



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



In the matter of:

)  
)  
)  
)  
)

ISCR Case No. 20-01335

Applicant for Security Clearance

**Appearances**

For Government: Nicole A. Smith, Esq., Department Counsel

For Applicant: *Pro se*

09/15/2022

**Decision**

HARVEY, Mark, Administrative Judge:

The criminal conduct allegations in the statement of reasons (SOR) under Guideline J (criminal conduct) are not mitigated. Access to classified information is denied.

**Statement of the Case**

On August 15, 2018, Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SCA). (Government Exhibit (GE) 1) On August 28, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DCSA CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline J.

Applicant provided an undated response to the SOR and requested a hearing. (HE 3) On May 3, 2021, Department Counsel was ready to proceed. Processing of the case was delayed due to the COVID-19 pandemic. On May 3, 2022, the case was assigned to me. On June 14, 2022, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for July 29, 2022. (HE 1) The hearing was held as scheduled.

During the hearing, Department Counsel offered seven exhibits into evidence, and Applicant did not offer any exhibits. (Transcript (Tr.) 12, 15-17; GE 1-7) There were no objections and all proffered exhibits were admitted into evidence. (Tr. 17; GE 1-GE 7) On August 8, 2022, DOHA received a transcript of the hearing.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

### **Findings of Fact**

In Applicant's SOR response, she admitted the SOR allegations in ¶¶ 1.a through 1.d. (HE 3) She also provided mitigating information. Her admissions are accepted as findings of fact. (HE 3)

Applicant is a 39-year-old contracts negotiator employed by a DOD contractor since about 2015. (GE 1) In 2000, she graduated from high school. (Tr. 8) She attended community college, and in 2012, she received a bachelor's degree in legal studies and prelaw. (Tr. 8; HE 3) She completed one year towards a master's degree in business administration and contracts negotiation. (Tr. 8) She has several years of experience as a quality inspector. (GE 1)

In 2006, Applicant married, and in 2011, she divorced. (Tr. 9) In August 2020, she married her current spouse. (Tr. 9) Her four children are ages 1, 7, 16, and 22. (Tr. 9) She has never served in the military. (Tr. 9)

### **Criminal Conduct**

SOR ¶ 1.a alleges in August 2001, Applicant was arrested and charged with importing cocaine into the United States. (HE 2) In October 2001, she pleaded guilty in U.S. district court to importing at least 500 grams of cocaine into the United States. The court dismissed a charge of possessing cocaine with intent to distribute. In January 2002, she was sentenced to 30 months of imprisonment and four years of supervised release.

Applicant admitted the allegations in SOR ¶ 1.a. (HE 3) At the time of the offense, she was 18 years old and earning \$7.25 an hour working in a retail establishment. (Tr. 19-22) A drug distributor promised to pay her \$1,500, and in return, she agreed to import an illegal drug into the United States. (Tr. 19-21; HE 3) She left the United States and went to Jamaica with the intention of bringing illegal drugs into the United States. (Tr. 19-21; HE 3) The drug distributor paid for her travel and vacation expenses for her trip to Jamaica. (Tr. 23) Authorities discovered about 3.1 pounds of cocaine concealed in her

suitcase. (Tr. 20) After she was sentenced, she served about 14 months of combined imprisonment and federal boot camp, where she received education, trade skills, and life skills. (Tr. 21; HE 3) Her probation ended in 2004. (Tr. 21) She described her decision to import cocaine into the United States as naïve and ignorant. (Tr. 25)

SOR ¶ 1.b alleges in April 2011, Applicant was arrested and charged with the following crimes: aggravated battery with a deadly weapon, a 2<sup>nd</sup> degree felony; aggravated assault with a deadly weapon, a 3<sup>rd</sup> degree felony; and battery. (HE 2) In October 2012, she pleaded guilty in state court to battery and assault. She received deferred adjudication of both charges with concurrent sentences of 12 months of imprisonment and 6 months of probation.

Applicant admitted the charges, pleas, and sentence described in SOR ¶ 1.b. (HE 3) She was outside a restaurant/night club where her sister worked. (HE 3) A woman asked Applicant about whether she was dating someone the woman was also dating. (Tr. 23, 26) Applicant got into her vehicle, and several women climbed into Applicant's vehicle. (Tr. 24) Applicant exited her vehicle, and a physical altercation between Applicant, her sister, and three women occurred. (Tr. 24; HE 3) Applicant's sister helped Applicant get back into her vehicle. Applicant said she was innocent of the charges because of self-defense; however, her attorney advised her to plead guilty because she was a convicted felon. (Tr. 24; HE 3) Her sister went to trial and was acquitted. (Tr. 24; HE 3) Applicant completed a six-month anger-management class in 2012. (Tr. 27; HE 3)

The police report states:

[Applicant] intentionally struck the [victim] against her will and in doing so caused harm (abrasions cuts and bruising). [Applicant] used closed fists in the incident. [Applicant] then using a motor vehicle intentionally used the vehicle as a deadly weapon driving at and striking the victim with the vehicle. [Applicant] then turned the vehicle around and drove the vehicle at the [victim] as she lay on the ground. Victim was pulled out of the path of [Applicant's] vehicle. (GE 5 at 11)

Applicant's Office of Personnel Management (OPM) personal subject interview (PSI) states Applicant admitted that she bumped the woman when she was backing the vehicle. (Tr. 44; GE 5 at 2) At her hearing, Applicant denied that she struck the woman with the vehicle. (Tr. 25, 45) Applicant said security at the restaurant testified at her sister's trial that the woman was not struck with a vehicle. (Tr. 26) Applicant successfully completed her probation, and she did not receive a conviction for the altercation in April 2011. (Tr. 27)

SOR ¶ 1.c alleges in January 2019, Applicant was charged in state court with public assistance fraud (\$200 or more), a 3<sup>rd</sup> degree felony, committed between December 2015 and December 2016. (HE 2) In February 2019, she was arrested. In September 2019, she pleaded nolo contendere to the charge and received deferred adjudication. She was sentenced to pay \$5,076 in restitution, to complete an anti-theft class, and to be on probation until 2024.

SOR ¶ 1.d alleges in January 2019, Applicant was charged in state court with public assistance fraud (\$200 or more), a 3rd degree felony, between April 2015 and December 2016. (HE 2) She was arrested in February 2019. In September 2019, she pleaded nolo contendere to the charge and received deferred adjudication. She was sentenced to pay \$11,202 in restitution, to complete an anti-theft class, and to be on probation until September 2024.

Applicant admitted the charge, pleas, and sentence described in SOR ¶¶ 1.c and 1.d. (HE 3) In November 2014, she went on paid maternity leave from her employment because of the birth of her third child. (Tr. 29) In 2015, her son's father moved out, and she applied for public assistance. (Tr. 29; HE 3) She started receiving public assistance in March 2015. (Tr. 30) In April 2015, she returned to her employment from which she took maternity leave. (Tr. 31) She failed to accurately report her employment income, and she continued to receive public assistance. (Tr. 31; GE 6; HE 3) In October 2015, she left her employment, and she went to work for a temporary staffing agency. (Tr. 32, 34) On November 23, 2015, Applicant provided a pay stub showing bi-weekly pay of \$540. (Tr. 35; GE 7 at 12) She did not submit the information about pay she received from another employer. (Tr. 35) Again on December 3, 2015, she provided a pay stub from one employer, but not the other employer. (Tr. 35-36) Applicant said someone told her that she did not have to disclose income from temporary employment because the employment might be for only one month. (Tr. 37-39) She acknowledged that she received incorrect information from someone about the income that was supposed to be disclosed. (Tr. 38-39) She said she did not feel at the time of the receipt of funds that she was fraudulently receiving funds from the government. (Tr. 40)

Applicant said she still qualified for public assistance because of her income level, three children, and not receiving child support. (Tr. 32, 39; GE 1; GE 2) She stated in her SCA that even with her new employment she would have still qualified for the assistance. (GE 1 at 44) She told the OPM investigator she did not report her total income "because her income would [have] still qualified her for the assistance." (GE 2 at 2) At her hearing, she said she believed the annual income threshold for receiving benefits was \$50,000 or \$60,000. (Tr. 41)

The state investigator indicated Applicant and her dependents "received \$6,167.00 in excessive Food Stamp Benefits to which they were not legally entitled, during the period of May 2015 through May 2016," and they "received \$5,035.02 in excessive Medicaid Benefits to which they were not legally entitled during the period November 2015 through December 2016, for an aggregate of \$11,202.02 which was obtained by fraudulent means." (GE 7 at 15) At her hearing, she conceded she was not really sure whether her statements were accurate about her total income not causing her to be disqualified from receiving public assistance. (Tr. 43-44)

From April 3, 2015 to October 1, 2015, Applicant received a salary of \$19,827. (Tr. 32-33; GE 7 at 12) From March 2015 to December 2016, she submitted pay stubs totaling \$7,737, and during that time period, she received total income of \$89,000. (Tr. 33)

After pleading guilty, she paid the court-ordered restitution of \$11,202 for food stamps and Medicaid and \$5,076 for school readiness services; she completed the anti-theft class; and her probation was terminated on June 29, 2020. (Tr. 42; HE 3; GE 7 at 6-9)

Applicant's current annual income is \$81,000, and her husband's annual income is about \$90,000. (Tr. 42) They do not have any financial problems. (Tr. 43)

Applicant indicated the first offense was more than 20 years ago. (Tr. 50) The second offense did not result in a conviction, and she paid restitution for the third offense. (Tr. 50) She is a different person today. (Tr. 48) She is a mother of four children and a mentor to others. (Tr. 48) She wants to move on and have a successful career and life. (Tr. 48)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant's 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.

Eligibility for a security clearance 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, these guidelines are applied 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, 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 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 "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, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI 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. 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 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

### Criminal Conduct

AG ¶ 30 describes the security concern about 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 lists two conditions that could raise a security concern and may be disqualifying in this case:

- (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; and
- (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.

AG ¶¶ 31(a) and 31(b) are established. Applicant admitted all of the SOR allegations. When an allegation under a disqualifying condition is established, “the Directive presumes there is a nexus or rational connection between proven conduct or circumstances . . . and an applicant’s security eligibility. Direct or objective evidence of nexus is not required.” ISCR Case No. 17-00507 at 2 (App. Bd. June 13, 2018) (citing ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018)). The disqualifying conditions will be discussed in the mitigation section, *infra*.

AG ¶ 32 describes four conditions that could mitigate security concerns including:

(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;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; 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.

The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

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. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

From 2001 to December 2016, Applicant was charged with five felonies: importation of cocaine (2001); aggravated battery with a deadly weapon (2011); aggravated assault with a deadly weapon (2011); public assistance fraud (2019); and public assistance fraud (2019). She pleaded guilty to all five charges or lesser-included offenses. She received deferred adjudication for all offenses except importation of cocaine; she successfully completed all probation requirements; and she paid court-ordered restitution. The offenses in 2001 and 2011 are not recent.

The public assistance fraud was a continuing offense that occurred in 2015 and 2016, and the offenses are relatively recent. The offense in 2001 and the offenses prosecuted in 2019 had financial components.

The SOR does not allege that Applicant made misleading or false statements in her SCA and during her OPM interview. Her claim that she would have received the public assistance even if she had accurately reported her income is not credible. This claim was repeated in her SCA, during her OPM interview, and initially at her hearing. The requirement for restitution shows the court believed she needed to repay funds that she wrongfully obtained after she provided false income information to the state.

In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility;
- (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances;
- (c) to consider whether an applicant has demonstrated successful rehabilitation;
- (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or
- (e) to provide evidence for whole person analysis under Directive Section 6.3.

*Id.* (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See also ISCR Case No. 12-09719 at 3 (App. Bd. Apr. 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). The non-SOR allegations will not be considered except for the five purposes listed above.

After careful assessment of Applicant's case in mitigation, her criminal conduct continues to cast doubt on his current reliability, trustworthiness, and good judgment. Criminal conduct security concerns are not mitigated at this time.

### **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 the 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), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline J are



incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 39-year-old contracts negotiator employed by a DOD contractor since about 2015. She attended community college, and in 2012, she received a bachelor's degree in legal studies and prelaw. She completed one year towards a master's degree in business administration and contracts negotiation. She has several years of experience as a quality inspector. She is well educated and intelligent.

From 2001 to December 2016, Applicant was charged with five felonies: importation of cocaine; aggravated battery with a deadly weapon; aggravated assault with a deadly weapon; public assistance fraud; and public assistance fraud. She pleaded guilty to all five charges or lesser-included offenses. She received deferred adjudication for all offenses except importation of cocaine, and she successfully completed all probation requirements and paid court-ordered restitution. She only has one felony conviction, and that was for the offense in 2001. The 2011 offense involved minor injuries to the victim. The 2001 and 2011 offenses are not recent.

The evidence against mitigation is more persuasive. Applicant submitted false income information to the state and received about \$18,278 in benefits for which she was not entitled. She claimed the income information she provided was not material to the decision to pay benefits. The court-ordered restitution of \$18,278 is contrary to her claim. Her misstatements about the materiality of her false income information shows her failure to accept full responsibility for her fraudulent behavior, and it shows a lack of rehabilitation.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more time without any conduct of security concern, and a longer track record of behavior consistent with her obligations, she may be able to demonstrate persuasive evidence of her security clearance worthiness. I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate criminal conduct security concerns.

**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 through 1.d:	Against Applicant

## **Conclusion**

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

---

Mark Harvey  
Administrative Judge