



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



In the matter of: )  
)  
) ISCR Case No. 22-01335  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Jeff A. Nagel, Esq., Department Counsel  
For Applicant: *Pro se*

09/12/2024

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**Decision**

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LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the security concerns under Guideline E (personal conduct). Eligibility for access to classified information is granted.

**Statement of the Case**

On November 30, 2023, the Department of Defense (DoD) issued a statement of reasons (SOR) to Applicant detailing security concerns under Guideline E. Applicant responded to the SOR on January 16, 2024, and requested a decision based on the written record in lieu of a hearing. Department Counsel requested a hearing before an administrative judge.

The case was assigned to me on July 18, 2024. The hearing convened as scheduled on August 8, 2024. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified, but he did not submit any documentary evidence.

## Findings of Fact

Applicant is a 37-year-old employee of a defense contractor. He has worked for his current employer since 2019. He served on active duty in the U.S. military from 2011 until he was honorably discharged in 2019. He is a high school graduate. He is married with three children. (Tr. at 16-19, 46; GE 1, 2, 4)

Applicant had criminal and disciplinary problems before and during his service in the military, primarily alcohol related. He was arrested in 2008 and charged with driving under the influence (DUI). He does not remember what his blood alcohol content (BAC) was, but he admitted that he drank more than he should have, and he was well over the limit. (Tr. at 26-27; Applicant's response to SOR; GE 3)

Applicant was on temporary duty in 2014. Personnel were ordered to have no more than one drink of alcohol while on liberty. He violated the order by having more than one drink. He does not remember how many drinks he had, but it was more than two. He was punished at nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) for violations of Articles 92, failure to obey order or regulation, and 134, drunk and disorderly. He received forfeitures, restriction, and extra duties. The forfeitures and all but 14 days of restriction and extra duties were suspended for six months. (Tr. at 27-30; Applicant's response to SOR; GE 2)

Applicant was arrested in 2015 by civilian authorities and charged with DUI. His BAC was .17%. He was found guilty and sentenced to community service and a fine. The military also punished him for the same incident at nonjudicial punishment under Article 15 of the UCMJ for a violation of Article 111, drunken or reckless operation of a vehicle. He received a reduction from E-5 to E-4, forfeitures, restriction, and extra duties. The forfeitures, restriction, and extra duties were suspended for six months. He was directed to attend a substance abuse class. (Tr. at 30-33; Applicant's response to SOR; GE 1-3)

Applicant had tattoos before he enlisted in the military. In about 2016, his tattoos were photographed and entered as a counseling entry in his military record. This was an administrative procedure and not a form of punishment. (Tr. at 34-35; Applicant's response to SOR; GE 4)

Applicant had scheduled dental appointments in late 2017 or early 2018. He missed three appointments. He stated it was due to his training schedule, and he forgot about at least one of them. He was counseled on the matter. (Tr. at 24-25, 35-36; Applicant's response to SOR; GE 4)

Applicant was scheduled to be discharged from the military in June 2019. He attended a formal military function in May 2019. He got drunk and blacked out. Another servicemember claimed that Applicant assaulted him by tapping or grabbing his genitals on two occasions. Applicant stated that he thought the individual was a friend. Applicant does not remember doing it because of the alcohol, but he does not deny that it likely occurred. (Tr. at 36-39; Applicant's response to SOR; GE 4)

Applicant was placed on legal hold and not permitted to be discharged while the alleged sexual assault was investigated. It was ultimately determined that he would not be prosecuted. He was counseled for committing an assault and for being drunk and disorderly. He was discharged with an honorable discharge in December 2019. (Tr. 16-17, 20-23, 39-41; Applicant's response to SOR; GE 1, 2, 4)

Applicant was an E-5 when he was discharged. He received two Good Conduct Medals and other awards. He regrets his problematic conduct, particularly his alcohol-related incidents. He realizes that he drank more than he should have when he was younger. He credibly testified that he still drinks occasionally, but in moderation. He tends to limit his consumption to about two to four beers a few times a month. He has three young children, and he coaches two youth-soccer clubs. He credibly testified that he has not driven after consuming alcohol since his 2015 DUI. (Tr. at 34, 38, 44-45, 49-50; Applicant's response to SOR; GE 2)

Applicant submitted a Questionnaire for National Security Positions (SF 86) in June 2021. He reported his October 2015 arrest and subsequent conviction. He was interviewed for his background investigation in July 2021. He discussed his military record and alcohol-related incidents. He stated that in 2019 another servicemember claimed that Applicant tapped him on the genitals. (Tr. at 42-43; GE 1, 4)

### **Policies**

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

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

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

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

## **Analysis**

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

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

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security clearance investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; 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 had criminal and disciplinary problems before and during his service in the military, primarily alcohol related. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(c) and 16(e) are applicable.

SOR ¶ 1.c alleges that Applicant was arrested for DUI in October 2015. SOR ¶ 1.d alleges that Applicant was counseled for that DUI by the military. They both allege the same underlying conduct. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005). SOR ¶ 1.d is concluded for Applicant.

SOR ¶ 1.e alleges that Applicant was counseled for failing to comply with his military branch's tattoo policy. Applicant was not disciplined, and he was not given an unfavorable administrative action. His tattoos were photographed and entered as a counseling entry in his military record for administrative and identification purposes. SOR ¶ 1.e is concluded for Applicant.

SOR ¶ 1.g alleges that Applicant, "without consent, grabbed the penis and testicles of another [servicemember] twice in a 45-minute period." SOR ¶ 1.h alleges that:

In or around May 2019 you were counseled for violating Articles 128 on two counts for being Drunk and Disorderly, due to an alcohol related incident where you were accused of sexually assaulting a coworker's genitals on two occasions. As a result of this incident, you were given a General Discharge from the [military branch].

There are several problems with this allegation. Applicant did not receive a general discharge; he was honorably discharged. Article 128 of the UCMJ is the assault article, not the drunk and disorderly article. Finally, SOR ¶¶ 1.g and 1.h both allege the assault on another servicemember's genitals. Because SOR ¶ 1.h also alleges that the assault was alcohol related, whereas SOR ¶ 1.g only alleges the assault, I am finding SOR ¶ 1.g as the duplicate allegation and concluding SOR ¶ 1.g for Applicant.

SOR ¶ 1.i alleges that Applicant falsified information during his July 2021 background interview when he "stated that a coworker claimed you 'tapped him on the genitals' when in fact [Applicant] engaged in the conduct alleged in subparagraph 1.g above," which alleged that Applicant "without consent, grabbed the penis and testicles of another [servicemember] twice in a 45-minute period." Applicant does not remember tapping or grabbing the genitals of the other servicemember because of the alcohol, but he does not deny that it likely occurred. I do not find that Applicant intentionally provided a false description of the incident to the background investigator. AG ¶ 16(b) is not applicable. SOR ¶ 1.i is concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

Applicant's problematic conduct was primarily alcohol related. He had two DUIs, most recently in 2015, and he got drunk at a formal military function in May 2019, blacked out, and tapped or grabbed another servicemember's genitals. I do not believe Applicant did that for sexual gratification. I do not mean to downplay the conduct, as there is a victim involved, but I believe it was an immature, degrading, and possibly hurtful form of humor. It is likely the military agreed because Applicant was not punished for the conduct, and he was honorably discharged.

Applicant regrets his problematic conduct, particularly his alcohol-related incidents. It has been more than five years since his last incident. He has matured and reduced his drinking. He has three young children, and he coaches two youth-soccer clubs. He credibly testified that he has not driven after consuming alcohol since his 2015 DUI. I find that problematic conduct is unlikely to recur, and it no longer casts doubt on his reliability, trustworthiness, or good judgment. The above mitigating conditions are applicable.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline E in my whole-person analysis.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the security concerns under Guideline E.

### **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 E:	For Applicant
Subparagraphs 1.a-1.i:	For Applicant

## **Conclusion**

It is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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Edward W. Loughran  
Administrative Judge