



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



In the matter of: )  
)  
) ISCR Case: 10-00362  
)  
)  
Applicant for Security Clearance )

For Government: Caroline H. Jeffreys, Esquire, Department Counsel  
For Applicant: Darin M. Groteboer, Esquire

March 9, 2011

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the record evidence as a whole, eligibility for access to classified information is denied.

On October 17, 2008, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On June 9, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline E (Personal Conduct) and Guideline D (Sexual Behavior). 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 effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on or about July 1, 2010, and requested a hearing. DOHA assigned the case to another administrative judge on October 12, 2010, and reassigned it to me on November 4, 2010. It issued a Notice of Hearing on November 12, 2010. The case was heard on December 9, 2010, as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 12 in evidence without objection. Applicant testified and called one witness. The record remained open until December

30, 2010, to give Applicant an opportunity to submit exhibits. DOHA received the hearing transcript (Tr.) on December 17, 2010.

### **Procedural and Evidentiary Ruling**

Applicant timely submitted five exhibits that I marked as Applicant Exhibits (AE) A through E. AE A, B and D were admitted without objection from Department Counsel. AE C and E are admitted over the Department Counsel's objections. Department Counsel objected to AE C, a December 2010 letter from a Commanding Officer, because it did not include the documents Applicant submitted to the Commanding Officer on September 10, 2010, and referenced in the exhibit. That objection goes to the weight of the evidence and not admissibility.

Department Counsel also objected to the introduction of AE E, a December 2010 letter from a complaining witness, on the basis of hearsay. That witness did not testify, but her statements to an Army investigator were admitted into evidence as part of the Army's investigative file that supported an Administrative Order entered against Applicant, and subsequently raised security concerns. In that exhibit, the complaining witness did not retract her previous allegations against Applicant, but instead provided statements about her current relationship with him in mitigation of the security concerns. Given the admission of her statements in the investigative file into this record, her letter is admissible.

### **Findings of Fact**

Applicant admitted the allegations contained in Paragraph 1.a and Paragraph 2.a of the SOR. Those admissions are incorporated herein.

Applicant is 60 years old. He has been married to his wife for 37 years. They have three adult children. In December 1974, he joined the U.S. Army. In February 2001, he retired as a full Colonel and was honorably discharged from active duty. During his career, he served as a base Commander and Chief of Staff. He has held a security clearance for 35 years. Since retiring, Applicant has been self-employed in a small business that provides support services to the Army at a base where he served.

In early 2009, the U.S. Army Criminal Investigation Command (CID) investigated Applicant for the offense of Abusive Sexual Contact and Simple Assault involving four female employees on different occasions. As part of that investigation, the CID took detailed statements from each complaining witness. On April 27, 2009, the Commanding Officer, a Major General, issued an Administrative Order permanently barring Applicant from the base, except for the limited purposes of: (1) using the Commissary, (2) using the Post Exchange; and (3) using the Health Clinic. (GE 4.) The Commanding Officer's Bar Letter summarized the four witnesses' statements as follows:

1. On April 7, 2000, [Applicant] committed the offenses of Abusive Sexual Contact and Assault Consummated by a Battery when

[Applicant] intentionally, wrongfully pulled the top of a female's dress away from her body and asked "do you have any tan lines?" or words to that effect. The touching of this female employee was unwanted and unwarranted. This incident occurred at the workplace on [base].

2. In the late summer of 2008, [Applicant] committed the offenses of Abusive Sexual Contact and Assault Consummated by a Battery by intentionally, wrongfully pulling open a female employee's blouse "to see if she was wearing a sexy bra." This incident occurred at the workplace on [base], and [Applicant's] touching of the female employee was unwanted and unwarranted.
3. On diverse occasions during the months of July, August, and September 2008, [Applicant] committed the offenses of Abusive Sexual Contact and Assault Consummated by a Battery against a female employee by unlawfully and wrongfully rubbing her inner thigh and the top of her thigh; by rubbing and patting her leg, from her thigh to her knee; and by rubbing her back. The touching of this female was unwanted and unwarranted. Each incident occurred at the workplace on the [base].
4. On diverse occasions during the months of October, November, and December 2008, [Applicant] committed the same two offenses against another female employee by unlawfully and wrongfully rubbing her thighs and shoulders. The touching of this female was also unwanted and unwarranted. Each incident occurred at the workplace on [base].

Applicant does not know the name of the complaining witness listed in Number 1 above and was unfamiliar with the allegation until confronted with it during the 2009 investigation. (Tr. 24.) Applicant denied the allegation. (Tr. 25.) Applicant does not know the name of the complaining witness listed in Number 2. He denied the allegation. (Tr. 26; GE 5.) When asked, during the investigation, what could have caused him to expose the woman's bra, he said he did not know, maybe he was "goofing around." (GE 3 at 52.)

Applicant knows the complaining witness referenced in Number 3. He apologized to her for his conduct that made her feel uncomfortable. (Tr. 29.) Applicant maintains contact with this woman and is helping her start a business. (Tr. 30.) She wrote a letter in which she accepted Applicant's "apology and believe[d] that these incidents have been fully resolved." (AE E.) She fully supports his efforts to obtain a security clearance. (*Id.*)

Applicant knows the complaining witness referenced in Number 4. He apologized to her for his conduct, if it made her uncomfortable. (Tr. 31.) She resigned her position in February 2009. He asserted that she had performance problems. (Tr. 32.) She filed a complaint with a state agency regarding his conduct that was later dismissed. (Tr. 33.)

On June 4, 2009, a psychologist evaluated Applicant using the Minnesota Multiphasic Inventory (MMPI) the Millon Clinical Multiaxial Inventory (MCMI), and the Historical Clinical Risk-2) (HCR-20). The conclusions cited from the MMPI suggest proclivity to initiate social contact, insensitivity to the feelings of others, and a lack of insight and introspection into their own behavior. Also suggested is a presentation of openness despite difficulty expressing emotion. The MCMI results confirmed attention to appearance without insight. These results raise concerns about Applicant, in that they find as enduring personality traits the initiation of social contact, the absence of insight, and presenting oneself favorably. These attributes underlie the episodes of concern. The HCR-20 findings are not relevant, as violence has never been posited as an issue in this case. (AE D.)

On June 30, 2009, Applicant submitted a request to the Commanding Officer for reinstatement of base access rights. Applicant submitted documentation of rehabilitative steps that he had taken since the Administrative Order was entered. (GE 7.) He included the following:

1. Certificate of completion of a Sexual Harassment Training course on February 13, 2009. (GE 11, Enc. 3A.)
2. Certificate of completion of a two-hour course on Illegal Harassment on June 11, 2009. (GE 11, Enc. 4.)
3. Certificate of completion of course on Preventing Harassment in the Workplace on June 16, 2009. (GE 11, Enc. 5.)
4. Notification that his company updated a section of its Security Handbook regarding improper conduct for personnel.
5. A letter from Applicant's wife, indicating her awareness of the allegations and discussions with her husband about the incidents. (GE 11, Enc. 8.)
6. The June 2009 letter from the psychologist described above. (AE D.)

On August 13, 2009, the Commanding Officer denied Applicant's request, stating that he did not submit sufficient evidence that Applicant appreciated the wrongfulness of his actions or took full responsibility for them. He discounted the psychologist's evaluation because it did not address the likelihood of a recurrence. The Commanding Officer wrote:

In the absence of any professional assessment of your likelihood to reoffend and in light of your continued assertions that your actions were merely misinterpreted by your victims, I am not convinced you appreciate the wrongfulness of your behavior. An acceptance of responsibility, as well as a demonstrated commitment to a rigorous and on-going treatment plan,

would be good first steps toward both your recovery and your return to the [base] community. (GE 8.)

On August 21, 2009, Applicant met with a licensed clinical social worker to develop a treatment plan. The social worker recommended four to six treatment sessions, over four to six month, which would focus on monitoring his physical interactions in the workplace. (AE 11, Inc. 1.)

On August 30, 2009, Applicant sent the Commanding Officer a lengthy letter, stressing his acceptance of responsibility for his conduct. He wrote, "I sincerely apologize to anyone who feels that I have engaged inappropriate conduct and I sincerely apologize to you and the United States Army, for which I have great respect." (GE 9.) He mentioned that he was participating in both psychological and pastoral counseling. He requested reinstatement of his access rights. The Commanding Officer denied his request on September 1, 2009, again stating that it was premature for him to grant the request given Applicant's therapist's recommendation that he participate in therapy for four to six months. (GE 10, 11.)

On November 5, 2009, Applicant's therapist drafted a Summary Report of her treatment observations. She noted that Applicant learned to monitor his professional boundary behaviors and recognized how others might misperceive his manner of interacting. During therapy, Applicant discussed his upbringing and physically demonstrative habits of interacting with people, which he asserted underlie the accusations. The therapist opined that he was "unlikely to engage in any of these behaviors in the future." (GE 11, Encl. 1.)

On November 30, 2009, Applicant's pastor and counselor wrote a letter on his behalf. The pastor began seeing Applicant in August 2009 and met with him twice a month thereafter to discuss Applicant's interactions with female employees and their claims of sexual harassment. "It is clearly [Applicant's] desire to avoid any perception of inappropriate contact in the future." (GE 11, Encl. 2.) The pastor noted that Applicant was fulfilling their counseling/treatment plan, which included Applicant's personal acceptance of responsibility for the situation, and Applicant's request for an ongoing accountability relationship with him. The pastor did not believe that Applicant would offend in the future. (GE 11, Encl. 2.) Applicant stated that he has continued to see his pastor once a month since November 2009.

On December 4, 2009, Applicant submitted another request for access to the base for purposes of conducting business. Attached to that request were eight documents, including the above letters from his therapist and pastor, a letter from his Communications Director, a woman with whom Applicant worked in various community activities, and his wife's letter. In his cover letter, Applicant listed eight not-for-profit community organizations or boards on which he serves. (GE 11.)

On January 22, 2010, the Commanding Officer restored Applicant's access to the base "for purposes of conducting contract business related to" Applicant's business whenever requested by an agent of the U.S. Government. (GE 12.)

On September 6, 2010, Applicant submitted another request that his base access privileges be fully restored. On December 13, 2010, the Commanding Officer rescinded the Administrative Order of April 27, 2009, restoring full access rights to Applicant "conditioned upon [Applicant's] good behavior." (AE C.)

Applicant's Communications Director testified.<sup>1</sup> She has worked for Applicant since March 2009. She is familiar with the allegations of Applicant's inappropriate sexual misconduct with four women. (Tr. 85-86.) Applicant has never acted inappropriately with her. (Tr. 90-91.) She has no reservations about recommending other females to work for him. She considers Applicant to be a fair and professional supervisor. (Tr. 93.) She knows the complaining witness, referenced as Number 4 above, and has been present when she has visited Applicant at the office. She never witnessed any inappropriate conduct and observed a cordial and friendly relationship between them. (Tr. 87-88.)

Applicant testified. He vehemently denies that he ever acted sexually inappropriately or harassed the four complaining witnesses. (Tr. 36-38, 49, 56.) He considers himself to be a "touchy-feely" person, meaning that he is physically demonstrative during his interactions with people. (Tr. 35.) He believes that the allegations grew out of the women's misconstruing his personal style and not wrongful sexual misconduct. (Tr. 36, 48, 57.) He recognizes that his actions caused the women to feel uncomfortable. (Tr. 54.) Prior to the CID investigation, he had no reason to believe that his personal style was inappropriate because he had not encountered problems during his Army career. (Tr. 31.) He stated, "I'm more aware of how something innocent on my part, where I thought I was either being friendly or concerned, I guess, as an employer, was taken out of context and was taken as something sexual." (Tr. 40.) He no longer touches female employees. (Tr. 38.) His security officer, business partners, and wife are aware of these allegations. (Tr. 75.)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) 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

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<sup>1</sup>She is also the author of GE 11, Enclosure 6.

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. Directive ¶ E3.1.14 requires the government to 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 an applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable clearance decision." 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."

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

## **Analysis**

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

The security concerns pertaining to the personal conduct guideline are set out in AG ¶ 15:

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

The Government alleged in SOR ¶ 1.a that after Applicant was investigated by the Army in 2009 for the offense of Abusive Sexual Contact and Simple Assault on four women employees, he was barred from a base except for very limited use. Although

Applicant admitted that allegation in his Answer, he denied throughout the security clearance process that he engaged in any inappropriate sexual behavior with any of the women.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying as to those allegations:

(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

(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.

There is sufficient evidence to apply AG ¶¶ 16(d) and (e). Applicant's behavior violates important civil and criminal statutes and rules in our society. Those offenses are the type of conduct that a person might wish to conceal, as it adversely affects a person's professional and community standing, if known. The evidence supporting that disqualifying condition requires a balancing of resulting security concerns with any potentially mitigating matters, and shifts the burden to Applicant rebut, explain, extenuate, or mitigate those concerns.

AG ¶ 17 includes four conditions that could mitigate security concerns arising under this guideline:

(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;



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

(f) the information was unsubstantiated or from a source of questionable reliability.

The evidence does not support the application of AG ¶ 17(c). The multiple offenses underlying the Commanding Officer's Administrative Order barring Applicant's access to the base were serious, not isolated to one woman, occurred two years ago, and raise doubts about Applicant's trustworthiness and good judgment.

The mitigating condition outlined in AG ¶ 17(d) has partial application to the security concerns raised in SOR ¶ 1.a. Applicant submitted documentation that he participated in four to six psychotherapy sessions in 2009 with a social worker and counseled with his pastor six to eight times from August to November 2009, in order to address the allegations. He testified that he has continued pastoral counseling on a monthly basis since then. He completed several hours of training in sexual harassment. He took those actions as rehabilitative steps to prevent a recurrence of similar allegations in the future.

While those steps, along with the Commander's recent rescission of the Administrative Order barring Applicant from the base, provide some mitigation, they are insufficient to warrant full application of the mitigating condition. Applicant did not present persuasive evidence of his acknowledgement or understanding of the seriousness of his behavior. Throughout the record, Applicant denied all wrongful conduct. He consistently defended the allegations on the basis that four women misconstrued his actions, misperceived his "touchy-feely" personal style of interacting, or he denied they ever occurred. While that defense may be persuasive if one woman had complained, it is not credible given the detailed statements of four witnesses, two of whom claimed that he pulled down their blouses and two of whom stated that he rubbed (not casually touched) their thighs on more than one occasion. Applicant's explanation for the woman's complaints lacks credibility and candor.

The facts in this case provide some support for the application of AG ¶ 17(e). Applicant's spouse, business partners, pastor, security officer, and an employee are aware of the allegations in the SOR. His conduct is documented by the base's law enforcement division, further eliminating his vulnerability to exploitation, manipulation or duress.

The evidence does not support the application of AG ¶ 17(f). The CID record contains ample evidence from four complaining witnesses to substantiate the allegations contained in this record.

## Guideline D, Sexual Behavior

AG ¶ 12 expresses the security concern under this guideline:

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 two conditions that could raise a security concern and be disqualifying in this case:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted; and
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

In 2000, Applicant sexually assaulted one woman; in 2008, he sexually assaulted three women. Those assaults were in violation of 18 U.S.C. 113(a) (5), a federal criminal statute. In early 2009, the Army took administrative action against Applicant based on the allegations of four women concerning the criminal sexual misconduct. Those allegations and other described inappropriate behaviors could cause Applicant to be vulnerable to coercion or duress. The evidence supports the application of the above disqualifying conditions.

AG ¶ 14 provides two conditions that could mitigate the above security concerns:

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

The evidence does not support the application of AG ¶ 14(b) for the same reasons articulated in the analysis of AG ¶ 17(c) above. AG ¶ 14(c) has some application based on the reasons set out in the analysis of AG ¶ 14(e).

## 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). They include the following:

- (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.

According to AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must include 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 is a 60-year-old retired Army Colonel. He honorably served this country for over 26 years. He was a Commander of a base and Chief of Staff for a command. After retiring from the Army in 2001, he began a business that supports the Army. He has held a security clearance for over 35 years. He and his wife have been married for 37 years. They have three adult children. He is an active participant in at least eight community organizations. Those are some facts supporting mitigation of security concerns under the whole-person concept.

However, the facts tending to support revocation of his security clearance are too significant to be mitigated at this time under the whole-person concept. A CID investigation found that four women had complained of repeated sexual misconduct on the part of the Applicant. The complaints are similar in nature. One described events that occurred shortly after Applicant completed an e-QIP.

Applicant contends the allegations arose because of the women's misperceptions and not his misconduct. He maintained this explanation throughout the course of his sessions with both a licensed clinical social worker and a pastoral counselor. Social work sessions seemingly focused on ways to prevent others from misperceiving his intent during interactions. Similarly, the pastoral counselor noted, "It is clearly [Applicant's] desire to avoid any perception of inappropriate contact in the future." During his testimony, Applicant further evidenced a lack of understanding or appreciation of his misconduct. He continued to assert that the allegations were solely the result of his interpersonal "touchy-feely" style, and he denied that the inappropriate touching actually occurred.

Applicant's focus and explanations are consistent with the findings of psychological testing that he lacks insight and sensitivity to the feelings of others. That continued lack of insight two years after the investigation raises concerns about his judgment and candor. More importantly, he failed to fully acknowledge and admit the substance of the allegations. I specifically find that he touched the four women as they allege he did.

Overall, the record evidence leaves me with questions as to Applicant's eligibility and suitability for a security clearance at this time. For all these reasons, I conclude Applicant did not mitigate the security concerns arising under the Guidelines for Personal Conduct and Sexual Behavior.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

### **Conclusion**

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

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SHARI DAM  
Administrative Judge