



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



In the matter of:)	
)	
)	ISCR Case No. 19-02005
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

08/18/2022

Decision

CERVI, Gregg A., Administrative Judge

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on November 3, 2016. On February 24, 2020, the Defense Counterintelligence and Security Agency, Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline J. The DOD CAF acted under Executive Order (Exec. Or.) 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Applicant responded to the SOR on March 26, 2020. I was assigned the case on March 31, 2022. The Defense Office of Hearings and Appeals issued a notice of hearing

on April 26, 2022, for a scheduled hearing on May 2, 2022. An amended notice of hearing was issued on April 27, 2022, correcting the time of hearing at Applicant's location. The hearing was convened as scheduled.

Department Counsel offered Government Exhibits (GE) 1 through 11 into evidence, all of which were admitted without objection. Applicant did not offer any exhibits during the hearing. Applicant and a character witness (his mother) testified at the hearing. The record was held open until May 13, 2022, to give Applicant the opportunity to submit documentary evidence in mitigation. He timely submitted a character letter that I marked as Applicant Exhibit (AE) A, and admitted into evidence without objection. DOHA received the hearing transcript on May 17, 2022.

Findings of Fact

Applicant is a 33-year-old aircraft lead mechanic, employed by a defense contractor since April 2022, and was preparing to deploy to the United Arab Emirates (UAE) for this employer. He previously worked for another defense contractor, and deployed to Iraq from November 2016 to March 2017, May to December 2017, February to December 2018, and May 2019 to April 2020. Applicant graduated from high school in 2007, and has some college credits. He enlisted in the U.S. Air Force (USAF) in July 2007, and was discharged in May 2015 with an other than honorable (OTH) discharge in lieu of a court-martial. Applicant held a security clearance while on active duty. Applicant was married in March 2017 and divorced in August 2020. He has one child, age seven, who lives with the child's mother.

The SOR alleges under Guideline J (criminal conduct) that Applicant was accused of violating a USAF no-contact order when a girlfriend claimed he struck her and sent over 50 text messages containing verbal attacks and profanities. He was convicted of wrongfully sending text messages with profanities, and received a reduction in rank, a fine, and a letter of reprimand. (SOR ¶ 1.a)

SOR ¶ 1.b alleges that Applicant was charged in 2014, while in the USAF, with aggravated sexual contact and kidnapping, arising from a 2012 incident, and referred to a court-martial. SOR ¶ 1.c alleges Applicant tested positive in April 2015, while in the USAF, for oxycodone and oxymorphone, and in May 2015, he tested positive for cocaine. He was charged in June 2015 with using prescription medications oxycodone and oxymorphone, not prescribed to him, and using cocaine. The charges were referred to a court-martial. SOR ¶ 1.d alleges he entered into a plea arrangement in October 2015 wherein he accepted an OTH discharge in lieu of court-martial for charges alleged in SOR ¶¶ 1.b and 1.c.

SOR ¶ 1.e alleges Applicant was arrested in March 2016 in state A, and charged with domestic abuse. SOR ¶ 1.f alleges he was arrested in state A in April 2016 and charged with driving under the influence of alcohol (DUI) and driving without a driver's license. He was convicted of DUI, placed on probation, and fined. Applicant admitted the

incidents described above occurred and provided explanations, but denied that he was guilty of most of the allegations. (Ans.)

While Applicant was stationed overseas on active duty, Applicant dated a local national woman beginning in 2009. He claimed that they were sexually active and that at some point, she claimed she was pregnant and harassed him to marry her. In 2011, she alleged he assaulted her and reported it to his command. As a result, he was ordered to have no contact with her. However, he claims they both exchanged numerous text messages that included profanities and verbal attacks toward each other, while his domestic assault case was being investigated. Applicant refused non-judicial punishment, and was referred to a special court-martial. (Tr. 26) He was found guilty of an orders violation under Article 92, Uniform Code of Military Justice (UCMJ), for sending the messages. (GE 2)

In his answer to the SOR, Applicant stated: "I admit to violating the no contact order by sending text messages." He explained that he did not understand the significance of the verbal order, and that he responded to her text messages since he was "young and ignorant." (Ans.) However, in testimony, Applicant equivocated that he did not receive "official documentation" of the order, and at one point, stated that he did not receive a verbal order. In a convoluted explanation, he testified as follows:

Applicant: . . . Initially, though, however, the no contact order was not on the official charges. And it also was initially a verbal that I, as I stated to my first sergeant at the time, was more so of in my opinion I was told hey, by the way, it would be in your best interest. I did not receive any documentation that said that I was not allowed to contact her until the day before the court-martial was adjourned ultimately on March 4. And it was – it was eventually – the no-contact order was put on the list of -- of you know, I forget the word. But it was put on the list of accusation the day before. And the reason why is because the – in my opinion, every other accusation was completely, utterly clear to the highest point. There was no evidence, I had proved that there was nothing. And at the end of the day, they came out and she said, yeah, he text (sic) me. And my first sergeant said, well, I told you not to text her. And I said, well, I was under the impression that the text was – or that he told me, you know, be in your best interest to not. As a – as a hey, you should keep this on, you know, keep your distance. . . .

Administrative Judge: All right, [Applicant], did you text her after you were – you received an order for no contact?

Applicant: Yes sir. Due to – based off of my first sergeant stating that he ordered me not to, yes. However, I was not under – I did not know I was not allowed to contract. When he stated it to me, I thought it was a verbal, hey, by the way. Because at the time, I did not receive any documentation to sign. And if it was the order, I thought that at the time of him stating.

Administrative Judge: Okay, I'm just trying to understand here. And I'm sure Department Counsel probably does too. Did you ever receive a verbal order not to have any contact with her, yes or no?

Applicant: Yes.

Applicant explained that he believes he should have received a written order. (Tr. 26-30)

In 2014, an active duty female airman (victim) told a sexual assault response coordinator (SARC) in State B that Applicant sexually assaulted her in State A at his off-base residence in 2012. Air Force Office of Special Investigations (AFOSI) opened an investigation. (GE 4) The summary report of investigation stated that the victim said that on November 18, 2012, she exchanged playful insults via text messages with Applicant, whom she knew from previous military training together. She went to his residence to have consensual sex, but Applicant became angry over the text messages. She attempted to leave, but Applicant knocked her to the floor, pushed her face into the carpet, and sexually penetrated her vagina with his finger. The victim threatened to kill Applicant if he did not get off of her, and she left the residence. She broke off contact with him and did not know if he was still in the military when she reported the incident to the SARC. (GE 4)

The investigator contacted Mr. S, who described Applicant as his best friend until 2012 when they had a falling out due to Applicant's involvement in a physical altercation with the victim, who was previously engaged to Mr. S for a six-to-eight-month period. Mr. S learned of the assault from the victim, and observed bruising and swelling on her face after the incident. He did not witness the altercation. Mr. S described Applicant as an "'alpha-male' type, very controlling, imposing, and manipulative." (GE 4)

The investigator interviewed Applicant, who stated that he met the victim in 2012 on an online dating application. They casually dated for months before Applicant learned that the victim was previously engaged to Mr. S. He stated that he broke off the relationship in the fall of 2012, but the victim responded by going to his residence unannounced. The two engaged in a verbal altercation which ended when the victim keyed Applicant's car. Applicant denied striking her or engaging in any sexual activity during the altercation.

In his personal subject interview (PSI), Applicant admitted that he and the victim had a sexual relationship, but he did not have sex with her or assault her on the date she reported the sexual assault. He claimed that the victim made up the story to cover herself with her boyfriend [Mr. S], who learned she was having consensual sex with Applicant. (GE 2) In testimony, Applicant stated that he had consensual sex with the victim for about three months while they dated, but not on the night she accused him of sexual assault. He claimed that on that night, he confronted her about her continuing relationship with Mr. S, her previous fiancé, and his intent to tell his friend about her. Applicant testified that he could provide the victim's witness statement in which she admitted to having consensual sex with Applicant that night. He did not provide the statement in his post-

hearing submission, and regardless, Applicant said they did not have sex that night. Rather, he provided an undated letter from Mr. S, addressed to me, claiming that:

There was a situation that arose in [state A] that was an attempt to smear [Applicant's] name and demean his character to the United States Air Force and the general public. An airman by the name of [victim] with whom he was romantically involved attempted to manipulate myself and others into believing that [Applicant] committed serious crimes against her. I was asked to make a statement with only half truths to go on, which I later redacted once I learned the entire truth of the situation.

The letter extolls the "upstanding character and moral fiber" of Applicant, and attests to him being "nothing but an exemplary airman for the United States Air Force and carry the same core values that he encompassed in the service as a civilian." (AE A)

During the pendency of a court-martial against Applicant on these allegations, he tested positive for oxycodone and oxymorhane in an April 2015 urinalysis, and in May 2015, he tested positive for cocaine. (GE 5) Applicant denied using any illegal drugs or prescription drugs not prescribed to him. However, he claimed that he received a prescription through a military pharmacy for oxycodone for a spider bite after his birthday on March 4, 2015, implying that it resulted in his positive test, but denied knowledge of the positive test for cocaine. (Tr. 39-40) An AFOSI report of investigation into the positive tests, dated June 17, 2015, stated that Applicant's medical records showed he was prescribed oxycodone on March 18, 2012. The prescription expired on March 22, 2012, three years before his positive urinalysis. (GE 5)

Applicant agreed to accept an OTH discharge in June 2015, in lieu of court-martial on the charges of sexual assault, kidnapping, and illegal use of drugs. (GE 6) He claimed in testimony that he agreed to the OTH because his leadership was not supporting him, and his discharge could be upgraded after he left the military if he could prove the charges against him were false. He has not petitioned for an upgrade of his discharge. (Tr. 40-42)

On March 1, 2016, Applicant was charged with domestic battery against a girlfriend (victim) who would later become his spouse. (GE 7, Tr. 42-43) The police report narrative states that they responded to a family disturbance. The police interviewed the victim at a different residence, and she stated that she and Applicant had been dating for several years, and have been living together for about one year. The victim complained that she and Applicant argued because he suspected her of cheating on him. She said he grabbed her by the neck and pulled her head up, threw items around the house, and slashed the tires on her vehicle. She left the house because she was afraid he would hurt her again. There were scratch marks and red spots on her neck region, extending from the right ear to the middle of the neck. She reported that he was at her mother's residence. The police interviewed Applicant at her mother's home. Applicant stated that he and the victim were arguing over messages on her phone from other men, and she tried to retrieve her phone from him. He said he grabbed her, threw her over his shoulders, and she landed on the ground. He had no visible markings or injuries. Applicant was arrested for domestic

battery. (GE 7) On August 22, 2016, the charge was dismissed without prejudice because the victim did not appear in court to testify. (GE 8, Tr. 54-60)

In contradiction to the police report narrative, Applicant claimed in his PSI and in testimony, that the incident resulted from a dispute between the victim and her sister that he broke up. He went to the victim's residence to pick up his "girlfriend's" (victim) children, when he encountered the fight between the victim and her sister. Despite calling her his girlfriend, he said in testimony that he and the victim were not together at the time, but rekindled their relationship in 2017. He said the victim was injured because he pulled her off of her sister during the fight, but did not throw her over his shoulder. Neither the fight between the two women nor the presence of the victim's sister was mentioned in the police report. He claimed the victim did not appear in court to testify because the allegation against him was false. (GE 2, Tr. 51-60) During testimony, Applicant alluded to being able to provide his ex-wife (victim) as a witness at his hearing, but did not. (Tr. 43-44, 56)

Inexplicably and in contradiction to his testimony and PSI about the incident, Applicant stated in his answer to the SOR "I came to the defense of a **brother** and sister argument in which I was defending the woman being assaulted but when officers came, the woman felt pressured to not send her family member to jail and instead me. I do have a witness to recall my actions in the situation that I was wrongfully accused of. [emphasis added]" (Ans.)

On April 4, 2016, the police responded to a report of a suspicious car parked on the road at 6:53 a.m. There was vehicle debris on the road and scrap markings on the roadway leading to the parked car. The car, a Dodge Charger, was running and had damage to the front end and two flat and shredded tires on the passenger side. When police approached Applicant in the driver's seat, he did not immediately roll down his window, but stated "I'm waiting for the TV match," and "I'm waiting for the match between the two guys." He put the car in drive and drove forward about twenty yards before stopping again. Applicant was escorted out of the vehicle. He smelled of alcohol, and had vomited and urinated on himself, and was unsteady on his feet. Applicant admitted to consuming vodka and driving within the past seven hours. He failed a field sobriety test, and was arrested. His breathalyzer tests showed BACs of .112 and .101, well over the legal limit, and he was charged with DUI and having an expired driver's license. (GE 9) On March 14, 2017, Applicant changed his plea to "no contest" and was found guilty of DUI. He was sentenced to unsupervised probation and fined. His probation ended on March 23, 2018. (GE 10)

In his PSI, Applicant claimed that he was arrested for DUI immediately after his arrest for domestic violence, despite the fact that the DUI occurred more than one month after the domestic violence arrest. He was upset and admitted the he drank too much at a house party. He claimed that he had no intention to drive, but since he was intoxicated, he decided to sleep in his running vehicle outside the house party. He claimed to have pled guilty to the DUI charge, and was ordered to attend victim impact class, which he completed, loss of his license for six months, and fined. (GE 2)

Of note, in his Answer to the SOR, Applicant admitted responsibility for the DUI incident, but claimed he was “living out of my car after the military” and contradictorily stated “one day I was drinking in my car that I was living out of and was charged with a DUI.” (Ans.)

Applicant’s mother testified about his history of military service after graduating from high school, and his service overseas while on active duty and as a civilian contractor. Applicant testified to his embarrassment for his actions, and attributed his pattern of behavior were a result of youthfulness. He said he has spent a decade;

“devoting myself to not only uplifting others, not just by race, not just by sex, not just by gender preference, but by uplifting by flag and informing people of my actions and what I did wrong. I hold seminars with the youth, especially of my color, I do, to inform them that there are certain things that we have to grow up having to be done that ultimately you no longer have to be governed by, and that it’s okay, that, you know, you can live a lift without having these expectations, that no one or mothering governs but your ego” (Tr. 74-75)

He reiterated that he does his job well, and was “a great Air Force member. I’m an even better civilian.” He said he was “deeply apologetic.” (Tr. 75-77)

At the conclusion of the hearing, I left the record open for Applicant to submit “anything that you’d like, including the character statements that you talked about, any evaluations, any work performance or achievements, any counseling, and community service.” (Tr. 77) In his post-hearing submission, he provided the character letter from Mr. S., described above. (AE A)

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 § 2.

National security eligibility is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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 a person’s stability, trustworthiness, reliability, discretion, character, honesty, and judgment. AG ¶ 1(b).

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.” 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. *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, e.g.*, ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015).

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, e.g.*, 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 ¶ 1(d).

Analysis

Guideline J, Criminal Conduct

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted or convicted; and
- (e) discharge or dismissal from the Armed Forces for reasons less than "Honorable."

Applicant's admissions, testimony, and the documentary evidence in the record are sufficient to establish the disqualifying conditions above.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

- (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; and
- (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant has not provided sufficient evidence in mitigation. Given the totality of his involvement with domestic violence issues, drug involvement, and a DUI between 2011 and 2016, I continue to have concerns that this pattern of misconduct and criminal activity may continue given the right circumstances. He has claimed no responsibility for the domestic violence incidents, and provided unconvincing, untruthful, and inconsistent explanations for his involvement, contrary to the investigatory and police records. In addition, he claims no responsibility or acknowledgement for use of illegal drugs despite the evidence and his contradictory account, and downplayed the DUI incident by claiming that he did not drive the car, but simply slept in it while parked outside the location of a house party he attended, or contradictorily, stated that he was drinking in the car he was living in when he was arrested. He did not testify regarding the apparent recent damage to the car, nor did he raise it in his PSI or SOR Answer. Applicant's accounts of the DUI were contradictory and appeared untruthful.

Although he has maintained employment since 2016, there has been insufficient

time elapsed to show that he has left criminal activity and domestic violence against women behind. He has not provided convincing evidence to show that similar behavior will not recur, or successful rehabilitation despite the passage of time since his last incident. Given the totality of his conduct, including his denial of drug involvement, inconsistent, dishonest accounts of his DUI and the incidents of violence against women, I remain unconvinced that his attitude or behavior has permanently changed. He has not been truthful about any of the SOR incidents, and I remain doubtful about Applicant's reliability, trustworthiness, or good judgment. No mitigation fully applies.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the 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(d).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guideline J in my whole-person analysis. I considered Applicant's work history and overseas service, but also his OTH, court-martial charges, civilian domestic abuse charge, illegal drug involvement, and DUI, and his inconsistent, dishonest explanations and excuses for each. I am not convinced that Applicant is willing or able to permanently put his past criminal activity aside, face the truth about his actions, and show good judgment in all areas of his life, especially those that are relevant to security eligibility.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraphs 1.a – 1.f:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interest of the United States to grant Applicant's eligibility for access to classified information. Applicant's security clearance is denied.

Gregg A. Cervi
Administrative Judge