



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



In the matter of: )  
)  
) ISCR Case No. 23-00606  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Adrienne Driskill, Esq., Department Counsel  
For Applicant: Phillip Stackhouse, Esq.

12/16/2024

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**Decision**  
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TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns regarding Guidelines D (sexual behavior) and J (criminal conduct). Clearance is granted.

**Statement of the Case**

On May 18, 2022, Applicant submitted a Questionnaire for National Security Positions (SF-86). On November 15, 2023, the Defense Counterintelligence and Security Agency (DCSA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines D and J. The SOR detailed reasons why the DCSA was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On December 22, 2023, Applicant submitted his Answer to the SOR through Counsel.

On January 30, 2024, Department Counsel was ready to proceed. On February 6, 2024, the Defense Office of Hearings and Appeals (DOHA) assigned the case to another administrative judge. On February 7, 2024, DOHA reassigned the case to me.

On February 15, 2024, DOHA issued a notice of hearing scheduling the hearing for March 1, 2024. On February 22, 2024, DOHA issued an amended notice of hearing rescheduling the hearing for February 29, 2024. The hearing was convened as rescheduled. Department Counsel submitted Government Exhibits (GE) 1 through 3, which were admitted without objection. Applicant testified, did not call any witnesses, and submitted Applicant Exhibits (AE) A through P, which were admitted without objection. On March 6, 2024, DOHA received the hearing transcript (Tr.).

## **Findings of Fact**

### **Background Information**

Applicant is a 27-year-old field service engineer employed by a defense contractor since April 2021. He has an interim Secret security clearance and seeks a permanent Secret security clearance, which is a requirement of his continued employment. (Tr. 21-23, 34-35)

Applicant received his high school diploma in August 2015. He served in the U.S. Marine Corps from October 2015 to January 2021, and was separated with an Other than Honorable (OTH) Discharge, discussed *infra*. (Tr. 23-24) His military occupational specialty was 3521, automotive maintenance technician. While in the Marine Corps, Applicant made one overseas deployment. (Tr. 24-25) Applicant has never married and has no dependents. (Tr. 25)

### **Sexual Behavior and Criminal Conduct**

The sole allegation cited in the SOR under Sexual Behavior is: ¶ 1.a - Applicant engaged in a sexual relationship with a minor between about May and July 2019. Two allegations were cited under Criminal Conduct: ¶ 2.a - Applicant received an OTH discharge from the U.S. Marine Corps in January 2021 for the offense of Misconduct – Sexual Relationship with a Minor; and ¶ 2.b – Cross-alleged information set forth under ¶ 1.a above.

In Applicant's December 22, 2023 SOR Answer, he denied all the allegations, adding that the criminal offense alleged has a specific intent element and a mistake of fact defense associated with the elements. He stated that, based on the lack of intent and an honest and reasonable mistake of fact regarding the other party's age, Applicant categorically and unequivocally denied the allegation. He added that he was never charged with a crime, let alone convicted of a crime. To further clarify his response to SOR ¶ 2.a, Applicant admits that he received an OTH discharge; however, he denied the Guideline J allegation "based upon the pending process of appealing to BCNR (Board for Correction of Naval Records) based upon obvious and admitted improprieties of the Board members, inequities committed during the processing, and violations of [Appellant's] due process rights." (SOR Answer) As of Applicant's hearing date, Applicant had not received a response from the BCNR regarding his appeal. (Tr. 55-56)

[Note – The applicable Uniform Code of Military Justice (UCMJ) Article is 120b—rape and sexual assault of a child. Pertinent portions of Article 120b: (b) SEXUAL ASSAULT OF A CHILD.—Any person subject to this chapter who commits a sexual act upon a child who has attained the age of 12 years is guilty of sexual assault of a child and shall be punished as a court-martial may direct. (2) UNDER 16 YEARS.—In a prosecution under this section, it need not be proven that the accused knew that the other person engaging in the sexual act or lewd act had not attained the age of 16 years, but it is a defense in a prosecution under subsection (b) (sexual assault of a child) or subsection (c) (sexual abuse of a child), *which the accused must prove by a preponderance of the evidence, that the accused reasonably believed that the child had attained the age of 16 years, if the child had in fact attained at least the age of 12 years* (emphasis added). (Manual for Courts Martial (2024 Edition) pgs. IV-93 to IV-94.)

In April 2019, Applicant met a female (F) on an Internet dating app before leaving on deployment in July 2019. At the time, he was a 21-year-old sergeant filling the billet of Motor Team Maintenance Chief for his company. He stated, “I was in charge of pretty much anything with wheels on it that the company utilized during our forward deployment. (Tr. 27-28; SOR Answer; GE1, GE 3) The app allows for random people to connect that are basically looking to “hook up.” Applicant added that this was somewhat common among fellow Marines before leaving for deployment and was not a secret. (GE 3)

Applicant recalled F saying that she was 19 and that she played water polo. However, as it turned out, she was in fact 14. Applicant assumed based on her age that she was in college. After meeting F, he did not think she was underage and the possibility of her being underage was never discussed. Furthermore, both encounters were very late at night, and it did not occur to Applicant that someone who was underage would be out that late. Applicant and F met on two occasions and on both occasions engaged in sexual activity. Shortly after his second encounter with F, Applicant deployed overseas and had no further contact with F. Two of Applicant’s friends and fellow Marines were aware of his encounters with F, corroborating that his involvement with her was not a secret. (Tr. 28-31, 37-40, 54; GE 3; SOR Answer)

The terms of service for the Internet dating app clearly stated, “[n]o part of the Service is directed to persons under the age of 18. IF YOU ARE UNDER 18 YEARS OF AGE, YOU MUST NOT USE OR ACCESS THE SERVICE AT ANY TIME OR IN ANY MANNER. By using the Service, you represent and warrant you are at least 18 years of age. If you are under 18 years of age, then you are not permitted to use the Service.” (GE 3, Exhibit 11) During the course of their brief relationship, Applicant and F engaged in an exchange of adult-like texts. Those texts included numerous photographs that F sent to Applicant of herself that would appear to corroborate his belief that she was 18 or older. (Tr. 40-42, 49-52; GE 3, Exhibits 8 & 9)

Applicant became the subject of a Naval Criminal Investigative Service (NCIS) investigation in October 2019 after an incident involving two Marines at a different base and the same underage female (F). In December 2019 with one month remaining on

deployment, Applicant and two senior noncommissioned officers (NCOs) were tasked to escort the battalion's gear from their overseas location back to the United States. Upon arriving at their home base, Applicant was met by two senior NCOs from his command and "a couple of special agents with NCIS." The agents handcuffed Applicant and escorted him to their station where he was read his rights, and fingerprinted. It was at this time that Applicant was informed that NCIS was investigating him having possible sexual relations with a minor. Applicant "felt overwhelmed with this information as he had no idea where these allegations came from or why he would be detained for such an allegation." Applicant "thought it best to invoke his 5<sup>th</sup> Amendment (Article 31(b) rights) until he could get proper counsel." NCIS confiscated his cell phone and released him back to his command. (Tr. 31-32, 42-43; GE 3; SOR Answer)

After Applicant was released and returned to his command, he resumed his regular duties as a platoon sergeant with Motor Team Maintenance and "went about his business as usual with no interaction from NCIS or JAG." He "seemed to have the support of his supervisors." In June or July 2020, approximately seven months after he was interviewed by NCIS in December 2019, Applicant's first sergeant notified him that the Commanding General ordered that his case be referred to an Administrative Discharge Board to "determine [his] future in the USMC." NCIS notified him that "there was not enough evidence against [him] to bring criminal charges." NCIS found F "to be habitual in trying to connect with Marines on-line and determined that [Applicant] may not have known the female's age at the time of their encounters." (Tr. 32-34, 44-47; GE 3; SOR Answer)

In October 2020, Applicant appeared before an Administrative Separation (ADSEP) Discharge Board. Applicant's commanding officer recommended that if the Board determined that separation was appropriate that his discharge be "general under honorable conditions." Numerous members from Applicant's chain of command submitted favorable comments and/or recommended retention. The Board's decision was that Applicant would be "Discharged with an Other than Honorable" discharge. Immediately following the hearing, Applicant's defense counsel filed a Letter of Deficiency with the Commanding General stating that the Board failed to review evidence and that board members admitted that they gathered information outside of the hearing, which is not allowed. Applicant's defense counsel apparently did not receive a favorable response to his Letter of Deficiency. Applicant was discharged from the Marine Corps with an OTH discharge in January 2021. (Tr. 34, 48-49; SOR Answer) At the time Applicant went to his ADSEP Discharge Board, he was a sergeant (pay grade E-5). However, as a result of receiving an OTH discharge, he was administratively reduced to a lance corporal (pay grade E-3). (Tr. 54-55)

Applicant stated what he has learned from this experience is "to be more diligent and do my due diligence to make sure I know exactly who I'm talking to, who I'm interacting with, and things of that nature." He noted that he is still feeling ramifications and fallout following this 2019 incident that occurred approximately five years ago. He had never been in trouble with the law or while in the Marines before this and has not been in any trouble with the law since. (Tr. 35-36, 48, 53-54) At the time of the hearing,

Applicant was dating a 26-year-old female Marine that he met while he was in the Marine Corps. He has never used a dating app since his 2019 experience with F. He deleted all of his social media accounts after he was notified that he was going to an ADSEP Board and has not reinstalled them. (Tr. 52)

## **Character Evidence**

While Applicant was in the Marine Corps, he volunteered at “a lot of different things” such as golf course displays and air shows adding that “[i]t kind of comes with the territory of being in the military.” (Tr. 27) In addition to statements submitted by Applicant’s chain of command to the ADSEP Board recommending retention, Applicant submitted 15 reference letters from active duty and retired senior Marines and one reference letter from a ten-year female friend. The collective sense of these letters conveys that Applicant is a professional and trustworthy individual. These individuals support reinstatement of Applicant’s clearance. (AE A-P)

## **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 AG ¶ 2(d), describing 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 clearance favorable 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).

## **Sexual Behavior**

AG ¶ 12 articulates the security concern for sexual behavior:

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

AG ¶ 13 describes two conditions that could raise security concerns and may be disqualifying in this case:

(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted; and

(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

Following the principle of collateral estoppel, the record establishes the disqualifying condition in AG ¶¶ 13(a) and 13(b) requiring additional inquiry about the possible applicability of mitigating conditions.

The criteria pertinent to a collateral estoppel determination are (1) that the party against whom it is asserted had an opportunity to litigate the earlier case; (2) that the issues in the current hearing are the same as those in the prior one; and (3) that application of collateral estoppel must not result in unfairness. See, e.g., ISCR Case No. 09-02752 at 4, n. 1 (App. Bd. Apr. 6, 2010). The Appeal Board has previously held that MSPB hearings can satisfy the requirements of collateral estoppel. ISCR Case No. 03-24233 at 7 (App. Bd. Oct. 12, 2005). Collateral estoppel is a due process doctrine that essentially requires the Government to accept the result of a hearing, especially where there is an affirmative fact that has or has not been proven. The Supreme Court has historically applied collateral estoppel to civil litigation and civil matters. See *Montana v. United States*, 440 U.S. 147, 153 (1979); *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). Under this due process or fairness doctrine, the DOHA should accept the finding of the separation board as conclusive, unless there is new, contradicting evidence that there was fraud on the separation board, or there is some other compelling evidence that raises a serious concern about the fairness of the separation board. The serious issues raised by Applicant in the administrative appeal options have not been addressed by the BCNR as of the issuance of this decision.

AG ¶ 14 includes four conditions that could mitigate the security concerns arising from Applicant's sexual behavior:

- (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 ¶¶ 14(b) and 14(c) fully apply, and 14(d) partially applies. At the time Applicant had sexual relations two times with F in 2019, he was 21 years old. He is now 27 and almost six years have elapsed since the sexual activity. Despite these allegations hanging over him, Applicant continued to perform his duties as a Marine in an exemplary manner, as documented by his performance evaluations. Applicant's fellow Marines and his command were aware of his involvement with F. With that said, his involvement did not dissuade his chain of command and senior leadership from supporting him before his ADSEP Discharge Board or after he was discharged from the Marine Corps, as evidenced by letters of support. With the status of the ADSEP Discharge Board's final results pending with the BCNR, AG ¶ 14(d) does not apply

because a 14-year-old child cannot legally consent to sexual activity. Because of the applicability of collateral estoppel, I cannot find Applicant did not commit the crime of sexual assault of a child.

## **Criminal Conduct**

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 ¶ 31 describes two conditions that could raise a security concern and may be disqualifying in this case:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and

(d) discharge or dismissal from the Armed Forces for reasons less than “Honorable.”

The record establishes the disqualifying conditions in AG ¶¶ 31(b) and (d), requiring additional inquiry about the possible applicability mitigating conditions. Discussion under the applicability of Sexual Behavior disqualifying conditions, *supra*, is applicable.

AG ¶ 32 lists conditions that could mitigate 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.



AG ¶¶ 31(a) and (d) are fully applicable for the reasons discussed under the Sexual Behavior mitigating conditions.

### **Whole Person Analysis**

In all adjudications, the protection of our national security is the paramount concern. A careful weighing of a number of 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 or continue national security eligibility “must be an overall common-sense judgment based upon careful consideration of the [pertinent] guidelines” and the whole-person concept. My comments under Guidelines D and J are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed in my discussion of those guidelines, but some warrant additional comment.

When Applicant was a 21-year-old Marine, he made the decision to visit an Internet dating app in 2019 to engage in sexual activity with a female before embarking on an overseas deployment. Up until that point, he had a promising career in the Marine Corps and held a responsible billet of Motor Team Maintenance Chief for his company. Unfortunately, the female turned out to be a 14-year-old minor. Applicant’s involvement with F led to the end of what was otherwise a promising Marine Corps career.

An administrative separation board determined he committed serious misconduct and he received an OTH discharge. Applicant denied that he had knowledge that F was a minor. At this juncture, there is no way of knowing what the ADSEP Discharge Board’s underlying thought process was in reaching their decision. Applicant has a pending petition with the BCNR to address some serious deficiencies in how the ADSEP Discharge Board conducted its deliberations. Even if Applicant’s BCNR petition is denied, mitigation is warranted primarily as a result of the passage of time, i.e. six years since his brief encounters with F. As a result of this incident, Applicant learned a hard lesson and no longer participates in social media. He is far more cautious in dealing with persons unknown to him. He continues to be a law-abiding citizen. All of his

numerous references, the majority of whom are from his former chain of command, believe in him and fully support him.

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 v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Applicant's evidence was sufficient to overcome the *Dorfmont* presumption with respect to the security concerns in the SOR.

I have carefully applied the law, as set forth in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), 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 the Guidelines D (sexual conduct) and J (criminal conduct) security concerns.

### **Formal Findings**

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

Paragraph 1, Guideline D:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraphs 2.a – 2.b:	For Applicant

### **Conclusion**

In light of the record as a whole, it is clearly consistent with the national interest to grant or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is granted.

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ROBERT TUIDER  
Administrative Judge