



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:	)	
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SSN:	)	ISCR Case No. 08-08823
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Melvin Howry, Esquire, Department Counsel  
For Applicant: Daniel C. Minutillo, Esquire

January 8, 2010

**Decision**

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WESLEY, Roger C., Administrative Judge:

**History of Case**

On June 23, 2009, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determining whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on July 13, 2009, and requested a hearing. The case was assigned to me on June 23, 2009. The case was scheduled for hearing on September 15, 2009. A hearing was held as scheduled, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, or deny, Applicant's application for a security clearance. At hearing, the government's case consisted of five exhibits (exs. 1-5); Applicant relied on four witnesses (including

herself) and seven exhibits (exs. A-G). The transcript (Tr.) was received September 26, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Procedural Issues**

Before the close of the hearing, Applicant asked for additional time to supplement the record with character references. For good cause shown, Applicant was granted 10 days to supplement the record. The Government was afforded two days to respond. Within the time permitted, Applicant supplemented the record with character references. The submissions are accepted as Applicant's exhibit H.

### **Summary of Pleadings**

Under Guideline J, the SOR alleges that Applicant was charged with false reporting (a Class 3 misdemeanor) in another state in January 2006, pleaded guilty to the charge, and received a 12-month deferred sentence with conditions that she complete 48 hours of community service and send letters of apology. The same allegations were incorporated under Guideline E.

In her answer to the SOR, Applicant denied each of the allegations. She explained that she pled guilty to a Class 3 misdemeanor on the advice of counsel, and only did so to spare herself the trauma of reliving a rape experience and being portrayed as a female perpetrator at an emotionally charged trial.

### **Findings of Fact**

Applicant is a 46-year-old software quality engineer for a defense contractor who seeks a security clearance. Because Applicant denied each of the allegations, factual findings are determined according to the from the evidentiary proofs of the parties.

### **Background**

Applicant immigrated to the U.S. from South Korea to pursue her education. Her parents and siblings are citizens and residents of South Korea. She applied for U.S. citizenship in the 1980s and was naturalized as a U.S. citizen in 1993 (see ex. 1 Tr. 59). She enrolled in an accredited U.S. university in 1992 and was awarded a bachelor's of science degree in computer science from the same school in May 1997

Applicant married in March 1988 and has two children from her marriage: ages 11 and 14 (ex. 1). Following her graduation from college, Applicant worked continuously for defense contractors over the ensuing five years (see ex. 1; Tr. 60-61). Due to family-related issues, she resigned her position from her defense employer at the time in February 2006 (see exs. 1 and 3). She remained unemployed for about a year before gaining employment with her previous employer in another city (see exs. 1 and 3). Since returning to her same employer, she has remained employed by this firm to

the present, and currently works for the firm's State A facility. Applicant has held a security clearance for each of her positions (see ex. 3; Tr. 61-62).

### **Reported December 2005 rape incident and false reporting charges**

Between October 2004 and February 2006, Applicant worked in the offices of her current employer in another state (State B). During her tenure, in the firm's State B facility, she befriended a work-colleague. By June 2006, her association with this colleague (A) had grown from a strictly professional relationship to a social one as well. She even introduced A to her husband (see ex. 3), who soon came to treat A as a part of their family. Applicant and her husband regularly invited A to family dinners and other functions at their home (ex. 3). In turn, A often purchased gifts for her children on their birthdays and holidays (ex. 3).

As her relationship with her colleague expanded, Applicant sometimes attended concerts and other events alone with him, and without telling her husband. On one particular occasion in June 2005, she even traveled to the west coast with this colleague on an overnight shopping trip without her husband's knowledge (see ex. 2). At some point in their relationship, the colleague began making advances on Applicant. When she did not respond favorably to his romantic overtures, he began calling her derogatory names (such as "Babe") in the work-place, which made working conditions in her office difficult for her (see ex. 3). She filed sexual harassment charges against A with her human resources department and was assured that her problem would be addressed and resolved (ex. 3).

Applicant's human resources department conducted its own investigation of A's reported harassment and interviewed her coworkers and colleagues at her place of business (ex. 3). By early December 2005, her employer had completed its own investigation. A, in turn, telephonically contacted Applicant in December 2005, and informed her he could not bring Christmas presents for her children to her home, as he had done in the past (see ex. 2). He asked Applicant if she could come to his residence to pick up the presents for her children (ex. 3). She agreed, and went over to A's residence after work to pick up the presents (ex. 3). Applicant claimed that once she was inside of A's apartment, A pushed himself aggressively against her and ignored her pleas to cease (see ex. 3). According to Applicant's police report account, A did not abide by her requests, and raped her (ex. 3; Tr.73).

Following the incident in A's apartment, Applicant reported her account of events to her husband. However, she did not promptly report the incident to local police, even though, she had a cell phone with her at the time (ex. 2). According to her accounts in the police report of the incident, she awoke the next day and went shopping (see ex. 2). After informing A of her whereabouts, he joined her at the local mall and apologized to her profusely (ex. 2). Several weeks later (in mid-January 2006), she filed a report with the local police department, charging A with rape (see ex. 2; Tr. 73, 76-77, 86-87).

Shortly after she filed rape charges against A with local police, Applicant's employer instructed her to cease coming to work until further notice (see ex. 3). Once she filed her report, A no longer tried to communicate with her.

Several days after she filed her police report, Applicant and her husband met with a detective (D) at the local police department where she filed her report (see exs. 2 and 3). In this initial police interview, she described her colleague as a family friend and coworker, but not a romantic partner, and declined to acknowledge any extra-marital affair with A (ex. 2). At some point in the interview, Applicant received the detective's approval to audio record an interview with A (Tr. 78-79). She was also offered the services of a counselor, but declined (see ex. 3).

Following the detective's suggestions, Applicant proceeded to interview her colleague in the presence of the detective. However, before she could elicit any comments from the colleague, he confronted her about her recording their conversation (Tr. 79-80). At this point, the interview ceased.

After interviewing both Applicant and her colleague, the investigating detective concluded that Applicant and the colleague had been involved in a romantic affair that began in June 2005. During this time, Applicant and her colleague traveled together to other cities, enjoyed concerts, and shopped and hiked together on numerous occasions (ex. 2). According to the detective's police report, all of Applicant's encounters with her colleague occurred without her husband's knowledge. A produced an audio tape that he recorded during a subsequent conversation between himself and Applicant after the reported December 2005 incident. The tape supported A's earlier statements to the investigating detective that Applicant and A had engaged in consensual sexual intercourse on the date of Applicant's reported incident (see ex. 2).

Based on his evaluation of the statements contained in A's produced audio tape and his interviews of A and Applicant, D concluded that Applicant broke off her relationship with A shortly after her sexual encounter with him (see ex. 2). According to the detective's account of the exchange between Applicant and A on this audio tape, Applicant suggested nothing that would indicate she had been raped by A on the date she reported (ex. 2).

After affording Applicant several opportunities to admit to him that she was not sexually assaulted by A, D ceased trying to elicit a recant of her rape charges. Applicant never actually recanted her claims that A forcibly subjected her to sexual intercourse (see ex. 2; Tr.73-75). Applicant and A each obtained restraining orders against each other (ex. 2; Tr. 83). Both were either dissolved, or expired without incident.

In late January 2006, the D served Applicant with a uniform summons and complaint, charging her with false reporting in violation of the governing state code, a Class 3 misdemeanor. At a scheduled hearing on the charge in February 2006, Applicant, through her lawyer, pleaded guilty to one count of false reporting (see exs. 2,

3, and A; Tr. 73-74, 81-82, 90-92). According to Applicant, the plea papers presented to her for signature did not contain any recant language, and Applicant never signed any kind of letter recanting what she reported to police in mid-January 2006 (Tr. 91-93).

The court accepted Applicant's guilty plea and issued a 12-month deferred sentence with conditions that she complete 48 hours of community service and send letters of apology to the accused and D (the investigating police detective). By all accounts, Applicant complied with the court's conditions, and the charge was ultimately dismissed (Tr. 89-90).

In explaining her reasons for accepting a guilty plea to the false reporting charges, Applicant stressed that the interviews and emotional trauma from the process were too much for her to endure any longer (Tr. 73-75, 88). With her guilty plea, which she assured she did not fully comprehend, she hoped to forgive, accept the consequences of a misdemeanor plea, and move on with her life and family (Tr. 74-76, 82-84).

Based on the police investigation reports from D, Applicant's rape charges against A lack substantive proof. Considered in their totality, the investigation reports lend more evidentiary support to A's account of a voluntary sexual encounter on the date Applicant claimed that he raped her. Although she has never recanted her rape charge against A, her guilty plea is amply supported by the record evidence. Except for witness B (who testified on her behalf), she has never told any of her supervisors and coworkers about the her claimed rape incident or how she pleaded to a false reporting charge (Tr. 94-96). Witness B affirmed that he did pass on the information about Applicant's rape charge and subsequent guilty plea to Applicant's manager (Tr. 134-35). However, it is not fully evident what details witness B conveyed or what information Applicant shared with her husband about all of the circumstances associated with her reported rape charges. Nor is it clear from the produced police investigation report whether A used any forcible seduction upon Applicant to induce her to succumb to his advances.

Because Applicant declined to elaborate on the circumstances surrounding her reported account of the incident when pressed by the investigating police detective and the investigator from the Office of Personnel Management (OPM) who interviewed her in January 2008, all of the circumstances surrounding the December 2005 incident may never be fully revealed. The developed facts contained in the February 2008 police investigation report are detailed and credible and were not challenged by Applicant in her court appearance on the false reporting charges.

While collateral estoppel principles do not preclude Applicant from challenging the accuracy of the underlying charges controlled by her guilty plea under the facts presented, she has not presented any credible evidence to corroborate her renewed rape claims against A, or cast doubt upon the detailed taped accounts of A's post-incident conversations with Applicant. Her plea and her assigned reasons for entering a guilty plea to false reporting charges are entitled to evidentiary consideration, in addition

to the accounts of the incident contained in the investigation reports and Applicant's hearing testimony.

Based on a thorough review of all of the circumstances associated with Applicant's rape claims and ensuing guilty plea, A's detailed account reported in the police investigation report (ex. 2) must be accepted as the most accurate account of the incident. Inferences warrant that the rape charges as reported by Applicant to local police in January 2006 did not represent a full and accurate account of what transpired between herself and A.

### **Endorsements and award**

Applicant is highly regarded by her supervisors, co-workers, and mentors. By all accounts, she and her husband have maintained a strong and viable marriage since she disclosed the incident to him. Applicant is respected and admired for her engineering skills and mentoring efforts with her employer (see exs. B through H). Colleagues who are familiar with Applicant's work ethic and performance attributes credit her with being very conscientious, trustworthy, and dependable (see ex. A; Tr. 64-68, 102-04, 116-21, 129-33). Applicant has received awards recognizing her outstanding contributions to her employer's contracts (see ex. A; Tr. 64).

### **Policies**

The revised Adjudicative Guidelines (AGs) list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Criminal Conduct**

The Concern: 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.

### **Personal Conduct**

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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. AG, ¶ 15.

### **Burden of Proof**

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *Kungys v. United States*, 485 U.S. 759, 792-800 (1988). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or

maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation of the Government's case. Because Executive Order 10865 requires that all security clearances be clearly consistent with the national interest, "security-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

### **Analysis**

Applicant is a high performing and well regarded meritorious test engineer of a defense contractor who was charged and convicted of filing a false police report in January 2006, charging a coworker/family friend with rape. Claiming she pleaded guilty in the belief her plea involved a minor offense and would enable her to avoid the emotional trauma of reliving the rape experience, she has never recanted her rape charges and has apparently never advised her husband and colleagues of what was actually detailed in the pertinent investigation report. Charging a colleague with felonious rape to cover up an extra-marital affair represents a serious breach of trust and candor that could have produced far reaching criminal, employment, and social repercussions for A, if not for some diligent investigation efforts by D (the investigating detective assigned to the case). Considered together, Applicant's actions create sufficient indicia of serious criminal and personal conduct to raise security concerns under both the criminal and personal conduct guidelines.

#### **Criminal conduct concerns**

By itself, Applicant's 2006 guilty plea and resulting conviction is serious enough to be security-significant; even though it is an isolated and somewhat dated incident, and only a Class 3 misdemeanor. When considered in the context of the seriousness of the false charges and what implications the charges could have presented to A and prosecutors (had they elected to accept Applicant's story and prosecute A for a rape offense), security concerns are clearly presented under Guideline J.

To be sure, Applicant's guilty plea to false reporting charges is not entitled to preclusive effect based on collateral estoppel principles. First and foremost, Applicant was never convicted of filing a false police report: Upon applicant's demonstrated compliance with the conditions established by the court, the charge was subsequently dismissed. Moreover, preclusive conditions are never automatically imposed on an applicant who challenges the findings underlying a misdemeanor guilty plea. See ISCR Case No. 04-05712 at 7-8 (App. Bd. Oct. 31, 2006). In this case, the Board



distinguished its previous applications of collateral estoppel principles to applicants seeking to discredit their criminal convictions (see ISCR Case No. 95-0817 at 2-3 (App. Bd. Feb. 21, 1997), and adopted a three-prong test for determining whether collateral estoppel effect should be accorded a misdemeanor conviction. Citing *Haring v. Prosise*, 462 U.S. 306, 313 (1983) and *Montana v. United States*, 440 U.S. 147, 155 (1979), the Board imposed requirements of (1) an applicant's having a full and fair opportunity to litigate the issue, (2) the same issue put in issue as litigated in the criminal proceeding, and (3) the absence of any special circumstances (such as the lack of any incentive to litigate in the first proceeding) that could make the imposition of collateral estoppel unfair to the party opposing the according of preclusive effect to a misdemeanor conviction. See *Otherson v. U.S. Dept. of Justice*, 711 F.2d 267, 273 (D.C. Cir. 1983)(cited by Appeal Board in ISCR Case No. 04-05712, *supra*).

Whether because of the absence of a conviction or the availability of one of the three-prong exceptions under DOHA's established jurisprudence governing the employment of collateral estoppel in misdemeanor cases, Applicant may reclaim her version of the underlying facts that directly support her rape claims in the police report she filed in December 2005. In waging a direct challenge of the underlying facts linked to her guilty plea, Applicant provided record evidence that she was advised by counsel that the underlying false reporting charges were not serious. In turn, she assured that she accepted this advice and entered a guilty plea in the hope she could avoid re-litigation of a very traumatic event and move on with her life. Based on her evidence, she was permitted to reassert her rape claims. By her evidence, she satisfied the minimal requirements for averting preclusive effect of her misdemeanor guilty plea.

Still, the accounts contained in the investigation report and Applicant's ensuing guilty plea to the false reporting charges waged against her are sufficiently probative to surmount her renewed rape claims and support the underlying findings covered by her plea. Together, her guilty plea and corroborating evidence of the underlying charges warrant initial consideration of two disqualifying conditions of the AG for criminal conduct: DC ¶ 31(a), "a single serious crime or multiple lesser offenses," and DC ¶ 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged." While the false report charge against Applicant was ultimately dismissed after she completed her deferred adjudication conditions, the underlying actions she attempted to shield with her rape charges against A reflect serious breaches of fidelity to her husband and the potential for the protracted use of state and personal resources to clear A of Applicant's rape charges.

Based on the evidentiary record, Applicant may not rely on any of the potentially pertinent mitigating conditions of the criminal conduct guideline. Considering Applicant's continuing denial of the underlying facts governing the false reporting charges she pleaded guilty to, and the potentially far-reaching criminal implications of her rape charges had they been prosecuted, her actions continue to cast doubt on her reliability, trustworthiness, and good judgment. Hence, neither MC ¶ 32(a) (so much time 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," MC ¶ 32(b), "the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life," nor MC ¶ 32(c), "evidence that the person did not commit the offense," have any application to the Applicant's situation. 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," has some application, in recognition of Applicant's lack of any other confrontations with law enforcement authorities, excellent employment record, and still viable marriage.

Both from a consideration of the applicable guidelines and from a whole person perspective, Applicant fails to establish sufficient remorse and rehabilitation necessary to meet all of the minimum requirements under the criminal conduct guideline for continued eligibility to hold a security clearance. Taking into account all of the facts and circumstances developed in the record, unfavorable conclusions warrant with respect to the allegations covered by subparagraph 1.a of the SOR.

### **Personal conduct concerns**

Because the Class 3 misdemeanor charges underlying Applicant's 2006 guilty plea involve honesty issues, they pose overlapping personal conduct concerns as well. Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's filing of false rape charges against her coworker and family friend over three weeks after the alleged offense. So much trust is imposed on persons cleared to see classified information that discounting actions that reflect serious breaches of fidelity and candor are gauged very narrowly.

Mitigation is difficult to credit Applicant with, since she failed to promptly correct her rape charges when confronted by the investigating officer in 2006 and the ensuing OPM investigator who interviewed her in December 2008. By knowingly and willfully failing to disclose all of the reported facts in A's account to the investigating detective at any time before or after her arranged guilty plea in 2006, Applicant concealed materially important background information needed for both prosecuting state officials and OPM investigators to properly process and evaluate the underlying facts associated with her guilty plea. Weighing all of the circumstances surrounding her filing of false rape charges against her coworker and friend, and failing to formally recant her charges, even after pleading guilty to a Class 3 misdemeanor, Applicant's actions lack any prompt, good-faith corrections of her false charges, which are necessary to successfully mitigate security concerns.

Because she has been selective in what she has told her husband, supervisors, and coworkers about all of the pertinent accounts covered in D's investigation report following her filing of rape charges against A in December 2005, she remains potentially

vulnerable to exploitation, manipulation, or duress. As a result, she may not take advantage of any of the mitigating conditions of the personal conduct guideline.

Holding a security clearance involves a fiduciary relationship between the Government and the clearance holder. Quite apart from any agreement the clearance holder may have signed with the Government, the nature of the clearance holder's duties and access to classified information necessarily imposes important duties of trust and candor on the clearance holder that are considerably higher than those typically imposed on government employees and contractors involved in other lines of government business. See *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980).

From a whole person standpoint, Applicant documents favorable assessments from her supervisors and colleagues, and stresses her long history of devotion to her assigned responsibilities with her employer. However, the cumulative effects of her bringing false rape charges against a colleague and friend and later pleading guilty to filing a false criminal report with the competent law enforcement authority outweigh the many positive credits she has earned in her professional life. Considering all of the evidence produced in this record and the available guidelines in the AGs (inclusive of the 2(a) factors), unfavorable conclusions warrant with respect to subparagraph 2.a of Guideline E.

### **Formal Findings**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE J: (CRIMINAL CONDUCT):	AGAINST APPLICANT
Subpara. 1.a:	Against Applicant
GUIDELINE E: (PERSONAL CONDUCT):	AGAINST APPLICANT
Subpara. 2.a:	Against Applicant

### **Conclusions**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

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Roger C. Wesley  
Administrative Judge

