



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



In the matter of:)
)
) ISCR Case No. 21-01304
)
Applicant for Security Clearance)

Appearances

For Government: Jeffrey T. Kent, Esq., Department Counsel
For Applicant: *Pro se*

01/26/2023

Decision

HARVEY, Mark, Administrative Judge:

Guidelines F (financial considerations) and J (criminal conduct) security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On April 12, 2018, Applicant completed a Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On July 22, 2021, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; 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) On November 16, 2021, the DOD issued an amendment to the SOR. (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 Guidelines F and J. (HE 2)

On September 23, 2021, and November 29, 2021, Applicant responded to the SOR, and he requested a hearing. (HE 3) On December 7, 2021, Department Counsel was ready to proceed. Processing of the case was delayed due to the COVID-19 pandemic. On September 1, 2022, the case was assigned to me. On September 19, 2022, DOHA issued a notice of hearing, setting the hearing for November 3, 2022. (HE 1) Applicant's hearing was held as scheduled using the DOD Microsoft Teams video teleconference system. (*Id.*)

During the hearing, Department Counsel offered eight exhibits, and Applicant offered two exhibits. (Transcript (Tr.) 26-30; GE 1-8; Applicant Exhibit (AE) A-AE B) There were no objections, and all proffered exhibits were admitted into evidence. (Tr. 29-30, GE 1-8; AE A-AE B)

On November 16, 2022, DOHA received a transcript of Applicant's security clearance hearing. Applicant provided seven post-hearing exhibits; and all exhibits were admitted without objection. (AE D-AE J) The record closed on December 1, 2022; however, January 19, 2023, Applicant submitted one document, which was admitted into evidence. (Tr. 92-93; AE J)

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

Findings of Fact

In Applicant's SOR response, he admitted the SOR allegations in ¶¶ 1.a through 1.k and 2.a. (HE 3) He also provided mitigating information. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 50-year-old outside machinist employed by a large DOD contractor for the previous five years. (Tr. 8, 10) In 1980, he received a General Education Development diploma. (Tr. 8) He has attended college; however, he did not receive a degree. (Tr. 8) He was married three times, and his most recent marriage was in 2020. (Tr. 9) His children are ages 15, 24, and 27 years old. (Tr. 10)

Financial Considerations

Applicant's gross salary is about \$130,000, and his spouse's salary is about \$50,000. (Tr. 54, 72) His spouse pays some of the family expenses. (Tr. 53) They do not have any car payments. (Tr. 54) Starting in March 2022, Applicant paid about \$200 monthly to employ two credit-repair companies (CRC) to contest the debts on his credit report. (Tr. 47-52) He wanted better credit to enable him to purchase a house. (Tr. 47) He generated a budget. (Tr. 48) He tries to set aside 75 percent of his pay after making all payments for debts and expenses for savings. (Tr. 48, 53-54) He has about \$20,000 in savings. (Tr. 55) On September 21, 2022, he and his spouse closed on a house with a

mortgage of about \$402,000, a monthly payment of about \$2,800, and about \$21,000 cash due at closing. (AE B) On August 8, 2022, his credit scores from Equifax, Experian, and TransUnion ranged from 635 to 685. (AE A)

The SOR alleges 11 delinquent debts totaling \$32,275, and their status is as follows.

SOR ¶ 1.a alleges a delinquent child-support account placed for collection for \$5,157. Applicant's weekly child-support responsibility is \$138 for his 15-year-old son. (Tr. 34) The payments are made automatically from his paycheck. (Tr. 34) Applicant was in jail for nine months (February to October 2019) because he was charged with rape, and he was unable to pay his child support. (Tr. 33) His August 11, 2020 credit report indicates the account is \$5,814 delinquent. (Tr. 34; GE 2 at 4) Applicant's November 17, 2022 child-support statement shows his current arrearage is \$2,571. (Tr. 36; AE C)

SOR ¶¶ 1.b, 1.c, and 1.i allege three charged-off accounts for \$2,030, \$1,287, and \$139. The \$2,030 debt was for the purchase of a vehicle. (Tr. 36) He said the \$2,030 account was current before he was arrested for rape. (Tr. 36) The debt for \$1,287 was a personal loan for a trailer. (Tr. 37) On December 10, 2021, the creditor wrote the \$1,287 debt was satisfied. (AE G) Applicant said the other accounts were paid around April 2022. (Tr. 36-38, 42) He provided a December 10, 2021 account statement showing a loan payoff of \$1,200 of a \$3,570 balance for one account. (AE D) He provided two undated account statements showing balances of \$2,030 and \$139. (AE E; AE F) The \$139 account statement has a handwritten note on it indicating it was paid on December 21, 2021. (AE F) I accept his verbal averment that all three debts are resolved.

SOR ¶¶ 1.d through 1.h allege five medical accounts placed for collection for \$523, \$368, \$279, \$222, and \$174. Applicant said he paid the \$523 medical debt a few months ago. (Tr. 38) He believed he paid some of the other medical debts; however, he was contesting some medical debts because his son may be responsible for them. (Tr. 39-40) I have credited him with either paying or attempting to verify his responsibility for the five medical debts.

SOR ¶ 1.j alleges a telecommunications account placed for collection for \$82. Applicant has an account with the creditor, and he intends to pay this debt. (Tr. 42-43)

SOR ¶ 1.k alleges a charged-off account for \$11,508. Applicant said around 2015 he cosigned for the vehicle loan with a girlfriend, and she was supposed to make the payments. (Tr. 44-46) The relationship ended. (Tr. 45) He acknowledged he was legally responsible for the payments; however, he never made any payments. (Tr. 46) He told the OPM investigator that he refused to pay for the vehicle, and he should not be held responsible for the debt. (GE 8 at 9)

Applicant's October 7, 2022, credit report shows one charged-off account with a zero balance and 14 accounts with "pays account as agreed" status. (GE 4) It does not show any debts in collections. (*Id.*)

Criminal Conduct

SOR ¶ 2.a alleges and Applicant admitted he was charged with rape. (SOR response) However, he denied that he raped Ms. A. Court records indicate in July 2019, he was indicted based on a grand jury true bill; he was arraigned; and in October 2019, the charge was *nolle prosequi*. (GE 5 at 3) There was a search warrant for the sheets because Ms. A described the sheets and said he ejaculated on the sheets after the rape. (GE 6) Applicant denied that he ejaculated on the sheets. (Tr. 81; GE 6 at 3, 9) The police found the sheets Ms. A described in Applicant's washer when the search warrant was executed. (GE 6 at 9) Applicant said the police did not have his DNA or other physical evidence to corroborate Ms. A's allegation of rape. (Tr. 25, 68, 81-82) Ms. A was present for one court hearing; she failed to appear at court for the next hearing; and the charge was dismissed. (Tr. 25) Applicant was in jail for nine months. (Tr. 25) He was reinstated at his job. (Tr. 71)

Applicant said a week before he met Ms. A, he applied for a passport because he was planning a trip outside the country. (Tr. 24) He did not provide a copy of his passport application. He met Ms. A through an online account. (Tr. 56) Ms. A was 38 years old. (Tr. 56) He met Ms. A for the first time in person at a gym in February 2019, and she went to his residence, where he received oral sex from her. (Tr. 21, 56, 72-74) The following day, he purchased the parts to repair Ms. A's brakes on her car, and he went to Ms. A's residence to work on the brakes of her car. (Tr. 21-22, 57-58) The third day, Ms. A came to Applicant's residence around midnight to watch a movie. (Tr. 58) She went outside of his house to smoke marijuana. (Tr. 77) He said Ms. A was intoxicated when she was at his residence. (Tr. 57-58) Even though he had fixed her brakes the previous day, it "never crossed his mind" that she was coming over to his residence to engage in sexual activity with him. (Tr. 89-90)

Ms. A said that she and Applicant were in bed watching a movie, and he put her hand on his penis. (GE 6 at 6) She told him that she was not doing that, and he said, "I'll be damned." (*Id.*) Applicant got on top of her, pulled her pants down, pushed her legs apart, and engaged in sexual intercourse with her against her will. (*Id.*) She screamed and yelled that she did not want Applicant to have sexual intercourse with her. (*Id.*)

Applicant denied that he put her hand on his penis, climbed on top of her, and engaged in sexual intercourse with her. (Tr. 75-77) He said she slept on his sofa, and she did not sleep in his bed. (Tr. 87) He did not explain why she engaged in oral sex with him and then two days later refused his sexual advances. (Tr. 77-78)

Applicant said he went to the restroom to take a shower, and when he came back into the room where he left his wallet, he noticed his wallet had moved. (Tr. 22, 59, 78) He believed Ms. A had gone through his wallet; he checked the contents of his wallet; and he noticed one of his bank cards was missing from his wallet. (Tr. 22, 78) He accused Ms. A of taking his bank card. (Tr. 22)

In response to Applicant's accusation, Ms. A said "you don't believe me, then I'll strip for you, and show you I ain't got it." (Tr. 22) Ms. A took off her pants; she pulled down

her panties; she pulled up her shirt; and his credit card fell out from under her bra strap onto the floor. (Tr. 23, 78-79) Applicant did not explain why Ms. A would lift up her shirt if she knew his bank card was under her bra strap. Ms. A put her clothes on and ran out of his residence. (Tr. 23, 80-82)

At about 7:00 a.m., Ms. A backed her car into the street, and she hit another car that Ms. B was driving down the street. (Tr. 23, 59, 83) Applicant said Ms. A drove away without telling Ms. B her contact information. Applicant advised Ms. B about Ms. A's contact information. (Tr. 23) About three minutes later, Ms. A drove back to Applicant's residence and almost hit him with her vehicle. (Tr. 23, 83) According to Applicant, Ms. A complained about him providing information to Ms. B, she said "you so-and-so, you gave my f'n information to that lady." (Tr. 83) Ms. A continued, ". . . well you gave the lady my information. I'm going to tell the police you raped me." (Tr. 23, 81, 84) He did not know whether Ms. B heard Ms. A make this threat. (Tr. 84)

Police officers went to Applicant's residence because of a report of an accident with no injuries. (GE 6 at 3) Ms. A told the police that she stayed overnight at Applicant's residence; he made sexual advances; she told him to stop; he got on top of her, pulled down her pants; and raped her. (*Id.*) The police report does not mention where Applicant was located when the police were getting the initial report from Ms. A. (*Id.*) Later the morning of accident, the police searched Applicant's residence. (*Id.* at 5) Applicant was not present during the search. (*Id.* at 6)

A few hours later, the sheriff's office called Applicant, advised him of Ms. A's allegations, and asked him what happened. (Tr. 24; GE 6 at 7) He denied that anything happened except Ms. A hit Ms. B with Ms. A's vehicle. (Tr. 61, 91) The sheriff's office asked him to come to their office; Applicant said he would be there in 20 minutes; Applicant contacted an attorney; and his attorney advised him that he did not need to go to the sheriff's office. (Tr. 24, 84; GE 6 at 7)

Shortly after the alleged rape, Applicant sent Ms. A several texts apologizing to her. (Tr. 86) Copies of the texts are not part of the record, and Applicant said he did not retain copies of the texts. (Tr. 87) He said he sent the texts to show he was being reasonable and holding his cool. (Tr. 87)

A warrant for his arrest was issued; however, Applicant said he was unaware a warrant had been issued until after he had already started his trip to another country. (Tr. 24, 60, 62) The September 10, 2020 Office of Personnel Management (OPM) personal subject interview (PSI) states Applicant's brother told him about the arrest warrant before he left the jurisdiction where the arrest warrant was issued. (GE 8 at 5) At his hearing, at first, he said he bought his airline ticket with his bank card. (Tr. 85) Then he said his brother's fiancé bought the ticket online. (Tr. 86) He flew out of the state where he is a resident four days after the arrest warrant was issued. (Tr. 85) He could have cancelled his flight and returned to his state of residence. (Tr. 62) At his hearing, he admitted that he elected to continue his trip after he learned of the warrant. (Tr. 24, 61-62) He was arrested at an airport where he was going to take a connecting flight outside the country. (Tr. 24, 61-62) He spent 28 days in jail in the state where he was arrested before he was

extradited back to his residence state. (Tr. 64) He was denied bail because he was considered a flight risk. (Tr. 64) He denied that he was fleeing to avoid an arrest. (Tr. 24) He said he was planning to return from the foreign country. (Tr. 63) He did not have a reservation for a hotel in the foreign country, and he did not have a ticket for a return flight to the United States. (Tr. 63)

Applicant believed Ms. A went through his wallet while he was in the shower and had written down his credit card numbers. (Tr. 22) Several weeks after the incident involving Ms. A, he noticed \$400 in charges on one of his accounts, and he believed that Ms. A made them. (Tr. 68-69) He did not tell the police that he believed Ms. A had committed a \$400 larceny. (Tr. 68) He did not pay the \$400 bill. (Tr. 69) He said Ms. A lied about her place of employment. (Tr. 88-89)

Credibility

In 1987, when Applicant was 16 or 17 years old, he was arrested for three allegations of second degree burglary based on his breaking and entering into commercial establishments to steal appliances and televisions. (Tr. 65; GE 8 at 6) In 1988, he was convicted and sentenced to 10 years in jail. (*Id.*) He served about four years in jail. (*Id.*)

In 1998, Applicant was arrested for making a false statement, a felony offense, when he applied for a concealed carry permit because he failed to disclose his felony conviction in 1988. (GE 8 at 6) He was subsequently convicted of making a false statement. (*Id.*) He was sentenced to pay a fine, and he was placed on probation. (*Id.*)

Section 22 of Applicant's April 12, 2018 SCA asked "Have you EVER been charged with any felony offense?" (GE 1 at 26 (emphasis in original)) Applicant answered, no, and did not disclose these felony charges. (*Id.* at 27) He said he did not disclose his felonies because he thought they did not meet the reporting criteria. (GE 8 at 6)

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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 Director of National Intelligence 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

Financial Considerations

AG ¶ 18 articulates the security concern for financial problems:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise

questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

The Appeal Board explained the scope and rationale for the financial considerations security concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility.

In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted).

AG ¶ 19 includes disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts"; and "(c) a history of not meeting financial obligations." The SOR alleges 11 delinquent debts totaling \$32,275. The record establishes AG ¶¶ 19(a) and 19(c). Further discussion of the disqualifying conditions and the applicability of mitigating conditions is contained in the mitigation section, *infra*.

The financial considerations mitigating conditions under AG ¶ 20 are as follows:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant described a circumstance which he believed was beyond his control that adversely affected his finances. He was in jail for nine months in 2019. The circumstance was not beyond his control as he was in jail without bail because he attempted to flee the jurisdiction.

The financial allegations in SOR ¶¶ 1.a through 1.j are mitigated. He either paid, disputed, or the creditor was unable to locate these debts, and they no longer appear on his credit reports as delinquent. He made enough progress on his child-support debt to show good faith.

Applicant is not credited with mitigating the debt in SOR ¶ 1.k, a charged-off account for \$11,508. He employed two CRCs to dispute negative items on his credit report, and the SOR ¶ 1.k debt was dropped from his credit report. He acknowledged he was responsible for this debt, and he did not make any payments.

A "charged-off debt" is an accounting entry. A creditor considers a debt owed to the creditor to be an asset. When the value of the asset is in doubt, the creditor is required to change the status of the debt to reflect its current status. When the debt appears to be uncollectible, the creditor should change the status for accounting purposes from being an asset to charged off. Notwithstanding the change to charged-off status, a creditor may still sell the debt to a collection agent, and the debtor may still pay or settle the debt. Eventually, the charged-off debts will be dropped from the debtor's credit report. "[T]hat some debts have dropped off his [or her] credit report is not meaningful evidence of debt resolution." ISCR Case No. 14-05803 at 3 (App. Bd. July 7, 2016) (citing ISCR Case No. 14-03612 at 3 (App. Bd. Aug. 25, 2015)). The Fair Credit Reporting Act requires removal of most negative financial items from a credit report seven years from the first date of delinquency or the debt becoming collection barred because of a state statute of limitations, whichever is longer. Debts may be dropped from a credit report upon dispute

when creditors believe the debt is not going to be paid, a creditor fails to timely respond to a credit reporting company's request for information, or when the debt has been charged off. "Mere evidence that debts no longer appear on credit reports is not reason to believe that they are not legitimate or that they have been satisfactorily resolved." ISCR Case No. 16-02941 at 2 (App. Bd. Dec. 29, 2017) (citing ISCR Case No. 14-03747 at 2-3 (App. Bd. Nov. 13, 2015)).

Applicant and his spouse have a total gross annual income of about \$180,000. He has \$20,000 in his savings account. He did not establish that he was unable to make more progress sooner in the resolution of the SOR ¶ 1.k debt. He did not establish a track record of consistent payments on this debt, and there is insufficient assurance that this debt is being resolved. Under all the circumstances, he failed to establish mitigation of financial considerations security concerns.

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 one condition that could raise a security concern and may be disqualifying in this case: "(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."

In July 2019, a grand jury indicted Applicant for rape. The evidentiary standard for a grand jury indictment is probable cause to believe the defendant committed the offense. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 423 (1983). Probable cause exists where the facts and circumstances are reasonably trustworthy and "sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been . . . committed." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). *See also Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion) (probable cause does not require a fact to be "more likely true than false"); *Escobedo v. United States*, 623 F.2d 1098, 1102 (5th Cir. 1980) ("probable cause" means "the existence of a reasonable ground to believe the accused guilty") (internal quotation marks omitted). "Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable-cause] decision." *Illinois v. Gates*, 462 U.S. 213, 235 (1983).

The government had the initial burden of proving Applicant committed rape. Security clearance proceedings employ the "substantial evidence" evidentiary standard, which 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). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). *See ISCR Case No. 15-05049 at 4 (App. Bd. July 12, 2017) ("A Judge's material findings must be based on*

substantial evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence.”) (citing ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014)). The substantial evidence standard is more rigorous than the probable cause standard. See *TVA v. Whitman*, 336 F.3d 1236, 1240 n. 6 (11th Cir. 2003). Applicant’s grand jury indictment is not given any weight in the determination of whether there is substantial evidence that Applicant committed rape.

In ISCR Case No. 18-02018 at 4 (App. Bd. Nov. 4, 2021) the administrative judge concluded that the applicant in that case committed a sexual assault even though that applicant was never arrested or charged with sexual assault. The Appeal Board affirmed the denial of the applicant’s security clearance and explained that law enforcement and prosecutorial determinations do not limit an administrative judge in his or her assessment of criminal charges as follows:

“In DOHA proceedings, a Judge can make findings of criminal conduct even if the applicant has not been formally charged with a criminal offense by the relevant criminal authorities.” See, e.g., ISCR Case No. 03-04931 at 4 (App. Bd. Jun. 3, 2005). See *also*, ISCR Case No. 17-00506 at 3 (App. Bd. Aug. 7, 2018) (“Even if criminal charges are reduced, dropped, or result in an acquittal, the Judge may still consider the underlying conduct in evaluating an applicant’s security clearance eligibility.”). A disqualifying condition at issue in this case highlights this point. Under Disqualifying Condition 13(a), a security concern could arise from “sexual behavior of a criminal nature, whether or not the individual has been prosecuted.” Directive, Encl. 2, App. A ¶ 13(a) (emphasis added). In this case, the Judge’s determination that [a]pplicant committed a sexual assault is merely an administrative conclusion that substantial evidence exists in the record to establish [a]pplicant engaged in security-significant conduct. Applicant failed to establish that the Judge acted beyond the authority provided him in the Directive when he concluded Applicant committed a sexual assault.

AG ¶ 31(b) is established. Ms. A said she expressed her desire not to engage in sexual intercourse with Applicant. Nevertheless, Applicant overcame her resistance and engaged in sexual intercourse with her without her consent. She left his residence in a hurry, and she accidentally struck Ms. B’s vehicle. She promptly reported the rape to law enforcement. There is substantial evidence Applicant committed the crime of rape, and consideration of mitigating conditions is required.

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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board explained an 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).

Applicant asserts that Ms. A falsely accused him of rape because he told Ms. B her identity after Ms. A hit Ms. B's vehicle. He denied that he engaged in sexual activity with Ms. A on the date she alleged he raped her. "There is no rule of evidence that compels the Judge to accept an applicant's statement merely because it is not rebutted by record evidence." ISCR Case No. 20-01361 at 3 (App. Bd. Dec. 21, 2021) (citing ISCR Case No. 99-0005 at 3 (App. Bd. Apr. 19, 2000)). In this instance, Applicant statement denying the rape was rebutted by Ms. A's statement as summarized in the police report.

Ms. A's statement about being raped is more credible than Applicant's statement denying the rape. She was in such a rush to leave his residence that she ran out of his house, and then backed out of his driveway so quickly she struck Ms. B's vehicle. Ms. A made a timely report of the rape to the police. Applicant fled the jurisdiction after he learned there was a warrant for the arrest. He purchased a one-way ticket to a foreign country using another person's credit card. He was arrested in another state just before he was going to board a flight to a foreign country.

The SOR does not allege: (1) Applicant fled the jurisdiction after an arrest warrant was issued; (2) In 1988, he was convicted of second degree burglary for breaking and entering into commercial establishments to steal appliances and televisions; (3) In 1998, he was convicted of making a false statement; (4) He failed to disclose these two felonies on his April 12, 2018 SCA; and (5) He failed to admit that he engaged in sexual intercourse with Ms. A against her wishes and without her consent. 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) (citations omitted)). The non-SOR allegations will not be considered except for the five purposes listed above.

Applicant failed to convincingly rebut Ms. A's allegation that he raped her. The rape offense is recent. He is not rehabilitated. His rape offense continues to cast doubt on his reliability, trustworthiness, and good judgment. Criminal 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 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 Guidelines J and F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 50-year-old outside machinist employed by a large DOD contractor from for five years. He has attended college. He is receiving annual pay of about \$130,000, and he is credited with being an excellent employee.

Applicant did not provide a good enough reason for his delay in failing to pay or establish a consistent track record of payments for the debt in SOR ¶ 1.k, especially in light of his and his spouse's current income, which totals about \$180,000 annually. He acknowledged his responsibility for this debt, and he failed to provide a good explanation for why he did not use more of his income to address the SOR ¶ 1.k debt.

There is substantial evidence Applicant committed rape in February 2019. He denied that he committed this rape; however, the statement of the victim, Ms. A, is more credible than Applicant's denial. The rape is recent.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Applicant's evidence did not overcome the *Dorfmont* presumption.

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. Unmitigated criminal conduct and financial considerations security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted.

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 F:	AGAINST APPLICANT
Subparagraphs 1.a through 1.j:	For Applicant
Subparagraph 1.k:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances 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