



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



In the matter of:)
)
) ISCR Case No. 19-02677
)
Applicant for Security Clearance)

Appearances

For Government: Brian Farrell, Esquire, Department Counsel
For Applicant: Jeffrey D. Billett, Esquire

03/28/2022

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding criminal conduct and personal conduct. Financial concerns allegations were withdrawn. Eligibility for a security clearance is granted.

Statement of the Case

On August 7, 2017 Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories, and also asked him to verify the accuracy of an investigator’s summary of an interview. He responded to those interrogatories and verified the interview summary on September 26, 2019. On November 27, 2019, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD

4), *National Security Adjudicative Guidelines* (December 10, 2016) (AG), effective June 8, 2017.

The SOR alleged security concerns under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline F (Financial Considerations), and detailed reasons why the DCSA adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a notarized statement, dated December 22, 2019, Applicant responded to the SOR and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on August 25, 2020. Because of health concerns associated with the COVID-19 pandemic and pandemic protocols, no further actions were taken regarding the case until the following year. The case was not assigned to me until April 21, 2021. A Notice of Hearing by way of a Defense Collaboration Services (DCS) video teleconference was issued on July 29, 2021. I convened the hearing as scheduled on August 31, 2021.

During the hearing, Department Counsel moved to amend the SOR by withdrawing the allegation under Guideline F. There being no objection, the motion was granted and the Guideline F allegation was withdrawn. (Tr. at 19-20) Also during the hearing, Government exhibits (GE) 1, and GE 3 through GE 8, and Applicant exhibits (AE) A through AE K were admitted into evidence without objection. GE 2 was admitted over the objection of Applicant. Applicant testified. The transcript (Tr.) was received on September 9, 2021. The record closed on August 31, 2021.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with extensive comments, some allegations in their entirety or some portions thereof in the SOR (SOR ¶¶ 1.a. through 1.d., 2.b., and 2.d.). His admissions and comments are incorporated herein. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Applicant is a 39-year-old employee of a defense contractor. He has been serving as a cybersecurity systems engineer with his current employer since January 2017. He previously worked for another employer as a functional analyst (July 2010 – December 2016). A 2001 high school graduate, he received an associate's degree in 2009, a bachelor's degree in 2010, and a master's degree in 2016. He enlisted in the U.S. Navy in January 2002, and served on active duty until March 2006, when he was honorably discharged as an aviation maintenance administration petty officer 3rd class (AZ3) (E4). He remained in the U.S. Navy Reserve (Inactive) until 2008. He was initially granted a security clearance in 2002, and he eventually held a top secret clearance. His most recent security clearance was suspended in October 2017. He was married in 2004 and divorced in 2011. He has two children, born in 2006 and 2014. He has sole custody of the older child since 2017, and shares custody of the younger child. (GE 2 at 8)

Military Awards and Decorations

During his military career, Applicant received the following awards and decorations: the meritorious unit commendation; the Navy “E” Ribbon; the Good Conduct Medal; the National Defense Service Medal; the Armed Forces Expeditionary Medal; the Global War on Terrorism Service Medal; the Global War on Terrorism Expeditionary Medal; and the Sea Service Deployment Ribbon (for participation in Operation Enduring Freedom). (AE B)

Criminal Conduct and Associated Personal Conduct

The SOR alleged four incidents of criminality – and associated personal conduct – by Applicant over a seven-year period, commencing in 2012 and continuing until 2018. Applicant acknowledged the first three incidents in his 2017 SF 86. (GE 1 at 37–40) The alleged incidents are as follows:

SOR ¶¶ 1.a. and 2.a. refer to an incident in 2012 – approximately ten years ago: In April 2012, Applicant met with some friends and ate dinner while consuming one mixed drink and three beers at a Mexican restaurant within a 2-hour period. At about 2:15 a.m., he got into his vehicle to drive to his residence located down the street. As he was leaving, the police arrived in response to an unrelated disturbance complaint, and they stopped his vehicle because it reportedly matched that of one of those unrelated disturbance participants. Applicant was administered a sobriety test which he passed. However, he was also administered a breathalyzer test, and he apparently failed it.

He was charged with driving while intoxicated (DWI), a misdemeanor, and arrested. In July 2012, he appeared before the city general district court and was found guilty as charged. He was sentenced to 365 days’ confinement, suspended; unsupervised probation for 12 months; his operator license was restricted (to and from work; to and from alcohol meetings; during work hours; for medically necessary travel; and to transport a minor child) for one year until July 9, 2013; he was ordered to attend the state Alcohol Safety Action Program (ASAP), a 12-week alcohol awareness program; fined \$250; and ordered to pay \$186 in costs. (GE 1 at 37-38; GE 2 at 14-15; GE 3 at 6; GE 4; Answer to SOR at 3)

Although the court documents do not mention any other sentence requirements, Applicant reportedly was also required to attend three Alcoholics Anonymous (AA) meetings which he claimed offered “stark insight to the world of alcoholism.” (Answer to SOR at 1) Since the 2012 incident, Applicant drinks responsibly. He no longer drinks and then drives, but readily uses car services like Uber or Lyft if he attends events where he expects to consume alcohol; and he has not been intoxicated. (Answer to SOR at 3; GE 2 at 15)

SOR ¶¶ 1.b. and 2.b. refer to an incident in 2013 – approximately eight and one-half years ago: On October 3, 2013, while cohabiting with his girlfriend who was pregnant with his youngest child, Applicant and his girlfriend engaged in a domestic dispute. At the time, he worked at home and generally obtained a breakfast from a local fast-food chain

and brought it home to eat. On this particular occasion, he brought home a large orange juice for himself and a small orange juice for his girlfriend. His girlfriend became upset because she wanted the larger drink. He explained that she always wanted the larger size, but she continued to be upset. One thing led to another and he threw the drink into the trash. The verbal dispute grew into a physical one. She yelled at him; tried to break his work phone; and started kicking and punching him, and he pinned her against the wall in an effort to restrain her, “simply to keep her still and to prevent her from injuring him.” When things calmed down, he released her, but she demanded that he leave the house, and she called the police. (Answer to SOR at 4; GE 2 at 15-16)

When the police arrived at the house, they were met by the girlfriend. She indicated that she was pregnant, and that Applicant had pinned her against the wall and choked her. She claimed that when she told him he had to leave the house, he pushed her against the wall “where he held her and choked her with his bare hands until she lost consciousness and passed out.” The police noticed no signs of injury on the girlfriend and she refused medical attention. She refused to provide a sworn written statement. When Applicant was questioned, he acknowledged the disagreement and stated that he had to grab her and hold her against the wall. He denied ever choking her. (Tr. at 53) Based on the facts obtained during the two interviews, the police found that “probable cause exists to charge the defendant with battery by strangulation – domestic violence, a 3rd degree felony; and aggravated battery on a pregnant female – domestic violence, a 2nd degree felony. Applicant was arrested. (GE 1 at 39; GE 2, at 16; GE 3 at 3-4; GE 5)

On December 19, 2013, based on an assessment of the facts before him, the State Attorney issued a No Information Notice stating that “[f]rom the investigation which has been made, it is the opinion of the writer that this case is not suitable for prosecution.” (AE F) All charges were dropped. (GE 3 at 4)

SOR ¶¶ 1.c. and 2.c. refer to an incident in 2016 – approximately six years ago: On May 30, 2016, another incident occurred between Applicant and his girlfriend. Applicant was at a restaurant when a female patron stopped him and asked for directions to the airport. Applicant’s girlfriend approached them and, thinking that Applicant had a relationship with the woman, started “attacking” the woman. To escape the situation, he departed and returned to his residence which he no longer shared with his girlfriend. At 4:00 a.m. that morning, the girlfriend arrived at his residence and texted him that she was there with her “boys” and wanted to see how tough he was going to be. Concerned about his own safety, he grabbed a kitchen knife for self-defense. As the girlfriend backed the vehicle closer to him, Applicant panicked when he thought he saw others in the car, and he threw the knife at the car. The girlfriend drove away and Applicant retreated to his residence. At 5:00 a.m., she texted him that a police report had been filed. (GE 1 at 39-40; GE 2 at 17; Answer to SOR at 5)

The girlfriend’s story to the police was vastly different. She acknowledged some of the issues involving Applicant and another woman, but claimed that after the incident she was merely going to Applicant’s residence to pick up their son. When she arrived at his house, he was standing outside without their son. She said she decided to make a U-turn and not encounter Applicant, and as she drove away, she heard a loud crashing sound

on her rear windshield when it shattered. She immediately called the police. When questioned by the police, she stated that he will not leave her alone; he shows up everywhere she goes; he has struck her in the past; and “**she has never called the police.**” (emphasis supplied) She was willing to assist with prosecution and completed a sworn written statement. (GE 6 at 1, 3) Applicant subsequently noted that their son was not even with him that night, and that he was with her. (Tr. at 64)

Before Applicant was even interviewed, the police field report stated:

The suspect maliciously hurled a knife into the victim’s vehicle while she was driving away, knowing it could cause great bodily harm or death to victim. The suspect consciously and intentionally, with reckless indifference to consequences and with the knowledge that damage is likely to be done threw the knife at the victim’s property causing monetary damage in the amount of approximately \$1000 dollars. Probable Cause was established to charge the suspect . . . with throwing deadly missile at, into occupied vehicle.

(GE 6 at 1)

Applicant was subsequently charged with throwing a deadly missile into occupied dwelling, vehicle, building, or aircraft, a 2nd degree felony. Applicant was reportedly arrested on June 9, 2016. (GE 3 at 4-5; Answer to SOR at 3) However, on July 22, 2016, based on an assessment of the facts before him, the State Attorney issued a No Information Notice stating that “[f]rom the investigation which has been made, it is the opinion of the writer that this case is not suitable for prosecution.” (AE G) All charges were dropped. (GE 3 at 5)

SOR ¶¶ 1.d. and 2.d. refer to an incident in 2018 – approximately four years ago: On an unspecified date after May 2018, Applicant and two friends were in a vehicle rented by one of the friends. The renter of the vehicle had been drinking, so he was in the rear seat, while the other friend was driving. Applicant was a passenger. On the way to Applicant’s residence, the driver fell asleep and the vehicle struck a parked vehicle. The renter struck his head on something during the crash and he was bleeding. Applicant panicked because the injury looked severe. He tended to the injured friend, placing a shirt on the injured head. The driver drove the vehicle to Applicant’s residence and left it in the driveway. Applicant drove his two friends to the hospital where they were met by a nurse. The two friends entered the hospital and Applicant parked his vehicle. While he was parking his vehicle, the two friends apparently told the nurse that the injured friend had merely fallen down the stairs without mentioning the vehicle accident. The injured friend received medical treatment and was transferred to another hospital. At some point, they retrieved the rental vehicle. Because the renter was wearing a neck brace and the driver was too scared to drive it, Applicant drove it to another location. It was only after they tended to their injured friend did they realize that they had been involved in a hit-and-run incident. The following day, the driver and the renter reported the incident to the police and the rental company. Applicant could only speculate on what transpired because he

was not present during any of the reporting. Applicant was not cited for any violations. (GE 2 at 19-20)

Other than Applicant's statement to an investigator from the U.S. Office of Personnel Management (OPM) on March 28, 2019, regarding the entire incident, there were no police reports or medical reports either supporting or contradicting Applicant's description of the event.

Personal Conduct

SOR ¶ 2.b. alleged that because of the first three incidents referred to above, Applicant's security clearance was suspended in October 2017 – nearly four and one-half years ago. Applicant reported that when he was first hired by his current employer he held a secret clearance, but his employer successfully sponsored him for top secret clearance. After being granted the top secret clearance, the employer sponsored him for top secret/sensitive compartmented information (SCI). While the background investigation was underway, two of the arrests were found, and as a result, according to two of his security managers, his security clearance was revoked due to "having too many occurrences." He learned of the revocation through an email from his security department, and he was subsequently debriefed. He was not aware what steps were available to him. He later was told that the clearance was no longer revoked, but was considered to be pending. (GE 2 at 18)

Although certain issues arose with respect to Applicant's security clearance eligibility before October 2017 when his eligibility was either suspended or revoked, there is no evidence that he was timely issued an SOR or offered an appeal of the actions at any point before November 27, 2019 – the date of the current SOR. Moreover, because the evidence is extremely skimpy, it remains unclear if Applicant's security clearance was actually suspended or revoked.

SOR ¶ 2.c. alleged that when Applicant completed his 2017 SF 86, in response to a question in Section 13A – 7, Employment Activities, "Provide the reason for leaving the employment activity," he falsified material facts when he answered "company went out of business" and deliberately failed to disclose that his employment was terminated in January 2008 due to attendance issues. (GE 1 at 20)

Applicant denied that he intended to falsify his response or intentionally failed to disclose how he was terminated. During his OPM interview, he claimed that he did not think it was necessary to include the details in his SF 86, and instead simply said that the company had gone out of business. He was fired because his school schedule and work schedule were creating problems with his work attendance, and that if he was a few minutes late to work, he was assessed a certain number of points. Once the accumulation of points rose to a certain level, he was terminated. (GE 2 at 9) The government offered no documentary evidence from the employer to support the allegation or to challenge Applicant's comments.

On October 28, 2009, when Applicant completed an SF 86, he was more thorough in responding to the same inquiry, and had no motivation to subsequently obscure it. (Answer to SOR at 7) He stated: "I was fired due (sic) to conflict with school schedule and work schedule causing me to be (sic) late." (2009 SF 86 at 27, attached to Answer to SOR)

SOR ¶ 2.d. alleged that Applicant was fired from his employment with another employer in December 2016 – nearly five and one-half years ago – due to his failure to follow standard attendance protocol. He explained that he was in a technical support role at the company and he was always on the phone. During his off-hours, he was attending school or dealing with his ex-girlfriend. There were times when, without notice, she would simply drop off their son for two or three weeks at a times, and just disappear. (Tr. at 43) A company matrix reported how many calls were received, tickets created, tickets closed, and the feedback from customers. The minimum requirement was 98.9. Because, at times, he was unable to be available for work, or he took longer breaks than permitted, or he took longer than allowed to close out calls, his performance was inconsistent and suffered. As a result, he was fired. (GE 2 at 8; Answer to SOR at 7-8) The government offered no documentary evidence from the employer to support the allegation or to challenge Applicant's comments.

Character References

Applicant's current Cyber Security Manager has supervised Applicant for over two years as of August 2021. He considers Applicant to be an accountable self-starter who arrives to work every day at 6:00 a.m. and makes wide contributions to a variety of demanding contracts. He demonstrates motivation in his current role, career path, and most importantly, providing for his family. He meets his required professional and personal goals on an annual basis and shows compliance with the high moral and ethical requirements necessary to balance his life. (AE I)

A friend who has known Applicant since 2004 when they were both on active duty in the U.S. Navy, believes he is honest, reliable, and trustworthy. He is loyal to friends, family, and the United States. He believes Applicant has learned from his mistakes and will use those lessons learned to teach others to always do the right thing and obey the law. As a security clearance holder himself who understands the implicit trust and responsibility a security clearance entails, he recommends Applicant be granted a security clearance. (AE C)

Another friend who also works in the information technology (IT) industry considers Applicant to be respectful, trustworthy, loyal, and willing to place himself second for the greater good of everybody around. He is willing to help others and contribute. With respect to the issues in the SOR, he believes Applicant has grown and removed himself from situations where his job and/or his family can be put at risk. The SOR does not reflect a depiction of who he is as a man, friend, or father. (AE D)

A married couple who reside near Applicant, often attend the same community events, shop at the local stores, and whose children attend nearby schools, do not believe

that the SOR is reflective of Applicant's character, patriotism, or willingness and ability to protect classified information. Applicant is a genuinely caring and compassionate individual. While the actions depicted in the SOR may attempt to represent Applicant as someone with poor judgment, it should not be used to classify him as someone of poor character. There may have been occasions in his past where he did not make the best decisions, but he has demonstrated more recently that he has learned from previous mistakes and is dedicating his time to growing in his career. (AE E)

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. The standard that must be met is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that granting the person access to classified information is clearly consistent with the interests of national security.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines in SEAD 4. 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.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, the administrative judge applies these 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. 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 meaningful decision. The concept recognizes that we should view a person by the totality of his or her acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 protect or safeguard classified information. Such

decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information. Furthermore, security clearance determinations should err, if they must, on the side of denials. (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)). 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 avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Upon consideration of all the facts in evidence, including those in the DOD CAF case file, those submitted by Applicant, and his testimony, as well as an assessment of Applicant's demeanor and credibility, and after application of all appropriate legal precepts and factors, I conclude the following with respect to the allegations set forth in the SOR:

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.

The guideline notes two conditions under AG ¶ 31 that could raise security concerns:

(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) have been established with respect to the 2012, 2013, and 2016 incidents. In April 2012, Applicant was charged with DWI, a misdemeanor, and arrested. In July 2012, he appeared before the city general district court and was found guilty as charged. He was sentenced to 365 days confinement, suspended; unsupervised probation for 12 months; his operator license was restricted (to and from work; to and from alcohol meetings; during work hours; for medically necessary travel; and to transport a minor child) for one year until July 9, 2013; he was ordered to attend the state ASAP program, a 12-week alcohol awareness program; fined \$250; and ordered to pay \$186 in costs.

In addition, in October 2013 and June 2016, following domestic disputes with his girlfriend, he was charged with battery by strangulation – domestic violence, a 3rd degree felony; and aggravated battery on a pregnant female – domestic violence, a 2nd degree felony (in 2013); and throwing deadly missile into occupied dwelling, vehicle, building, or aircraft, a 2nd degree felony (in 2016). In both instances, based on an assessment of the facts before them, the State Attorneys issued No Information Notices stating that “[f]rom the investigation which has been made, it is the opinion of the writer that this case is not suitable for prosecution.” All charges were dropped.

With respect to the 2018 incident, Applicant was merely a passenger in a vehicle that struck another vehicle and left the scene without immediately reporting it to the authorities. Accordingly, the SOR alleged that Applicant’s conduct in being present at the accident; the conduct of the driver in reportedly lying to medical personnel regarding the cause of the injuries sustained by another passenger when Applicant was not present; allegedly fleeing the scene of the accident; or someone reportedly falsely reporting to the police that the vehicle was involved in a hit-and-run when Applicant was not present, all constituted both criminal conduct and poor personal conduct. The SOR alleged that Applicant’s conduct consisted of criminal conduct, but it did not identify the law that he supposedly broke, and the government failed to produce any evidence other than Applicant’s own description of the events to establish that his actions were criminal in nature. Applicant was merely a passenger in the vehicle, not the driver. He did not operate the vehicle as a passenger; he did not encourage or enable the driver to drive knowing he was unable or unfit to drive; and he did not interfere with the driver’s ability to operate the vehicle. Under these circumstances, as to the 2018 incident, neither AG ¶¶ 31(a) nor 31(b) has been established.

The guideline also includes examples of conditions under AG ¶ 32 that could mitigate security concerns arising from Criminal Conduct:

- (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.

AG ¶¶ 32(a), 32(c), and 32(d) apply. Appellant’s DWI charge and conviction occurred in 2012, and in the ensuing decade no similar criminal conduct has taken place. He attended ASAP and AA. He now drinks responsibly: he no longer drinks and then drives, but readily uses car services like Uber or Lyft if he attends events where he

expects to consume alcohol; and he has not been intoxicated. Considering the passage of one decade since the incident, without recurrence of any other similar alcohol-related conduct, it appears that he has rehabilitated himself. Similar alcohol-related conduct is unlikely to recur, and his past alcohol-related conduct no longer casts doubt on his reliability, trustworthiness, or good judgment.

With respect to the two domestic violence incidents that occurred in 2013 – approximately eight and one-half years ago – and 2016 – approximately six years ago – there are substantial issues related to both incidents. As noted above, both incidents involved conflicting stories presented by Applicant and his ex-girlfriend, two individuals who were in a toxic relationship. In one case, she claimed to the police that Applicant “choked her with his bare hands until she lost consciousness and passed out,” but she had no signs of injury and she refused medical attention. She also refused to provide a sworn written statement. In the other he was charged before he was even afforded the opportunity to explain his side of the story. The police reported that Applicant had “maliciously hurled a knife,” that he “consciously and intentionally, with reckless indifference to consequences, threw the “deadly missile” at her vehicle.” Such phrases are filled with flowery prose, not stark facts. Although she lied to the police in 2016 when she stated that she had never called the police, in fact, she did call the police against Applicant in 2013. In both instances, based on an assessment of the facts before them, the State Attorneys issued No Information Notices stating that “[f]rom the investigation which has been made, it is the opinion of the writer that this case is not suitable for prosecution.” All charges were dropped. Applicant has moved on from that relationship. Considering his positive character references and the passage of time since the most recent incident, without recurrence of any other criminal conduct, it appears that he has rehabilitated himself. Similar conduct is unlikely to recur, and his past alleged criminal conduct no longer casts doubt on his reliability, trustworthiness, or good judgment.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with

medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline also includes an example of a condition that could raise security concerns under AG ¶ 16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

(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

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: . . . (2) any disruptive, violent, or other inappropriate behavior; (3) a pattern of dishonesty or rule violations.

AG ¶¶ 16(a), 16(c), and 16(d) have been established. My discussion related to Applicant's criminal conduct is adopted herein. Applicant was charged and convicted of DWI in 2012; charged with two domestic violence incidents that occurred in 2013 and 2016, both of which were subsequently dismissed; fired from one employer in 2016; had his security clearance suspended or revoked in 2017, reportedly because of the three criminal incidents between 2012 and 2016; and furnished an incorrect response to a question in his 2017 SF 86. The allegation regarding his alleged criminal conduct and unacceptable personal conduct while a passenger in a vehicle that was involved in a hit-and-run in 2018 is the sole exception in that none of the conditions identified have any application to the incident.

The guideline also includes examples of conditions under AG ¶ 17 that could mitigate security concerns arising from personal conduct. They include:

(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.

AG ¶ 17(c), 17(d), and 17(e) apply. Appellant's DWI charge and conviction occurred in 2012 – a decade ago; and the two domestic violence incidents occurred in 2013 – approximately eight and one-half years ago – and 2016 – approximately six years ago. Applicant learned from the DWI, and after attending ASAP and AA, he modified his consumption of alcohol and has had no similar incidents. The two domestic violence incidents occurred while he was in a toxic relationship with his ex-girlfriend, and since they are no longer in a relationship – except that they share custody of a child – it is unlikely that such conduct will recur.

Applicant was fired from his employment with an employer in December 2016 – nearly five and one-half years ago – due to his failure to follow standard attendance protocol. He explained that a company matrix reported how many calls were received, tickets created, tickets closed, and the feedback from customers. The minimum requirement was 98.9. Because, at times, he was unable to be available for work, or he took longer breaks than permitted, or he took longer than allowed to close out calls, his performance was inconsistent and suffered. As a result, he was fired. The government offered no documentary evidence from the employer to support the allegation or to challenge Applicant's comments. Since that relatively minor incident, he has taken positive steps to alleviate the stressors, circumstances, or factors that contributed to his employment difficulties: he is no longer in the toxic relationship; he has completed his education; and he is a new work environment where he is treasured, respected, and liked.

As noted above, according to two of Applicant's security managers, and as alleged in the SOR, his security clearance was revoked due to "having too many occurrences." He learned of the revocation through an email from his security department, and he was subsequently debriefed. He was not aware what steps were available to him. He later was told that the clearance was no longer revoked, but was considered to be pending. Although certain issues arose with respect to Applicant's security clearance eligibility before October 2017 when his eligibility was either suspended or revoked, there is no evidence that he was timely issued an SOR or offered an appeal of the actions at any

point before November 27, 2019 – the date of the current SOR. Moreover, because the evidence is extremely skimpy, it remains unclear if Applicant's security clearance was actually suspended or revoked. In addition, if his security clearance was suspended or revoked in 2017, it appears that any such action was done without affording him appropriate due process in violation of Exec. Or. 10865; the *Directive*; and SEAD 4.

It was alleged that Applicant falsified material facts in his 2017 SF 86 when he answered "company went out of business" and deliberately failed to disclose that his employment was terminated in January 2008 due to attendance issues. He denied that he intended to falsify the truth or intentionally failed to disclose how he was terminated. During his OPM interview, he claimed that he did not think it was necessary to include the details in his SF 86, and instead simply said that the company had gone out of business. In fact, he was fired because his school schedule and work schedule were creating problems with his work attendance, and that if he was a few minutes late to work, he was assessed a certain number of points. Once the accumulation of points rose to a certain level, he was terminated. On October 28, 2009, when he completed an earlier SF 86, Applicant was more thorough in responding to the same inquiry, and had no motivation to subsequently obscure it. He stated: "I was fired due (sic) to conflict with school schedule and work schedule causing me to be (sic) late." The government offered no documentary evidence from the employer to support the allegation or to challenge Applicant's comments. While there is evidence of an incorrect response, there is no evidence that Applicant intentionally falsified his response or intended to obfuscate the truth, especially in light of his 2009 response.

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 appellant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the 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. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis. (See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966))

There is some evidence against mitigating Applicant's conduct. Applicant was charged and convicted of DWI in 2012; charged with two domestic violence incidents that occurred in 2013 and 2016, both of which were subsequently dismissed; fired from one employer in 2016; had his security clearance suspended or revoked in 2017, reportedly because of the three criminal incidents between 2012 and 2016; and furnished an incorrect response to a question in his 2017 SF 86.

The mitigating evidence under the whole-person concept is simply more substantial. Applicant is a 39-year-old employee of a defense contractor. He has been serving as a cybersecurity systems engineer with his current employer since January 2017. He previously worked for another employer as a functional analyst (July 2010 – December 2016). A 2001 high school graduate, he received an associate's degree in 2009, a bachelor's degree in 2010, and a master's degree in 2016. He enlisted in the U.S. Navy in January 2002, and served on active duty until March 2006, when he was honorably discharged as an AZ3 (E4). He remained in the U.S. Navy Reserve (Inactive) until 2008. He was initially granted a security clearance in 2002, and he eventually held a top secret clearance. He has two children, born in 2006 and 2014. He has sole custody of the older child since 2017, and shares custody of the younger child. His character references, including his current Cyber Security Manager, think very highly of him.

Overall, the evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has mitigated the security concerns arising from his criminal conduct and personal conduct. See SEAD 4, App. A, ¶¶ 2(d)(1) through 2(d)(9).

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:	FOR APPLICANT
Subparagraphs 1.a. and 1.d.:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a. through 2.d.:	For Applicant
Paragraph 3, Guideline F:	WITHDRAWN
Subparagraph 3.a.:	Withdrawn

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

ROBERT ROBINSON GALES
Administrative Judge