



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



In the matter of:)	
)	
)	ISCR Case No. 20-03448
)	
Applicant for Security Clearance)	

Appearances

For Government: Mark Lawton, Esq., Department Counsel
For Applicant: *Pro se*

05/01/2023

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant mitigated the criminal conduct and personal conduct security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On December 1, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). The action was taken under Executive Order (Exec. Or.) 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) implemented by DOD on June 8, 2017.

Applicant responded to the SOR (Answer) on December 28, 2021, and he elected to have his case decided on the written record in lieu of a hearing. Pursuant to ¶ E3.1.7 of the Directive, Department Counsel requested a conversion from an administrative determination to a hearing on March 4, 2022. The case was assigned to me on November 3, 2022. The Defense Office of Hearings and Appeals (DOHA) issued

a notice of video teleconference hearing on November 14, 2022, scheduling the hearing for December 1, 2022. I convened the hearing as scheduled.

Government Exhibits (GE) 1 through 5 were admitted in evidence without objection. Applicant testified and he did not call any witnesses or submit any documentation. At Applicant's request, I kept the record open for documentation until December 15, 2022. I timely received documentation from Applicant that I marked collectively as Applicant Exhibit (AE) A and admitted in evidence without objection. DOHA received the hearing transcript (Tr.) on December 12, 2022.

SOR Amendment

Department Counsel amended SOR ¶ 1.b to strike the second sentence, which reads, "As of the date of this Statement of Reasons, final disposition of this case is still pending," and replace it with "You pled guilty in or about October 2019 and, in accordance with your plea, were found guilty of misdemeanor disorderly conduct, second degree."

Findings of Fact

Applicant admitted SOR ¶¶ 1.a, 1.b, and 1.c. He neither admitted nor denied SOR ¶ 2.a, and I have construed his silence as a denial of that allegation. His admissions are incorporated in my findings of fact. He is 36 years old, he married in 2009, and he divorced in 2015. He has a 12-year-old child from his previous marriage, and he and his ex-spouse were expecting another child as of the date of the hearing. (Answer; Tr. at 7, 9-10, 12-15, 41-45; GE 1, 2; AE A)

Applicant obtained his general educational development certificate in January 2006. He attended college from January 2006 to May 2007 and February 2013 to August 2013 but did not earn a degree. He was unemployed from September 2005 to January 2006, September 2007 to January 2008, and January 2017 to January 2018. He enlisted in the U.S. military in January 2008 and received a general discharge under honorable conditions in approximately February 2016, as further discussed below. He worked for a previous DOD contractor from January 2018 until November 2018. Since then, and as of the date of the hearing, he has worked for his current employer, another DOD contractor, in information technology and cybersecurity. He was first granted a security clearance in 2009, while serving in the U.S. military. (Tr. at 5-7, 25-27, 42, 52-54; GE 1, 2, 3; AE A)

In approximately August 2004, Applicant was arrested and charged with misdemeanor harassment (physical contact) no injury. He was 18 years old. He was with friends at a gas station convenience store, and he put the palm of his hand in front of a girl's forehead as she walked past him. He testified, "I was just being dumb." He pled guilty and was credited for one day served and fined. He disclosed this incident on his 2009 security clearance application (SCA). (SOR ¶ 1.c; Answer; Tr. at 25, 40-41, 44, 46; GE 2, 5; AE A)

In approximately February 2015, Applicant received a general discharge under honorable conditions for misconduct (serious offense) from the U.S. military, after receiving a non-judicial punishment (NJP) for adultery and communicating a threat. After his then-spouse discovered that he had been having an affair, she repeatedly telephoned him to provoke an admission while secretly recording their conversation. He threatened her during one such telephone conversation, after she told him that she would leave with all his possessions and he would never again see their daughter. She reported him and provided the recording to his command. He admitted guilt. He was ordered to and received anger management counseling. He disclosed this information on his 2018 SCA. He expressed remorse for his actions and pledged to never again engage in such conduct in the future. He and his ex-spouse have become friends since their divorce. They communicate effectively with one another to raise their daughter, and they visit each other and take trips together. She wrote a letter of support attesting to his personal growth and commitment to her, their daughter, and their unborn child. (SOR ¶ 1.a; Answer; Tr. at 23-27, 42-47; GE 1, 3; AE A)

In approximately May 2019, Applicant was arrested and charged with felony wanton endangerment, first degree, police officer, after a handgun was pointed at a police officer. This incident occurred while Applicant was visiting his mother, who lived with his brother, in a different state than his state of residence. One night, after his brother returned from socializing with friends, Applicant and his brother consumed alcohol together at his brother's home. They then went to a bar, where they continued to consume alcohol, and then they went to eat at a restaurant. Applicant's brother drove them to the bar and restaurant in Applicant's brother's car. (SOR ¶ 1.b; Answer; Tr. at 24-25, 27-40, 44-51, 53-54; GE 3, 4, 5; AE A)

Applicant's then-girlfriend and her friend arrived at the same restaurant shortly after Applicant and his brother. His brother and then-girlfriend began arguing with each other. She and Applicant exited the restaurant to sit in her car, and Applicant's brother continued to argue with her. Applicant's brother learned that she was cheating on Applicant while Applicant was away. Applicant broke his then-girlfriend's passenger side window and then went to sit inside his brother's car. Applicant's brother continued to argue with Applicant's then-girlfriend and her friend, and a bystander allegedly pulled a knife out on Applicant's brother in defense of Applicant's then-girlfriend and her friend. Applicant's brother then came to his car and retrieved a handgun that, unbeknownst to Applicant, was inside the car. When Applicant's brother walked towards the restaurant with the handgun, Applicant immediately began running to his brother's house. He heard someone say they were calling the police, so he used the back streets to avoid the police. He knew he was intoxicated. (SOR ¶ 1.b; Answer; Tr. at 24-25, 27-40, 44-51, 53-54; GE 3, 4, 5; AE A)

When Applicant arrived at his brother's home, he knocked on the doors and windows to wake up his mother so that she could let him in. He then went inside and locked the door behind him. Soon after, there was a knock on the door. Applicant did not open the door. He asked who it was and attempted to look through a window at the top of the door to see who was there. The knocking continued and Applicant knocked back. Applicant testified:

They kept doing whatever I -- whatever I did. They wouldn't answer, wouldn't tell me who they were. They weren't saying anything. They would just knock and they wouldn't stop. I told them to go away. They wouldn't go away.

(Tr. at 33-36)

Applicant then cracked the door open while pointing his vaping device and sweeping it back and forth, from left to right, so that it looked like a gun. At the hearing, he denied it was a gun and maintained he did not possess a gun. He then heard, "police, drop the gun or we'll shoot," so he threw the vape on the ground outside the door and slammed it shut. Applicant's brother arrived and informed the police officers that Applicant had pointed a vape out the door. Applicant obeyed the officers' orders to come out of the home and he was arrested. The police swept his brother's home, and with his brother's assistance, found a handgun in the cabinet beneath the kitchen sink. The police report noted that this handgun belonged to Applicant's brother, and it matched the handgun that was pointed out the door. Unbeknownst to Applicant, Applicant's brother had driven home while Applicant was running from the restaurant and put his handgun underneath the kitchen sink then left. Applicant's brother returned to the home when Applicant's mother telephoned him to tell him that the police were at the home looking for him. (SOR ¶ 1.b; Answer; Tr. at 24-25, 27-40, 44-51, 53-54; GE 3, 4, 5; AE A)

In October 2019, Applicant pled guilty to misdemeanor disorderly conduct, 2nd degree. He was credited with five days served. He did not want to fight the case because he lived and worked in a different state, and he already missed work for his time spent in jail. He was prohibited from owning or possessing a firearm for two years. He complied with the terms of his plea. He reported this incident to his supervisor and security manager, and he discussed it during his 2019 background interview. His brother was charged with and pled guilty to felony wanton endangerment. He was prohibited from possessing a firearm and remained on probation as of the date of the hearing. (SOR ¶ 1.b; Answer; Tr. at 24-25, 27-40, 44-51, 53-54; GE 3, 4, 5; AE A)

Applicant testified that he would not again put himself in a similar position because "I can't get in trouble. . . . I don't want to get in trouble." He still sees his brother on the occasions when he visits his mother, and he stated that his brother is on a better path. Applicant stated that he takes care to not put himself in similar situations, he does not frequent bars, and he does not associate with people who exhibit reckless behavior. If he were to find himself in a risky situation, he stated that he would endeavor to find a safe way out of it and recognized that he should have taken an Uber or taxi to a safe friend or family's residence. He testified that he received favorable performance evaluations from his previous and current employers who are DOD contractors. He stated that he has received performance-based promotions yearly from his current employer, and he earned \$93,000 annually as of the date of the hearing, an increase from \$85,000 annually in 2018. (Tr. at 51-55; AE A)

Applicant's direct supervisor since approximately 2019 wrote a letter of support for Applicant and described Applicant as a stellar performer who has demonstrated "notable personal growth and maturity." Applicant's colleague and close friend of four years also attested to Applicant's strong work ethic and professionalism. This individual also noted Applicant's remorse for his past mistakes and strength of character. Another colleague, who previously served with Applicant in the U.S. military, also attested to Applicant's reliability, dedication, and maturity. (AE A)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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(a), 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 Exec. Or. 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* Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct as: “[c]riminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.”

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant: “(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.”

Applicant was convicted in 2004 of misdemeanor harassment and in 2019 of misdemeanor disorderly conduct. He also received a general discharge under honorable conditions for misconduct in 2015, after NJP for adultery and communicating a threat. AG ¶ 31(b) is established.

AG ¶ 32 provides the following mitigating conditions:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant’s 2004 conviction for misdemeanor harassment occurred when he was a young and immature 18-year-old. The circumstances surrounding his 2015 discharge from the U.S. military happened under unusual circumstances involving his ex-spouse, with whom he has since become friends and is committed to raising their daughter and unborn child. Almost four years have passed since his 2019 arrest for misdemeanor disorderly conduct. He was candid and sincere at the hearing, he accepted responsibility, and he was remorseful for his criminal involvement. He reported the 2019 incident to his supervisor and security manager and discussed it during his 2019 background interview, and he disclosed information about his 2004 conviction and 2015 discharge on his SCAs. He has a favorable employment record with his current employer, to include yearly performance-based promotions since 2018 and his direct supervisor’s attestation to Applicant’s stellar performance and notable personal growth and maturity. I find that enough time has elapsed since his criminal behavior and

without recurrence of criminal activity, and the record evidence does not cast doubt on his reliability, trustworthiness, and judgment. AG ¶¶ 32(a) and 32(d) are established.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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. . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant:

(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 displayed untrustworthiness, questionable judgment, and unreliability, which led to his 2004 and 2019 convictions and his 2015 general discharge under honorable conditions for misconduct in 2015. AG ¶ 16(e)(1) is established.

I have considered all of the mitigating conditions under ¶ AG 17 and considered the following relevant:

(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.

For the same reasons set forth above in my Guideline J analysis, I find that ¶¶ AG 17(c), 17(d), and 17(e) are established.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J and E in my whole-person analysis. Applicant was candid and sincere at the hearing, he accepted responsibility, and he was remorseful for his criminal involvement. Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the criminal conduct and personal 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:	FOR APPLICANT
Subparagraphs 1.a - 1.c:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

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.

Candace Le'i Garcia
Administrative Judge