial.” The Commandant concluded an OTH was appropriate because Applicant’s misconduct “demonstrates he has no potential for future service and represents a

significant departure from the conduct expected of USMC officers.” On April 2, 2020, the Commandant’s recommendations were approved by the Secretary of the Navy, as reflected on Applicant’s DD214. (AE C; GE 3 at 96)

Personal Statement

In the personal statement accompanying Applicant’s RFR, he apologized “for my actions that led me to this point.” He realized his “actions have had great, harmful impacts on the Marines I was entrusted to serve, as well as my unit and myself, both personally and professionally.” He acknowledged, “[m]y selfish actions are not in line with the expectations for a commissioned officer in the [USMC] and have the potential to destroy trust and discipline within the unit.” He stated, “[t]hough I am ultimately responsible for my actions, I will not let these poor choices define my life.” (GE 3 at 87-88)

Without referencing any specific charge or allegation of misconduct, Applicant appeared to attribute his actions to his leadership style and upbringing. He developed his leadership style in response to his negative experiences in the USCG with young officers who “did not care to build a relationship with their subordinates.” He hoped “that by being close with my Marines, they would learn to trust me and want to crush any obstacle in our way.” He acknowledged,

Unfortunately, I crossed a line and moved well past my initial good intentions. I did not draw clear boundaries and eventually found myself being the toxic leader that I had once said I would never become. (GE 3 at 87)

Applicant came to realize his lack of “appropriate respect for women” stemmed from the “harmful environment” to which he was exposed during his early childhood. He was raised by his mother, who had serious problems with drug addiction and worked as a prostitute, and he was exposed to pornography and sex at “a very early age.” He admitted he treated the female Marines and Sailors with whom he served “with a lack of respect and disregard that they did not deserve.” He averred,

I recognize now how wrong and harmful my treatment of these individuals was and have decided that I will seek help for deep seated personal issues I face that led to these poor decisions. . . My past in no way excuses my behavior but it does explain some of the poor choices I made. (GE 3 at 87)

UCMJ Charges

In Applicant’s RFR, he acknowledged guilt to the following misconduct:

- Knowingly fraternizing with an enlisted female Marine (Marine A) by engaging in an unduly familiar sexual relationship with her, on one or more occasions in Country 1 between about October 2017 and May 2018, in violation of Article 134, UCMJ (*Fraternization*) (**Charge II, Specification 1**);

- Wrongfully engaging in a sexual relationship with Marine A, on one or more occasions in Country 1 between about October 2017 and May 2018, in violation of Article 133, UCMJ (*Conduct Unbecoming of an Officer and a Gentleman*) (**Charge IV, Specification 1**);
- Knowingly fraternizing with three enlisted male Marines (Marines B) by engaging in unduly familiar relationships with them, on one or more occasions in Country 1 between about January and September 2018, in violation of Article 134, UCMJ (*Fraternization*) (**Charge II, Specification 2**) and Article 133, UCMJ (*Conduct Unbecoming of an Officer and a Gentleman*) (**Charge IV, Specification 2**);
- Wrongfully sexually harassing two enlisted female Marines (including Marine C) and two enlisted female Sailors (Sailor 1 and Sailor 2), in Country 1 between about January and November 2018, in violation of Article 133, UCMJ (*Conduct Unbecoming of an Officer and a Gentleman*) (**Charge IV, Specification 4**);
- Wrongfully harassing one enlisted Sailor (Sailor 1), one Marine officer (Marine D), and five enlisted Marines (including Marine E, Marine F, and Marine G) by engaging in conduct that was unwelcome, offensive, and based on sex, and which created an intimidating, hostile, and abusive working environment, on one or more occasions in Countries 1 and 2 between about March and September 2018, in violation of Article 92, UCMJ (*Violation of a Lawful General Order*) (**Charge III, Specification 4**);
- Wrongfully harassing one Marine officer (Marine D) and six enlisted Marines (including Marine A, Marine C, and Marine E) by engaging in conduct that was unwelcome, offensive, and based on race, and which created an intimidating, hostile, and abusive working environment, on one or more occasions in Countries 1 and 2 between about March and September 2018, in violation of Article 92, UCMJ (*Violation of a Lawful General Order*) (**Charge III, Specification 3**); and
- Wrongfully using the following inappropriate and offensive language in the presence of Marines and Sailors junior to him, in Countries 1 and 2 between about January and November 2018, in violation of Article 133, UCMJ (*Conduct Unbecoming of an Officer and a Gentleman*) (**Charge IV, Specification 5**), to wit:
 - using [the N-word] in the presence of six enlisted Marines (including Marine A, Marine C, and Marine E);
 - telling Marine F he had sex with a junior enlisted Marine and that “her vagina was nicely shaved”;
 - telling Marine F, “I would hit that,” and “Damn, she’s fine,” when referring to female Marines;

- o telling Marine G, “I can’t wait to get back to [Country 1] and beat some cheeks”; and
- o stating “I f***ed [Marine A],” when referring to Marine A in the presence of Marine E,

“or words to that effect.” (AE C, I, J; GE 3 at 81)

Throughout the security clearance process, Applicant attempted to distance himself from his admitted misconduct, as further discussed below. At the hearing, he maintained he and his military defense counsel undertook only a “broad” review of the charge sheet and “didn’t assess every word.” He asserted his military defense counsel did not give him any opportunity to remove specific words from the UCMJ charges and specifications before acknowledging guilt in his RFR. He denied any of his admitted misconduct took place before about November 2017, “closer to the beginning of [his] arrival in [Country 1].” He estimated his sexual relationship with Marine A began about “the beginning of 2018” and ended about “spring or May 2018.” (Tr. at 144-145, 147-148, 167, 168-170, 211-212)

November 2020 Interview

Applicant disclosed information about his OTH and the underlying UCMJ charges on his August 2020 EQIP and during his security clearance interview on November 30, 2020. The investigator documented the interview in a report. On October 4, 2021, after being afforded an opportunity to “carefully read all pages,” Applicant affirmed that the report, as amended with his corrections, accurately reflected the information he provided to the investigator during his 2020 interview. (GE 1, 2)

During his 2020 interview, Applicant unequivocally admitted only the charges involving his sexual relationship with Marine A. Regarding the two charges involving his fraternization with Marines B, he admitted one, and denied the other. He denied the charges involving harassment and the use of inappropriate and offensive language. There is no indication he disclosed, during his 2020 interview, the prior acknowledgments of guilt he made in his RFR.

Applicant admitted the Article 134 and 133 charges (**Charge II, Specification 1; Charge IV, Specification 1**) involving his sexual relationship with Marine A. He explained Marine A was one of three enlisted members of his battalion, including Sailor 1 and Sailor 2, with whom he engaged in consensual sexual relationships. He described the relationships with Marine A and Sailor 1 as casual, and with Sailor 2 as more than casual. He estimated he began the three relationships between about January and June 2018, but he did not indicate when they concluded. (GE 2 at 8, 9-10)

Applicant denied the Article 134 charge (**Charge II, Specification 2**) involving fraternization with Marines B, which he explained resulted from an allegation that he showed favoritism by giving them more awards or attention than he gave the other Marines he managed in his unit. He admitted he gave Marines B more responsibilities

because they were his hardest working Marines. However, he denied he showed them favoritism or treated them differently. He admitted the Article 133 charge (**Charge IV, Specification 2**) involving fraternization with Marines B, without further explanation. (GE 2 at 3, 8, 9)

Applicant denied the Article 92 and 133 charges (**Charge III, Specification 3, 4; Charge IV, Specifications 4, 5**) involving harassment and the use of inappropriate and offensive language. He denied he harassed anyone by engaging in conduct that was either unwelcome or based on sex or race. He denied he sexually harassed anyone. He denied he used any inappropriate or offensive language in the presence of junior Marines, including racial slurs. He denied telling Marine F, "damn she is fine" or "I would hit that," or telling Marine G, "I can't wait to get back to [Country 1] and have sex." (AE I; GE 2 at 9)

Applicant admitted he used racial jargon, such as the N-word, while joking around with his friend, Marine D. However, he maintained he never used racial jargon, such as the N-word, in a derogatory manner. He did not understand why anyone would allege he had done so. He admitted he engaged in conversations of a sexual nature and exchanged sexual photos, consensually, with Marine C, which he acknowledged was inappropriate because she was a junior Marine. He admitted his platoon sergeant, Marine G, observed Marine A texting him, which Applicant acknowledged was against policy because she was lower in rank. (GE 2 at 2, 7-10)

Applicant professed his belief that the sexual harassment charges were alleged because he engaged in sexual relationships with junior Marines over whom he exercised a position of power. However, he denied his sexual relationships with Marine A, Sailor 1, and Sailor 2 constituted sexual harassment because they were consensual. There is no indication he addressed, during his 2020 interview, why he did not consider his admitted communications of a sexual nature with Marine C to constitute sexual harassment or what, if any, other specific allegations underlay the sexual harassment charges. (GE 2 at 2, 7-10)

Applicant attributed the preferred UCMJ charges to an Equal Opportunity (EO) complaint initiated by Sailor 1's boyfriend. Some months after Applicant and Sailor 1's relationship ended, Applicant sent her a social media friend request. On the same day Sailor 1 asked Applicant to withdraw the friend request because she had a boyfriend, Sailor 1's boyfriend initiated the EO complaint for fraternization. Applicant acknowledged that, during the investigation of the EO complaint, several Marines provided witness statements alleging they observed him talk about sex in the presence of junior Marines, sexually harass and fraternize with junior Marines, and show favoritism to Marines B. He indicated Marines B proffered statements favorable to him, but Marine G did not. He stated Marine G had an interest in Marine A and did not like Applicant. (GE 2 at 2, 7-8)

Applicant averred the investigation led to several false allegations against him, but he did not elucidate further. He later opined the allegations were all opinion based. He then asserted there were no real facts or evidence presented and the Commandant was not able to hear both sides. He maintained he declined to make a statement during the

investigation upon the advice of his military defense counsel. He stated he agreed to resign in lieu of court-martial to avoid felony charges. He claimed he did so without having either been informed of, or otherwise understanding, the possibility of an OTH; and, had he known, he may have chosen a different path regarding the investigation and charges. He engaged civilian counsel in about June 2020, to begin an unspecified appeal process. (GE 2 at 10)

Applicant attributed his knowing violation of USMC policy by fraternizing and having sexual relationships with junior Marines to the isolated nature of his duty station in Country 1 and his limited access to female peers in the USMC. He professed his love for the USMC. Upon declaring he took full responsibility for, and regretted, the decisions he made, he asserted many of the UCMJ charges and allegations were false and unfounded, without explication. He characterized the circumstances of his discharge as an isolated incident, and not a pattern of behavior, which ruined his life. He acknowledged his family and friends looked at him differently and he was thoroughly embarrassed. He claimed he was not susceptible to any potential influence, blackmail, or coercion regarding these issues. (GE 2 at 10)

During the hearing, Applicant claimed the following about certain statements he made during his 2020 interview:

- When he made any statements about false or unfounded charges or allegations, he was referencing only the charges and allegations involving the Article 120 and 128 charges involving abusive sexual contact, to which he did not admit guilt. (GE 2 at 8, 10; Tr. at 177-178)
- When he stated the allegations were all opinion based, he was referencing “hearsay” he learned about Marine G during the investigation. He explained, “one or more of his fellow Marines” told him Marine G was soliciting individuals from their battalion to “provide negative testimony about me.” (GE 2 at 10; Tr. at 186-187)
- When he stated there were no real facts or evidence presented, he was referencing that he did not make a statement during the investigation, upon the advice of his military defense counsel. (GE 2 at 10; Tr. at 157-158)
- When he made the statement indicating he had neither been informed of, nor otherwise understood, the possibility of an OTH at the time he decided to submit his RFR, he was referencing that he was not expecting to receive an OTH when he submitted his RFR. He maintained, despite acknowledging the possibility of an OTH in his RFR, he did not believe he would receive an OTH discharge because his military defense counsel left him with the impression he would receive a General discharge. (GE 2 at 10; Tr. at 129-130, 158-160)

During the hearing, Applicant also explained he had not yet requested to upgrade his OTH (the appeal process he referenced during his 2020 interview), due to financial constraints. He believed his admitted misconduct was not deserving of an OTH.

Regarding Marine C, he stated: 1) she was not a member of his platoon during the period they engaged in conversations of a sexual nature and exchanged sexual photos; 2) he initially approached her because she was crying, at which time she told him several members of her platoon called her a “derogatory term”; 3) he told her he would report the issue to Marine D; 4) he initially gave Marine C his number to use as a point of contact to report any future name calling, and took her number so he could let her know once he reported the issue to Marine D, which he did; and 5) sometime after they exchanged phone numbers, their communications became of a sexual nature. He maintained, once he was assigned to her platoon, they mutually agreed to cease communications of a sexual nature and move forward with a “strictly professional” relationship. He acknowledged they had one subsequent conversation of a personal, but not sexual, nature. (GE 2 at 8, 10; Tr. at 161, 178-185)

SOR Allegations

In Applicant’s Answer and during the hearing, he oscillated between acknowledging responsibility for his admitted misconduct and attempting to minimize its scope and security significance. (Ans; Tr. at 121, 124, 128, 136-138, 149, 151-153, 162, 169, 170, 174, 176-178, 187-192, 199-200, 206, 212-213, 217-218)

Guideline D, Sexual Behavior, SOR ¶ 1.a (as amended): You have engaged in unwelcomed sexual comments and innuendoes around junior Marines, made unwelcomed sexual advances, and used a racial slur on multiple occasions in [the] presence of junior Marines.

In his Answer, Applicant responded “admit, in part; deny, in part” to SOR ¶ 1.a. He defined his admitted sexual behavior as: “sexual relationships with three enlisted females,” consisting of private and discreet conduct between consenting adults; and “flirtatious behavior with various females,” consisting of making “sexual comments and innuendos around junior Marines and . . . sexual advances that he later learned were unwelcomed.” He denied engaging in any flirtatious behavior he knew was unwelcome. He maintained he immediately desisted engaging in any flirtatious behavior once he became aware it was unwelcome. He acknowledged rumors about his sexual relationships “did spread throughout his unit.” He characterized “much of” the flirtatious behavior “viewed as inappropriate” as “normal conversations about topics of mutual interests.” (Ans. at 3, 13-14, 15)

Applicant explained he acknowledged guilt in his RFR to the Article 133 sexual harassment charge (**Charge IV, Specification 4**) because he recognized his admitted flirtatious behavior “could be . . . viewed as sexual harassment” under military policy as “he did not ask permission to flirt with the females before doing so.” However, he argued his admitted flirtatious behavior “was not actually sexual harassment in the true sense of the word,” and should not be considered as such in the context of his security worthiness. (Ans. at 3, 13-17)

Applicant admitted “using racial slurs in a conversation with [Marine D] which, as a result of the conversation taking place outside a tent [believed to have occurred in

Country 2], was overheard by junior Marines.” He maintained: his “use of racial slurs was never intended to be derogatory and instead was being used as a term of endearment for [Marine D] who was like a brother to him”; and he was “wholly unaware that [Marine D] was uncomfortable by his choice of words or phrases, but had he known, he would have ceased using such terms immediately.” He stated, “[i]rrespective of his intent and the extenuating and mitigating circumstances” surrounding this conduct, he “understands his behavior was unacceptable,” which was the “primary reason” he “voluntarily” submitted his RFR “rather than require the USMC to expend resources to hold a trial.” (Ans. at 13-14; Tr. at 217, 106, 118)

In a declaration accompanying Applicant’s Answer, he stated,

Due to the limited number of female officers, I expressed interest in certain female Marines and Sailors. Essentially I would flirt with these females as though we were all civilians, and in most cases, the flirting was reciprocated. I did not know that some of my flirting was unwelcomed, and had I known this, I would have stopped . . . I was also shocked to learn that [Marine D] was offended by comments I had made routinely throughout the course of our friendship. I used [the N-word] in the same way you would emphasize your closeness to another person. I never intended to use [the N-word] in a derogatory manner, and had I known that [Marine D] was uncomfortable with this word, I would have immediately stopped using it and found another term of endearment to use. I associate with people of all walks of life, and I have realized that I sometimes adopt words or phrases that, while appropriate among certain groups, may not be acceptable in society as a whole. (AE B; Tr. at 214-217)

During the hearing, Applicant maintained he used the N-word only one time while in the USMC, during the conversation with Marine D referenced in his Answer (Conversation X). He claimed he did not recall using the N-word or any other racial slur at any other time while in the USMC. He asserted any phrasing used in his Answer suggesting he used the N-word more than once was inadvertent and not meant as an admission he used the N-word more than his one-time use during Conversation X. He attributed his one-time use of the N-word during Conversation X to his childhood experiences. In the community in which he grew up, which he described as “primarily African American” and “Hispanic,” use of the N-word “was normal . . . a term of brotherhood or endearment or something that you say to a friend in certain conversations, it was appropriate.” He acknowledged, “it’s not appropriate for me to carry that habit on. It’s not appropriate in . . . work settings. It’s not appropriate in my private life because of the nature of the word.” On a DOD medical form, he reported his race as “White.” One or more of his witnesses, current or former USMC members, testified that use of the N-word, in any fashion, would be inappropriate in any setting in the USMC, and would have a negative impact on command climate if overheard by junior Marines. (GE 3 at 131; Tr. at 63, 82-83, 114-115, 125-126, 187-190, 214-215, 220-221)

Applicant reiterated he did not use the N-word during Conversation X in a derogatory manner. He described the tent outside of which Conversation X occurred as

one used by Marines for sleeping. He did not recall anyone else being present during Conversation X. However, he acknowledged he reviewed information about the Marine who “made the initial allegation” underlying the UCMJ charges involving his use of racial slurs (Marine H). Although he admitted Marine H “was being truthful in what [Marine H] said,” he indicated Marine H “promoted” the allegation because Applicant previously advocated a non-judicial punishment against Marine H. Neither Applicant’s admissions nor other record evidence established that the “racial slur” allegation in SOR ¶ 1.a involved sexual behavior. (Tr. at 125-126, 187-190, 214-215, 220-221)

Applicant denied engaging in any conduct that created a hostile working environment. He claimed that, in acknowledging guilt in his RFR to **Charge III, Specifications 3 and 4**, he intended only to acknowledge the fact that he engaged in “locker room talk” with junior Marines and used the “N-word,” not as an admission he engaged in any conduct that created a hostile working environment. He maintained he only acknowledged guilt to **Charge III, Specifications 3 and 4** because he wanted to take responsibility for using words he realized were “inappropriate.” He explained, “. . . I needed to own up to . . . that action, whether . . . my intention was to create a hostile environment or not, I realized that if someone heard it, it could have been considered a hostile environment.” (Tr. at 123-124)

Applicant’s testimony about the sexual harassment charges included:

APPLICANT’S COUNSEL: Okay, going to the sexual harassment, . . . were you saying that you agree to that, because of the locker room? Is that what you said?

APPLICANT: Yes, ma'am. So I had engaged in [“locker room talk”] where essentially [*sic*] talking about women that may be attractive, etc, in that sort of fashion.

APPLICANT’S COUNSEL: And based upon your training, did you believe that constituted sexual harassment?

APPLICANT: In the manner in which I use[d] it, no. I understand it's not appropriate to talk about women in any sexual manner in the workplace. But again, I was trying to be more relatable to my Marines and as a person. You know, a person that they felt wasn't just . . . their boss and looking down on them. I tried to have conversation[s] with them. Though, looking back at it, it wasn't appropriate. It wasn't the appropriate way to go about building that bridge with my Marines and making them realize I'm human versus just someone that gives them orders and tells them what to do.

APPLICANT’S COUNSEL: Okay, and I'm, going back to that, you didn't intend it to be harassing, but you acknowledge it, it would mean that? Is that what you meant? Or you said, I'm sorry.

APPLICANT: Correct. So I understand that if . . . someone were to overhear it, they could have interpreted [it] as something that may be harassment, or inappropriate. But in the way that we were having our conversation and the way that I intended it, there was there was no intention whatsoever of me harassing anybody, or attacking anybody negatively or anything in that, in that manner. . . . (Tr. at 126-128)

DEPARTMENT COUNSEL: Okay, and creating a hostile work environment, your understanding having gone through OCS, TBS, and yearly training is part of what is considered sexual harassment underneath [MCO 5354.1E], correct?

APPLICANT: Yes, sir.

DEPARTMENT COUNSEL: And that's why you admitted that you had engaged in sexual harassment as well, correct?

APPLICANT: I admitted to sexual harassment because I understand that individuals did in fact take it in a manner that was harmful to them. I said what I said, and it wasn't with that intention, but I understand that people did receive it in a way that was harmful to them and it caused them stress and, and pain, I presume. . . . (Tr. at 150-151)

DEPARTMENT COUNSEL: . . . what was your reasoning in denying that you'd sexually harassed anyone to the OPM investigator [during your 2020 Interview]?

APPLICANT: I gave that statement because, again, my intention when I had said what I said and engaged in the conversations I engaged in, there was no ill intention. I didn't ever mean to hurt anybody. I didn't mean to ever feel or make anyone feel as if they were, you know, getting victimized or something along those lines. Again, it's still inappropriate. And that's what again, I was owning up to was the fact that yes, I said things that could have been, you know, depending on the audience and who heard it could have been . . . offended by it. . . . (Tr. at 153)

DEPARTMENT COUNSEL: . . . why when talking to the OPM investigator [during your 2020 Interview], when you have already admitted guilt to the Secretary of the Navy, would you then deny that you had committed . . . sexual harassment?

APPLICANT: Because again, . . . I was admitting to . . . the use of the language, and that isn't appropriate, and that . . . there was no intention, but it was still [in]appropriate language. And I'm admitting to using it. . . . (Tr. at 154)

DEPARTMENT COUNSEL: [Regarding **Charge IV, Specification 4**], Do you admit that the comments that you made, intentions or not, . . . amounted to sexual harassment underneath [MCO 5354.1E], and were conduct unbecoming an offer and a gentle[man]?

APPLICANT: Yes, sir. I admit that those comments were [in]appropriate.

DEPARTMENT COUNSEL: No, no. Not that they were inappropriate, but that those comments amounted to sexual harassment underneath [MCO 5354.1E] and underneath the UCMJ.

APPLICANT: Yes, sir, . . . individuals felt sexually harassed by the inappropriate comments that I made. . . . (Tr. at 155-156)

DEPARTMENT COUNSEL: . . . [**Charge IV, Specification 4**] says that you wrongfully sexually harassed, and it lists two Navy personnel and two Marines, and that such conduct constituted conduct unbecoming an officer and a gentleman. You admitted to that. Do you admit to that today that you sexually harassed those individuals?

APPLICANT: Yes, sir. (Tr. at 157)

Guideline D, Sexual Behavior, SOR ¶ 1.b: You have engaged in a sexual relationship with at least one enlisted Marine and maintained overly familiar communications with junior Sailors and Marines in violation of [MCO 5354.1E];

In his Answer, Applicant responded “admit” to SOR ¶ 1.b. He admitted engaging in: “[consensual and private] sexual relationships with three (3) enlisted service members, which amounted to fraternization in violation of military law”; and “unduly familiar communications with enlisted personnel . . . that despite his intent . . . violated USMC and [DOD] policy.” He accepted responsibility for “fraternizing with enlisted personnel both in terms of consensual sexual relationships” and by having “unduly familiar relationships” with Marines B. Neither Applicant’s admissions nor other record evidence established that his fraternization with Marines B involved sexual behavior. (Ans. at 10, 14)

During the hearing, Applicant reaffirmed his admission to **Charge II, Specification 2**, engaging in fraternization of a sexual nature with Marine A. By way of explanation and not as an excuse, he reiterated the attribution of this behavior to the nature of his duty station in Country 1, including its “closed off nature” and the “disproportionate number of officers to enlisted.” (Tr. at 144, 162)

Guideline E, Personal Conduct, SOR ¶ 2.a (as amended): You received [an OTH] discharge in lieu of trial by Court Martial from your employment at [USMC] in about June 2020 for Article 134 (Fraternization) 3 times, Article 92 (Failure to Obey) 4 times, and Article 133 (Unbecoming of an Officer).

In his Answer, Applicant responded “admit, in part” to SOR ¶ 2.a. He admitted he received an OTH resulting from his “voluntary request for resignation in lieu of [court-martial],” which was “based only on Articles 92, 133, and 134.” (Ans. at 14)

During the hearing, Applicant acknowledged he sought the advice of his military defense counsel before choosing which UCMJ charges and specifications he admitted guilt in his RFR. He reaffirmed his RFR admissions of guilt but denied any ill intent. During cross-examination, he reluctantly acknowledged “based upon reviewing [witness statements during the investigation of misconduct allegations],” his conduct “did, in fact, harm individuals” and create a hostile work environment, and that he “sexually harassed those individuals.” (Tr. at 143-144, 148-150, 155-156)

Guideline J, Criminal Conduct, SOR ¶ 3.a: Information as set forth under paragraph 1, above.

In his Answer, Applicant responded to SOR ¶ 3.a by adopting his responses to SOR ¶¶ 1.a and 1.b. He noted, “his actions while criminal in the military, would not have been criminal violations under civilian law,” which he offered as a mitigating factor and not “as an excuse.” (Ans. at 15) During the hearing, Applicant reiterated that fraternization would not be considered criminal conduct outside of the military. (Tr. at 196)

Mitigation

In Applicant’s Answer and during the hearing, he argued the Guideline D, E, and J concerns had been fully mitigated. He expressed remorse for his actions. He attributed his admitted misconduct primarily to: “living without accountability” during “his early to mid-20s” while stationed in Country 1; the cultural climate of his duty station in Country 1; his battalion leadership in Country 1; the nature of the USMC; and his leadership style. He testified,

. . . this was just a small period of time. There [were] no incidents in my life prior to this. There have been no incidents in my life since this. The gravity and the weight of . . . losing . . . one of the greatest privileges that any person can have, which is to serve [in the] Marines, carried a really heavy burden. Losing the respect of mentors and peers carried a heavy burden. Friendships, it carried a heavy burden. So since . . . that point on, there’s been no such incidents, and there won’t be such incidents moving forward. (Ans. at 15; Tr. at 121, 128, 130-132, 137, 173, 197-198, 213)

Applicant sought counseling from his military chaplain sometime before his RFR was approved. The chaplain recommended he undergo formal counseling. Due to financial constraints, he instead sought and received informal counseling, guidance, and mentorship from family, friends, peers, and coworkers, who also recommended formal counseling. He stated, “[he] took it upon himself to seek guidance and mentorship to find the root cause of both his actions and his ability to recognize whether the other party to his comments are comfortable with his comments and actions.” When it became financially feasible, he underwent formal counseling for about six or seven months

between about December 2021 and June or July 2022. He did not receive a diagnosis, treatment plan, or prognosis. He attributed his personal growth and development, to which his witnesses attested, to the informal and formal counseling he received. He asserted he now has the self-awareness and tools to avoid repeating any of the misconduct in which he engaged in the USMC. (Ans. at 17, 19; AE D; Tr. at 7-117; 132-135; 163-166; 171-174; 201-204, 209-211)

USMC Officers Held to a Higher Standard

One witness affirmed USMC officers are “held to a higher standard,” and explained, “We're expected to be leaders of Marines. And if you can't trust your leader then it's difficult to be a Marine and be expected to follow orders and go into battle.” (Tr. at 64) In a victim impact statement, Marine C, a victim of Applicant’s sexual harassment (**Charge IV, Specification 4**), wrote:

I never wanted anything to do with any of this. I never wanted to ruin anyone’s job or life . . . I do not think anyone really knows how hard it is to keep a secret about being sexually harassed . . . I think about all of the times [Applicant] made me feel uncomfortable and stupid. I thought I could go forever without telling anyone about what [Applicant] did to . . . the Marines and Sailors in our unit . . . Officers are supposed to have integrity and be honest. But [Applicant] was not any of those things. How could someone like that make it through [OCS]. He has ruined my belief that officers are held to a higher standard. I question what standard was [Applicant] held to . . . (GE 3 at 79-80)

Testimony of Marine D

Marine D was a first lieutenant when charges were preferred against Applicant and is now a Captain. He and Applicant served as the two platoon commanders of the same unit in Country 1. Marine D described Applicant’s work performance as “very good,” “very professional,” “sharp,” and “really, really proficient.” Marine D’s testimony at the hearing largely corroborated Applicant’s testimony concerning Applicant’s use of the N-word during Conversation X, including that it was not used in a derogatory manner, but rather as a “term of endearment.” However, Marine D’s testimony suggested Applicant used the N-word in his presence on more than one occasion (Tr. at 112-113). Marine D described the location of Conversation X as “not private” and “more of an open setting where people could have heard or been around.” Marine D characterized the context of Conversation X as “talking, like hanging out” and “talking, laughing, and joking.” Marine D, an African American, maintained he was neither personally offended nor considered Applicant’s use of the N-word during Conversation X as a “big deal or an issue” for him. Marine D was not aware whether any junior Marines or other persons overheard Applicant use the N-word either during Conversation X or at any other time. However, Marine D acknowledged he confronted Applicant about his use of N-word during Conversation X, given the possibility it could have been overheard by others. (Tr. at 106-107, 112-117)

Testimony of Applicant's Former Battalion Commander

Applicant's former Battalion Commander (Marine I) from July 2018 through May 2020 (and the former Provost Marshall of the duty station in Country 1 from about May or June 2017 through July 2018), now a retired USMC Lieutenant Colonel, offered a resounding endorsement of Applicant's professionalism, trustworthiness, and security worthiness. Marine I described Applicant's leadership as: "even better than some of the seasoned Captains"; "exceed[ing] the expectations of his junior rank"; and "outpacing his peers." Marine I praised Applicant for immediately taking "responsibility for his actions" at the outset of the investigation of misconduct allegations, and for remaining committed to his professional duties and mission accomplishment throughout the "stress of the investigation." Marine I considered Applicant's resignation as "a form of taking accountability." Marine I attributed his support of Applicant's resignation in lieu of court-martial to the fact that, during the investigation, Applicant "took accountability for his actions," "continued to charge forward . . . work hard, . . . and [take] responsibility." (AE D at 1; Tr. at 39, 41, 70, 79, 72-77)

Marine I affirmed: 1) the military is a different culture from the civilian world; 2) there are specific laws and regulations that help support the unique dynamics in the military and to maintain good order and discipline; 3) instances of fraternization and sexual harassment can lead to a poor command climate; and 4) a junior Marine hearing an officer use the N-word could have a negative effect on the command climate, regardless of whether the officer meant to use the N-word in a derogatory manner. (AE D at 1; Tr. at 70-72, 86) Marine I acknowledged Applicant's misconduct, including sexual harassment, fraternization, and use of the N-word, showed a lack of judgment and an inability to follow the rules and regulations. (Tr. at 79-83) Marine I indicated Applicant appropriately "paid a significant price for his actions," because the offenses "were extremely serious." He added: "It has cost [Applicant] his career in the Marine Corps. It cost him his reputation." Marine I "would have probably rather have seen [Applicant be separated with a General rather than an OTH discharge]. I've seen significantly worse stuff go for a lot less . . ." (Tr. at 92-93)

Marine I acknowledged Marines are responsible for their individual actions, regardless of the command climate. Marine I described the command climate of Applicant's duty station in Country 1, upon Marine I's arrival, as "toxic," particularly for newer Marines, who "were experiencing some of the dysfunction and the erosion of . . . good order and discipline." (AE D at 1; Tr. at 70-72, 86). He explained,

There was a complete lack of engagement from senior officers and senior enlisted Marines, which left the battalion in disarray and was certainly not one that fostered the development of a young officer. This lack of leadership was made evident by the rampant drug use, Marines out of standards, a suicide along with nine additional Marines making suicide ideations and/or attempts, all indicated an absence of effective support from the command. There were also several other pending disciplinary actions among all ranks during this period . . . [Applicant's] environment . . . failed to provide the

necessary support from leadership to ensure the success of all developing Marines under a command. (AE D at 1); and

. . . personnel who were my seniors to [Applicant], were involved in, you know inappropriate relationships. It was almost as though they didn't, they were checked out. Like, Wild, Wild West, would probably fit into some of it. But it, to me, it seemed more of a very selfish organization, people were concerned about checking boxes, you know, the company commanders, like I've been doing this for a year, so I'm done. (Tr. at 85)

Marine I recommended Applicant be granted a security clearance due to Applicant's "willingness to own his mistakes and take full responsibility." Marine I has remained in contact with Applicant since Marine I retired via a "strictly professional" relationship. Marine I has "complete confidence" Applicant has "learned . . . matured through this process." Marine I, who works for Applicant's current employer, referred Applicant to his current position. Marine I would not have referred Applicant, especially to work for Marine I's former mentor of "many years," had he not "wholeheartedly believed" Applicant was the "right person for the job." Applicant's current employer confirmed Marine I's referral was held in high regard. (AE D at 1; Tr. at 78-79, 81, 88-89)

Whole-Person Concept

Applicant received the National Defense Service Medal award during his USCG service. During his USMC service, he also received numerous medals, awards, and other commendations for exceptional work performance. He regularly volunteered his time in support of various United Service Organizations (USO) morale programs and local community programs. He earned his first degree black belt in the USMC martial arts program in April 2018. (AE D; GE 3 at 10-40, 48, 68-72, 92, 96, 147)

Applicant's character and work performance were lauded by 20 individuals, including current and former colleagues and supervisors, who either wrote letters or testified, or both. Many corroborated the positive changes and efforts Applicant has made to rehabilitate himself. Several witnesses corroborated the toxic climate of the Applicant's command in Country 1 during the period of Applicant's admitted misconduct. Each of these 20 individuals professed knowledge of the security concerns, and many expressly praised Applicant's candor about the circumstances of his military discharge. However, the character letters and witness testimony reflect that each of these 20 individuals had limited knowledge of the specific admitted misconduct underlying the UCMJ charges. (AE D, G, H; Tr. at 7-120)

In a declaration accompanying Applicant's Answer, he professed,

I agree that I exhibited a significant lapse in judgment, and I have no one to blame for that but myself. I knew the rules, and I took advantage of the fact that the rules were not being enforced. I allowed my personal life to ruin my career, I will forever pay for my actions, but I learned a great deal from this experience, will follow all rules and polices of my employer – and especially

those concerning security/classified information. I may not be able to return to military service as an active member, but I have a lot to give this nation and intend to support our troops through my civilian employment. (AE B at 2)

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.” (*Egan* 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 AG. 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. (*Egan* 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. (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. (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 [or her] 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* at 531; AG ¶ 2(b))

Analysis

Guideline D: Sexual Behavior

The concern under Guideline D is set out in AG ¶ 12, as follows:

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 a person'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.

Neither Applicant's admissions nor the record evidence establishes that the allegations regarding his use of a racial slur (SOR ¶ 1.a) or his fraternization with Marines B (SOR ¶ 1.b) involved sexual behavior. Accordingly, I find those parts of SOR ¶¶ 1.a and SOR 1.b in Applicant's favor as relates to Guideline D. Nevertheless, they remain relevant in evaluating Guidelines J and E, mitigation, and the whole-person concept.

With respect to the remaining allegations in SOR ¶¶ 1.a and 1.b, Applicant's admissions and the record evidence establish the following disqualifying conditions in AG ¶ 13 under Guideline D:

- (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.

Having considered all the factors set forth in AG ¶ 14 that could mitigate the concerns under this guideline, I find the following warrant further discussion:

(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.

Applicant engaged in sexual behavior that was not only inappropriate, but also criminal under Articles 92, 133, and 134, UCMJ. To avoid a court-martial conviction for serious offenses, he admitted engaging in sexual harassment and fraternization of a sexual nature involving 12 victims, including at least three enlisted female members of his battalion. In his RFR and personal statement, he acknowledged wrongdoing and accepted responsibility for his admitted sexual behavior. Had the record ended there, he might have been able to mitigate the security concerns. However, beginning with his 2020 interview, he has incredulously attempted to distance himself from the culpability he acknowledged in his RFR and minimize the scope of his admitted sexual behavior.

The consensual nature of Applicant's sexual relationships with Marine A, Sailor 1, and Sailor 2 does not mitigate his flagrant violation of USMC policy. By the time he arrived in Country 1, he had been indoctrinated about the military's rules and policies concerning fraternization and sexual harassment, not only by virtue of his two years of enlisted experience in the USCG, but also through the training he underwent upon commissioning into the USMC. He demonstrated poor judgment and a lack of discretion by choosing to engage in those three sexual relationships, sharing graphic details about his sexual relationship with Marine A, and using inappropriate and offensive language of a sexual nature in the presence of junior Marines and Sailors. Despite his attempt to downplay his admitted sexual behavior as largely benign flirting, I conclude he engaged in inappropriate sexual behavior that created an intimidating, hostile, and abusive working environment.

As an officer in the USMC, Applicant's admitted sexual behavior was egregious, particularly given its impact on individuals subordinate to him. His inconsistent statements and equivocating throughout the security clearance process damaged his credibility and undermined mitigation. Moreover, his admitted sexual behavior demonstrates a willingness to prioritize his own self-interest above his obligations, which casts doubt as to whether he may also act similarly in the context of his security obligations. Considering the record as a whole, I am left with doubts about Applicant's current reliability, trustworthiness, and judgment. AG ¶ 14(b), 14(c), and 14(d) are not established.

Guideline J: Criminal Conduct

The concern under Guideline J 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.

With respect to SOR ¶ 3.a, which cross-alleges the facts in SOR ¶¶ 1.a and 1.b, Applicant's admissions and the record evidence establish the following disqualifying condition in AG ¶ 31 under Guideline J:

(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.

Because Applicant's OTH was not alleged under Guideline J, AG ¶ 31(e) (discharge or dismissal from the Armed Forces for reasons less than "Honorable") is not established. Nevertheless, his OTH remains relevant in evaluating Guideline E, mitigation, and the whole-person concept.

Having considered all the factors set forth in AG ¶ 32 that could mitigate the concerns under Guideline J, I find the following warrant discussion:

(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.

Incorporating my comments under Guideline D, Applicant has not mitigated the concerns raised by his admitted sexual behavior, which violated Articles 92, 133, and 134, UCMJ. He engaged in unwelcome and offensive conduct, based on race, which created an intimidating, hostile, and abusive working environment, in violation of Article 92, UCMJ. He fraternized with Marines B in violation of Articles 133 and 134, UCMJ. He used the N-word in the presence of six enlisted Marines in violation of Article 133, UCMJ.

Applicant's violation of the USMC fraternization policy by engaging in unduly familiar relationships with Marines B is not any less security significant because it did not involve conduct of a sexual nature. I have doubts as to whether he used the N-word on only one occasion while in the USMC. Nonetheless, particularly as an officer, it was inappropriate for him to use the N-word even one time, regardless of his intent or whether Marine D was personally offended.

Applicant did not meet his burden to rebut the substantial evidence of his UCMJ violations to which he admitted guilt in his RFR. His OTH, which was endorsed by his chain of command, underscores the significance and gravity of his admitted sexual

behavior and other admitted misconduct. I considered the time passed without recidivism and the efforts Applicant made to avoid repeating the admitted misconduct underlying his OTH. However, given his failure to unequivocally accept responsibility and acknowledge wrongdoing for his admitted misconduct, I am left with doubts about his current reliability, trustworthiness, and judgment. AG ¶¶ 32(a), 32(c), and 32(d) are not established.

Guideline E: Personal Conduct

The concern under Guideline E 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 ¶ 2.a alleged Applicant's OTH and the following facts about the UCMJ charges underlying his OTH: "Article 134 (Fraternization) 3 times, Article 92 (Failure to Obey) 4 times, and Article 133 (Unbecoming of an Officer)." Because the "3 times" and "4 times" language was not established by either Applicant's admissions or the record evidence, I find that part of SOR ¶ 2.a in Applicant's favor.

With respect to the remaining allegations in SOR ¶ 2.a, I have considered all the disqualifying conditions in AG ¶ 16 under Guideline E. I find the following warrant discussion:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline . . .

(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 . . . (2) any disruptive, violent, or other inappropriate behavior; (3) a pattern of dishonesty or rule violations . . . ; 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 . . .

Applicant's less than honorable discharge from the USMC is adverse information explicitly covered under Guideline J, as indicated above. His OTH is not independently disqualifying under Guideline E because it is a consequence of his admitted misconduct, not the misconduct itself. The admitted misconduct underlying Applicant's OTH was explicitly covered by the allegations in Guidelines D and J, which were found against Applicant. AG ¶¶ 16(c) and 16(d) are not established. Despite my adverse determinations under Guidelines D and J, the admitted misconduct underlying Applicant's OTH raises independent security concerns under Guideline E. AG ¶ 16(e) is established.

Having considered all the factors set forth in AG ¶ 17 that could mitigate the concerns under Guideline E, I find the following warrant discussion:

(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.

Incorporating my comments under Guidelines D and J, neither AG ¶¶ 17(c) nor 17(d) are established as to the admitted misconduct underlying Applicant's OTH. Applicant made disclosures about his admitted misconduct to family, friends, and to his current and former coworkers and superiors. However, the record did not sufficiently establish that he divulged to them the full nature and extent of his specific actions. Moreover, throughout the security clearance process, he attempted to minimize the scope of, and failed to accept full responsibility for, his admitted misconduct. Therefore, I am left with doubts and ongoing concerns about his susceptibility to exploitation, manipulation, or duress. AG ¶ 17(e) is not established.

Whole-Person Analysis

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall commonsense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. 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 D, E, and J in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). I considered all the evidence and arguments proffered by Applicant in support of mitigation, the occasions he acknowledged wrongdoing and professed remorse for his admitted misconduct, the counseling and other efforts he undertook to understand and reform his behavior, and the favorable testimony of his witnesses. The toxic culture of his leadership and duty station in Country 1, his negative experiences with his USCG leadership, and his upbringing undoubtedly played a role in Applicant's admitted misconduct and poor decisions. However, these factors do not mitigate the Government's concerns. Beginning with his 2020 interview and continuing through the hearing, Applicant undermined his credibility and mitigation through his inconsistent statements, equivocations, and minimization.

Applicant and his witnesses touted the accountability he took for his admitted misconduct. Had the record ended with the level of accountability he professed in his RFR and accompanying personal statement, it might have been a closer case. However, this is not a close case. He appeared sincere in his resolve to avoid repeating the misconduct and poor judgment underlying his OTH. He is commended for his efforts toward personal and professional growth. However, he failed to unequivocally accept responsibility or demonstrate that he grasped the gravity of his admitted misconduct. Moreover, his attempts to distance himself from the culpability he acknowledged in his RFR and to minimize the scope of his admitted misconduct raise doubts about the extent to which he has truly evolved.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for an award of a security clearance in the future. However, based on the evidence before me, I am unable to conclude that it is clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. After weighing the disqualifying and mitigating conditions under Guidelines D, E, and J and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the security concerns raised by his sexual behavior, personal conduct, and criminal conduct. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the interests of national security to grant his eligibility for access to classified information.

Formal Findings

Formal findings 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
Subparagraph 1.a:	Against Applicant (except for the part regarding his use of a racial slur, which I find for Applicant)
Subparagraph 1.b:	Against Applicant (except for the part regarding his fraternization with Marines B, which I find for Applicant)
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant (except for the “3 times” and “4 times” part, which I find for Applicant)
Paragraph 3, Guideline J:	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’s eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge