



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



In the matter of:)
)
) ISCR Case No. 10-08004
)
Applicant for Security Clearance)

Appearances

For Government: Stephanie C. Hess, Esquire, Department Counsel
For Applicant: *Pro se*

January 6, 2012

Decision

DUFFY, James F., Administrative Judge:

Criminal conduct and personal conduct security concerns raised by Applicant’s criminal charges in 1981 and 1987 were mitigated. Furthermore, Applicant did not deliberately falsify his Electronic Questionnaire for Investigations Processing (e-QIP). However, doubts persist regarding his judgment, reliability, and trustworthiness because of his 2004 criminal conduct. Clearance is denied.

Statement of the Case

Applicant submitted an e-QIP on January 12, 2009. On July 13, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines J and E. DOHA acted under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

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 Applicant's security clearance. In an undated response, Applicant answered the SOR. The case was assigned to me on October 20, 2011. DOHA issued the Notice of Hearing on November 17, 2011. The hearing was held as scheduled on December 8, 2011. Department Counsel offered exhibits (GE) 1 through 4 that were admitted into evidence without objection. Applicant testified, called no witnesses, and offered no exhibits. DOHA received the transcript (Tr.) of the hearing on December 22, 2011.

Findings of Fact

Applicant is a 48-year-old employee of a defense contractor. He has worked as an electronic technician for that employer since November 2007. He served in the U.S. Navy from 1980 to 1984 and received an honorable discharge. He obtained his high school General Educational Development (GED) certificate while serving in the Navy. He is married and has a son who is 18 years old. He held an interim Secret security clearance.¹

The SOR alleged, under Guideline J (Criminal Conduct), that Applicant was charged with criminal offenses on three separate occasions. Specifically, he was charged with felony Assault and Battery with Intent to Kill, Having a Concealed Weapon, and Threatening a State Witness in 1981; Malicious Mischief in 1987; and Assault and Battery of a High and Aggravated Nature after engaging in criminal sexual conduct with a minor in 2004. In his Answer, he admitted that he was charged with the 1981 and 1987 offenses. He also admitted that he was charged with Assault and Battery of a High and Aggravating Nature in 2004, but denied engaging in criminal sexual conduct with a minor. His admissions are incorporated herein as findings of fact. The SOR also cross-alleged the three criminal conduct allegations in a single Guideline E (Personal Conduct) allegation and separately alleged that he falsified his e-QIP by failing to disclose that he was charged with felony offenses in 1981. He denied the falsification allegation and did not respond to the Guideline E allegation that cross-alleged the criminal conduct.²

1981 Criminal Charges

In 1981, civilian authorities charged Applicant with Assault and Battery with Intent to Kill, Having a Concealed Weapon, and Threatening a State Witness. At that time, he was about 18 years old and was serving in the Navy. During this incident, he engaged in a fistfight with a fellow sailor because the sailor slighted one of his friends. The sailor claimed Applicant assaulted him with brass knuckles. However Applicant denied using any weapon or threatening the sailor and claimed the sailor blew the incident out of

¹ Tr. 5, 49-50, 54, 74-75; GE 1.

² SOR and Applicant's Answer to the SOR.

proportion because Applicant got the better of him in the fight. Applicant stated that he was then unaware that the sailor was working with the local police in a drug case and that he had no involvement with the sailor's drug activities. He denied having an intent to kill the sailor during the fight or causing him any permanent injury. These charges were dismissed when the sailor did not appear in court. At the security clearance hearing, Applicant indicated that the Navy may have awarded him 30 days restriction due to this incident, but he did not remember going to a nonjudicial punishment proceeding or court-martial for these offenses.³

1987 Criminal Charge

In 1987, Applicant and his then-girlfriend were planning to travel out of town together. For this trip, she intended to purchase a dress from a store, wear it during the trip, and later return it to the store for a refund. He purchased the dress for her. While wearing the dress, she got sick and soiled the dress. Because it was soiled, the store refused to accept it for return. He later went to her house to retrieve the dress, but she refused to give it to him. During this incident, he was banging loudly on the door and the police were called. Apparently, the bottom of the door was damaged, but Applicant claimed he did not kick or damage the bottom of the door. He was arrested and charged with Malicious Mischief. The charge was dismissed when she failed to appear in court.⁴

2004 Criminal Charge

In October 2004, Applicant was charged with Assault and Battery of a High and Aggravated Nature. On April 3, 2006, Applicant pled guilty to that charge and was awarded a suspended sentence of ten years imprisonment upon service of one year in prison and two years of probation. He served six months in prison before being placed on probation. He was released from probation in October 2008.⁵

At the time of the offense, the female victim was 14 years old. On October 14, 2004, the police interviewed the victim. The police report indicated:

[Victim] stated that she attends [X] Middle School, where she is in the 8th grade. [Victim] stated that her mom and dad are divorced and she has a good relationship with both of her parents. [Victim] stated that she has known [Applicant's family] since she was in [kindergarten], as they used to be her next door neighbors. [Victim] stated that she and [Applicant's son] are best friends. [Victim] stated that on Sunday, August 29, 2004, she was at home with her mother and they lost power to their home due to the hurricane. [Victim] stated that her mom called [Applicant's family] and

³ Tr. 38-42, 45, 48-49, 53; GE 2; Applicant's Answer to the SOR.

⁴ Tr. 42-45; GE 1, 3.

⁵ Tr. 30-31, 33, 45; GE 1-4.

asked them if she could bring [her] over as [Applicant's family] had not lost power. [Victim] stated that her mother dropped her off at [Applicant's] residence . . . between 4:00 and 4:30 PM. [Victim] stated that [Applicant, his wife,] and their 11 year old son . . . were in the residence when she arrived. [Victim] stated that she and [Applicant's son] played games and rode [his] bike. [Victim] stated that when she and [Applicant's son] were on [his] bicycle, she burned her skin by her right ankle with the tire. [Victim] stated that when she and [Applicant's son] went into the residence, they went to [the son's] room where [Victim] was playing games on his TV. [Victim] stated that the burn on her leg was hurting and she picked up a small hand pump that is used to blow up balloons, and started to blow the air on her burn. [Victim] stated [Applicant] walked into the room and saw her blowing air on her leg and stated to her "give me a blow job." [Victim] stated that she told [Applicant] that she did not think that he knew what that was, and he stated to her "I think I do" and walked out of the bedroom. [Victim] stated the only thing she knows as a blow job is "head." [Victim] stated that she did not think too much of [Applicant's] comment and went on playing games with [his son.] [Victim] stated that she did not think [the son] heard the comment as he did not react and he was playing a game.

[Victim] stated that at night she, [Applicant's son] and [Applicant] were in the master bedroom on the bed. [Victim] stated that she, [Applicant's son] and [Applicant] were on the bed wrestling while [Applicant's wife] was taking her shower. [Victim] stated that when [Applicant's wife] finished her shower and came into the bedroom, they all settled down. [Victim] stated that [Applicant's son] got tired and laid down on the bed and fell asleep. [Victim] stated that [Applicant's wife] laid down next to [her son] and fell asleep as well. [Victim] stated that she laid down by [the son] and [Applicant] laid down next to her. [Victim] stated that she was laying on her side facing [Applicant's son] and [his wife] and she could see that they were sleeping. [Victim] stated that she was wearing underwear, a bra, long pajama bottoms with shorts over them and a tank top. [Victim] stated that [Applicant] was wearing boxers, however, she does not remember what color they were. [Victim] stated that [Applicant's] body was right up to her, touching her body. [Victim] stated that she felt [Applicant] kissing her on her neck and on her shoulder. [Victim] stated that she moved and he stopped. [Victim] stated that [Applicant] again started to kiss her on her neck and shoulder and did so approximately four times. [Victim] stated that [Applicant] did not say anything. [Victim] stated that [Applicant] then put his arm around her waist, put his hand underneath her shirt, touching her skin and started to move his hand up towards her breasts and she moved and he stopped. [Victim] stated that [Applicant] put his hand between her shorts and pajama bottoms, but his hand stayed in her waist area. [Victim] stated that [Applicant] removed his hand then put it in her pajamas but not in her underwear. [Victim] stated that [Applicant] then

rubbed her thigh, on her skin with his hand. [Victim] stated that she moved and [Applicant] stopped touching her. [Victim] stated that [Applicant] did not touch her breasts or her vagina. [Victim] stated that she got out of the bed and went to another bedroom.

[Victim] stated that she went to the bathroom, that is located in the upstairs hallway, and when she opened the door, she found [Applicant] standing by the door, and he startled her. [Victim] stated that [Applicant] ask her if she could use another bedroom as he wanted to put [his son] in the bedroom that she had been in. [Victim] stated that she moved to the guest bedroom. [Victim] stated that she waited a little while, then she went downstairs and tried to call her mother. [Victim] stated that [Applicant] came downstairs and asked her what she was doing. [Victim] stated that she told [Applicant] that she was trying to call her mother. [Victim] stated that [Applicant] went back upstairs then came back down again and told her "I think what I did made you feel uncomfortable." [Victim] stated that she said, "you think?" [Victim] stated that [Applicant] told her not to tell anyone because if she told, [Applicant's wife] and [son] would not have a place to live. [Victim] stated that she told [Applicant] that she and her mother would take care of [Applicant's wife] and [son]. [Victim] stated that [Applicant] asked her "what if you can't?" [Victim] stated that she looked at the clock on the stove and it was displaying 1:50 AM. [Victim] stated that [Applicant] told her he was overwhelmed by something, then he stated that he had not done this to [another specific child]. [Victim] stated that [this other child] is a 12 year old child that [Applicant's wife] babysits for. [Victim] stated that she told [Applicant] that she was not sure if she was going to tell anyone and went upstairs. [Victim] stated that she went into the master bedroom and took the phone with her to her bedroom and locked the door. [Victim] stated that [Applicant] knocked on the bedroom door and told her he need[ed] the phone back. [Victim] stated that she opened the bedroom door and [Applicant] asked her "what do you mean, you don't know if you are going to tell anyone?" [Victim] stated that [Applicant] then asked her "who would you tell?" [Victim] stated that she advised [Applicant] that she would tell her mom. [Victim] stated that [Applicant] asked her "why would you tell your mom, you know she will call the police?" [Victim] stated that she would tell her mother because she is her mother. [Victim] stated that [Applicant] again told her that [Applicant's wife] and [son] would lose the house. [Victim] stated that [Applicant] told her that he was sorry and she told him that he needed to ask God for forgiveness not her. [Victim] stated that he told her that he already asked God for forgiveness. [Victim] stated that she closed the door and went to bed. [Victim] stated that she looked at the clock and it displayed 3:25 PM. [Victim] stated that she was sleeping when someone knocked on the bedroom door. [Victim] stated that it was [Applicant] and [his wife] that were at the door. [Victim] stated that [Applicant] told her that her mother was coming to get her and that he

had told [his wife] what had happened. [Victim] stated that she and [Applicant's wife] hugged, but [Applicant's wife] did not tell her what [Applicant] told her. [Victim] stated that she has not returned to [Applicant's] residence.⁶

Applicant's and the victim's description of the assault are similar. He stated that he was underneath the covers on the bed and the victim was above the covers. He admitted to nibbling and kissing her on the neck and rubbing her side, hip, and thigh. He stated that she was wearing shorts during the assault and rubbed her bare thigh, but indicated that at no time did he touch her breasts, buttocks, or vagina. He admitted that his actions were wrongful. He stated that he touched her to gratify his sexual desires. When questioned by representatives of a social services agency at a later time, he lied to them about the incident. He told the representatives that the only physical contact he had with the victim was to wake her up by shaking her. He also initially lied to neighbors about this incident. Shortly thereafter, he came to believe that, if he continued with the lie, the Lord would take his son from him. He later told the neighbors that he lied to the representatives of the social services agency and the neighbors reported to that agency that he lied to them. The neighbor's daughter, who Applicant's wife had periodically babysat, underwent a forensic interview and disclosed that no one had touched her inappropriately.⁷

In his Office of Personnel Management (OPM) interview, his Answer to the SOR, and his testimony, Applicant claimed that the victim later changed her version of the events by claiming that he cupped her breast. However, the police report does not reflect that the victim changed her statement. When he went to a court hearing, he believed that, if he did not plead guilty to the charged offense, the prosecutor would have also charged him with Lewd Act on a Minor. He also stated that the prosecutor told the judge that Applicant had cupped the victim's breast.⁸

Applicant denied making any comment to the victim about oral sex when she was using the balloon pump. He stated that his son was present at the time and substantiated that he did not make such a comment.⁹

⁶ Tr. 50-51; GE 4. The names of the victim and Applicant's son, who were both minors, were redacted from the police report. The words "victim" or "Applicant's son" were inserted in the above quotation based on the context of the statement. The above quote was one paragraph; the paragraph breaks were added to assist the reader.

⁷ Tr. 26-33, 45-48, 66-70; GE 2; Applicant's Answer to the SOR. In his Answer to the SOR, Applicant stated that he did not engage in criminal sexual conduct with a minor because that offense required "some form of penetration with a minor." He also stated he was charged with Assault and Battery of a High and Aggravating Nature because of disparity in age and size between him and the victim.

⁸ Tr. 28, 30, 46; GE 1; Applicant's Answer to the SOR.

⁹ GE 2; Applicant's Answer to the SOR.

At the hearing, Applicant testified that the charged offense was a misdemeanor. Department Counsel indicated the charged offense was a common law crime that later was amended substantially and could not confirm whether it was a felony at the time of the alleged offense. Applicant was initially registered as a sex offender. However, the court later removed him from the sex offender registry contingent on him receiving sex abuse counseling. Applicant completed nine months of sex abuse counseling for pedophiles. This counseling consisted of weekly sessions. He provided no professional assessment of his prognosis or the status of his rehabilitation. He is no longer registered as a sex offender. He was released early from prison due to good behavior and successfully completed his two years of probation. He expressed remorse for his 2004 offense and called his actions heinous. He disclosed his misconduct to his church pastors and others at his church are aware of this offense.¹⁰

Falsification Allegation

Applicant submitted an e-QIP on January 12, 2009. In the police record section of the e-QIP, he disclosed his conviction for Assault and Battery of a High and Aggravated Nature and the sentence. In the comments to that section, he indicated that his attorney advised him that offense was a misdemeanor.¹¹

In that e-QIP, he did not disclose that he was charged with Assault and Battery with Intent to Kill, Having a Concealed Weapon, and Threatening a State Witness in 1981. His FBI background report does not reflect the 1981 charges. In his Answer to the SOR, he indicated that his employer required him to submit his e-QIP two days before he was to travel overseas. He stated that he filled out the questionnaire from 7:00 pm to 12:30 am one evening and that he misread the question in Section 23a to mean have you ever been “convicted” of a felony. During his subsequent OPM interview, he was asked whether he was ever charged with a felony offense and disclosed to the investigator his 1981 felony charges. He indicated that the investigator did not have any information about the 1981 charges until he provided her with the details.¹²

Character Evidence

Applicant presented no reference letters or work performance evaluations. His wife was present at the hearing, but did not testify. His wife and son live with him. From 2009 to 2010, he served six months in Kuwait (two separate three-month tours) and nine months in Afghanistan. In Afghanistan, he served in Helmand Province, where the fighting was fierce. While serving overseas, his responsibilities included installing electronic equipment in bomb-proof vehicles.¹³

¹⁰ Tr. 14-15, 30-38, 51-53; GE 1, 2; Applicant’s Answer to the SOR.

¹¹ GE 1.

¹² Tr. 16-17, 41-42; GE 1, 3.

¹³ Tr. 13-14, 16-17, 32-33, 54-57; AE A.

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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, to reach his decision.

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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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, a clearance decision is merely an indication that the Applicant has or 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 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.” 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 and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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

Guideline J, Criminal Conduct

AG ¶ 30 sets out the security concern relating 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.

Two disqualifying conditions under Criminal Conduct AG ¶ 31 are potentially applicable in this case:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was charged with criminal offenses in 1981 and 1987. He also pled guilty to assaulting a minor female in 2004 when he touched her with the intent to gratify his sexual desires. The evidence establishes both of the above disqualifying conditions.

I have considered all of the mitigating conditions for Criminal Conduct under AG ¶ 32. The potentially mitigating conditions are:

- (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;
- (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.

The only record evidence pertaining to the 1981 felony charges is Applicant's statements. This incident happened 30 years ago when he was 18 years old. He stated that this was a fistfight that he had with another sailor over a personal slight to a friend. He indicated that he did not use a weapon during the assault and the other sailor was not permanently injured. Civilian authorities dismissed the charges against him. He believed the Navy may have awarded him 30 days restriction for this matter, which is a minor punishment. AG ¶ 32(a) applies to the 1981 charges.

The Malicious Mischief charge in 1987 was for a minor offense. This incident happened 25 years ago when he was 24 years old. The charges were dropped when the complainant did not appear in court. AG ¶¶ 32(a) and 32(c) apply to the 1987 charge.

The Assault and Battery of a High and Aggravating Nature in 2004 was a serious offense. This incident happened seven years ago when Applicant was 41 years old. During this assault, he touched a 14-year-old girl on her stomach, side, hip, and thigh with the intent to gratify his sexual desire. The girl stopped his advances. At the time of that offense, he was serving *in loco parentis* to the girl. By engaging in that misconduct, he violated the trust and confidence the victim's mother placed in him. He initially lied to social service representatives and neighbors about this misconduct, but eventually confessed to the neighbors. Approximately a year-and-a-half after committing the offense, he pled guilty to the charged offense and was awarded a suspended sentence of ten years imprisonment upon service of one year in prison and two years of probation. He was released early from prison for good behavior and received sex abuse counseling. He provided no professional assessment of the status of his rehabilitation. He completed his probation in October 2008 and has only been removed from the court's supervision for a little over three years. He has accepted responsibility for his misconduct and taken the first steps towards rehabilitation. Nevertheless, given the nature and seriousness of this offense, I find that insufficient time has passed to conclude that Applicant's misconduct is unlikely to recur. AG ¶¶ 32(a) and 32(d) do not apply to the Assault and Battery of a High and Aggravated Nature offense.

Guideline E, Personal Conduct

The security concern for Personal Conduct is set out in AG ¶ 15, as follows:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; 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

In submitting his e-QIP in January 2009, Applicant disclosed his conviction for Assault and Battery of a High and Aggravating Nature. In responding to Section 23a of the e-QIP, however, he did not disclose that he was charged with felony offenses, *i.e.*, Assault and Battery with Intent to Kill, Having a Concealed Weapon, and Threatening a State Witness, in 1981. He was given only a couple of days to complete the e-QIP before going on a business trip. He filled out the application late one evening and misinterpreted Section 23a. He thought the question requested disclosure of felony convictions, instead of felony charges. When asked during his OPM interview whether he had ever been charged with a felony, he disclosed the 1981 charges even though the investigator had no knowledge of those charges. I find that Applicant did not intentionally falsify his response to Section 23a, but misinterpreted that question. Such a misinterpretation does not equate to intentional falsification. AG ¶ 16(a) is not applicable. I find for Applicant on the falsification allegation (SOR ¶ 2.b).

As for SOR ¶ 2.a, AG ¶¶ 16(c) and 16(e) apply to Applicant's criminal conduct as set forth above in the Analysis section of Guideline J.¹⁴

AG ¶ 17 lists three personal conduct mitigating conditions that are potentially applicable:

(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

¹⁴ The SOR did not allege that Applicant provided false or misleading information to the representatives of the social service agency. Consequently, his false statements to them will not be considered for applying the disqualifying conditions, but will be considered in assessing his credibility and in applying the whole-person concept.

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.

For the reason set forth in the Analysis section under Guideline J, Applicant has mitigated the security concerns under Guideline E for the 1981 and 1987 criminal charges, but has not done so for his 2004 offense. AG ¶17(c) does not apply to the 2004 offense. However, because Applicant has informed his pastor of the 2004 offense and others are aware of that offense, he has eliminated his vulnerability to exploitation. While AG ¶ 17(e) applies, the 2004 offense remains a security concern.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case and examined all of Applicant's alleged wrongdoing as a whole. 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. Applicant served in the Navy from 1980 to 1984 and received an honorable discharge. He worked in Kuwait and Afghanistan in support of U.S. forces in 2009 and 2010. Nevertheless, Applicant committed a serious offense in 2004. He lied to social service representatives about that

offense. He was released from probation for that offense in October 2008. Sufficient time has not passed to conclude that Applicant has rehabilitated himself and will not engage in future misconduct. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated the security concerns under the Criminal Conduct and Personal Conduct guidelines for his 2004 offense.

Formal Findings

Formal findings 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
Subparagraphs 1.a – 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant

Decision

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 eligibility for a security clearance for Applicant. Eligibility for access to classified information is denied.

James F. Duffy
Administrative Judge