



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



In the matter of: ) ) ----- ) SSN: ----- ) ) Applicant for Security Clearance )	ISCR Case No. 09-00306
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**Appearances**

For Government: Pamela C. Benson, Esquire, Department Counsel  
 Braden M. Murphy, Esquire, Department Counsel on the Appeal  
 For Applicant: Andrea L. Reino, Esquire

December 14, 2010

**Remand Decision**

HOWE, Philip S., Administrative Judge:

On August 8, 2008, Applicant submitted his Security Clearance Application (SF 86). On August 17, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines D (Sexual Behavior) and E (Personal Conduct). 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 adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on August 21, 2009. He answered the SOR in writing on October 1, 2009, and requested a hearing before an administrative judge. DOHA received the request on October 2, 2009. Department Counsel was prepared to proceed on January 7, 2010, and I received the case assignment on January 13, 2010. DOHA issued a Notice of Hearing on January 29,

2010, and I convened the hearing as scheduled on February 25, 2010. The Government offered Exhibits 1 through 3, which were received without objection. Applicant testified. Applicant had no exhibits to offer into the record. DOHA received the transcript of the hearing (Tr.) on March 9, 2010.

The DOHA Appeal Board, in a decision dated November 19, 2010, remanded my original favorable decision based on an analysis of my conclusions under both security concerns. After reading the Appeal Board decision, and their instructions, I make the following revisions in my decision after considering all the evidence again and the issues addressed in the Appeal Board decision. Therefore, based upon a further review of the case file, pleadings, exhibits, testimony and the Appeal Board's decision, eligibility for access to classified information is denied.

### **Remand Findings of Fact**

In his Answer to the SOR, Applicant admitted the factual allegations in ¶ 1.a, and at the hearing he admitted the allegations in ¶ 2.a of the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance. (Tr. 11)

Applicant is 24 years old and works for a defense contractor. He has been employed there for 20 months, since January 2008. He joined the Navy in April 2005 while he was in college studying engineering. He served three years of active duty until being administratively discharged on January 31, 2008, with an honorable discharge. During his Navy service Applicant had a security clearance. No violations of security procedures or regulations were committed by Applicant while he held the clearance. Applicant lives with his mother and brother at present. Applicant joined the Navy to help his mother financially and because he was not doing well academically in the engineering school. (Tr. 17-19, 26, 27, 30-33, 69, 70; Exhibit 1)

Applicant had some personality conflicts with other service people while on active duty. He attributed those conflicts to the judgments people made about him based on his economically poor childhood and his bisexual interests. Applicant was involved in three incidents involving other service people and alcohol. (Tr. 19-94)

The first incident occurred in March 2007 in which Applicant was physically assaulted by two very intoxicated men because of his race and sexual preference, according to Applicant. He left a voicemail message on the phone of his barracks leading petty officer that he was assaulted because he was gay. Applicant knew his commander accepted the version of the altercation presented by the two other people, who were extremely intoxicated. Because of this admission, he was to be processed by his commander for administrative separation. The processing of that paperwork started two months before the party in June 2007 at which the incidents leading to Applicant's administrative discharge occurred. When he was on leave, he told his mother about his pending separation. He claimed she said hateful things to him and told Applicant she did not love him anymore. (Tr. 19-25, 35-38, 94; Exhibits 2, 3)

Applicant was involved in a second incident in May 2007. Navy men tickled him. Applicant concluded he was being harassed. He made a complaint to his superiors. His leading petty officer submitted a statement that three men told him that Applicant made them feel uncomfortable. Applicant denies sexual contact with any of these three men. (Tr. 38-40; Exhibits 2, 3)

On June 22, 2007, Applicant and a friend bought alcohol for his friend's party. The friend was hosting a party at his house. Everyone at the party drank alcohol and was intoxicated, in Applicant's opinion. Applicant drank to excess and claimed he later "blacked out." Applicant's friend, the party host, drank too much alcohol and regurgitated on his clothing and the kitchen floor later in the evening. The host fell asleep at that point. The host's friends then put him to bed after removing his clothing to make him comfortable. Applicant wanted to be in the bedroom with his friend, but the man's girlfriend was uncomfortable with that request. She put a laundry basket in the doorway to keep it open. Later she found the bedroom door closed. She entered the room to find Applicant performing oral sex on her unconscious boyfriend. Applicant does not remember making any sexual or improper advances toward any woman or man that evening. He cannot admit or deny the incident because he does not know what happened. He blames his extreme intoxication for his inability to remember anything about that party. He woke up on the floor of the house where the party occurred. Applicant asserted his friend wanted them to engage in a sexual three-some with his girlfriend. The friend and his girlfriend deny that request ever occurred. (Tr. 19-26, 40-44, 54-61; Exhibits 2, 3)

The Article 32, Uniform Code of Military Justice (U.C.M.J.), Navy investigating officer told Applicant the accusations against him for his alleged activities the night of the party in June 2007. He was accused of sodomy (Article 125), assault (Article 128), and indecent assault (Article 134), under the U.C.M.J. in October 2007. Applicant was alleged to have groped his friend's girlfriend while seeking sex from her, put his hands down the pants of another male party-goer, and later was found performing fellatio on his friend who invited him to the party. His friend was unconscious in his bed at the time. His friend and Applicant knew each other from their training school. Applicant claimed "the first time I met him he humped me, but we were pretty good friends." His friend remembered nothing from the incident because of his intoxication. No civilian criminal charges were filed against Applicant. A Navy investigation occurred that resulted in the court-martial charges and the Article 32 investigation. These charges were withdrawn when Applicant accepted the administrative discharge. (Tr. 21-26, 44-46; Exhibits 2, 3)

Applicant does not consume alcohol anymore. He performs his work for the defense contractor that employs him, attends college classes, and goes to his synagogue. Since March 2008, he has attended counseling to help him understand his life and interests. Applicant would like to finish college and work in the medical field. (Tr. 26-30, 64-65; Exhibit 1)

Applicant accepted his administrative discharge instead of a court-martial. He was told that he would receive a dishonorable discharge if he chose a court-martial

instead of accepting an honorable discharge through the administrative process. Applicant did not disclose on his SF-86 in response to Question 23 (e) that he faced court-martial charges because he was not presented with “direct charges.” He did not disclose on the SF-86 in response to Question 22 that he left the Navy “following allegations of misconduct,” because he did not think he engaged in any misconduct. Nor did he disclose in the same answer that he “left a job for other reasons under unfavorable circumstances,” because his military service was favorably rated in his performance appraisals. He did disclose in Question 22 that he left a civilian job in August 2003 by mutual agreement after allegations of unsatisfactory performance. (Tr. 46-50, 69; Exhibit 1)

### **Remand Policies**

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for 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, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Remand Analysis**

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

AG ¶ 12 expresses the security concern:

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

AG ¶ 13 describes four conditions that could raise a security concern and may be disqualifying. All of them apply to this case:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) a pattern of compulsive, self-destructive, or high risk sexual behavior that the person is unable to stop or that may be symptomatic of a personality disorder;
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and
- (d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

Applicant engaged in sexual acts in June 2007 at a party with friends. Those friends did not consent to these activities and filed complaints with the appropriate Navy officials against Applicant. The Navy investigated and preferred court-martial charges against Applicant for assault, indecent assault, and sodomy pursuant to the U.C.M.J. Applicant's actions were of a criminal nature. AG ¶ 13 (a) applies.

The night of the party in June 2007 Applicant made sexual advances or committed sexual acts on three persons. The multitude of actions within a short period of time at the party shows a pattern of compulsive sexual acts by Applicant as he sought to gratify his desires that night. Those actions were highly risky and showed he was unable to stop or control his behavior. AG ¶ 13 (b) applies.

Applicant perpetrated sexual assaults on two males and one female that make him vulnerable to coercion, exploitation, or duress if these incidents became known. The variety of acts, his denial of them, coupled with his continued statements that he remembers nothing about that evening's events and the resulting criminal investigation, are the basis for that vulnerability if the events were known publically. AG ¶ 13 (c) applies.

Finally, Applicant committed his actions at a party in front of other persons such that they can be construed to be of a public nature. Making unwanted sexual advances to a man and a woman show a serious lack of discretion and judgment. AG ¶ 13 (d) applies.

AG ¶ 14 provides four conditions that could mitigate security concerns. Three conditions might apply:

(b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress; and

(d) the sexual behavior is strictly private, consensual, and discreet.

AG ¶ 14 (b) does not apply. Applicant's actions occurred three years ago while he was in the Navy and attended a party with friends, which is not an unusual event. This incident was the third one in which Applicant was involved between March and June 2007 involving alcohol and some type of altercation with men. The pattern of these incidents and his failure to alter his behavior so as not to be involved in such situations cast doubt on Applicant's current reliability, trustworthiness and good judgment. They also diminish his overall credibility.

Applicant's behavior in 2007 serves as a basis for coercion, exploitation, or duress. During his testimony, Applicant repeatedly stated he could not remember anything about the June 2007 sexual incidents. The explicit statements from other witnesses concerning the events at the party are credible because of their specificity. Applicant's failure to recall the situations that caused his administrative discharge from the Navy make his statements is neither persuasive nor believable. His statements indicated that he wrongly assumed his friends consented to the sexual activity in 2007

and sought his participation in a sexual three-some. There is no evidence from the other witnesses to support that statement. The totality of the situation in June 2007, if publically known, would render Applicant vulnerable to coercion, exploitation, or duress. AG ¶ 14 (c) does not apply.

AG ¶ 14 (d) does not apply. Applicant's activities at the party were not private because they occurred at a party and were done publically. Applicant claims the alcohol he consumed at the party diminished his capacity to control his behavior and made him black out so he cannot remember what happened. His activities were not consensual on the part of the other person and were not discreet according to the statements of the other witnesses.

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

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,
- (b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The Government alleged the same conduct under the Personal Conduct guideline as it alleged under the Sexual Behavior guideline. At the hearing, questions were asked about Applicant's disclosures on his SF-86. The Government argued in its closing that Applicant's credibility was an issue because of his failure to disclose certain information about the U.C.M.J. investigation and his administrative discharge. (Tr. 82-85) The SOR was not amended to allege a failure to answer the SF-86 questions truthfully. Therefore, I have not considered any issue beyond Applicant's general credibility relating to his behavior under this security guideline.

AG ¶ 16 describes seven conditions that could raise a security concern and may be disqualifying. Pertaining to the allegation of criminal conduct in 2007 resulting in U.C.M.J. charges of sodomy, assault, and indecent assault, one condition applies:

(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant's conduct in June 2007, in the subsequent investigation and administrative discharge, and his failure to explain specifically and with clarity the circumstances surrounding those incidents as he applied for a security clearance make him vulnerable to exploitation, manipulation, or duress because it appears he is attempting to conceal information about himself. His lack of candor and evasive testimony raises questions about his credibility. His concealment of the conduct at the party creates a vulnerability to exploitation, manipulation, or duress because Applicant's misconduct in June 2007 may affect his professional and community standing if his actions were known publically. AG ¶ 16 (e) applies.

AG ¶ 17 provides seven conditions that could mitigate the above security concerns. Three conditions might apply:

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Although the incidents as alleged in SOR Paragraph 1.a. occurred three years ago they were not minor actions. They involved sexual assaults upon a man and a woman in a social environment. The party was not an unusual circumstance or event. Applicant's three incidents in three months involving alcohol, other men, and his alleged sexual actions at party to which he had been invited by a friend, cast doubt on his current reliability, trustworthiness, or good judgment. Hence, AG ¶ 17 (c) does not apply.



Applicant did not admit or deny the incident in June 2007. He claims he could not remember what happened. While not admitting the June 2007 incident, Applicant now claims he started counseling in March 2008 and continues it today to help him deal with issues in his life. He did not explain how this counseling relates to the intoxication issues and his behavior in the three incidents occurring during 2007. Applicant has not explained how the same type of incident will not recur. His repeated denials of any wrongdoing cast serious doubt on his credibility when contrasted to the specific statements of witnesses. AG ¶ 17 (d) does not apply.

Applicant has not shown any positive steps he took in the past three years to reduce or eliminate vulnerability to exploitation, manipulation, or duress. He claims he stopped drinking alcohol and actively sought the counseling he thought he needed to resolve any issues in his life. He did not present any corroborating evidence to show the counseling addressed the stressors in his life in 2007. He did not express any remorse for the incidents. Living at home, getting a job, and attending college are normal activities. Applicant did not demonstrate how these ordinary events changed the underlying social behavior problems he exhibited in 2007. He has not provided any evidence that he informed his family, friends, or employers about the incidents that formed the basis for this security concern. AG ¶ 17 (e) does not apply.

### **Whole-Person Concept**

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

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

AG ¶ 2(c) requires each case must be judged on its own merits. 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant presented himself in a professional manner at the hearing.

Applicant was in a military environment within which he could not function positively. The freedom of being away from his family led him to alcohol consumption and socializing with people whom he thought were his friends. They accused him of engaging in inappropriate sexual behaviors. His commander investigated the allegations, and offered Applicant the opportunity to leave military service with an honorable discharge. The three incidents of misconduct forming the basis of the administrative discharge occurred three years ago and were serious. Applicant was a 22-year-old adult at the time of the three incidents. He had two years of military service at the time of his discharge. He knew what was expected of him in the Navy concerning the performance of his duty. As an adult, he also knew or should have known what inappropriate sexual conduct toward other persons was.

Following his administrative discharge, he sought counseling for problems that Applicant did not specify at the hearing. There was no evidence from Applicant that this counseling addressed the underlying reasons for his intoxication and incidents in 2007.

Applicant's conduct was voluntary in 2007. He exhibited no remorse for his misconduct. He did not present any evidence that he altered his behavior regarding such serious misconduct. There is no evidence of rehabilitation or permanent behavior change.

The potential for coercion, exploitation, pressure, or duress exists because he has kept the nature of the incidents undisclosed from his family and employers. He continued his lack of disclosure at the hearing by claiming his extreme intoxication caused him to "blackout" and not remember anything that happened at the party. He has a serious alcohol problem if consumption causes that condition. There is no evidence Applicant eliminated the causes of the intoxication from his life.

The type of extreme intoxication described by Applicant may recur and place him in a vulnerable situation in the future regarding the safeguarding of classified information. Applicant does not acknowledge anything illegal or inappropriate occurred at the party. He steadfastly adheres to this version of the party incidents. That raises serious issues about his reliability, good judgment, and trustworthiness.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising from his sexual behavior and personal conduct security concerns. I conclude the "whole-person" concept against Applicant.

### **Remand 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 D:                   AGAINST APPLICANT

    Subparagraph 1.a:                   Against Applicant

Paragraph 2, Guideline E:               AGAINST APPLICANT

    Subparagraph 2.a:               Against Applicant

### **Remand Conclusion**

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

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PHILIP S. HOWE  
Administrative Judge