DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 07-14772
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: John B. Glendon, Esquire, Department Counsel
For Applicant: Kathleen E. Voelker, Esquire

October 22, 2008

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Decision

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CREAN, Thomas M., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on December 13, 2006. On March 20, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns for Applicant for criminal conduct under Guideline J. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006. Applicant acknowledged receipt of the SOR on March 31, 2008.

Applicant answered the SOR in writing on April 18, 2008. He admitted the factual allegations of arrests and charges as alleged in the SOR under Guideline J, but denied there was criminal behavior because the offenses were either not pursued, dismissed, or there were findings of not guilty. He requested a hearing before an administrative judge. Department Counsel was prepared to proceed on May 6, 2008.

On May 13, 2008, the government amended the SOR to add security concern allegations under Guideline E as noted below for the same incidents. On June 18, 2008, Applicant again admitted the factual allegations but denied that there were personal conduct security concerns. The case was assigned to another administrative judge before being transferred to me on July 30, 2008. DOHA issued a notice of hearing on August 6, 2008, for a hearing on September 24, 2008. I convened the hearing as scheduled. The government offered 14 government exhibits marked (Gov. Ex.) 1 through 14 which were received without objection. One government witness testified in rebuttal. Applicant submitted nine Applicant Exhibits marked (App. Ex.) A-I which were received without objection. Applicant and two witnesses testified on his behalf. Applicant offered one document for administrative notice (Hearing Exhibit 1). DOHA received the transcript of the hearing (Tr.) on October 2, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Procedural Issues

The March 20, 2008 SOR alleges four criminal acts of security concern. The Government amended the SOR on May 13, 2008, to add allegation 2, the same four criminal acts as personal conduct security concerns under Guideline E. Allegation 1.c alleges a grand jury indictment for aggravated sexual battery and object sexual penetration. In the amended SOR, the government alleged a personal conduct security concern against Applicant in allegation 2.c for being arrested and charged with aggravated sexual battery on March 29, 2003. In allegation 2.d SOR, the government alleged a personal conduct security concern against Applicant for being arrested and charged with attempted object penetration on March 29, 2008. The personal conduct allegation in 2.c and 2.d arose from the same March 29, 2003 incident or event and will be considered as one allegation. It is the same incident raised as a single criminal conduct security concern under SOR paragraph 1.c. Applicant did not object to the additional allegations under Guideline E. Applicant admitted the May 13, 2008 SOR factual allegations. The SOR was amended to add SOR allegation paragraph 2.

Findings of Fact

Applicant is 32 years old and has worked as a software developer for a defense contractor for almost two years. He is a college graduate with a degree in mathematical science with concentration in operations research and statistics. He is presently enrolled for his employer in an accelerated combined master's program in systems engineering and business administration with expected graduation in May 2009. He has never been married but has a 14 year old daughter who lives with her mother. He sees his daughter frequently and pays child support (Tr. 55-60; Gov. Ex. 1, e-QIP, dated December 13, 2006). This is his first application for a security clearance.

Applicant worked part time for a company from 2000 until 2004 while he attended college. When he completed college in 2004, he continued to work for the company full time. In December 2006, he left the company to move to his present location to work

for the defense contractor (Tr. 62-64). The president of the defense contractor sponsored Applicant for the combined master's degree program. He informed the university that Applicant's performance with his company has been outstanding and his programming and analytical skills are being continually tested in complex projects for the Department of Defense. He notes Applicant has met every challenge and produced excellent results. He vouches for Applicant's intelligence, common sense, and ability to find solutions to different type problems (App. Ex. A, Recommendation letter, dated March 17, 2008). Applicant was a member of the team that received the company's outstanding team award (App. Ex. B, Award memorandum, dated November 14, 2007). Applicant's performance reviews with the defense contractor shows he has exceeded all expectations and his performance and goal achievement have been exceptional (App. Ex. C, Performance review, December 4, 2006 to July 18, 2007; App. Ex. D, Performance Review, July 18, 2007 to August 7, 2008).

Applicant stated that when he accepted the position with the defense contractor in December 2006, he left his old college friends and area and now has new friends who are mostly defense contractors. He has "grown up" and is working hard to be mature. He is very serious about life and making good long-term decisions (Tr. 92-94).

Applicant admitted he was charged with and pled guilty to possession of Drug Paraphernalia in 1996 (SOR 1.a, 2.a). Applicant admitted he was charged with assault and battery on a family member in October 1999, but the charge was not prosecuted (SOR 1.b, 2.b). Applicant admitted he was arrested for, charged with, indicted for, but found not guilty of aggravated sexual battery and object sexual penetration in June 2003 (SOR 1c., 2.c and 2.d). Applicant admitted he was arrested and charged with two counts of profane, threatening language over public airways on July 2004. The 2004 charge was dismissed. (SOR 1.d, 2.e)

In July 1996, Applicant, then 19 years old, had just dropped a friend at his house after returning from a holiday concert. As he exited the highway to go to his own house, he hit a patch of gravel and spun his tires. He got out of his car to see if there was any damage. A police officer was parked near-by and saw the incident. The police officer stopped Applicant because she believed he had been speeding. While looking into the car, the police officer spotted a drug pipe on the passenger side floor. Applicant recognized the pipe as belonging to his friend, since he had also used it, but did not know it was in the car. He was arrested for possession of drug paraphernalia. He pled guilty and was sentenced to six months probation and a fine (Tr. 64-66, 94-96).

While a college student, Applicant was arrested for assault and battery in October 1999. Applicant was sharing living arrangements with his girlfriend, a college student. The two had an argument after Appellant learned that she recently had an affair with a male friend while visiting him in another state. Applicant also learned she had been using drugs in their apartment when he was not home. The girlfriend slapped him in the face and he pushed her very hard knocking her to the ground. The girlfriend received a minor injury from the fall. Applicant left the apartment to cool off and the girlfriend called the police. He was arrested for domestic assault since they were living

together. The charges were not prosecuted when the girlfriend informed the prosecutor she did not wish to continue with the case. Applicant and his girlfriend continued to live together for another six months (Tr. 66-70, 96-106; Gov. Ex. 2, Federal Bureau of Investigation (FBI) Criminal Justice Report, dated December 31, 2006; Gov. Ex. 3, Arrest Record, dated October 28, 1999).

Applicant shared living arrangement starting in 2001 with another girlfriend, Ms. E. They lived together for a few years at two separate locations while both attended college. They were to evenly split the living expense to include rent, utilities, and food. They did not always agree on the payments needed and there were constant arguments over sharing and paying expenses. At one time, Applicant observed what he believed to be drug activity by Ms. E. in the apartment. He called Ms. E's mother to report her behavior. Ms. E vehemently denied the activity and was angry with Applicant for calling her mother. In January 2003, the arrangement was deteriorating so Applicant had her sign an agreement to stay in the apartment and share expenses until May 2003 when school ended.

In March 2003, Applicant called Ms. E's alleged other boyfriend and drug supplier and told him that he and Ms. E were still living together. Ms. E was very angry with Applicant and threatened him if he continued to interfere in her life. Later that month, they were to attend a film festival as part of a college language course. Applicant bought two tickets. They were to meet at the theater, but when they met, Ms. E refused to sit with Applicant and sat with a friend. Applicant attended the festival and met a new girlfriend. Later that evening, Applicant was involved in an automobile accident on the way to a party. He tried to call Ms E to inform her of the accident but she did not answer the telephone. Applicant returned home in the early morning and was in bed when Ms. E returned home. They engaged in a heated argument moving from room to room in the house. At one time, Applicant pushed open and broke the door to a room where Ms. E had fled. Ms. E punched Applicant in the eye and scratched him on the neck (App. Ex. E, photographs of Applicant). Ms. E left and went to another girl's house complaining that Applicant sexually assaulted her. The other girl convinced her to call the police and she filed a complaint with the police and was taken to a local hospital and examined by the nursing staff. Applicant was arrested the next day and charged with sexual assault and sexual object penetration. The case was sent to a grand jury and Applicant was indicted and again arrested for the alleged offense.

Applicant was tried before a jury for the sexual assault and sexual object penetration in October 2003 (Tr. 72-82, 106-131; Gov. Ex. 4, Arrest Record, dated March 29, 2003; Gov. Ex. 5, Arrest Record, undated; Gov. Ex. 7, Incident Report, dated March 29, 2003; Gov, Ex. 9, Incident Report, dated March 29, 2003; Gov. Ex. 14, trial transcript). Applicant was acquitted by the jury of both sexual assault and sexual object penetration. The prosecutor stated at the hearing she presented testimony from the complaining witness, Ms. E, her friend, the forensic nurse who examined Ms. E, her report, and photographs taken during the examination. Also, the forensic nurse coordinator testified as an expert witness. The case was heard on a Friday, the testimony ended at about 7 PM, and the jury deliberated about 20 minutes before

rendering a not guilty finding on all charges (Tr.144-156; Gov. Ex. 12, Case Information, dated October 29, 2003).

At the criminal trial, Ms. E testified that she and Applicant had argued frequently and heatedly. She testified that at one time he grabbed her around the throat and forced his fingers in her mouth to make her stop talking. On the night of March 29-30, 2003, they had a very heated and vehement argument. They went from room to room arguing. She tried to get away from Applicant and closed or locked doors to the bathroom and bedroom. She was in her bedroom lying on her bed when Applicant broke the door to the bedroom and assaulted her when he lay on top of her trying to insert his tongue in her mouth, and placing his fingers in her vagina. She was able to get away from Applicant and leave the apartment. She went to a friend's house who urged her to call police and go to the hospital to be examined. She called the police and was examined at the hospital (Gov. Ex. 14, trial transcript, at 4-42).

A friend testified at the criminal trial that she went to the film festival with Ms. E and then attended a party with her. Ms. E received a number of telephone calls from Applicant while at the party. Later that morning, Ms. E came to her house and was hysterical and crying, complaining that Applicant assaulted her. The friend urged her to call the police and go to the hospital. She accompanied Ms. E to the hospital and stayed with her for a short time (Gov. Ex. 14, trial transcript, at 42-49).

At the criminal trial, a forensic nurse, who had been in that position in the hospital for about nine months, testified that she examined Ms. E at the hospital and took photographs of her genital area. She noticed a small tear in the labia minora, and Ms. E complained of some soreness in the area. The nurse noted the tear but no lacerations, bruising, abrasions, redness, or swelling (Gov. Ex. 14, trial transcript, at 49-59).

The forensic nurse coordinator for the hospital testified that the photographs taken of Ms. E indicate redness and an abrasion in the area of the tear. This was the only injury she could observe. The injury happened within 12 to 24 hours before the examination. The only conclusion she could draw was that there was some type of sheering force, but not just from fingers. It would have to come from something attached to the finger, a ring or fingernails. The injury could also be caused by Ms. E's use of sexual objects (Gov. Ex. 14, 59-68).

Ms. E's mother testified she received a call from her daughter in the middle of the night telling her that Applicant had physically hurt her. Since she was over 800 miles away, she told her daughter to go to a hotel and she would pay for the room. She noted that Applicant and her daughter had visited her and also Applicant's parents. She last visited her daughter and Applicant about seven days before the alleged sexual assault. There seemed to be no issues between her daughter and Applicant (Gov. Ex. 14, trial transcript, at 69-74).

The forensic nurse coordinator from another hospital testified for Applicant at the criminal trial that she has done forensic nursing for about 15 years. She reviewed the

examination records of Ms. E but did not examine her. In her opinion, the forensic nurse examination report is defective and does not conform to the required standard of care. However based on her reading of the report, she classified the injury or tear as a non-specific finding in that the tear could have been caused by a number of means. It could come from trauma, disease, yeast infection, or been self-inflicted. Sexual toys belonging to and used by Ms. E could have caused the injury. The injury could also have been caused by a fingernail. She observed no other injury in her examination of the photographs (Gov. Ex. 14, trial transcript, at 75-88).

Applicant's father testified at the criminal trial that he has never seen his son wear finger jewelry. Also, his son does not have long fingernails since he has the bad habit of biting his nails to the nub since he was 3 or 4 years old. He saw his son in March 2003 and he did not have finger jewelry or finger nails (Gov. Ex. 14, trial transcript, at 88-90).

Applicant's friend testified at the criminal trial that she knows both Applicant and Ms. E. She discussed their relationship with Ms. E in February and March 2003. Ms. E told her she intended to move out of the house with Applicant because she wanted freedom. She did not mention she was moving because he abused her. Applicant came to her house on the morning of March 30, 2003. He was crying and bleeding from the neck and had a black eye. He told her he and Ms. E had a fight (Gov. Ex. Trial transcript, at 14, 90-94).

A neighbor of Applicant and Ms. E testified that she heard no violent conduct between them. Ms. E did tell her she was moving to get her freedom. She saw Ms. E the morning after the incident and she told her Applicant was in jail. She was with some other friends and asked her if she wanted to come to the apartment because they were having a party (Gov. Ex. 14, Trial transcript, at 96-103).

Applicant testified in the criminal trial that shortly after meeting Ms. E at school, they started living together. They argued frequently and vehemently. The only time he touched her was in a previous argument after she pushed him in the bathroom and he fell over the toilet and hit his head on a window. He got up and pushed her out of the bathroom. She did not hit anything nor was she hurt. Ms. E on one other occasion while they were arguing slapped him in the face but he did not hit her. When they moved to their second apartment they agreed to continue to share all expense evenly. They argued continuously about paying the bills. He did admit to calling Ms. E's other alleged boyfriend and telling him that he and Ms. E were still together and were intimate. Ms. E was upset with him for making this call.

On the night of March 29-30, 2003, he tried to call Ms. E after he was involved in an automobile accident. She did not answer the phone. When Ms. E. returned to the apartment, they argued and she called him various obscene names. She pushed him when he followed her into the bathroom and he pushed her back. Ms. E. went to the bedroom and closed the door. He pushed it open damaging the door and frame. Ms. E was on the bed and he sat down next to her. She got up and he reached for her,

grabbing her underwear. She then punched him in the eye and scratched him with her long fingernails on the neck. He got dressed and left the apartment. At no time did he try to sexually assault her or place his fingers in her vagina (Gov. Ex. 14, trial transcript, at 104-130).

Applicant testified at the security clearance hearing that in July 2004, he was now dating Ms. I. He learned that a Ms. C, a married friend of Ms. I, was having an affair with another man who was a reputed drug dealer. He called Ms. C's husband, R, and reported Ms. C's actions. Ms. C was home at the time he called R and she took the phone and accused Applicant of trying to ruin her life. Applicant terminated the call. The next morning Applicant left to go to work and obscene words and phrases had been scratched into every panel of his car. He received an estimate of over $4,000 to get the damage repaired. He called R and told him he was calling the police on Ms. C. He did not threaten R or Ms. C, but did use excessive profanity in the conversation. He did not say "Do not let me catch [Ms. C] alone" or "I am going to get you guys." Applicant filed a report with the police for damage and destruction of private property for the car damage (App. Ex. F, Incident Report, dated July 27, 2004). The police did not charge anyone with this offense because there was no evidence to show who committed the offense (Tr. 84-89).

R and Ms. C also filed an incident report with the local police concerning Applicant using the telephone to threaten bodily harm (Tr. 84-87; Gov. Ex. 8, 10, and 11, incident report, dated July 27, 2004). Applicant was arrested in January 2005 for the offense of profane, threatening or indecent language over public airways. The criminal offense involves the use of obscene, vulgar, profane, lewd, lascivious, or indecent language, or making any suggestion or proposal of an obscene nature, or threatening an illegal or immoral act with the intent to coerce, intimidate, or harass any person over any telephone. It is a class I misdemeanor (Hearing Exhibit 1, statute). Applicant appeared in court on the offense but it was dismissed because R did not press the charge and Ms. C did not appear for the trial (Tr. 88-92, 131-142; Gov. Ex. 13, Case Information, dated February 17, 2005).

Applicant's present girlfriend, Ms. J, testified that she met Applicant in December 2006 after he moved to his present location. She has a bachelor and masters degree and works for the federal government. After meeting Applicant, they lived together and purchased a condominium together. They recently agreed not to live together but are still dating. During their over two year relationship, Applicant has never hit her or yelled at her. Applicant does not have a temper and she has never heard him threatening anyone. His friends are mainly quiet professionals. Applicant is a kind and loving father to his daughter. She described him as kind, generous, intelligent and loyal. He is reliable, honest, and trustworthy (Tr. 44-55).

Applicant's fellow worker testified that he sees Applicant on a daily basis. He believes Applicant is honest, trustworthy, and has good judgment. He has never seen Applicant lose his temper. Applicant is cool and calm and very level-headed. He is

aware of the incidents Applicant was involved in that cause security concerns (Tr. 36-43).

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). 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.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines 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. 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 access to classified information will be resolved in favor of national security." 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.

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 applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining 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 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.

Analysis

There are four incidents that are of security concern for Applicant. The incidents are alleged to raise both criminal conduct and personal conduct security concerns. The incidents are the possession of drug paraphernalia in July 1996, the assault in October 1999, the sexual assault and sexual object penetration in March 2003, and the profane and threatening language over the telephone in July 2004. Even though the actions of Applicant give rise to two similar security concerns, each security concern will be treated separately.

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 ¶ 30). Appellant admitted that he was arrested for and pled guilty to possession of drug paraphernalia. He admitted he was arrested for assault even though the charge was not prosecuted. He was arrested, charged, indicted and tried for and found not guilty by a jury of sexual assault and sexual object penetration. He was arrested and charged with the offense of profane and threatening language over the telephone even though the charge was dismissed. The government must establish by substantial evidence controverted facts alleged in the SOR. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record (*See*, directive ¶ E3.1.14, ISCR Case No. 04-11463 (App. Bd. Aug 4, 2006)). Substantial evidence is more than a scintilla but less than a preponderance (*See v. Washington Metro. Area Transit Auth., 36 F. 3d 375, 380 (4th Cir. 1994))*. The government, based on Applicant's admissions and the fact that he was arrested and charged with criminal offenses, has established by substantial evidence the four criminal offenses alleged in the SOR. These facts raise Criminal Conduct Disqualifying Conditions (CC DC) ¶ 31(a) "a single serious crime or multiple lesser offenses", and CD DC ¶ 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted". The alleged offenses are serious crimes. Even though charges may not have been prosecuted, or findings of not guilty entered, or charges dismissed, they are still allegations of criminal conduct that raise a security concern.

The government produced substantial evidence to establish the disqualifying conditions in AG ¶¶ 31(a) and (c). The burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the illegal drug use (Directive ¶ E3.1.15). An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden of disproving it never shifts to the government (*See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005)).

Appellant has raised by his testimony Criminal Conduct Mitigating Conditions (CC MC) ¶ 32 (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"; CC MC ¶ 32(c) "evidence that the person did not commit the offense"; and CC MC ¶ 32(d) "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". The possession of drug paraphernalia happened in 1996, and the domestic assault happened in 1999, over 12 and nine years ago when Applicant was a teenager or in college. The passage of time since the offenses were committed is sufficient especially when coupled with the fact the acts were committed as a teenager and college student to show that the acts are unlikely to recur and no longer cast doubt on his reliability and trustworthiness.

There are two remaining criminal conduct security concerns established by the government to consider. Applicant was tried for sexual assault and sexual object penetration in 2003 and found not guilty in a jury trial. The offense of use of profane and threatening language over the telephone in 2004 was dismissed. Since the government has established these concerns, Applicant must refute, explain, mitigate, or extenuate these facts by a preponderance of the evidence. A preponderance of the evidence requires that the prevailing factual conclusions must be based on the weight of the evidence. The preponderance test means that the fact finder must be convinced that the factual conclusion chosen is more likely than not, (*See* Steadman v. SEC, 450 U.S. 91 (1981), or whether the favorable evidence out weighs the unfavorable evidence or vice versa (*See* ISCR Case No. 07-16442 at 3 (App. Bd. Oct. 9, 2008)).

Applicant denied the sexual assault and sexual object penetration. The not guilty disposition of these cases is a jury's determination that the prosecution failed to prove the crimes beyond a reasonable doubt. I am not bound by the jury determination and must independently evaluate the evidence whether he committed the offenses. There was evidence of an acrimonious relationship. There was testimony of a mutual argument and fight between Applicant and the girlfriend. The girlfriend accused Applicant of sexual assault and object penetration. Applicant admitted the argument and fight but denied a sexual assault or penetration. The forensic nurses noted a vaginal area tear but could not establish what caused the tear. A finger itself would not cause the tear. There was testimony that Applicant did not wear finger jewelry or did not have long fingernails. The two forensic nurse coordinators were unable to state with certainty whether the tear was caused by an assault or some other action. I am convinced by a preponderance of the evidence from the criminal trial transcript and Applicant's testimony at the hearing that he did not commit the criminal offense of sexual assault or sexual object penetration. There was a fight and argument but not a criminal sexual assault or sexual foreign object penetration. I draw no inference from the fact the case went to the jury at 7 PM on a Friday night and the jury deliberated only 20 minutes. The only inference I draw is that the jury did its civic duty of following the judge's instruction in reaching a fair and impartial verdict.

Applicant admitted he called Ms. C's husband and told him she was having an affair. Applicant's car was damaged and he believed Ms. C caused the damage. He

called her and her husband and vehemently complained about the damage. Both parties used profane language in the call. Based on the testimony of Applicant at the hearing and the dismissal of the profane and threatening language offense, I am convinced by a preponderance of the evidence that he did not communicate by threatening language with intent to coerce, intimidate, or harass.

Even if it was determined that Applicant committed the criminal offenses of sexual assault and sexual foreign object penetration and communicating a threat over the telephone, there is evidence the security concerns have been mitigated. There is evidence of successful rehabilitation. Applicant was in an environment in which others used drugs, but he did not use drugs. The incident that resulted in profane telephone calls could have evolved into a physical confrontation but did not. He established he is considered now quiet and peaceful by those who know him. Applicant completed college, is employed by a defense contractor and is consider an excellent employee. He is enrolled in an accelerated two degree masters program. He has moved from the college environment and now lives in a professional environment. Applicant has established he is successfully rehabilitated by his new life style and successes and the passage of time. AG ¶¶ 32(a), 32(c), and 32(d) all apply. Applicant has mitigated or refuted the criminal conduct security concerns alleged under Guideline J.

Personal Conduct

Personal 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, AG ¶ 15. While the four incidents have been refuted or mitigated as criminal conduct security concerns, the government has established by substantial evidence that they are incidents of personal conduct that raise questionable judgment and unwillingness to comply with rules and regulation affecting Applicant's reliability, trustworthiness, and ability to protect classified information. As noted above, there were only four incidents. The government alleged the same action as two allegations of security concern under Guideline E, one when Applicant was arrested, and another when he was arraigned on the charge. Since there was only one incident, SOR allegations 2.c and 2.d are treated together.

The government established by substantial evidence, relying on Applicant's admissions and testimony as well as evidence of the arrests and charges, that Applicant possessed drug paraphernalia in 1996, assaulted a girlfriend during an argument in 1999, was involved to some extent in another argument and assault in 2003, and used profane, threatening, and vulgar language towards others in 2004. These four incidents raise Personal Conduct Disqualifying Conditions (PC DC) ¶ 16(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, or other characteristic indicating hat the person may not properly safeguard protected information"; PC DC ¶ 16 (d) "credible adverse information that is not explicitly

covered under any other guideline and may not be sufficient by itself for an adverse determination, but which when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules or regulation, or other characteristic indicting that the person may not properly safeguard protected information"; and PC DC ¶ (16(e) "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, . . . ".

I considered Personal Conduct Mitigating Conditions (PC MC) ¶ 17(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"; and PC MC ¶ 17(e) "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress"; and PC MC ¶ 17(f) "the information was unsubstantiated or from a source of questionable reliability". The mitigating conditions for both the personal conduct and criminal conduct security concerns are similar. They involve consideration of the minor nature of the offense, the passage of time, and the unusual or unique circumstances of the events to show that the events are unlikely to recur, and that Applicant did not commit the offenses. Also the mitigating conditions under both guidelines consider that rehabilitation or positive steps can establish mitigation. As noted under criminal conduct, the first two incidents happened in 1996 and 1999. Applicant was a young college student at the time. Twelve years have passed since the possession of drug paraphernalia incident. In the meantime, Applicant has seen drugs being used around him, but there is no evidence he used drugs since 1996. There is evidence he tried to stop others from using drugs. The passage of time and his action in not using drugs mitigates the possession of drug paraphernalia incident.

There is evidence Applicant was involved in assaults and argumentative behavior, so PC MC 17(f) does not apply. One domestic assault happened over nine years ago. Applicant had an argument with his girlfriend and pushed her after she slapped him. He also engaged in argumentative behavior leading to a physical encounter with his live-in girlfriend in March 2003 that resulted in an arrest, indictment, and criminal trial. In July 2004, he provided personal information about a wife to her husband that led to an argument using profane and threatening language. However since 2004, he has not been involved in any argumentative or violent incidents and he has a peaceful relationship with his current girlfriend. Applicant established that since 2004, over four year ago, he has not been involved in any improper personal conduct. He established that he moved to a different area, and changed his working and living environment. He now has a professional position and is pursuing a master's degree in an accelerated program. His friends now are mostly professionals. Applicant has established by a preponderance of the evidence that since the last incident of personal conduct concern happened over four years ago, sufficient time has passed that such incidents are unlikely to recur. He has established by a preponderance of that evidence

that he been rehabilitated by his new lifestyle, work environment, new friends, and living environment so that his previous actions do not case doubt on his reliability and trustworthiness. He established these as positive steps taken to reduce or eliminate vulnerability to exploitation, manipulate, or duress. Applicant has mitigated security concerns for personal conduct.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An 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 a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered that since the incidents of security concern Applicant completed college and is a highly regarded employee of a defense contractor. I considered that two of the offenses leading to criminal conduct and personal conduct security concerns happened over twelve and nine years ago and are not likely to recur. I considered he did not commit two criminal conduct offenses. I considered he mitigated the personal conduct security concerns by establishing successful rehabilitation and that sufficient time has passed to show the offense are not likely to recur. He has established that the criminal and personal conduct security concerns are unlikely to recur. Overall, on balance the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his personal and criminal conduct.

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 J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline E:	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

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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THOMAS M. CREAN
Administrative Judge