



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 14-00606

**Appearances**

For Government: Robert J. Kilmartin, Esquire, Department Counsel  
For Applicant: *Pro se*

09/30/2014

**Decision**

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the sexual behavior, criminal conduct, and alcohol consumption security concerns, but failed to mitigate the personal conduct security concerns. Eligibility for a security clearance and access to classified information is denied.

**Statement of the Case**

On August 16, 2013, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).<sup>1</sup> On March 11, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility – Division A (CAF) issued him a Statement of Reasons (SOR), under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective

<sup>1</sup> GE 1 ((SF 86), dated August 16, 2013).

September 1, 2006. The SOR alleged security concerns under Guidelines D (Sexual Behavior), J (Criminal Conduct), G (Alcohol Consumption), and E (Personal Conduct), and detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

It is unclear as to when Applicant received the SOR. In a sworn statement, dated June 12, 2014, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing. Nevertheless, on July 14, 2014, pursuant to Paragraph E.3.1.7 of the Directive, Department Counsel requested a hearing before an administrative judge.<sup>2</sup> Department Counsel indicated the Government was prepared to proceed on July 22, 2014. The case was assigned to me on July 23, 2014. A Notice of Hearing was issued on July 25, 2014, and I convened the hearing, as scheduled, on August 12, 2014.

During the hearing, six Government exhibits (GE 1 through GE 6) and one Applicant exhibit (AE A) were admitted into evidence without objection. Applicant testified. The transcript of the hearing (Tr.) was received on August 21, 2014. I kept the record open to enable Applicant to supplement it. Applicant took advantage of that opportunity. He submitted two additional documents which were marked as exhibits (AE B and AE C) and admitted into evidence without objection. The record closed on August 26, 2014.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted factual allegations in the SOR pertaining to criminal conduct (¶¶ 2.b. through 2.e.), alcohol consumption (¶¶ 3.a. through 3.c.), and personal conduct (¶¶ 4.a. and 4.b., as well as a portion of ¶ 4.c.). He denied the remaining factual allegations pertaining to sexual behavior (¶ 1.a.), as well as a portion of a factual allegation pertaining to personal conduct (¶ 4.c.). He did not address allegation ¶ 2.a. Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 30-year-old employee of a defense contractor, and he is seeking to retain the secret security clearance which was granted to him in 2011.<sup>3</sup> He has been employed by the same defense contractor since July 2013, and currently serves as a security officer, protecting individuals.<sup>4</sup> He was previously employed by defense contractors and worked at various locations in Afghanistan, Iraq, and Kuwait. Applicant served as an automated logistical specialist on active duty with the U.S. Army from

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<sup>2</sup> Joint Exhibit I (Memorandum, dated July 14, 2014).

<sup>3</sup> GE 1, *supra* note 1, at 35; Tr. at 37.

<sup>4</sup> GE 1, *supra* note 1, at 12-13, 59.

August 2003 until October 2007.<sup>5</sup> During his period of active duty, Applicant was involved in a number of alcohol-related arguments and fights with personnel from other military services at various clubs. The local military police would escort him back to the base, and he would have to report to his commanding officer, where he generally received verbal reprimands. Applicant was disciplined on one occasion when he received non-judicial punishment from a field grade officer.<sup>6</sup> Upon his discharge, Applicant was issued a general discharge under honorable conditions, due to misconduct.<sup>7</sup>

Although Applicant attended some high school, he failed to obtain a diploma from it. Instead, in about March 2003, he received a General Educational Development (GED) diploma.<sup>8</sup> Applicant was married in May 2007 and divorced in February 2008, due in part to his wife's becoming pregnant during an affair.<sup>9</sup> In August 2011, he entered into a cohabitation relationship which became a marriage in December 2013.<sup>10</sup> He and his second wife have one daughter, born in 2013.<sup>11</sup>

### **Criminal Conduct, Sexual Behavior, and Alcohol Consumption**

Applicant starting consuming alcohol when he was 15 years old. His frequency and quantity of consumption over the ensuing years has varied from total abstinence, to three beers about six or seven days per month, to sharing 12 beers per day.<sup>12</sup> Applicant's alcohol consumption has resulted in a number of police-related incidents.

(SOR ¶ 3.b.): On an unidentified day in July 2006, Applicant was at an outdoor bar with his first wife and was loud and belligerent. The resulting scenario is unclear because Applicant has offered differing descriptions of what had happened, and there is no police or court record to substantiate any scenario. In September 2013, he informed an investigator from the U.S. Office of Personnel Management (OPM) that he was arrested and charged with disorderly conduct and public intoxication, and that he spent one night in jail. He denied ever going to court, and contended the authorities declined to prosecute him.<sup>13</sup> In his Answer to the SOR, Applicant admitted he was arrested and

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<sup>5</sup> GE 1, *supra* note 1, at 21; Tr. at 50.

<sup>6</sup> GE 2 (Personal Subject Interview, dated September 18, 2013), at 3.

<sup>7</sup> GE 1, *supra* note 1, at 22. It should be noted that I indicated to Applicant that it would helpful to review a copy of his Certificate of Release or Discharge from Active Service (DD Form 214), but Applicant did not to submit one. See Tr. at 82.

<sup>8</sup> GE 2, *supra* note 6, at 3.

<sup>9</sup> GE 2, *supra* note 6, at 1.

<sup>10</sup> GE 2, *supra* note 6, at 25-26; Tr. at 54.

<sup>11</sup> GE 1, *supra* note 1, at 29.

<sup>12</sup> GE 2, *supra* note 6, at 5-6; Tr. at 55. Applicant explained that when he is "on contract," in other words working, he does not consume any alcohol. Tr. at 59, 80-81.

<sup>13</sup> GE 2, *supra* note 6, at 4-5.

charged with public intoxication, and that he paid a \$125 fine.<sup>14</sup> During his hearing, he stated that the police officers issued him a violation notice for public intoxication, but did not arrest him. He acknowledged he paid a \$125 fine.<sup>15</sup>

(SOR ¶ 2.d.): On November 9, 2006, while overseas, Applicant was involved in a bar fight with some members of the U.S. Marines and the U.S. Navy. They had all been drinking, and an argument ensued.<sup>16</sup> He was purportedly arrested for the incident on February 9, 2007, and turned over to his first sergeant who assigned Applicant weekend duty painting walls.<sup>17</sup> There is no police or incident report to describe the events leading up to the arrest, or any discipline received as a result of the incident. There is also no explanation regarding the reasons for the four-month delay between the incident and the arrest.

(SOR ¶ 2.e.): On November 25, 2006, Applicant was arrested and charged with simple assault and drunk and disorderly conduct.<sup>18</sup> He indicated he was depressed over the loss of two friends who had returned from Iraq, only to die while driving in the United States under the influence of alcohol.<sup>19</sup> Applicant and another military member were involved in a verbal altercation which turned physical, with each individual striking the other. The military police were called and both individuals were apprehended and administered breathalyzer tests, referred to as PBTs or preliminary breath tests. Applicant's test registered .125 and he was advised of his legal rights. The other individual was considered too intoxicated to understand his rights.<sup>20</sup> Applicant received a letter of concern/counseling and was referred for drug/alcohol and mental health counseling. There is no counseling record in evidence. He completed the counseling.<sup>21</sup> There was no diagnosis reported.<sup>22</sup>

(SOR ¶ 2.c.): On December 8, 2007, barely two months after his discharge from the U.S. Army, Applicant was driving from a club with friends when he was pulled over for unspecified reasons. The police asked to search his vehicle, and when they found his army ka-bar combat/fighting utility knife in his rucksack, he was arrested and

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<sup>14</sup> Applicant's Answer to the SOR, dated April 17, 2014), at 2.

<sup>15</sup> Tr. at 47, 81-82.

<sup>16</sup> Tr. at 41-42.

<sup>17</sup> Tr. at 42-43.

<sup>18</sup> Applicant's Answer to the SOR, *supra* note 14, at 2; GE 5 (Military Police Report, dated November 25, 2006).

<sup>19</sup> Tr. at 43-44.

<sup>20</sup> GE 5, *supra* note 18.

<sup>21</sup> Tr. at 43.

<sup>22</sup> Tr. at 43.

charged with two counts of unlawful carrying weapon.<sup>23</sup> The charge was dismissed and Applicant never had to go to court.<sup>24</sup> Other than a very brief reference to the incident in the FBI Identification Record, there is no police or court record to describe the events leading up to the arrest or the results of the arrest.

(SOR ¶ 2.b.): On February 4, 2013, Applicant was arrested and charged with battery – touch or strike – domestic violence.<sup>25</sup> He and his then-fiancée were engaged in a loud non-violent verbal argument when her daughter, who was in the adjacent room, believed Applicant was abusing her mother. The daughter called the police, and when they arrived at the residence, Applicant was arrested. He was jailed overnight.<sup>26</sup> The charge was dismissed without Applicant ever having to go to court.<sup>27</sup> He did, however, attend a two-hour class on domestic violence.<sup>28</sup> There is no police or court record to describe the events leading up to the arrest or the results of the arrest.

(SOR ¶¶ 1.a., 2.a., and 3.c.): There is an allegation that on August 31, 2013, while in Afghanistan, Applicant exposed his genitals on three separate occasions to two different Ethiopian cleaning maids. There are three separate security incident reports from Applicant’s former employer alleging that at 0800 hours, 1000 hours, 1145 hours, and at 1645 hours, Applicant supposedly “pulled his pants down exposing himself” or pulled “his zipper to his pants exposing his genital.” There are no signed written statements or translations of statements by the victims in question. There are no signed statements by anyone in authority at the employer attesting to the accuracy or reliability of the witnesses or their respective verbal scenarios. There are merely unsigned printed Security Incident Reports. Witness “S” claimed that Applicant approached her while she was cleaning room #11, and without warning, he exposed his genitals to her. Later that same morning, when she was cleaning room #24, Applicant exposed himself a second time. Witness “S” purportedly immediately informed the facility manager of what had occurred. Witness “S” also contended the same type of incident had occurred in June 2013, but she did not report the incident because she felt no one would believe her story.<sup>29</sup>

A second individual, witness “E,” claimed that Applicant approached her while she was cleaning room #10, and without warning, he exposed his genitals to her. It is unclear when the witness “E” informed the facility manager of what had occurred. Witness “E” also contended the same type of incident had occurred in June 2013, when

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<sup>23</sup> Applicant’s Answer to the SOR, *supra* note 14, at 2; Tr. at 40-41; GE 2, *supra* note 6, at 5; GE 4 (Federal Bureau of Investigation (FBI) Identification Record, dated September 11, 2013).

<sup>24</sup> Tr. at 41.

<sup>25</sup> Applicant’s Answer to the SOR, *supra* note 14, at 2; Tr. at 38.

<sup>26</sup> GE 2, *supra* note 6, at 5; Tr. at 38-39.

<sup>27</sup> GE 2, *supra* note 6, at 5; Tr. at 39-40.

<sup>28</sup> Tr. at 40.

<sup>29</sup> GE 3 (Security Incident Report (for 0800 hours and 1000 hours), dated August 31, 2013).

she was also questioned about her age, her boyfriend, and did she have a baby. Witness "E" never explained why she did not report the earlier incident.<sup>30</sup>

At approximately 1845 hours, the facility manager reported that, based on reports from unidentified cleaning maids, at 1645 hours Applicant pulled his pants down exposing himself three times to two cleaning maids in different areas of the living area. The facility manager gave a mock demonstration "so that there was no mistake on the actions of [Applicant] possibly shifting his pants or adjusting them while standing in front of the two women."<sup>31</sup> Based on the information furnished the project manager, Applicant's immediate removal from the project was ordered.<sup>32</sup>

Applicant commenced service overseas as a security consultant and team leader for the federal contractor in September 2012.<sup>33</sup> He was scheduled to rotate out of Afghanistan on vacation on September 1, 2013, and had a round-trip return ticket.<sup>34</sup> He was allowed to leave and was not informed or confronted about the allegations by the project manager or anyone else associated with the employer. No further investigation was performed, and Applicant was never afforded the opportunity to address or dispute the allegations.<sup>35</sup> Notwithstanding the incomplete nature of the report, the employer "directed this Incident Report still be filed with JPAS."<sup>36</sup>

Applicant was informed of his employer's action on September 3, 2013, when he received a telephone call from an employer-recruiter who told him he was being discharged for uncertain reasons, and the telephone call would be followed by an e-mail. The e-mail said he was terminated for sexual misconduct.<sup>37</sup> Applicant was told he would be questioned regarding the allegations, but he was not, and the JPAS paperwork was issued shortly thereafter.<sup>38</sup> Applicant steadfastly denied the allegations and attributed the actions of his employer to its efforts to downsize and reduce salaries. He noted that another former colleague was also fired the day before he left on vacation.<sup>39</sup>

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<sup>30</sup> GE 3 (Security Incident Report (for 1145 hours), dated August 31, 2013).

<sup>31</sup> GE 3 (Security Incident Report (for 1845 hours), dated August 31, 2013).

<sup>32</sup> GE 3 (Security Incident Report (for 1845 hours), *supra* note 31).

<sup>33</sup> GE 1, *supra* note 1, at 13; Tr. at 25.

<sup>34</sup> Tr. at 26-27.

<sup>35</sup> GE 3 (Joint Personnel Adjudication System (JPAS)/Joint Adjudication Management System (JAMS) Incident History, dated September 10, 2013; Tr. at 32, 70).

<sup>36</sup> GE 3 (JPAS/JAMS), *supra* note 33.

<sup>37</sup> Tr. at 31-32.

<sup>38</sup> Tr. at 35.

<sup>39</sup> Tr. at 32, 72.

Applicant had little if any relationship with the cleaning staff for they rotated with other staff members, and they did not speak English, so he could not communicate with them.<sup>40</sup> When he resided in the facility he occupied room #30, a shipping container and private shower, called a cube, which was not near rooms #10, 11, or 24.<sup>41</sup> He noted that he had worked a double shift on August 31, 2013, during which he worked from midnight until 0700 hours, and from 1000 hours until 1700 hours. Between 0700 hours and maybe 0745 hours he was at the chow hall for breakfast, and was in his quarters until around 0930 or 0945 hours when he departed for the jobsite, escorting construction workers.<sup>42</sup>

The alleged sexual behavior is reported to have occurred at 0800 hours, 1000 hours, 1145 hours, and at 1645 hours. Based on Applicant's work schedule that day, an incident could have taken place at 0800 hours, or shortly after he returned from the chow hall. No such incident could have occurred at 1000 hours or at 1145 hours as Applicant had left the residential facility earlier and was already at the jobsite. No such incident could have taken place at 1645 hours for Applicant was still at the jobsite.

Applicant did acknowledge that there was one incident during his year in Afghanistan when he had the day off and was in his room. The cleaning staff normally is scheduled to work when the occupant is at work, and generally knocks before entering. On this one occasion, at about 1300 hours, Applicant was exiting the shower when he noticed his bedroom door open and someone cleaning the room next door. He tried to grab a towel, but before he could do so, the cleaning person had already walked in, giggled, and quickly walked away.<sup>43</sup> The incident was not intentional and was not for the purpose of Applicant's sexual gratification.<sup>44</sup>

(SOR ¶ 3.a.): On October 1, 2013, Applicant was arrested and charged with driving under the influence (DUI).<sup>45</sup> After watching sports, playing video games, and consuming about eight beers and four ounces of whiskey between 9 p.m. and 5 a.m., Applicant and his cousin drove to a fast food restaurant. While consuming their food, they fell asleep with the engine running.<sup>46</sup> They were found asleep in a vehicle parked in a parking lot. Two beer bottles were observed on the floor of the vehicle. Applicant emitted the odor of alcohol. After initially refusing a breathalyzer test, he finally took one

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<sup>40</sup> Tr. at 34, 66.

<sup>41</sup> Tr. at 29, 65-66.

<sup>42</sup> Tr. at 66-70.

<sup>43</sup> Tr. at 29-30.

<sup>44</sup> Tr. at 30.

<sup>45</sup> GE 6 (Incident Report, dated October 1, 2013).

<sup>46</sup> GE 2, *supra* note 6, at 8.

and it registered 0.208.<sup>47</sup> He was fined \$6,000, ordered to attend “a few” alcohol classes, placed on probation for an unspecified period, and issued a restricted operator’s license for limited purposes.<sup>48</sup>

Applicant has remained sober since the incident in October 2013<sup>49</sup> and vows that he will never have any further alcohol-related incidents.<sup>50</sup> He does not need alcohol, and does not consider himself to be an alcoholic.<sup>51</sup> He has never been diagnosed as an alcoholic.<sup>52</sup>

## Personal Conduct

(SOR ¶¶ 4.a. and 4.b.): On August 16, 2013, when Applicant completed his SF 86, he responded to certain questions pertaining to his police record. The questions in Section 22 – Police Record asked if, in the past seven years, he had: been issued a summons, citation, or ticket to appear in court in a criminal proceeding against him (not including citations involving traffic infractions where the fine was less than \$300 and did not involve alcohol or drugs); been arrested by any police officer, sheriff, marshal or any other type of law enforcement official; and been charged, convicted, or sentenced of a crime in any court (including in any Federal, state, local, military, or non-U.S. court). Also, regarding offenses other than those already listed, Applicant was asked if he had EVER been convicted of an offense involving domestic violence or a crime of violence such as battery or assault against his child, dependent, cohabitant, spouse, former spouse, or someone with whom he shares a child in common; or been charged with an offense involving alcohol or drugs. (emphasis in the original)

Applicant answered “no” to all of those questions. He certified that the responses were “true, complete, and correct” to the best of his knowledge and belief, but the responses to most of those questions were, in fact false. He failed to disclose his arrests of November 2006, February 2007, December 2007, and February 2013.<sup>53</sup> Applicant’s response to the inquiry regarding domestic violence does not appear to be false, for the question addressed convictions, not arrests, and there is evidence that the charge was dismissed, with no other significant evidence that there was a conviction. Applicant admitted in his Answer to the SOR that his omissions were deliberate,<sup>54</sup> but

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<sup>47</sup> GE 6, *supra* note 45, at 2-3.

<sup>48</sup> Tr. at 45-46.

<sup>49</sup> Tr. at 46.

<sup>50</sup> Tr. at 59.

<sup>51</sup> Tr. at 46-47.

<sup>52</sup> Tr. at 46.

<sup>53</sup> GE 1, *supra* note 1, at 32-33. In fact, although it was not alleged in the SOR, Applicant also failed to list his July 2006 incident which involved either a disputed arrest or simply being charged.

<sup>54</sup> Applicant’s Answer to the SOR, *supra* note 14, at 2-3.



during the hearing, he explained that he was in Afghanistan when he completed the SF 86, and he did not have all the necessary information regarding the incidents, so he simply bypassed the questions.<sup>55</sup> Applicant's explanation is too simplistic, for it fails to explain why he did not enter a notation in the SF 86 indicating there were issues which he could not fully address.

(SOR ¶ 4.c.): While Applicant denied any involvement in the alleged sexual behavior described above, he was fired from his employment in September 2013 for sexual misconduct.

### **Character References and Work Performance**

Three of Applicant's former employers are fully supportive of his application and would not hesitate to rehire him. Applicant is characterized as dependable and honest, with a high level of commitment, a willingness to accept additional responsibility, and interpersonal skills necessary to handle conflict and challenging situations. He proved to be a valuable asset in team cohesion, decisiveness and execution of duties under hostile situations.<sup>56</sup>

### **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."<sup>57</sup> 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. The President has authorized the Secretary of Defense or his designee to grant an applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."<sup>58</sup>

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 useful in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines

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<sup>55</sup> Tr. at 48-49.

<sup>56</sup> AE A (Character Reference, dated March 20, 2012); AE B (Character Reference, dated January 6, 2012); AE C (Character Reference, dated August 25, 2014).

<sup>57</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>58</sup> Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."<sup>59</sup> The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.<sup>60</sup>

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials."<sup>61</sup>

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."<sup>62</sup> Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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<sup>59</sup> "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994).

<sup>60</sup> *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

<sup>61</sup> *Egan*, 484 U.S. at 531

<sup>62</sup> *See* Exec. Or. 10865 § 7.

## Analysis

### Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 31(a), *a single serious crime or multiple lesser offenses* is potentially disqualifying. Similarly, under AG ¶ 31(c), if there is an *allegation of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*, security concerns may be raised. Applicant's history of criminal conduct consists of four alleged incidents involving criminal charges, arrests, or convictions for a variety of actions, and an allegation of inappropriate sexual misconduct not involving police authorities. As to all but the sexual misconduct allegations, AG ¶¶ 31(a) and 31(c) have been established.

The allegation of sexual misconduct would constitute criminal conduct, regardless of the absence of a formal charge, formal prosecution, or conviction. As noted above however, there are no signed, written, or authenticated statements or translations of statements by the victims in question. There are no signed, written, or authenticated statements by anyone in authority at the employer attesting to the accuracy or reliability of the witnesses or their respective verbal scenarios. There are merely unsigned printed Security Incident Reports. Based on those three documents, the project manager ordered Applicant's immediate removal from the project. Applicant was not informed or confronted about the allegations by the project manager or anyone else associated with the employer. No further investigation was performed, either by the employer or by any investigative authority, and Applicant was never afforded the opportunity to address or dispute the allegations. Notwithstanding the incomplete nature of the report, the employer directed that the Incident Report be filed with JPAS. When finally informed of the allegations, Applicant steadfastly denied them.

The alleged sexual behavior is reported to have occurred at 0800 hours, 1000 hours, 1145 hours, and at 1645 hours. Based on Applicant's work schedule that day, an incident could have taken place at 0800 hours, or shortly after he returned from the dining facility. No such incident could have occurred at 1000 hours or at 1145 hours as Applicant had left the residential facility earlier and was already at the jobsite. No such incident could have taken place at 1645 hours for Applicant was still at the jobsite. Under these circumstances, it is difficult to trust the reliability of the documents submitted. After considering all of the conflicting evidence, I conclude that Applicant's testimony and signed sworn statements are more reliable than the Security Incident Reports. As to the sexual misconduct allegations, AG ¶¶ 31(a) and 31(c) have not been established.

The guidelines also include examples of conditions that could mitigate security concerns arising from criminal conduct. Under AG ¶ 32(a), the disqualifying condition may be mitigated where *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.* Also, where there is *evidence that the person did not commit the offense*, AG ¶ 32(c) may apply. In addition, AG ¶ 32(d) may apply when *there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.*

As to the sexual misconduct allegations, there is evidence that Applicant did not commit the offense, and AG ¶ 32(c) applies. With respect to the incidents other than the sexual misconduct allegations, AG ¶¶ 32(a) and 32(d) apply. The three incidents from 2006 involved alcohol in varying degrees, and two of those incidents involved inter-service rivalry and bar fights. The other incident was disorderly conduct with his wife at a bar. Those alcohol-related actions of a relatively young military member in 2006 have little in common with the February 2013 domestic violence incident where no alcohol was involved, and there was no conviction. Given the quality of the evidence, it is unclear if there was a non-violent argument with his wife and an over-reaction by her daughter in another room, as described by Applicant, or something worse. In any event, there is no evidence of a conviction, and Applicant's description of events stands unchallenged. Likewise, the 2007 incident involving Applicant's possession of his army ka-bar combat/fighting utility knife in his rucksack barely two months after he was discharged, resulted in a dismissal of the charge. Applicant's October 2013 incident was not alleged as criminal conduct in the SOR.

There have been no further alleged criminal activities between 2007 and 2013, or since February 2013. As to the 2006, 2007, and the February 2013 incidents, so much time has elapsed since the criminal behavior happened, or they happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on Applicant's reliability, trustworthiness, or good judgment.

#### **Guideline D, Sexual Behavior**

The security concern for Sexual Behavior is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 13(a), *sexual behavior of a criminal nature, whether the individual has been*

*prosecuted* is potentially disqualifying. Similarly, under AG ¶ 13(c), *sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress* may raise security concerns. In addition, *sexual behavior of a public nature and/or that reflects lack of discretion or judgment* is potentially disqualifying under AG ¶ 13(d). As noted above, it is difficult to trust the reliability of the documents alleging Applicant's sexual behavior. After considering all of the conflicting evidence, I conclude that Applicant's testimony and signed sworn statements are more reliable than the Security Incident Reports. AG ¶¶ 13(a), 13(c), and 13(d), have not been established.

## **Guideline G, Alcohol Consumption**

The security concern relating to the guideline for Alcohol Consumption is set out in AG ¶ 21:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

The guideline notes two conditions that could raise security concerns. Under AG ¶ 22(a), *alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent* is potentially disqualifying. Also, habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent may raise security concerns under AG ¶ 22(c). As alleged in the SOR, there were three alcohol-related incidents that occurred in July 2006 (intoxication), November 2006 (simple assault and drunk and disorderly conduct), and October 2013 (DUI). AG ¶¶ 22(a) and 22(c) have been established.

The guidelines also include examples of conditions that could mitigate security concerns arising from alcohol consumption. It is potentially mitigating under AG ¶ 20(a) where *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*. Under AG ¶ 23(b), the disqualifying condition may be mitigated when *the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser)*.

AG ¶¶ 23(a) and 23(b) apply. There have been no further alleged alcohol-related activities between November 2006 and October 2013, or since October 2013. As to the two 2006 incidents and the October 2013 incident, so much time has elapsed since the alcohol abuse happened, or they happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on Applicant's reliability, trustworthiness, or good judgment. He has never been diagnosed or treated for alcohol abuse or alcoholism. He greatly modified his alcohol consumption, both in

terms of frequency and quantity. There are long periods, especially when he is on assignment, when he abstains. He has remained sober since the incident in October 2013, and vows that he will never have any further alcohol-related incidents. He has a good employment record; he has expressed genuine remorse; he has reformed his habits; and there has been no recurrence of excessive alcohol consumption. In this instance, I conclude that Applicant's 2006 public intoxication and his 2006 simple assault and drunk and disorderly conduct, both of which occurred eight years ago, are very different from his most recent alcohol-related incident of October 2013. With the exception of alcohol, they should not be considered a pattern of conduct. The most recent incident occurred 12 months ago, and given his altered drinking habits, no longer casts doubt on his reliability, trustworthiness, or good judgment.

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

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(a), it is potentially disqualifying if there is

a deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Also, under AG ¶ 16(e), security concerns may be raised where there is

personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing. . . .

As noted above, on August 16, 2013, when Applicant completed his SF 86, he responded to certain questions pertaining to his police record. The questions in Section 22 – Police Record asked a variety of questions about criminal incidents that may have taken place within the past seven years and other questions about criminal incidents that had ever occurred. Although Applicant had been involved in a number of such incidents, he answered “no” to all of those questions. He certified that the responses were “true, complete, and correct” to the best of his knowledge and belief, but the

responses to most of those questions were, in fact false. Applicant admitted in his Answer to the SOR that his omissions were deliberate, but during the hearing, he explained that he was in Afghanistan when he completed the SF 86, and he did not have all the necessary information regarding the incidents, so he simply bypassed the questions. Applicant's explanation is too simplistic, for it fails to explain why he did not enter a notation in the SF 86 indicating there were issues which he could not fully address. As to Applicant's lack of responsiveness on his SF 86, AG ¶¶ 16(a) and 16(e) have been established.

Although Applicant was fired from his employment in September 2013 for sexual misconduct, for the reasons set forth above, there is insubstantial evidence to support such action, and I conclude that the employer's action should not be considered as negative personal conduct by Applicant. AG ¶ 16(e) has not been established.

The guidelines also include examples of conditions that could mitigate security concerns arising from personal conduct, but none of them apply.

### **Whole-Person Concept**

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

- (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 Guidelines D, J, D, and E in my analysis below.

There is substantial evidence in favor of mitigating Applicant's conduct. As a security officer, protecting individuals in the combat zone, he proved to be a valuable asset in team cohesion, decisiveness and execution of duties under hostile situations. He was involved in a variety of misconduct when he was on active duty, but over the years, he matured. He modified his alcohol consumption habits and has practiced abstinence for lengthy periods, especially when on assignment. He has been sober for one year. There has been no recurrence of criminal activity. There is no evidence of a diagnosis or an evaluation of alcohol abuse or alcohol dependence. With the exception of one employer, he has a good employment record. He has expressed genuine

remorse, and has reformed his habits. Such criminal behavior or excessive alcohol consumption is unlikely to recur. The sexual misconduct allegations, under the circumstances, in the absence of a meaningful investigation or evidence of signed allegations by victims, and without the opportunity to address those allegations at the time they were made, remain essentially nothing more than unsubstantiated allegations.

The disqualifying evidence under the whole-person concept is slightly more significant. In his SF 86, there was a series of questions about criminal incidents that may have taken place within the past seven years and other questions about criminal incidents that had ever occurred. Although Applicant had been involved in a number of such incidents, he answered “no” to all of those questions. He certified that the responses were “true, complete, and correct” to the best of his knowledge and belief, but the responses to most of those questions were, in fact false. Applicant admitted in his Answer to the SOR that his omissions were deliberate, but during the hearing, he explained that he was in Afghanistan when he completed the SF 86, and he did not have all the necessary information regarding the incidents, so he simply bypassed the questions. Applicant’s explanation is too simplistic, for it fails to explain why he did not enter a notation in the SF 86 indicating there were issues which he could not fully address. It should also be noted that when asked elsewhere in the SF 86 if he had ever been fired, he denied that he had been. That fact was not made an allegation in the SOR, and is only mentions at this point as another example of a course of conduct in which Applicant had omitted or concealed the truth.

I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.<sup>63</sup> Overall, the record evidence leaves me with substantial questions and doubts as to Applicant’s eligibility and suitability for a security clearance. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has mitigated the sexual behavior, criminal conduct, and alcohol consumption security concerns, but failed to mitigate the personal conduct security concerns. (See AG ¶¶ 2(a)(1) - 2(a)(9).)

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the Government’s case. For the reasons stated, I conclude he is not eligible for access to classified information.

### **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:

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<sup>63</sup> See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).



Paragraph 1, Guideline D:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	For Applicant
Paragraph 3, Guideline G:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	For Applicant
Subparagraph 3.c:	For Applicant
Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraph 4.a:	Against Applicant
Subparagraph 4.b:	Against Applicant
Subparagraph 4.c:	For Applicant

**Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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ROBERT ROBINSON GALES  
Administrative Judge