



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



In the matter of:)	
)	
)	ISCR Case No. 19-03293
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

08/28/2020

Decision

BENSON, Pamela C., Administrative Judge:

Applicant failed to mitigate Guideline J (Criminal Conduct) security concerns. He has a history of violent criminal conduct, and he provided no evidence of mitigation, to include participation in an anger-management program or successful rehabilitation. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On February 12, 2018, Applicant submitted a security clearance application (SCA). On January 23, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) [or DCSA CAF] issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J (criminal conduct). The action was taken under Executive Order (EO) 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) effective within the DOD on June 8, 2017.

Applicant answered the SOR on March 2, 2020. He admitted seven out of eight SOR allegations alleged under Guideline J. SOR ¶ 1.a was denied because Applicant claimed this criminal offense was confused with the offense alleged in SOR ¶ 1.b. He

did not provide any additional documentation with his SOR response. Applicant requested that his case be decided by an administrative judge on the written record in lieu of a hearing. (Item 4) On April 13, 2020, Department Counsel submitted the Government's written case. A complete copy of the Government's File of Relevant Material (FORM), containing 14 Items, was mailed to Applicant on April 13, 2020. The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant did not provide any documentation. Applicant did not object to Items 1 through 14, and I admitted all of the Government's exhibits into the record. The Defense Office of Hearings and Appeals (DOHA) Office assigned the case to me on July 28, 2020.

Findings of Fact

Having thoroughly considered the evidence in the record, including Applicant's admissions, I make the following findings of fact: Applicant is 42 years old and employed by a DOD contractor as an electrician since March 2007. He earned his associate's degree in 2002. He was married in 2007, and his divorce was finalized in 2018. Applicant listed a daughter, age 15, on the 2018 SCA. He is requesting national security eligibility to perform specific employment duties. (Item 5)

Under Guideline J, the SOR alleges that Applicant was charged with criminal offenses, primarily of a violent nature, on eight different occasions between 1997 and 2018. (Items 1, 4)

SOR ¶ 1.a alleges that Applicant was charged with assault and brandishing a firearm in approximately October 1997. Applicant told the investigator during his July 2018 background interview that he was at a restaurant and was approached by a male accusing Applicant of sleeping with his girlfriend. The man tackled Applicant to the ground and a fight ensued between the men. Applicant claimed he fought the man in self-defense. Based on the arrest records in evidence, Applicant was arrested for these offenses in September 1997. Both charges were subsequently dismissed in October 1997. This is the only allegation he denied in his SOR response. The adverse information is verified by Applicant's notarized response to interrogatories, criminal records from the sheriff, and his Federal Bureau of Information (FBI) record. (Items 6, 7, 14) There is sufficient evidence to support this allegation, and due to the dissimilar facts, I do not find this criminal offense was confused with the offense set forth below.

Applicant admitted responsibility for the criminal conduct concerning his arrest in August 1998 for assault and battery and brandishing a firearm. (SOR ¶ 1.b) He said that he was dropping off his girlfriend at her job when two unknown males walked up to his vehicle and started harassing him and his girlfriend. Applicant grabbed his gun, but claimed that he never pointed it at anyone. The two males contacted the police who took Applicant into custody. He was convicted of both charges, sentenced to ten days in jail, and fined. (Items 4, 6, 14)

SOR ¶ 1.c alleges that in December 2005, Applicant was charged with intimidation and a weapons offense. His wife reported to police that they had been involved in an argument around 1:30 a.m. when Applicant pulled out a semi-automatic pistol. Although his wife denied that he had pointed the gun at her, she stated that he chambered a round in the gun and threatened to kill her. Applicant was arrested, but the charges against him were subsequently *nolle prossed*. (Items 4, 8, 14)

SOR ¶ 1.d alleges that Applicant was charged with simple assault in January 2008. He was riding in his truck with a woman he had been dating for about one month. They got into an argument over politics. Applicant became furious and ordered the woman out of his truck. When she refused, he pulled over and attempted to push the woman out of the truck. He eventually dropped her off at a convenience store with a swollen lip, and she reported the incident to police. Applicant was charged with simple assault, but the charge was later dropped due to the victim's failure to cooperate with the prosecution. (Items 4, 9)

Applicant admitted responsibility for the criminal conduct concerning his charge in July 2014 for assault and battery on a family member. (SOR ¶ 1.e) He and his wife reported to police that they were arguing when he pushed her in the back and caused her to hit a wall and injure her hand. Applicant drove his wife to the emergency room where she reported the incident to the medical staff and advised that she was afraid of her husband. Police were called to the hospital, and Applicant admitted he had pushed his wife to get her off of him. He was charged with simple assault, but the charge was subsequently *nolle prossed*. (Items 4, 6, 10)

SOR ¶ 1.f alleges that in approximately August 2015, Applicant was charged with destruction of property (value less than \$1,000). Applicant went to his mother-in-law's house to pick up his daughter. He honked the horn, but no one came out of the house. As he drove out of the driveway, he spun his tires and rocks from the gravel driveway caused damage to his mother-in-law's property. He was charged with destruction of property (value less than \$1,000), but the charge was later dismissed. (Items 4, 5, 6, 11)

The SOR alleges that in about July 2017, Applicant was charged with felony criminal history false statement. (SOR ¶ 1.g) He ordered an AR-15 semi-automatic rifle from an online store. As part of the purchase process, Applicant was required to fill out a form wherein he was asked about his criminal history. At the time, his wife had an active protective order against him that he failed to disclose. He claimed that he thought the protective order had already expired. He was charged with felony criminal history false statement, and the charge was subsequently dismissed. (Items 4, 5, 6, 12)

In approximately January 2018, Applicant's wife was at his home, although they were in the process of getting a divorce. He arrived home around 2:30 a.m. and became physically violent with his wife because he suspected she had communicated with another man on the phone. He jumped on her, punched in the back of the head, and pushed her head into a pillow (making it difficult for her to breathe), punched her in the stomach, and threatened to kill her. His wife could not call police because Applicant had

taken her phone away. The next morning Applicant was still threatening her, so she sent a note with their daughter going to school which requested the police be called and sent to the house. The police report identified bruises on his wife's wrist, abrasions on her right forearm, scratches on the back of her neck, and a bruise on her right cheek bone. All injuries were photographed. Applicant was charged with assault and battery and an emergency protective order was issued. Prosecution was deferred until April 2020, and if there were no further incidents, the charge would be dismissed. (Items 4, 6, 13)

Applicant noted in his SOR response that there were several criminal offenses that did not result in a final conviction. He did not provide any information about counseling or participation in an anger-management program. He has presented no favorable evidence of his employment record or community involvement. (Item 4)

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 list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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 not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This

relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

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

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining 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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant:

(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.

Between 1997 and 2018, Applicant was charged on eight occasions with criminal offenses, predominantly of a violent nature. AG¶ 31(b) is established.

I have considered all of the mitigating conditions under AG ¶ 32 and considered the following relevant:

(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's eight criminal offenses occurred between 1997 and 2018. Although he is now divorced from his wife, the evidence does not justify a conclusion that recurrence of the violence with his now ex-wife or any other individual is unlikely. Applicant's history shows that he has a vehement nature, and he has not provided any evidence of treatment or successful rehabilitation. He was on probation for his 2018 offense until earlier this year. Too little time has passed since the latest criminal conduct. I find that the behavior which resulted in his criminal charges is likely to recur and casts doubt on Applicant's reliability, trustworthiness, and good judgment. AG ¶¶ 32(a) and 32(d) do not apply. Applicant failed to mitigate the criminal conduct security concerns.

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):

- (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. I have incorporated my comments under Guideline J in my whole-person analysis. Some of the factors in AG ¶ 2(d) was addressed under those guidelines, but some warrant additional comment.

Applicant is 42 years old and employed by a DOD contractor as an electrician since March 2007. He has a 15-year-old daughter and was divorced from his wife in 2018. He has a history of violent criminal conduct. Applicant chose not to submit any mitigating evidence with his FORM response.

Overall, the record evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude he failed to mitigate the security concerns alleged under Guideline J, criminal conduct.

Formal Findings

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

Paragraph 1, Guideline J: AGAINST APPLICANT

Subparagraphs 1.a-h: 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 interest to grant or continue Applicant a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge