



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



In the matter of: )  
)  
) ISCR Case No. 20-01699  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Rhett E. Petcher, Esq., Department Counsel  
For Applicant: *Pro se*

09/02/2022

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the security concerns under Guidelines E (personal conduct) and J (criminal conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

On July 15, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E and J. Applicant responded to the SOR on July 30, 2021, and requested a hearing before an administrative judge. The case was assigned to me on March 28, 2022.

The hearing was convened as scheduled on May 23, 2022. Government Exhibits (GE) 1 through 13 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A and B, which were admitted without objection.

## Findings of Fact

Applicant is a 40-year-old employee of a defense contractor. He has worked for his current employer since 2017. He attended college for a period without earning a degree. He married in 2004 and divorced in 2012. He married his current wife in 2019. He has a 15-year-old child and a 2-year-old child. (Transcript (Tr.) at 40, 52, 92; GE 1, 2)

Applicant served on active duty in the U.S. military from 2000 until he was discharged with an other than honorable discharge for misconduct due to the commission of a serious offense in 2016. (GE 1, 13) His problems resulted from a tumultuous relationship with an ex-girlfriend (Ms X).

Applicant and Ms. X lived together in an apartment in April 2014. Ms. X called the police before 0800 on April 5, 2014, and reported that she and Applicant had an argument, and he assaulted her. She found emails that he was communicating with another woman. She printed the emails and left them where he could see them. He was angry when he woke up and saw the printed emails. He demanded that she leave immediately. He pushed her causing her to slip to the floor. He grabbed her legs and dragged her, which caused her head to hit the floor. She put some clothes on, and she and her sister, who was visiting them, left without her belongings. She stated that he threw two pairs of shoes and several bottles of Gatorade at her head when she was outside. He hit her with at least one shoe and one bottle of Gatorade. (Applicant's response to SOR; GE 3, 4)

Ms. X and her sister returned to the apartment a short time later. Ms. X related to the police that Applicant let them in. Her sister was helping move items out of the house. While she was outside, Applicant took out a handgun, pulled Ms. X to the living room, pushed her to the couch, and pointed the gun at her head. He let her go several minutes later, and she ran out of the apartment. (Applicant's response to SOR; GE 3, 4)

Ms. X's sister told the police that in the morning, she heard loud banging coming from downstairs. When she went downstairs, she saw Applicant trying to push her half-naked sister out the door. They left the apartment. After they returned, as they were gathering Ms. X's belongings, the sister saw a handgun in the nightstand in Applicant's and her sister's bedroom. The sister left the apartment with some of Ms. X's clothes. The door locked when she left. The sister pounded on the door until Ms. X came running out saying they had to leave immediately. The sister stated that Ms. X looked terrified when she ran out and yelled "leave the stuff; I'm going to die, so let's just GO!" Ms. X told her sister that "he is going to kill me, I know he is." Ms. X told her that Applicant put the gun to her forehead and made the clicking noise so it could shoot. The sister never saw Applicant with the gun. (Applicant's response to SOR; GE 3, 4)

Ms. X called a friend to see if she and her sister could stay with the friend. Ms. X and her sister went to the friend's house. Ms. X told him that Applicant had been physical with them. The friend stated that they left after about 30 minutes. He later

received a call from Ms. X who told him that Applicant held a gun to her head and kept her from leaving. (GE 4)

Police were dispatched at about 0755, and they met Ms. X and her sister at a commercial establishment at about 0810. The above facts are derived from the police reports of the incident. Ms. X gave them permission to search the apartment. They found an unregistered semi-automatic pistol in the nightstand drawer. It was unloaded, but a magazine with nine rounds of ammunition was also in the nightstand. An extra empty magazine and ten more rounds were found in the closet. The police took pictures of everything, including what they described as bruises or abrasions on Ms. X's right calf and right knee. (GE 3, 4)

Applicant was arrested and charged with kidnapping, carrying or use of a firearm in the commission of a separate felony, and abuse of family or household member. The arrest also included a charge of having an unregistered firearm, but the prosecution did not pursue that charge. (Applicant's response to SOR; GE 1, 2, 4, 12)

A restraining order was issued forbidding Applicant from contacting Ms. X. He was arrested in August 2014 for violating the order. Applicant denied violating the order, and the charge was dismissed. (Applicant's response to SOR; GE 2, 12)

Ms. X was at the prosecuting attorney's office on March 3, 2015, preparing for trial. A member of the prosecution team noticed that she had bruising on her arms and legs. The police were called and interviewed Ms. X. A victim witness advocate was present during the interview. (GE 5)

Ms. X told the police that Applicant was her boyfriend. She reported that she was at his apartment on March 2, 2015, when they got in an argument at about 0800 over laundry. He yelled at her, and she pushed him to get him out of her face. He pushed her, causing her to fall backwards on her elbows. He also punched her in the thigh. The police officer reported bruises on Ms. X's arms and legs, including one that was five to six inches in diameter, which she stated came from the punch to the thigh. Ms. X stated that she was using Applicant's vehicle, but she wanted to return it so that he would not report it stolen. Applicant was charged with abuse of family or household member. (Applicant's response to SOR; GE 2, 5, 11, 12)

Applicant pled not guilty to the April 2014 charges at a jury trial in March 2015. Ms. X's testimony was somewhat similar to her statements to the police, except she testified that she ended up on the ground before Applicant started pulling her by the ankles, but she could not remember how she got there. She remembered that Applicant held a gun, but she could not remember if he threatened her with it. She testified that she and Applicant had been in contact on multiple occasions since the incident in an attempt to work things out in their relationship. They talked about her testifying in his trial, but she could not remember what was said. She testified that they were no longer in a relationship, but she still loved him and wanted what was best for him. (Applicant's response to SOR)

Ms. X's sister's testimony was mostly consistent with her statements to the police, except she testified that she did not witness aggressive physical contact between Applicant and her sister. (Applicant's response to SOR)

Applicant was convicted on March 19, 2015, of the lesser offense of unlawful imprisonment in the second degree and abuse of family or household member. He was found not guilty of the firearm offense. Sentencing was set for May 2015. (Applicant's response to SOR; GE 1, 2, 7, 11, 12)

Ms. X called the police from a location not far from Applicant's apartment at about 1930 on April 5, 2015. Applicant also called the police from his apartment at about the same time. Ms. X told the police that Applicant was her boyfriend, and that they had been dating for about a year and five months and lived together for the last five months. She stated that they were arguing at the top of the stairs when he pushed her, and she fell down about three to four steps before she caught herself. She noted that part of the stairs was broken in the fall. Applicant threw her phone in the toilet, and he punched her several times in the face. The police took photos of her injuries, which included abrasions on her face, and her eye was swollen to the point of being almost closed. (Applicant's response to SOR; GE 1, 2, 6)

Applicant was arrested for abusing a family member, criminal property damage, and interference with the reporting of an emergency. He was released on \$3,000 bail. (Applicant's response to SOR; GE 1, 2, 12)

Applicant was sentenced for the April 2014 charges on May 27, 2015. He was sentenced to probation for one year for the first count and two years for the second, to run concurrently. A term of the probation included imprisonment for seven days, with credit for time served. The case was overturned on appeal in May 2018 for prosecutorial misconduct based on remarks made by the prosecutor in closing argument suggesting that Applicant's counsel attempted to induce Ms. X to give false testimony during cross-examination. The appellate court found no basis to support the prosecutor's remarks. The conviction was overturned without prejudice, so Applicant could have faced another trial. The charges were eventually dismissed without another trial. (Applicant's response to SOR; GE 1, 2, 7, 11, 12)

Applicant was found not guilty of the April 2015 charges in September 2015. The March 2015 charge was dismissed in October 2015. (Applicant's response to SOR; GE 1, 2, 12)

Applicant was issued a military protective order (MPO) by his commander in early March 2015 to not initiate any contact or communication with Ms. X and to not come within 500 feet of her. On October 2, 2015, he received nonjudicial punishment under Article 15 of the Uniform Code of Military Justice, for violating the commander's order on divers occasions from March 6, 2015, to April 5, 2015, by coming within 500 feet of Ms. X and by calling her. He was reduced one paygrade to E-5; ordered to perform extra duties for 45 days; and forfeited \$1,562 in pay per month for one month. He did not appeal the punishment. Applicant stated he accepted the nonjudicial

punishment and an other than honorable discharge as part of a deal to avoid a court-martial. He stated that the serious offense that was the basis of the discharge was the violation of the MPO. (Tr. at 45, 62-68, 94-96; Applicant's response to SOR; GE 1, 2, 9)

Applicant denied that he ever assaulted Ms. X. He stated that their relationship was already over in April 2014, and he just let her stay in the apartment until she could move out. Her sister was there to help with the move. He asserted that she attacked him in April 2014 and the most he did was grab her arms so that she could not hit him. He admitted that he had an unregistered firearm, but he stated that he never picked up the gun that day, and that the gun was in the nightstand, but the magazine was in the closet. The police report indicates that the loaded magazine was in the nightstand drawer with the gun. He denied that they had any romantic involvement after the April 2014 incident. (Tr. at 14-23, 56-65, 70-87; Applicant's response to SOR; GE 1-4)

Applicant stated that Ms. X essentially stalked him for the next year, calling him frequently from new and other people's numbers, sending texts, and showing up unannounced at his apartment. He submitted a muster report showing he was on duty on March 2, 2015, at the time she said he assaulted her. (Tr. at 14-23, 56-65; Applicant's response to SOR; GE 1, 2; AE A, B)

Applicant asserted that Ms. X left some items at the apartment after she left in April 2014. He was told that he had to return the items. He agreed to leave them in a box outside the apartment door. She showed up on April 5, 2015, and knocked and rang his doorbell for about an hour. She then somehow forced her way in and attacked him. He stated that the damage to the apartment was caused by her. He called the police, but he was the one arrested. He testified that he showed the police everything, but the police would not take a report from him. (Tr. at 23-34, 53-56, 61; Applicant's response to SOR; GE 6, AE A) The police report indicates that Applicant was advised in writing of his constitutional right to remain silent (Miranda rights) at 2230 on April 5, 2015. He initialed next to the section that indicated he did not want to tell the police what happened. (GE 6) I did not find his testimony credible.

Except for the incidents that involved Ms. X in one way or another, Applicant had an excellent military career. Several military members believe that he was set up by Ms. X, and that he was treated unfairly by his command. He is praised for his outstanding performance of military duties, reliability, and trustworthiness. As part of the Security Access Eligibility Report (SAER) submitted by his command in April 2014, his command reported:

1. **Excellence of character:** [Applicant] has displayed unquestionable integrity, excellent military bearing and an enthusiasm to excel in his technical field.
2. **Stability:** Since checking onboard in January 2012 [Applicant] has shown no traits that could be identified as unstable. He has displayed excellent timeliness, excelled at work tasks, and has maintained a positive attitude.

**3. Other comments/observations:** The alleged actions are extremely out of character for [Applicant]. (GE 10)

Applicant's command provided similar comments in an April 2015 SAER. (GE 11)

### **Policies**

This case is adjudicated 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), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines 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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant 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 EO 10865 provides that adverse 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**

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant’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. The following are potentially applicable:

(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 denied that he ever assaulted Ms. X. In some instances, two or more witnesses can provide completely opposite descriptions of the same event, but none of the witnesses are lying. That is not the case here. Either Applicant or Ms. X lied about what happened in April 2014, March 2015, and April 2015. However, in order to accept Applicant’s version of the 2014 incident, I have to believe that not only did Ms. X lie, but her sister either also lied or was lied to by Ms. X. I would also have to find that their friend also lied or was lied to by Ms. X and possibly her sister. Additionally, the physical evidence, including photos of Ms. X’s injuries, supports her version. I find by substantial evidence<sup>1</sup> that Applicant committed the criminal conduct alleged by Ms. X. I also find that he was discharged with an other than honorable discharge for misconduct due to the commission of a serious offense, which was violating the MPO. AG ¶¶ 31(b) and 31(e) are applicable.

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<sup>1</sup> Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” See, e.g., ISCR Case No. 17-04166 at 3 (App. Bd. Mar. 21, 2019) (citing Directive ¶ E3.1.32.1). “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994); ISCR Case No. 04-07187 at 5 (App. Bd. Nov. 17, 2006).

I am convinced that Applicant was arrested in August 2014 for violating a temporary restraining order. I am also satisfied that he was in contact with Ms. X after April 2014. I do not have enough evidence to conclude that he committed the specific conduct that led to his August 2014 arrest. SOR ¶ 1.b is concluded for Applicant.

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;
- (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.

All of the criminal conduct in one way or another involved Ms. X. Applicant is married to another woman with a young child. Any involvement with Ms. X appears to be in the past. The most recent criminal conduct happened more than seven years ago. There are no bright-line rules for when conduct is considered recent. As discussed above, I have found that Applicant has been untruthful about the criminal charges throughout the security clearance process. Without complete candor, I am unable to determine that criminal conduct is unlikely to recur. His conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. I find that criminal conduct security concerns remain despite the presence of some mitigation.

### **Guideline E, Personal Conduct**

The security concern for personal conduct is set out in AG ¶ 15, as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

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



(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 individual may not properly safeguard classified or sensitive information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant's criminal conduct is cross-alleged under SOR ¶ 2.a. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. The conduct also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable because that conduct is sufficient for an adverse determination under the criminal conduct guideline. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

SOR ¶ 2.a is a duplicitous allegation that cross-alleges all of the criminal conduct allegations, including SOR ¶ 1.e, which alleges Applicant's discharge for commission of a serious offense. The serious offense was the MPO violations for which he received nonjudicial punishment. SOR ¶ 2.b alleges the nonjudicial punishment for the MPO violations. As such, SOR ¶ 2.b alleges conduct that is already alleged in SOR ¶ 2.a. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005). SOR ¶ 2.b is concluded for Applicant.

There is no factual basis in the record for SOR ¶ 3.b. That allegation is concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy,

unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

The analysis under Guideline J applies equally here. Personal conduct security concerns are not mitigated.

### **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 have incorporated my comments under Guidelines E and J in my whole-person analysis. I also considered Applicant's favorable character evidence, the time since the last offense, that all of the criminal conduct in one way or another involved Ms. X, and that he is no longer in contact with her. Nonetheless, I simply do not believe Applicant's version of events. I believe he has been untruthful throughout the security clearance process. Without complete candor, there can be no rehabilitation or mitigation.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal conduct and 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
Subparagraph 1.a:	Against Applicant

Subparagraph 1.b:	For Applicant
Subparagraphs 1.c-1.e:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant
Subparagraphs 2.b-2.c:	For Applicant

### **Conclusion**

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Edward W. Loughran  
Administrative Judge