DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 08-02299
SSN:	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: John B. Wells, Esquire

August 18, 2010

Decision

HARVEY, Mark, Administrative Judge:

In 2001, Applicant, a commissioned officer, and two other officers were involved in sexual conduct with an enlisted female. Applicant was convicted at a general court-martial of conspiracy, conduct unbecoming an officer, and false swearing. The Judge Advocate General subsequently set aside Applicant's convictions and authorized a new trial. Although no new trial is anticipated, there is substantial evidence that Applicant committed these criminal offenses. He has not taken responsibility, shown remorse, or otherwise established his rehabilitation. Personal conduct concerns are mitigated; however, criminal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On July 10, 2007, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86) (Item 5). On November 20, 2008, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant (Item 1), pursuant to Executive Order 10865, *Safeguarding Classified Information Within*

Industry, dated February 20, 1960, as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guidelines J (criminal conduct) and E (personal conduct) (Item 1). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked (Item 1).

On December 8, 2008, Applicant responded to the SOR allegations, and initially requested a hearing. (Item 4) On November 19, 2009, Applicant's counsel waived Applicant's right to a hearing and requested a decision on the record (Item 19 at 1). A complete copy of the file of relevant material (FORM), dated January 6, 2010, was provided to Applicant's counsel on February 22, 2010, and he was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation.[1] On March 12, 2010, Applicant responded to the FORM. On April 29, 2010, Department Counsel filed a rebuttal to Applicant's FORM response. The case was assigned to me on May 3, 2010.

Findings of Fact[2]

In Applicant's responses to the SOR and FORM, he admitted that he was convicted at a general court-martial (GCM) in 2001 of conspiracy, conduct unbecoming an officer, and false swearing in violation of Articles 81, 133, and 134, UCMJ, 10 U.S.C. §§ 881, 933 and 934. The GCM sentenced him to forfeit $500 pay per month for two months, and a letter of reprimand. However, Applicant has continued to challenge whether there is sufficient evidence to meet the substantial evidence test used for security clearance determinations. *See* Policies section of this decision for burdens of proof. Applicant's admissions are accepted as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 44-year-old employee of a defense contractor.[3] He was awarded a masters degree in public administration in 1994. He served on active duty from 1983 to 2003. He was enlisted from 1983 to 1992, and he was an officer from 1992 to 2003. He

[1]The DOHA transmittal letter is dated January 8, 2010; and Applicant's receipt is dated February 22, 2010 (file). The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information (file).

[2]Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

[3]Unless stated otherwise, the facts in this paragraph are from Applicant's July 10, 2007 SF 86 (Item 5).

married in 1991 and divorced in 2005. He married his current spouse in 2006. His two children were born in 1993 and 1996.

Applicant's statement, Prosecution Exhibit (PE) 12[4]

Applicant met H and W, who were the same grade as Applicant (O-3), in July 1999. Applicant, H, and W were good friends, who often played golf and went to each other's residences for social reasons.

Applicant met V at a Super Bowl party in January 2001. "There were numerous people at the party and [he] briefly talked to [V]. [Applicant and V] did not have an in-depth conversation, just one in which we introduced each other. . . . [H] was at the party, but [W] was not."

Applicant, H, W, and V attended a second party on January 31, 2001, at a club. Applicant, H, and W consumed a considerable amount of alcohol at the party. H left the party without telling Applicant he was leaving. W and Applicant "became concerned as we knew [H] had a lot to drink. [Applicant and W] drove to [H's] residence to make sure [H] was fine." W drove to H's residence even though Applicant and W had been drinking "pretty heavily as the night went on." When Applicant went to H's residence, they noticed that H's vehicle was parked at H's house. H's front door was unlocked. Applicant and W went inside H's residence, and W went to H's bedroom door, which was closed. W shouted for H, asking if H was OK. H responded that he was fine. Applicant claimed that he did not hear any other voice emanating from H's room, and he did not see W open H's bedroom door. Applicant and W immediately left H's residence. W arrived at Applicant's home between 11 pm and midnight.[5]

V's testimony

V met W in the summer of 2000. (Tr. 184) She knew he was an officer. (Tr. 184) They talked and danced the first evening that they met. (Tr. 184) She was then 19 years old and an active duty enlisted woman (E-3). (Tr. 183-184) She is 64 inches tall. (Tr. 192) During the summer of 2000, W and V engaged in consensual oral sexual activity. (Tr. 185, 198) She continued to occasionally see W at the gym and around the base. (Tr. 184-186)

V met Applicant and H at a Super Bowl party in January 2001. (Tr. 185, 200) V and Applicant danced together at the party, and V told Applicant she was enlisted. (Tr. 186, 200) Applicant also gave V his business card. (Tr. 186) His card has Applicant's rank on it. (Tr. 186, PE 4) Applicant told V he was a commissioned officer and they were

[4] Applicant made a sworn statement to military law enforcement on February 6, 2001, which was admitted in evidence at his court-martial. This statement is the source for the facts in this section. H, W, and Applicant did not testify at their joint court-martial. They have an absolute right not to testify at their court-martial, and no adverse inference whatsoever is drawn from their decision not to testify.

[5] A law enforcement agent indicated it took about 10-15 minutes to drive from H's residence to Applicant's residence on base. (Tr. 150)

in the same branch of service. (Tr. 186-187; PE 4) V also danced with H at the Super Bowl party. (Tr. 186) Applicant also told her about a party for him on January 31, 2001, at a club on base, which was because he was being reassigned. (Tr. 187)

On January 31, 2001, V went to the party and danced with H. (Tr. 188) V observed H talking to Applicant and W. (Tr. 188) V did not consume any alcohol. (Tr. 188) H invited V to a party at his residence. (Tr. 187-189) H said there were going to be a lot of people at the party at H's house. (Tr. 187-188) H did not appear to be intoxicated. (Tr. 188) H and V departed the party about 10:30 pm and drove to H's residence, which took about 25-30 minutes. (Tr. 188, 201)

At first V and H sat on the couch, and V waited for others to arrive at the party. (Tr. 188-189) H started kissing and fondling V, with her consent, and then they moved from the couch to H's bedroom. (Tr. 188-189) H continued to kiss and fondle V, and he kissed her vaginal area. (Tr. 188-189, 202) H's bedroom door was open, and V heard the front door open. (Tr. 189) V asked H to close the bedroom door and he partially closed it. (Tr. 189) V observed Applicant and W watching through the partially open bedroom door. (Tr. 190) She asked to leave. (Tr. 190) Applicant and W entered the bedroom. Applicant was only wearing a tank top, and W was naked. (Tr. 190, 206, 207) W got into bed with H and V, and H and W fondled V. (Tr. 190) V said they were forcing themselves on her and she told them to stop. (Tr. 190) Applicant engaged in sexual intercourse with V for about two minutes while W and H held her legs and encouraged Applicant to continue. (Tr. 191, 197-198, 202) She was unsure whether Applicant was wearing a condom, or whether he ejaculated. (Tr. 191) After engaging in sexual intercourse with V, Applicant left the room and did not return. After Applicant left the room, W and H forced V to perform oral sodomy on H. (Tr. 191-192) Applicant was the only one who had sexual intercourse with V. (Tr. 192)

V did not scratch, punch, kick, bite, or scream because she was scared. (Tr. 198, 206) She did not incur any physical injuries, such as scratches or bruises. (Tr. 195) On the way back to the base, H took V to a carry out restaurant. (Tr. 193) She saw two petty officers at the restaurant; however, she did not talk to them. (Tr. 193) She also called a male friend and left a message that "some shit" had happened to her, but she did not provide details. (Tr. 193, 195) H dropped her off at her barracks, which was about a 25 minute drive from H's residence. (Tr. 205) She did not take a shower because she did not want to wash away evidence. (Tr. 193, 195) She went to sleep, and the next morning contacted her supervisors and reported the incident. (Tr. 193-194) On February 1, 2001, she was examined at a rape crisis center, and on February 2, 2001, she provided a statement to law enforcement.

H's statement to law enforcement and PE 7

H said on January 31, 2001, he drank two Long Island ice teas at the club from approximately 5:00 p.m. until the time that he left the club with V at about 10:30 pm. (Tr. 139) He said he did not see V drink any alcohol, and he did not provide her with any at his house. *Id*. H denied that he was intoxicated. *Id*. H said that when he left the club with V, both Applicant and W saw H leave with V. *Id*.

H initially told a law enforcement agent that he did not know V. (Tr. 137) Eventually he admitted that he met a female at a club on January 31, 2001, and that he took her to his house, where they engaged in sexual activity. (Tr. 137) He did not "get" her name. (Tr. 137) He kissed around her vaginal area, but did not engage in oral sodomy with her. (Tr. 137) While she was in his bedroom, she advised H that she was enlisted. (Tr. 137) H immediately stopped his sexual activity, drove her to a restaurant, and then to her barracks. (Tr. 137)

H said he had given keys to his residence to Applicant and W. While he was in the bedroom, Applicant and W entered his residence to check on H. They knocked on the bedroom door, which was closed. H said he was OK, and they left. (Tr. 137-138) At first H said he was sure the door had not opened; however, later he said his bedroom door may have come open, but he did not think that it did. H said the female did not want to be caught with an officer. (Tr. 137-139) H later said the female became upset when the other guys entered the room where H and V had been engaging in sexual activity. (Tr. 138)

W's statement to law enforcement, PE 9

W's statement to law enforcement was consistent with the statements of other witnesses until he described the point at which W and Applicant arrived at H's bedroom door way on January 31, 2001. W stated:

> I knocked on [H's bedroom] door, and the door opened slightly. I saw two figures on the bed. I heard a female voice stating something like ["who's that?" H] then stated, "What's up gentlemen, I am alright." I felt uncomfortable, turned and walked past [Applicant] into the living room. [Applicant] was about five steps behind me. I then walked into the kitchen, and got a drink of water. [Applicant] and I waited in the living room, for maybe five (5) minutes. I recall the TV being on in the living room. I don't recall what show was on. [H] did not come out of his bedroom, so we left the house. [Applicant] and I then drove directly back to [base]. I drove [Applicant] to the [club] to pick-up his car. When we got to the [club], [Applicant] asked that I just drop him off at home. [Applicant] and I both live in base housing, just a few houses apart. . . . I would guess the time was about 2345 hours, when I got home.

W denied that he entered H's bedroom on the evening of January 31, 2001. He denied that he had any physical or sexual contact with the female that was on H's bed that evening. He denied knowing the woman who was in bed with H that evening.[6]

[6] During the summer of 2000, a female enlisted person, C, saw W and V dancing at the club on approximately three occasions. (Tr. 221) In the summer of 2000, another female enlisted person, D, listened in during a telephone conversation between W and V in which W and V discussed getting together. (Tr. 224) Thus, W's statement about not recognizing V is not credible.

Telephone records

Neither Applicant nor W called H on January 31, 2001 (evening of sexual activity between H and V) to check on him. On February 5, 2001, V called W four times, at the behest of law enforcement to attempt to obtain incriminating admissions from him. (Tr. 126-128, 134-135; PE 5, 6) Their telephone conversations were tape recorded. W indicated he did not know who V was, and had no knowledge of the January 31, 2001, incident, asserting that the phone calls must be a joke. V threatened to call law enforcement to report the rape, and W discussed having a meeting with V or calling V back.

On February 5 and 6, 2001, H and W, H and Applicant, and W and Applicant communicated with each other several times over the telephone. From 4:49 pm to 5:35 pm, on February 5, 2001, H, W, and H called each other five times, and the three longest telephone conversations were 7 minutes, 25 minutes, and 27 minutes. Law enforcement interviewed H, W, and Applicant on February 6, 2001.

Deoxyribonucleic Acid (DNA) tests

A law enforcement agent testified that, five days after the alleged sex offenses, three used condoms and a partially full box on unused condoms were found in the garbage outside H's residence. (Tr. 141-142) The condoms were inside a sealed plastic garbage bag containing various items of trash including bones from chicken wings and tomato peelings. (Tr. 141-142) H was present when his garbage was searched and indicated he had chicken wings several days previously. (Tr. 142) The garbage inside H's kitchen contained chicken wings and tomato peelings. (Tr. 142)

The DNA examiner, M, testified that two of those condoms contained DNA on their outside showing some consistency with V's DNA. (Tr. 160-163) The inside of one condom showed some consistency with Applicant's DNA; however, M refused to label the contents of the condom as a match to Applicant's DNA. (Tr. 160-163). M concluded that Applicant could not be excluded as the donor of the DNA. In 2003-2005, M was implicated in nine discrepancies involving contamination of samples and providing false testing information. *See United States v. Luke*, 63 M.J. 60, 63 (C.A.A.F. 2006). The Court of Appeals for the Armed Forces ordered a hearing in *Luke* to assess for prejudice due to the possibility that the same DNA expert, M, contaminated the DNA samples in Luke's case or falsified Luke's test results.[7]

Upon retest of the three condoms in October 2006 by a different DNA expert, all three condoms tested negative for semen, but epithelial or skin cells were found on each condom. V's DNA was confirmed on all three condoms. (Item 19 at 24) For the

[7] In Luke, M examined the bed sheet and the bra for stains that contained saliva. *Luke*, 63 M.J. at 62. M testified that each contained cells from which DNA could be obtained, so a portion of each was preserved for another examiner who would perform DNA tests. *Id*. M did not actually perform the DNA tests in Luke. Nevertheless, the Court of Appeals for the Armed Forces recognized that M could have contaminated the sheet and bra, causing the DNA test to falsely implicate Luke.

inside of the first condom (7(1)), "the remaining partial DNA profile from the inside of the condom could not have originated from" Applicant, W, or H. (emphasis added) *Id*. For the inside of the second condom (7(2)), "the remaining partial DNA profile from the inside of the condom is consistent with originating from unknown Individual #1." Applicant, W, and H "are excluded." *Id*. For the third condom (9), "the remaining partial DNA profile is consistent with originating from unknown individual #1 and genetically typed as male," and "the remaining partial DNA profile could not have originated from" Applicant, H, or W. (emphasis added) *Id*. The DNA profile for the third condom was inconclusive "due to degraded or insufficient amount of human DNA." *Id*.

Both H and V agreed that they engaged in sexual activity on January 31, 2001. V said the only one who had sexual intercourse with her was the Applicant. (Tr. 191, 194) H denied that he used a condom, and V was unsure whether Applicant used a condom. (Tr. 138, 191, 193, 202) V said she saw three or four condoms on H's bed. (Tr. 193, 202) H claimed he used a different brand of condom than those found in his trash. (Tr. 138) V said she did not remember whether the condoms on the bed were unwrapped or not. (Tr. 193)

Resolution of charges against Applicant

On January 31, 2002, a military judge sitting as a general court-martial found Applicant not guilty of conspiracy with H and W to commit an indecent act with V, violation of a lawful general regulation (fraternization), rape of V, forcible sodomy of V, and engaging in indecent, sexual acts with V in the presence of H and W, in violation of Articles 81, 92, 120, 125, and 134, UCMJ. The military judge found Applicant guilty of conspiracy with H and W to make a false official statement to law enforcement, conduct unbecoming an officer "by wrongfully and dishonorably engaging in sexual activities" with V in the presence of other officers, and making a false sworn statement, in violation of Articles 81, 133, and 134, UCMJ. The court-martial sentenced Applicant to forfeit $500 pay per month for two months and a reprimand.

In December 2004, the Judge Advocate General set aside the false swearing charge after completing his required review under Article 69(a), UCMJ. In August 2005, the Government disclosed the compromise of the credibility of the DNA expert who tested condoms seized from the trash outside H's residence and who testified at Applicant's trial. The Judge Advocate General reviewed the 2006 re-test of the three condoms. On June 4, 2009, the Judge Advocate General stated:

> In light of the significant differences between the new DNA evidence and the DNA evidence presented at trial, the arguments and theories[8] that

[8] The Judge Advocate General's memorandum of June 4, 2009, provides:

> The DNA evidence, as properly tested, not only fails to implicate the three defendants, but it also presents possible theories of the case and interpretations of the evidence that are favorable to the defense. For instance, the fact that the alleged victim's cells were on the inside and outside of each condom, combined with the fact that the condoms were found outside [H's] house, could lead a trier-of-fact to wonder whether the alleged victim

> would have been available to the defense with knowledge of the new evidence and all the other pertinent facts, I conclude that this evidence would probably produce a substantially more favorable outcome for the accused.

(Item 18 at 5) In regard to the conspiracy to make a false official statement offense, "in order to effect the object of the conspiracy, the said [Applicant, H, and W] did each make a false statement to [law enforcement]." *Id*. The Judge Advocate General noted that the three accused made multiple statements to law enforcement, and it could not be established "which statement the military judge concluded was false." *Id*. Thus, the conspiracy conviction was not reviewable and could not be affirmed. The Judge Advocate General set aside the last two charges and authorized a new trial under Article 73, UCMJ. However, no new trial is anticipated. The sentence at the first trial would be the maximum sentence limitation for his retrial, and Applicant is now retired. *See* FORM at 10 n. 33.

FORM response

Applicant's counsel argues that V's allegations against Applicant are not credible because of inconsistencies between her testimony at trial and her testimony at Applicant's Article 32 testimony, or lack of memory of details, such as: (1) whether V told Applicant or H she was enlisted; (2) where she was located at the club when she first saw Applicant; (3) whether she spoke to Applicant at the club on January 31, 2001; (4) the particular room where the dance in the club was located; and (5) whether others were expected at H's residence on January 31, 2001.

V was not able to describe whether Applicant used a condom, whether Applicant was circumcised, or the fraternity brand on Applicant's upper arm. Applicant's pubic hair and bodily fluids were not found on V's person or at H's residence.[9] Several witnesses at trial opined that V was not credible and had a poor reputation for honesty. Other witnesses opined that Applicant was a credible person, and had a good reputation for honesty.

Applicant's counsel contends the lack of corroboration concerning whether V danced with Applicant at the Super Bowl party in 2001, absence of physical injuries to V, and V's lack of agitation at the restaurant after the sexual incident and when she

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> may have planted the condoms herself. Moreover, the presence of one, if not two unidentified males on all three of the condoms also raises significant questions.

Item 19 at 20. *See also* FORM response at 17. The DNA expert who testified in Applicant's trial was male, and handled all three condoms. He was disciplined for sloppy lab work relating to several cases. There is no evidence that the laboratory excluded the DNA expert's own DNA as the source of the male skin cells found on the condoms. There is no evidence that V knew if or when law enforcement would search Applicant's trash for condoms.

[9] When law enforcement searched H's bedroom the bedding had been removed from the bed. Other beds in his residence did not have the bedding removed.

described the incident at the Sexual Assault Resource Center are inconsistent with being sexually assaulted earlier and cast further doubt on V's credibility.

Character evidence[10]

Applicant has a 4.6 average of all officer fitness reports. He has received: four awards of the service Commendation Medal, five awards of the service Achievement Medal, four awards of the Meritorious Unit Commendation, two awards of the service Battle Efficiency Ribbon, two awards of the Good Conduct Medal, two awards of the National Defense Service Medal, the Military Outstanding Volunteer Service Medal, four awards of the service Deployment Ribbon, three awards of the Overseas Service Ribbon, two awards of the service Recruiting Service Ribbon, and the service Expert Rifle and Pistol Ribbons.

Applicant's file has numerous letters lauding his duty performance and dedication to the service. His file was replete with recommendations for promotion to O-4 and for assignment to sensitive, high profile duties. The testimony at trial of a three-star flag officer, a two-star flag officer, and an O-6 level officer during Applicant's trial lauded Applicant's good character, solid integrity, or tireless efforts on behalf of his commands during his 20-year military career.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id*. at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

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

[10]The Staff Judge Advocate's post trial recommendation, dated November 1, 2002, and the numerous letters and awards from Applicant's personnel records are the basis for the information in this paragraph.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to 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. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. 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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the initial burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance," and "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

The DOHA Appeal Board has repeatedly stated:

> Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole."

ISCR Case No. 09-01015 at 3 (App. Bd. July 16, 2010); ISCR Case No. 07-16427 at 2 (App. Bd. Feb. 4, 2010); ISCR Case No. 07-16841 at 4 (App. Bd. Dec. 19, 2008).

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

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guidelines J (criminal conduct) and E (personal conduct).

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to 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, ¶ 31(a), "a single serious crime or multiple lesser offenses," and ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether [Applicant] was formally charged, formally prosecuted or convicted."

V's statement describing Applicant's conduct on January 31, 2001, is credible. There is no record evidence supporting any reason for her to falsely accuse Applicant of such serious crimes.[11] Applicant and V agree that they barely knew each other before the sexual incident of January 31, 2001. Applicant and W claim that they went to H's residence to check on H's welfare, even though Applicant, W, and H had all had been consuming alcohol, and it was risky for W to drive after consuming alcohol. Applicant and W could have called H's cell phone number to check on his welfare. When they arrived at H's residence, they saw H's vehicle and knew he arrived home safely. Nevertheless, they entered H's residence without knocking on the front door or ringing his doorbell. H had left the front door unlocked, which is a clear indication he expected their arrival, wanted them to enter his residence, and anticipated that he did not want to prematurely alert V concerning their arrival. Applicant and W's statements about driving to H's residence to check on H are not credible.

H and V agree that they were engaging in consensual sexual activity when Applicant and W arrived at H's bedroom door supposedly to check on H's welfare. It is more reasonable to infer that Applicant and W drove 20-30 minutes to H's residence because they wanted to engage in sexual activity with V. Applicant and W stripped off

[11] Applicant's counsel suggests that V had four different reasons to falsely accuse Applicant of sexual crimes. First, V was upset because she thought W, who was "fine" or very handsome, saw V at H's residence and V may have been upset about losing a chance for a relationship with W. Second, "a reasonable inference may be that [V] thought she had a chance at a trifecta in bringing three [officers] down for the price of one." Form Response at 9. Third, V may have thought that V's acquaintance would report her for fraternization so she decided that "[s]triking first with a phony rape report must have seemed like a logical course of action." Form Response at 14. Fourth, V may have wanted to strike back at W because "she felt spurned." Form Response at 15. Ultimately Applicant's counsel concludes, Applicant "was an innocent bystander caught in the wrong place at the wrong time in the sights of a liar who for whatever reason, decided to take down three [officers]." Form Response at 16.

their clothes, except for Applicant's tank top, entered H's bedroom, and proceeded to engage in sexual acts upon V, even though Applicant and W did not have V's consent to engage in this sexual activity. Moreover, even if she had consented, Applicant would have committed conduct unbecoming an officer and indecent acts by engaging in sexual intercourse with V while H and W were watching this sexual activity.

On February 5, 2001, after V called W and threatened to disclose the rape to law enforcement, H, W, and Applicant coordinated their false statements to law enforcement to ensure consistency. Their plan and agreement was to assert that W and Applicant did not enter H's bedroom. Applicant subsequently made a false statement to law enforcement that he did not enter H's bedroom. This behavior established conspiracy to make false statements, and making false statements, in violation of Articles 81, and 107, UCMJ, as well as 18 U.S.C. § 1001. Additionally, Applicant engaged in sexual intercourse with V, a 19-year-old enlisted woman, in the presence of H and W. This behavior constitutes conduct unbecoming an officer, and indecent acts, in violation of Articles 133 and 134, UCMJ. There is more than substantial evidence to prove these military crimes. AG ¶¶ 31(a) and 31(c) apply with respect to Applicant's indecent acts, conduct unbecoming an officer, conspiracy and making false statements, even though he does not have a conviction for any of these offenses.

AG ¶ 32 provides four conditions that could potentially 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 person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
>
> (c) evidence that the person did not commit the offense; and
>
> (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.

AG ¶ 30(a) partially applies. None of the other mitigating conditions fully apply. A substantial period of time has elapsed since the criminal behavior happened, and it happened under unusual circumstances. The offenses occurred on January 31, 2001, more than nine years ago. Applicant has left active service. He has remarried. There is no evidence of any other disciplinary action, misconduct, or arrests.

The case of ISCR 07-14127 at 3-4 (App. Bd. Aug 12, 2010) is instructive. In that case the Applicant was a heavy drug user from 1975 to 1990, while holding a security clearance. Additionally, he provided false information about his history of illegal drug abuse on his security clearance applications from 1975 to 2001. In 2005, he provided

accurate information about his history of drug abuse "following a pre-polygraph examination." *Id*. at 4. The administrative judge determined his offenses were not recent and mitigated his misconduct under Guidelines E and J. The Appeal Board reversed the favorable security clearance decision, concluding the Applicant's conduct continued to "cast doubt upon his reliability and good judgment." *Id*.

The Applicant in the instant case did not have a long history of history of drug abuse and falsifications of multiple security clearance applications, and yet the Applicant in ISCR Case No. 07-14127 admitted his long history of drug abuse and other misconduct in 2005. On the other hand, the Applicant in the instant case had a brief episode of illegal behavior (January 31, 2001 to February 6, 2001); however, he has not shown any remorse, apologized to the victim, or taken responsibility for his misconduct.

Applicant's criminal conduct is not fully mitigated. He was not pressured into committing the misconduct. He was a mature, 36-year-old man with 19 years of military service. V was only 19 years old. I have carefully considered all of the evidence and I conclude there is substantial evidence that he committed the offenses. His lawyer's attacks on the 19-year-old enlisted victim of these three officers do not convince me that she framed three innocent officers for the reasons stated in n. 11, *infra*. Under all the circumstances, Applicant's offenses continue to "cast doubt on the [Applicant's] reliability, trustworthiness, [and] good judgment." There is insufficient assurance that other criminal offenses are "unlikely to recur." There is insufficient evidence to establish his rehabilitation.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating, "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."

Two potentially pertinent disqualifying conditions are AG ¶ 16(d)(3) which states:

> (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 and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations,

and AG ¶ 16(e)(1), which states, "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."

With respect to the personal conduct concerns involving Applicant's conspiracy to make false statements, making false statements, and engaging in sexual intercourse with a 19-year-old enlisted woman, in the presence of H and W, this behavior violates multiple statutes or rules. As discussed in the criminal conduct section, this conduct violates Articles 81, 107, 133, and 134, UCMJ. Moreover, making a false statement to federal law enforcement concerning involvement in sexual offenses committed upon an enlisted woman violates 18 U.S.C. § 1001. However, AG ¶ 16(d)(3) does not apply because this conduct is covered under the criminal conduct guideline, as all rules involved, when violated, are criminal offenses.

Certainly, such crimes violate important civil and criminal rules in our society, and these offenses are conduct a person might wish to conceal, as it adversely affects a person's professional and community standing. Thus, AG ¶ 16(e)(1) applies and further inquiry concerning the applicability of mitigating conditions is required.

The mitigating condition outlined in AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress" applies to Applicant's offenses. Applicant's former commanding officer, supervisor, and security officials are well aware of Applicant's offenses. His conduct is well-documented in court-martial, law enforcement, and appellate records. The federal government's knowledge of these allegations eliminates any vulnerability to exploitation, manipulation or duress. I do not believe Applicant would compromise national security to avoid public disclosure of these offenses. Any personal conduct security concerns (pertaining to disclosure of his criminal conduct) are mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(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 J and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There are several factors tending to support reinstatement of Applicant's access to classified information. He presented a very strong mitigation case at his court-martial, and his military records contain an outstanding record of dedicated, honorable service to his command, service, and the Department of Defense. He has left the service, remarried, volunteers in his community, and wishes to contribute to the Department of Defense as a contractor. I attribute his offenses in part to alcohol consumption, and the encouragement of two fellow officers and friends. Applicant deserves substantial credit for serving his country in war and peace for 20 years. There is every indication that he is loyal to the United States. There were no allegations of security violations. He does not have any felony arrests or any drug or alcohol-related arrests or convictions, aside from the UCMJ offenses which occurred from January 31, 2001, to February 6, 2001. He is motivated to have a successful career, and to retain his security clearance.

There are more substantial whole-person factors weighing against reinstatement of Applicant's access to classified information at this time. Applicant's UCMJ violations were not prudent or responsible. His conduct violated Articles 81, 107, 133, and 134, UCMJ. The offenses did not result from a brief, irresponsible impulse. His misconduct involved planning to go to H's residence to have sex with V, riding with W to H's residence, undressing outside H's bedroom door, entering H's bedroom, engaging in sexual intercourse with V, planning the false statements to law enforcement with H and W, and making his false sworn written statement to law enforcement. The offenses occurred over a period of about seven days. He had ample opportunity to reconsider before taking each step in his criminal activity. He committed the offenses while on active duty, as a commissioned officer, with 19 years of service. He was fully inculcated with service values of integrity and honesty. He knew he was not supposed to engage in sexual activity with a 19-year-old enlisted woman. He held a secret-level security clearance when he committed the misconduct. Sexual abuse of V, and the subsequent cover-up, shows extraordinarily poor judgment.

Applicant has not apologized to V or indicated he regrets his misconduct. During the sentencing phase of his court-martial, he said he accepted the judgment of the court. (Tr. 297-298) However, this statement does not constitute an admission of guilt but is merely a statement of recognition of the court's finding. *See* FORM Response at 11. The service has not held him fully accountable for his misconduct because the courts-martial findings and sentence were set aside. Acceptance of responsibility, and a sincere statement of regret and remorse must occur or substantially more time must elapse without further misconduct before confidence in his judgment, character, integrity and trustworthiness can be restored.

I have carefully applied the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), Exec. Or. 12968, the Directive, the AGs, and other cited references to the facts and circumstances in the context of the whole person. For the reasons stated, Applicant has not mitigated or overcome the Government's case, and 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:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to reinstate Applicant's eligibility for a security clearance. Eligibility for a security clearance is denied.

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MARK HARVEY
Administrative Judge