



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



In the matter of: )  
 )  
 [Redacted] ) ISCR Case No. 14-04324  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Carroll J. Connelley, Esq., Department Counsel  
For Applicant: Greg D. McCormack, Esq.

03/09/2016

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application on April 18, 2013. On October 28, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline E. The DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on December 8, 2014, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on June 30, 2015, and the case was assigned to me on July 13, 2015. It was tentatively scheduled for the week of August 24, 2015, but was postponed when Applicant retained counsel. It

was reassigned to another administrative judge on September 29, 2015, and then reassigned back to me on November 24, 2015, due to workload and scheduling difficulties. On November 30, 2015, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for December 15, 2015. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 9 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. DOHA received the transcript (Tr.) on December 23, 2015.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted all the allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 46-year-old director of operations for a defense contractor. He has worked for his current employer since December 2012. He has held a security clearance since January 1998.

Applicant attended high school from September 1984 to May 1987. While in high school, he and a friend stole car stereos and radar detectors, sold them, and used the money to buy cocaine and marijuana. He and his friend also stole a new luxury automobile and stripped it for parts to rebuild his friend's older automobile. He was not arrested for these incidents. (Tr. 28.)

Applicant enlisted in the U.S. Army in July 1987. He did not disclose his criminal conduct and drug involvement when he enlisted. In a sworn statement submitted to a security investigator in September 1998, he stated that his drug use continued until May 1991. (GX 8 at 5.) At the hearing, he testified that he did not believe that his drug use continued after he enlisted. (Tr. 42-43.)

Applicant served on active duty in the U.S. Army until July 1989, serving primarily with Special Forces units. He deployed to Iraq for Operation Desert Shield and Desert Storm. (AX C at 2; Tr. 28.) He was honorably discharged, served in the Army National Guard (ARNG) for three months, and then returned to active duty in October 1989.

In August 1991, Applicant was charged with raping a fellow service member, which whom he had a romantic relationship, grabbing her by the throat, and threatening to kill her. (GX 8 at 3-4.) Applicant admitted having sexual intercourse with her, but contended that it was consensual. A formal pretrial hearing was conducted, during which the alleged victim recanted her accusation and admitted that it was false. The charges were dismissed. (GX 7.)

Applicant testified that he and the woman who accused him of rape were engaged to be married. (Tr. 31.) However, during a personal subject interview (PSI) with a security investigator in June 2013, Applicant told the investigator that his accuser was

angry because she found out that he was dating another woman at the same time. (GX 2 at 4.)

Applicant also was charged with another assault and battery and threatening the same woman about a week after the alleged rape. These charges also were dismissed. (GX 6.) At the hearing, Applicant testified that he had no recollection of a second incident. (Tr. 48.)

Applicant was honorably discharged in August 1997, and served in the ARNG for three years. He was honorably discharged from the ARNG as a staff sergeant (E-6) in August 2000. During his active duty and ARNG service, Applicant was awarded the Army Commendation Medal (2 awards), Army Achievement Medal (5 awards), the Army Good Conduct Medal (3 awards), numerous service medals and badges, numerous certificates of achievement, and consistently outstanding performance evaluations. (AX C.)

Applicant disclosed the rape charge when he submitted a security clearance application in July 1998. (GX 9 at 11.) He disclosed his criminal activity in high school and the rape charge in a sworn statement to a security investigator in September 1998. (GX 8 at 2-4; Tr. 26-27.)

Applicant worked for defense contractors from June 1998 to June 2006, when he was fired following allegations of sexual harassment and inappropriate behavior in the workplace. The accusations arose from Applicant's romantic relationship with a coworker. During a personal subject interview (PSI) with a security investigator in June 2013, Applicant stated that he and a coworker had been flirting for about six years. On a "few occasions," they kissed and hugged each other in various offices. (GX 2 at 2.) Applicant testified that they never had sexual intercourse. (Tr. 50.) Applicant testified that he was angry at his coworker and felt betrayed when she disclosed their relationship. (Tr. 55.) After learning about with his coworker's disclosure, he admitted the relationship to his supervisors and disclosed it to his wife.

Applicant was unemployed from June to August 2006. He worked for a defense contractor from September 2006 to September 2007. He worked for a non-DOD federal contractor from September 2007 to October 2011, when he was fired for sending an inappropriate text message to a female government employee who was collocated with Applicant's employer. After Applicant and the woman exchanged text messages for two days about her application for another job, the woman sent him a text message telling him how provocatively she intended to dress for an interview. He responded with a text message saying, "[M]eet me in my office so that I can have my way with you." (Answer to SOR.) He admitted at the hearing that the purpose of his message was to invite "a little show and tell." (Tr. 57-58.) The woman printed the text message and left it on the printer, where someone else read it and reported it. (GX 2 at 2; Tr. 61.)

Applicant was unemployed from October 2011 to June 2012. He worked for a non-federal employer for six months and then began his current job in January 2013. He

disclosed his termination in 2011 to his current employer, but he did not disclose the specific facts on which it was based.

Applicant married in July 1993 and divorced in August 1997. He married his current spouse in July 2001. He and his current spouse have a 12-year-old son and a 10-year-old daughter.

Applicant began taking online college courses in 2006. He received a bachelor's degree in program management in 2014. (Tr. 32.)

Several colleagues, former colleagues, supervisors, and family members submitted letters in support of Applicant. All were familiar with the allegations in the SOR.

A former colleague and fellow soldier, who has known Applicant for more than 20 years, considers Applicant competent, hardworking, devoted to his family, and trustworthy. (AX D at 1.) The president of the company by whom Applicant is employed considers him honest, trustworthy, sincere, and hardworking. The president states that he was aware of Applicant's termination in 2011, spoke to his former supervisors, and received strong positive recommendations from them. (AX D at 2-3.) A former supervisor was shocked when he learned that Applicant's security clearance was in jeopardy, but he believes that Applicant has atoned for his mistakes, is remorseful, and deserves to retain his security clearance. (AX D at 4-6.)

Applicant's two older brothers also submitted statements supporting Applicant. They both consider him hardworking, trustworthy, compassionate, and devoted to his family. (AX D at 7-8.)

Applicant testified that he now spends more time with his wife, taking walks together and engaging in activities with their children. They are taking martial arts classes as a family. (Tr. 36.) Applicant's spouse submitted a statement on Applicant's behalf, stating that she was "very disappointed" with his behavior that caused him to be fired twice. She states that they have received counseling, Applicant has received pastoral counseling from a priest, and they are strengthening their relationship one day at a time. (AX D at 9.)

Applicant and his wife are volunteer coaches for youth sports. (Tr. 36.) Applicant also volunteers at nearby military installations to assist military veterans in making the transition to civilian life, helping them with interviewing techniques, connecting them with job fairs, and mentoring them on rewriting their resumes. (Tr. 38.)

### **Policies**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an

individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants 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.

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

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 about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “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. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the 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 therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No.

01-20700 at 3 (App. Bd. Dec. 19, 2002). “[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 E, Personal Conduct

The SOR alleges that, in 1986 or 1987, Applicant stole car stereos and radar detectors, sold them to buy cocaine, (SOR ¶ 1.a); and stole a luxury automobile and stripped it (SOR ¶¶ 1.a and 1.b). It alleges that he was accused of raping a fellow soldier in August 1991 (SOR ¶ 1.c). Finally, it alleges that Applicant was fired from two jobs, in June 2006 and October 2011, for inappropriate behavior with female coworkers (SOR ¶¶ 1.d and 1.e).

The concern under this guideline is 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. . . .” The rape allegation was investigated at a formal hearing, during which the investigating officer had an opportunity to evaluate the demeanor and credibility of the participants. His accuser admitted that she made the accusation because she was angry. Her accusation was determined to be false. I have concluded that SOR ¶ 1.c is not supported by substantial evidence, and I have resolved it in Applicant’s favor.<sup>1</sup> However, the remaining allegations are supported by substantial evidence and are sufficient to raise the following disqualifying conditions under this guideline:

AG ¶ 16(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;

AG ¶ 16(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 . . . a pattern of dishonesty or rule violations; and

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<sup>1</sup> If the rape allegation had been alleged under Guideline J, Criminal Conduct, I would conclude that it was mitigated under AG ¶ 32(e) (“evidence that the person did not commit the offense”).

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The following mitigating conditions are potentially relevant:

AG ¶ 17(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;

AG ¶ 17(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

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(c) is established for the conduct alleged in SOR ¶¶ 1.a and 1.b. Applicant's offenses were not minor, but they were committed almost 30 years ago, when he was a high school student. I conclude that they are not recent and are mitigated by the passage of time without recurrence of similar conduct. This mitigating condition is not established for the conduct alleged in SOR ¶¶ 1.d and 1.e.

AG ¶ 17(d) is partially established for SOR ¶¶ 1.d and 1.e, because Applicant has received marital and pastoral counseling. However, I am not convinced that similar behavior is unlikely to recur. Applicant has a long history of deceptive behavior. He did not disclose his criminal conduct or drug use when he enlisted in the Army. He continued his drug use after his enlistment, and he was vague when he responded to questions at the hearing about his continued drug use while on active duty. The rape allegation in 1991 was unfounded, but it was triggered by Applicant's deceptive behavior with his purported fiancée, by not revealing that he was dating another woman at the same time. He engaged in a six-year relationship with a coworker that began around 2000 and was not voluntarily terminated. It ended only after it was discovered in 2006 and he was fired. He felt betrayed by the woman for revealing the affair. The incident in 2011 occurred after two days of texting that ended when he invited the woman to his office for "a little show and tell." Applicant did not voluntarily terminate this relationship; it also ended when it was discovered. In his answer to the SOR, Applicant admitted that he did not fully disclose the facts underlying his termination in 2001 to his current employer.<sup>2</sup>

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<sup>2</sup> Applicant's lack of candor when he enlisted in the Army and when he applied for his current job were not alleged in the SOR. Conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of

AG ¶ 17(e) is established for the conduct alleged in SOR ¶ 1.d. It is not established for the conduct alleged in SOR ¶ 1.e, because Applicant has been deliberately vague about the specific facts that led to his termination in 2011.

### **Whole-Person Concept**

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant had a distinguished military career, including service in combat. He has earned a reputation as a talented, hardworking contractor employee. He has held a security clearance for many years, apparently without any security violations. He was remorseful at the hearing, but at times his testimony was deliberately vague. He dissembled about whether he used drugs on active duty. He felt betrayed when his coworker disclosed their relationship in 2006. He disclosed to his current employer that he had been terminated from a previous job, but did not disclose the underlying facts.

"Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance." ISCR Case No. 09-01652 at 3 (App. Bd. Aug 8, 2011), *citing Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his personal conduct. Accordingly, I conclude he has not

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extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted).

carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

**Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	For Applicant
Subparagraphs 1.d-1.e:	Against Applicant

**Conclusion**

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman  
Administrative Judge