



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



In the matter of:)
)
) ISCR Case No. 23-02348
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: Grover Baxley, Esq.

09/12/2024

Decision

HARVEY, Mark, Administrative Judge:

Applicant mitigated security concerns arising under Guideline F (financial considerations); however, he failed to mitigate Guidelines D (sexual behavior), J (criminal conduct), and E (personal conduct) security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On December 8, 2022, Applicant completed and signed an Electronic Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On December 1, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a statement of reasons (SOR) to Applicant. (Hearing Exhibit (HE) 2) This action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective on June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DCSA CAS notified Applicant that it intended to deny or revoke his security clearance because it did not find that it is clearly consistent

with the interests of national security to grant or continue a security clearance for him. Specifically, the SOR set forth security concerns arising under Guidelines D, J, E, and F. (Hearing Exhibit (HE) 2) On December 7, 2023, Applicant responded to the SOR. (HE 3)

On April 5, 2024, Department Counsel was ready to proceed. On May 8, 2024, the case was assigned to me. On May 17, 2024, DOHA issued a notice of hearing, scheduling the hearing for July 23, 2024. (HE 1) Applicant's hearing was held as scheduled.

At hearing, Department Counsel offered nine exhibits, and Applicant offered four exhibits into evidence. (Tr. 19-22; GE 1-9; Applicant Exhibit (AE) A-AE D) The attachments to the SOR response were received into evidence at the hearing without objection (69 pages). (Tr. 41, 93; HE 3 at 1-69) All proffered exhibits were admitted into evidence without objection. (Tr. 20, 22-23) The record was not held open after the hearing. (Tr. 147-148) On August 5, 2024, DOHA received a transcript of Applicant's security clearance hearing.

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

Findings of Fact

Applicant admitted the allegation in SOR ¶ 2.b. (HE 3) He denied in whole or in part the allegations in SOR ¶¶ 1.a, 1.b, 2.a, 3.a, 4.a, and 4.b. (HE 3) He provided clarifications and extenuating and mitigating information. (HE 3)

Applicant is 36-year-old network engineer, and he has been a full-time employee of a large corporation since late 2023. (Tr. 41, 62; AE B) For the last 17 years, he has held a security clearance. (Tr. 63) He was home schooled, and in 2006, he received a General Educational Development (GED) diploma. (Tr. 42-43, 120) In 2021, he received an associate degree in general studies, and he expects to receive a bachelor's degree in information technology in the fall of 2024. (Tr. 120) He has two certifications in information technology areas. (Tr. 120-121)

In August 2006, Applicant enlisted in the Army. (Tr. 43) His initial military occupational specialty (MOS) was Signal Support Systems Specialist (25U). (Tr. 45; HE 3 at 57) In 2011, he received a new communication MOS (Nodal Network Systems (25N)). (Tr. 51-52, 93; HE 3 at 57) He served on active duty in the Army for 16 years. (Tr. 59) He was not permitted to continue on active duty because he was a sergeant (E-5), and he was separated from the Army due to a retention control point (RCP) because of his rank and years of service. (Tr. 61) He received an Honorable discharge from the Army. (Tr. 59)

Applicant had four combat deployments and tours in Kuwait and Africa. (Tr. 55-60; HE 3 at 50, 57-58) During his deployments to combat zones he was subjected to frequent enemy fire from mortars, small arms, and missiles. (Tr. 46-57) He said during one enemy attack, his helmet was hit with a bullet and deflected. (Tr. 50) He received a 100 percent

disability rating from the Department of Veterans Affairs (VA), which included 70 percent for post-traumatic stress disorder (PTSD). (Tr. 60-61; HE 3 at 4-7)

Applicant married in 2007 and divorced in 2014. (GE 1) In 2018, Applicant married. (Tr. 26; GE 1) Applicant does not have any children with his current spouse; however, they each have two children from previous relationships. (Tr. 27)

Sexual Behavior and Criminal Conduct

SOR ¶ 1 alleges sexual behavior security concerns. SOR ¶ 1.a alleges in about February 2022, Applicant was charged with violations of Article 120, Uniform Code of Military Justice (UCMJ), (assault consummated by a battery), and Article 107, UCMJ (false official statement). He was convicted of sexual harassment and assault consummated by a battery. He received a reduction of E5 specialist, 45 days of extra duty, and an oral reprimand. There are several errors in SOR ¶ 1.a, and correct information follows.

SOR ¶ 1.b alleges on December 3, 2021, a military protective order (MPO) was issued against Applicant as a result of the charges in SOR ¶ 1.a.

SOR ¶ 2 alleges criminal conduct security concerns. SOR ¶ 2.a cross-alleges the conduct in SOR ¶ 1.

Applicant was Specialist (SPC) A's section sergeant. (HE 3 at 8) While they were deployed overseas, SPC A moved to a different room in the barracks without permission, which violated a rule. (HE 3 at 8) A Navy petty officer recommended adverse action against SPC A. (Tr. 66, 98-99; HE 3 at 8) Applicant had a friendly relationship with SPC A at that time, and he recommended disposition using counseling. (HE 3 at 8) Applicant believed he was pressured to take more adverse action against SPC A. (Tr. 99) SPC A subsequently made the allegations in SOR ¶ 1.a against Applicant, and he was unable to participate in SPC A's nonjudicial punishment (NJP) proceeding (assuming she had one) after she made allegations against him. (HE 3 at 9) Applicant believed the barracks incident may have been a factor in SPC A's decision to make allegations against him.

SPC A said in August 2021 that Applicant made sexual contact with her on three occasions without her consent. (GE 4 at 54) On the first occasion, he came up behind her and squeezed her buttocks. She "brushed off" the incident. About seven days later, he kissed her on the cheek on two occasions when she was in a vehicle with him. Later that same evening, she was in a storage building with Applicant, and she "felt [his] hands 'caressing her back, sides, hips, and thighs from behind.'" (GE 4 at 54) She began to cry and went to tell her roommate about the incident. (*Id.*)

On September 8, 2021, Applicant waived his rights and denied to Army Criminal Investigation Command (CID) special agents that he kissed SPC A or touched SPC A's buttocks, hips, or thighs (Tr. 123; GE 4 at 18) He was not being coerced by the CID when he made this initial denial of the allegation that he kissed SPC A. (Tr. 124) After the initial CID interview, Applicant was being processed at the CID office, and he volunteered to

the CID that he kissed SPC A on the neck when they were riding in a vehicle. (GE 4 at 18)

On January 20, 2022, a CID special agent interviewed Applicant for about 12 hours. (Tr. 68; GE 4 at 61) The CID told Applicant he had a negative result on the polygraph. (Tr. 69) Initially, he denied that he touched SPC A's hips, buttocks, or thighs. (Tr. 69) However, he subsequently told the CID special agent he touched her hips, buttocks, and thighs.

After interviewing Applicant, a CID special agent typed a statement, and Applicant initialed the start and end of each paragraph. (Tr. 102; GE 4 at 65-67) Applicant's typed statement included the following comments:

I would play a joke and duck down and run behind her, and grab by her sides, and we both laughed. . . . [SPC A] I am truly sorry for my actions and must ask you for forgiveness. . . . [we were] exchanging playful banter and I tapped the side of her left butt cheek with the back of my right hand. . . [while she was dancing] everyone was smacking her on the ass, and I did one time. . . When I was coming up behind her, I was moving fast. I put my hands on the side of her waist and hip, and my momentum caused my hands to slide down to her thighs. (GE 4 at 65-66)

At his hearing, Applicant said these five comments in his statement to CID were all false. (Tr. 69, 102-103) However, he admitted that while SPC A was twerking on a table, he put her in a fireman's carry. (Tr. 103-104; GE 4 at 66) He grabbed the lower part of her leg during the fireman's carry. (Tr. 104) He used the fireman's carry because she asked him to help her down from the table. (Tr. 104) The fireman's carry occurred the same night that he kissed her. (GE 4 at 66) Applicant said at his hearing that several other parts of the typed CID statement were also false. He lied in the CID statement when he said that he was treated very well during the CID interview. (Tr. 105; GE 4 at 66) He said he also lied in his CID statement about other comments such as receiving advice about what to say in the interview from friends and his motivation for telling the truth during the CID interview. (Tr. 105-106)

An Army judge advocate opined there was probable cause to believe Applicant committed abusive sexual contact, assault consummated by battery, and false official statement, in violation of Articles 120, 128, and 107, UCMJ.

Applicant was not charged with any offenses. His offenses were resolved in February 2022 in an NJP proceeding, which does not involve preferral of charges. (Tr. 70) SPC A was not a witness at Applicant's NJP proceeding. (Tr. 121) Applicant told his commander at the NJP proceeding that he kissed SPC A; however, he denied that he touched SPC A's buttocks, hips, or thighs. (Tr. 71, 76; HE 3 at 49-50) He also said he made a false admission to the CID about touching her buttocks, hips, or thighs. (Tr. 90) The offense of false official statement was not alleged on the record of NJP. (HE 3 at 52-53)

Block 2 of the Army NJP form states that the imposing commander must apply the following standard of guilt. "I will not impose any punishment unless I am convinced beyond a reasonable doubt that you committed the offense(s)." (Tr. 136; HE 3 at 52) In February 2022, Applicant's commander concluded at his NJP proceeding that around August 2021 he "unlawfully kiss[ed]" SPC A on the cheek in violation of Article 128, UCMJ, and he failed to obey a lawful regulation, paragraph 7-7, Army Regulation 600-20, by sexually harassing SPC A, to wit: by deliberate physical contact of a sexual nature, in violation of Article 92, UCMJ. (Tr. 71) His commander crossed out the Article 120, UCMJ, sexual assault and Article 128, UCMJ assault and battery offenses. (HE 3 at 52-53) He reduced Applicant from staff sergeant to sergeant, and directed he serve 45 days of extra duty and receive an oral reprimand. (Tr. 73; HE 3 at 54) The record of NJP was filed in the Performance section of Applicant's Official Military Personnel File. (HE 3 at 52) He was discharged from the Army in July 2022 because he was not permitted to reenlist due to RCP. (Tr. 72) There have not been any similar allegations against Applicant, and this was his first NJP. (Tr. 73)

Applicant received a military protective order (MPO) directing him to stay away from SPC A. (Tr. 75) Issuance of an MPO is standard practice to ensure separation from witnesses and the accused when there is an allegation of sexual assault. (Tr. 75) Applicant did not commit any offense aside from the offenses previously addressed in the CID investigation. (Tr. 75-76) Applicant complied with the MPO. (Tr. 76)

At his hearing and in his SOR response, Applicant admitted he engaged in an inappropriate relationship with SPC A. (Tr. 65; HE 3) He admitted that he kissed SPC A on the cheek while they were in a vehicle together in the presence of other soldiers; however, he denied that he touched her buttocks, hips, or thighs. (Tr. 67; HE 3) He said the kiss was in a joking manner and not sexual. (Tr. 67; HE 3) He could not explain why SPC A made a false allegation against him, except that it may have been related to a possible disciplinary action against her for moving to a different barracks room without permission. (Tr. 100; HE 3) He said his statement to CID was false, and his admissions that he touched her hips, thighs, and buttocks were the product of pressure or coercion. (Tr. 89)

SOR ¶ 2.b alleged in about January 2023, Applicant was charged with driving under the influence of alcohol (DUI). The charge was amended to negligent driving in the first degree after he completed a court-ordered alcohol/drug referral treatment and a DUI victim's panel.

In January 2023, Applicant was feeling stress from leaving the Army, adjusting to civilian life, and mourning for a deceased brother. (Tr. 84; HE 3) His father was in a mental institution because he had a psychotic break. (Tr. 84) Applicant was working at two jobs. (Tr. 84) He said he drank two mixed drinks and one beer. (Tr. 84) His vehicle stopped while he was driving home due to a mechanical malfunction, and the police determined he had been drinking. (Tr. 84) There was no vehicular accident. (Tr. 86) He received a breathalyzer test at the police station; however, he said he could not remember his breathalyzer test result. (Tr. 96, 119-120)

The DUI in SOR ¶ 2.b was Applicant's first and only alcohol-related incident involving the police or any other disciplinary action. (Tr. 85, 87) In January 2023, he limited his alcohol consumption to four drinks. (Tr. 85) He completed the court-ordered alcohol treatment and DUI victim's panel. (Tr. 86-87; HE 3 at 59) He was found guilty of negligent driving in the first degree. (Tr. 87) He said in the future he does not intend to drive after drinking alcohol. (Tr. 88) He currently drinks two to four drinks a week. (Tr. 88)

Personal Conduct

SOR ¶ 3.a alleges on June 23, 2023, Applicant falsified material facts when he told an authorized investigator for the U.S. Department of Defense during his personal subject interview (PSI) that he did not touch the buttocks and hips/thighs of the victim. He deliberately sought to conceal the information alleged in SOR ¶ 1.a.

In his December 8, 2022 SCA, Applicant disclosed that he received NJP and was not charged or convicted of any offense. (GE 1 at 41) He also said an MPO was issued against him for an "incident between me and another Soldier." (*Id.*)

Applicant's June 23, 2023 PSI includes the following summary:

Allegations were made that Subject had touched [SPC A's] buttocks but Subject does not recall ever doing so. While [overseas] they were allowed to consume alcohol so there were times they were socializing together as a group where alcohol was consumed so if anything had happened it would have happened then, but Subject does not recall ever touching [SPC A's] buttocks. Subject never made a point to be alone with [SPC A] and never made romantic advances toward [SPC A]. (GE 2 at 5)

Applicant's PSI indicated he was only found at his NJP proceeding to have kissed SPC A, and the summary does not indicate he told the investigator that he was also found to have sexually harassed SPC A in violation of Article 92, UCMJ. (GE 2 at 6) He also told the investigator that he "voluntarily" left the Army. (*Id.* at 7) Applicant said he brought some NJP documents to his meeting with the investigator; however, he "inadvertently fail[ed]" to bring the page from the NJP record with the offenses with findings of guilty. (Tr. 74) Applicant said he told the investigators during the PSI that he did not touch SPC A's breast, buttocks, or thighs in a sexual manner. (Tr. 89)

Financial Considerations

Applicant's child support was recalculated, resulting in a \$12,000 arrearage. (Tr. 78) Payments toward his child support arrearage resulted in some other debts becoming delinquent. (Tr. 30) He received a reduction in grade from his NJP, and he was also unemployed after leaving the Army. (Tr. 31, 37) He uses a budget, and he is careful about his spending. (Tr. 32)

SOR ¶ 4.a alleges a credit-card debt placed for collection for \$4,174. (HE 2) Applicant has a payment plan with the credit-card creditor. (Tr. 33) He provided

documentary evidence showing five monthly payments of \$287 and one payment of \$612 from March 2023 through July 2024 to address the credit-card debt. (Tr. 80-82; AE A)

SOR ¶ 4.b alleges a delinquent bank debt for \$96. (HE 2) He said he paid the \$96 debt. (Tr. 79)

Character Evidence

Applicant's spouse described him as patriotic, responsible, and proud of his Army service. (Tr. 28, 34) For the most part, he received excellent noncommissioned evaluation reports (NCOER). (HE 3 at 10-21, 24-32) He received a negative NCOER for 2015 to 2016 for his performance during a combat tour. (Tr. 55) His NCOER stated he did not meet standards for the following reasons:

- o demonstrated lapses in judgment; degraded the camaraderie and esprit de corps of the S6 shop through his actions
- o struggled to take appropriate actions when faced with difficulties; unwilling to ask for help to support mission
- o leadership skills require refinement; lacks managerial skills and ability to make positive decisions without guidance
- o failed to keep Task Force informed; information dissemination inconsistent, lost trust and confidence of team
- o requires further development prior to increased responsibilities
- o failed to use low OPTEMPO time to improve COMSEC account and account paperwork
- o failed to follow and established (sic) procedures for securing and accounting for Physical (COMSEC) Material
- o completed assigned tasks as prescribed, however failed to do so within assigned timeline and with increased leadership oversight
- o counseled multiple times during the rated period for sub-standard performance and was ultimately relieved of his duties as the BDE COMSEC Account Manager due to failure to perform by his rater
- o requires a significant amount of mentorship and development before returning to a duty position of leadership (HE 3 at 22-23)

Applicant denied that he had ever been counseled for failure to follow rules and regulations related to how to safeguard classified information. (Tr. 63, 92; HE 3) He said he lacked training for his assigned position. (Tr. 95) He was receiving about 100 documents a week from subordinate units, and the destruction forms were not properly completed. (Tr. 117) Dates and signatures on the documents were incorrect. (Tr. 118) He considered the adverse NCOER to be unfair. (Tr. 96; HE 3)

Applicant provided five-character letters from coworkers and friends, which indicate he is an excellent NCO and contractor employee. (AE B-AE D; HE 3 at 67-69) The general sense of Applicant's character evidence was that he is professional, diligent, responsible, reliable, and conscientious. One character witness who works for the DOD contractor said:

[Applicant] has consistently demonstrated exceptional technical proficiency and an unparalleled commitment to our classified projects. His work has significantly improved the quality and timeliness of our deliverables, ensuring that our programs run smoothly and efficiently. Beyond his technical skills, [he] is a person of great character and integrity. The same principles of honor, duty, and commitment that were ingrained in me as an Army Ranger are vividly reflected in [Applicant's] actions and character. He is deeply respected by his colleagues for his dedication to mentoring and teaching. His ability to foster a collaborative and supportive environment has greatly enhanced our team's cohesion and performance. (AE B)

Applicant received the following awards: Army Commendation Medal (5); Army Achievement Medal (1); Meritorious Unit Commendation (1); Valorous Unit Award (2); Army Good Conduct Medal (3); National Defense Service Medal (1); Global War on Terrorism Service Medal (2); Afghanistan Campaign Medal with 2 Campaign Stars; Iraq Campaign Medal with 2 Campaign Stars; Noncommissioned Officer Professional Development Ribbon (3); Army Service Ribbon; Overseas Service Ribbon (3); NATO Medal; Combat Action Badge; Expert Marksmanship Badge with Rifle Bar; and Driver and Mechanic Badge with Driver Wheeled Vehicle(s). (HE 3 at 57-58) He completed numerous Army training courses. (*Id.*) The character evidence supports approval of his access to classified information.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's 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.

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

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation

about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). “The Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant’s security eligibility. Direct or objective evidence of nexus is not required.” ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020) (citing ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018)).

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 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). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Sexual Behavior and Criminal Conduct

AG ¶ 12 describes the security concern arising from sexual behavior 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 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 ¶ 30 describes the security concern about criminal conduct, “Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very

nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations."

AG ¶ 13 lists conditions that could raise a security concern about sexual behavior and may be disqualifying as follows:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop;
- (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.

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

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

AG ¶¶ 13(a), 13(c), 13(d), 31(a), and 31(b) are established. AG ¶ 13(c) applies because Applicant continued to deny the extent of his sexual conduct with SPC A. He does not want his family, employer, and community to be aware that he touched SPC A's hips, thighs, and buttocks. AG ¶ 13(b) does not apply because Applicant is able to control his sexual behavior. Additional discussion of the established disqualifying conditions is in the mitigation section, *infra*.

AG ¶ 14 lists conditions that could mitigate sexual behavior security concerns:

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;
- (b) the 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;

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

(e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

AG ¶ 32 lists conditions that could mitigate criminal conduct security concerns:

(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;

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

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

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

SPC A, a woman Applicant supervised, accused him of touching her buttocks, hips, and thighs and kissing her in August 2021 without her consent. Applicant's allegation that SPC A fabricated her allegations of sexual assault are not impeached because of her unauthorized move to a different room in the barracks, and any actions he chose to take against her.

In September 2021, Army CID special agents interviewed Applicant, and he initially denied that he kissed her, and touched her buttocks, hips, and thighs. Later, during the initial interview, he said he kissed SPC A. Several months later, CID special agents questioned him for several hours, and he provided a detailed written account of his kissing SPC A and touching her buttocks, hips, and thighs.

At Applicant's NJP proceeding, he admitted that he kissed SPC A on the cheek while they were in a vehicle together in the presence of other soldiers; however, he denied that he touched her buttocks, hips, or thighs. His commander concluded at his NJP proceeding that around August 2021 he "unlawfully kiss[ed]" SPC A on the cheek in violation of Article 128, UCMJ, and he failed to obey a lawful regulation by sexually

harassing SPC A, to wit: by deliberate physical contact of a sexual nature, in violation of Article 92, UCMJ. He did not specify the conduct that constituted the sexual harassment.

Applicant's commander crossed-out the nonconsensual sexual offenses and one assault and battery offense on the record of NJP, which is an indication he was not satisfied those offenses were proven beyond a reasonable doubt.

In ISCR Case No. 08-02299 (App. Bd. Nov. 12, 2010), the administrative judge concluded that the statement of a victim of sexual assault was credible even though there was some impeachment of her version of events, and that applicant was acquitted of nonconsensual sexual offenses at his court-martial. The Appeal Board said, "the fact that criminal charges were dropped, dismissed, or resulted in an acquittal does not preclude an Administrative Judge from finding an applicant engaged in the conduct underlying those criminal charges." (*Id.* at 4 (quoting ISCR Case No. 99-0119 at 2 (App. Bd. Sep. 13, 1999))). See *also* ISCR Case No. 19-00883 at 6 (App. Bd. Dec. 20, 2022) (stating same). The administrative judge concluded that the applicant in ISCR Case No. 08-02299 committed the nonconsensual sexual offenses and denied his security clearance. The Appeal Board acknowledged the offenses occurred 10 years before the applicant's security clearance hearing; however, a factor in the denial of his security clearance was that applicant's failure to accept full responsibility for his conduct during the security clearance process, which reduced the mitigation of the passage of time from the original offenses. ISCR Case No. 08-02299 at 7 (App. Bd. Nov. 12, 2010) (denial of security clearance affirmed).

Applicant's failure to follow procedures for securing and accounting for Physical (COMSEC) Material as indicated in his 2015 to 2016 NCOER and his false denials that he touched SPC A's hips, thighs, and buttocks, to CID special agents, to his commander during his NJP proceeding, in his SOR response, and at his hearing will not be considered for disqualification purposes because they were not alleged in the SOR. However, the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered, stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See *also* ISCR Case No. 12-09719 at 3 (App. Bd. Apr. 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). These non-SOR allegations will not be considered except for the five purposes listed above. I note the allegation that he failed to follow procedures for securing and accounting for Physical (COMSEC) Material was not fully developed at his hearing. The problems detailed in 2015 to 2016 NCOER occurred in a combat zone, and he may not have been sufficiently trained or had adequate

resources to properly perform his COMSEC duties. The content of his adverse NCOER has minimal security clearance significance under all of the circumstances. No adverse inference is drawn from Applicant's failure to pass the CID polygraph administered on January 20, 2022.

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

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

SOR ¶ 1.b alleged Applicant received an MPO to keep him away from SPC A. There is no evidence he violated the MPO. The underlying facts that supported issuance of the MPO are detailed in SOR ¶ 1.a. SOR ¶ 1.b is mitigated.

SOR ¶ 2.b alleged and the record established in about January 2023, Applicant was charged with and committed a DUI. The charge was amended to negligent driving in the first degree after he completed a court-ordered alcohol/drug referral treatment and a DUI victim's panel. There have not been any other DUIs. He promised not to drive after consuming alcohol. AG ¶ 32(a) applies because his DUI "happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on [Applicant's] reliability, trustworthiness, or good judgment." SOR ¶ 2.b is mitigated.

AG ¶¶ 14(b), 32(a), and 32(d) are partially established. Applicant has not engaged in any sexual misconduct since August 2021. He understands the serious consequences entailed in future sexual misconduct, and he is unlikely to engage in future sexual misconduct. In 2021, he received an associate degree in general studies, and he expects to receive a bachelor's degree in information technology in the fall of 2024. He has multiple tours in combat zones. He has a 100 percent disability rating from the VA, and he received multiple Army awards. His character evidence indicates he is working successfully for the government contractor.

The evidence against mitigation is more persuasive. As indicated previously Applicant has not been honest and candid in his descriptions of his conduct with SPC A. Poor judgment is shown when an Applicant presents false information in an SOR response and at a security clearance hearing. His false statements, including at his hearing, show a lack of rehabilitation. His repeated false statements continue to cast

doubt on his reliability, trustworthiness, and good judgment. Sexual behavior and criminal conduct security concerns related to his behavior with SPC A are not mitigated.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. . . .

AG ¶ 16 provides one personal conduct disqualifying condition that is relevant in this case as follows:

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

SOR ¶ 3.a alleges on June 23, 2023, Applicant falsified material facts when he told an authorized investigator for the U.S. Department of Defense during his PSI that he did not touch the buttocks and hips/thighs of the victim. He deliberately sought to conceal the information alleged in SOR ¶ 1.a.

Applicant's June 23, 2023 PSI includes the following summary:

Allegations were made that Subject had touched [SPC A's] buttocks but Subject does not recall ever doing so. While [overseas] they were allowed to consume alcohol so there were times they were socializing together as a group where alcohol was consumed so if anything had happened it would have happened then, but Subject does not recall ever touching [SPC A's] buttocks. Subject never made a point to be alone with [SPC A] and never made romantic advances toward [SPC A]. (GE 2 at 5)

AG ¶ 16(b) is established. As indicated in the previous section. In his PSI, he mentioned his NJP and discussed the allegations of sexual misconduct involving SPC A; however, he never told the truth about touching SPC A's hips, thighs, and buttocks. Applicant told the CID in his written statement that he touched SPC A's hips, thighs, and buttocks. Applicant's written statement to the CID corroborated SPC A's statement to the CID about Applicant touching her hips, thighs, and buttocks.

AG ¶ 17 lists the conditions that could mitigate personal conduct security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability.

None of the mitigating conditions fully apply. Applicant was not honest when he said in his PSI that he did not remember touching SPC A's thighs, hips, and buttocks. His subsequent false denials that he touched SPC A's thighs, hips, and buttocks in his SOR response and at his hearing show a lack of judgment and rehabilitation. Personal conduct security concerns are not mitigated.

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An

individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

AG ¶ 19 includes disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts"; and "(c) a history of not meeting financial obligations." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). The record establishes the disqualifying conditions in AG ¶¶ 19(a) and 19(c) requiring additional inquiry about the possible applicability of mitigating conditions. Discussion of the disqualifying conditions is contained in the mitigation section, *infra*.

The financial considerations mitigating conditions under AG ¶ 20 which may be applicable in this case are as follows:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

SOR ¶¶ 4.a and 4.b allege a credit-card debt placed for collection for \$4,174, and a delinquent bank debt for \$96. Circumstances partially or fully beyond Applicant's control adversely affected Applicant's finances. He left the Army and was unemployed. He suffered from PTSD. He had a substantial child-support arrearage. Family stressors affected his ability to work. He has a payment plan with the credit-card creditor. He provided documentary evidence showing five monthly payments of \$287 and one payment of \$612 from March 2023 through July 2024 to address the credit-card debt. He paid the \$96 bank debt.

A security clearance adjudication is not a debt-collection procedure. It is designed to evaluate an applicant's judgment, reliability, and trustworthiness. See ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010). Applicants are not required "to be debt-free in order to qualify for a security clearance. Rather, all that is required is that an applicant act responsibly given his or her circumstances and develop a reasonable plan for repayment, accompanied by 'concomitant conduct' that is, actions which evidence a serious intent to effectuate the plan." ISCR Case No. 15-02903 at 3 (App. Bd. Mar. 9, 2017) (denial of security clearance remanded) (citing ISCR Case No.13-00987 at 3, n. 5 (App. Bd. Aug. 14, 2014)). There is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

Applicant has taken meaningful actions to address his delinquent SOR debts. He has demonstrated a good-faith effort to resolve his debts. There are clear indications that his financial problems are being resolved and under control. His finances do not cast doubt on his current reliability, trustworthiness, and judgment. AG ¶¶ 20(a), 20(b), and 20(d) are established. Financial considerations security concerns are mitigated.

Whole-Person Analysis

In all adjudications, the protection of our national security is the paramount concern. A careful weighing of several variables in considering the whole-person concept is required, including the totality of his or her acts, omissions, and motivations. Each case is decided on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Under the whole-person

concept, the administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guidelines D, J, E, and F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 36-year-old network engineer who has been a full-time employee of a large corporation since late 2023. For the last 17 years, he has held a security clearance. In 2021, he received an associate degree in general studies, and he expects to receive a bachelor's degree in information technology in the fall of 2024. He has two certifications in information technology areas.

In August 2006, Applicant enlisted in the Army. He served on active duty in the Army for 16 years. He was not permitted to continue on active duty because he was a sergeant (E-5), and he was separated from the Army due to an RCP. He received an Honorable discharge from the Army.

Applicant had four combat deployments, and tours in Kuwait and Africa. During his deployments to combat zones, he was subjected to frequent enemy fire from mortars, small arms, and missiles. He said during one enemy attack, his helmet was hit with a bullet and deflected. He received a 100 percent disability rating from the VA, including 70 percent for PTSD.

Applicant received mostly excellent NCOERs and numerous Army awards. He completed multiple Army training courses. His wife and five coworkers or friends made statements on his behalf. The general sense of Applicant's character evidence is that he is professional, diligent, responsible, reliable, and conscientious. The overall character evidence supports reinstatement of his security clearance.

The evidence against reinstatement of his security clearance is more persuasive. In August 2021, Applicant kissed SPC A, and he touched her thighs, hips, and buttocks. He was her supervisor. He falsely repeatedly denied that he touched her thighs, hips, and buttocks. His false statements show lack of judgment and rehabilitation.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant mitigated financial consideration security concerns; however, sexual behavior, criminal conduct, and personal conduct security concerns are not mitigated.

Formal Findings

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

| | |
|----------------------------|-------------------|
| Paragraph 1, Guideline D: | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |
| Subparagraph 1.b: | For Applicant |
| Paragraph 2, Guideline J: | AGAINST APPLICANT |
| Subparagraph 2.a: | Against Applicant |
| Subparagraph 2.b: | For Applicant |
| Paragraph 3, Guideline E: | AGAINST APPLICANT |
| Subparagraph 3.a: | Against Applicant |
| Paragraph 4, Guideline F: | FOR APPLICANT |
| Subparagraphs 4.a and 4.b: | For Applicant |

Conclusion

Considering all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge