



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



In the matter of:)	
)	
)	ISCR Case No. 22-02391
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: Jason Wareham, Esq.

07/18/2023

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline J, criminal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On December 19, 2022, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J. The DOD acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on January 4, 2023, and he requested a hearing. The case was assigned to me on February 17, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 10, 2023, and the hearing

was held as scheduled on April 11, 2023. The Government offered exhibits (GE) 1-3, which were admitted into evidence without objection. The Government's exhibit list was marked as hearing exhibit (HE) I. Applicant testified, called four witnesses (a therapist/counselor, his wife, and two character witnesses). He also offered Applicant exhibits (AE) A-J, which were admitted without objection. DOHA received the hearing transcript (Tr.) on May 1, 2023.

Findings of Fact

In Applicant's answers, he admitted the allegation in the SOR with explanations. His admission is adopted as a finding of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 43 years old. He married in 2001 and has three children, two who still live at home. He served in the U.S. Marine Corps from 2001 to 2005 and deployed twice to combat areas. He was honorably discharged. He holds a master's degree. He has worked for his current defense-contractor employer since 2008. He has held a clearance for approximately 20 years and has never had a security incident. (Tr. 88-89, 91-92; GE 1)

The SOR alleged in October 2020 that Applicant was charged with felony assault, misdemeanor assault, false imprisonment, two counts of child abuse, harassment, and criminal mischief. In March 2021, he pleaded guilty to misdemeanor assault and received a two-year supervised deferred judgment. The events leading to his conviction are described below. (SOR ¶ 1.a)

On October 17, 2020, at approximately 11:30 pm, police officers (Officers) responded to a call for assistance at Applicant's home. The call was made by one of Applicant's teenage daughters. The call reported a domestic violence incident between Applicant and his wife. (GE 2 (Affidavit of Probable Cause))

Upon arriving at the home, the Officers knocked several times before Applicant responded. The Officers explained to Applicant that they were responding to a reported domestic disturbance. The Officers indicated they needed to enter the residence because of the nature of the reported domestic disturbance. According to the Officers, Applicant refused their entry and told them they needed a warrant to enter his home. The Officers entered the home even though Applicant attempted to keep them out. He further resisted being handcuffed. Applicant's answers to Government interrogatories give a contrasting version of these events. Applicant stated, "When police arrived at the scene, I was cordial and non-resistant as bodycams can show. I was very confused as to why the police wanted force [sic] entry into my residence, but I complied, nonetheless." I find the Officers' report more credible than Applicant's. (GE 2 (Affidavit of Probable Cause; Applicant's answer to interrogatory question 1 at attachment 1))

The Officers went to the basement and found Applicant's wife and two daughters locked in a bedroom. The bedroom door was damaged on the outside such that it could

not be opened from the inside. An Officer pushed the door open. Applicant's wife was observed to have a cut lip, swelling on the side of her face, a bruised eye with blood in it, and red marks on her neck. Applicant's wife told the Officers that she and her husband got into an argument and it spiraled out of control. She was hit in the head and she believed Applicant tried to drag her down the stairs by her neck. One of the daughters stated to the Officers that her mother told her multiple times that Applicant hit her on the head when she was on the stairs. She and her two daughters were able to barricade themselves in a bedroom by locking the door and placing a wooden desk against the door. Applicant tried to break the door down. One of the daughters corroborated that Applicant tried to break down the bedroom door. Applicant testified that he did not attempt to break the door down and that it was damaged weeks before by his nephew. He also claimed he did not strike or strangle his wife. I do not find Applicant's testimony credible. (Tr. 78, 84; GE 2 (Affidavit of Probable Cause))

Based upon the observations of the Officers, the statements by Applicant's wife and two daughters, and the evidence of physical injuries to Applicant's wife, as supported by the information contained in the "Affidavit of Probable Cause," Applicant was arrested on the charges of: felony assault, misdemeanor assault, false imprisonment, child abuse, criminal mischief, and harassment. (GE 2 (Affidavit of Probable Cause))

In March 2021, Applicant entered into a plea agreement, whereby he pleaded guilty to one count of misdemeanor assault and the case was handled as a deferred judgment and sentence. Applicant's conditions included being on supervised probation for two years, completion of a domestic-violence evaluation and a substance-abuse evaluation, and compliance with all treatment recommendations from the evaluations. Applicant complied with the terms by being evaluated. He followed those evaluations with participation in domestic violence and anger management treatment from May 2021 to February 2022. Substance-abuse assessments were completed in March 2021 (no indication of the results of this evaluation). Applicant's supervised deferred sentence was converted to unsupervised deferred sentence in March 2022. He successfully completed all the terms of his deferred sentence in March 2023 and his record concerning this case was sealed by the court at that time. (GE 2 (Stipulation For Deferred Judgment and Sentence and Court Order; Plea Agreement; Petition and Order to Convert Supervised to Unsupervised); AE D (Order to Seal Record))

Applicant's wife testified at his hearing that the events that led to Applicant's arrest and conviction were partially her fault because she became intoxicated that evening, and threw and broke objects in their home. She also said this was a one-time incident that had not happened before. She did not believe Applicant assaulted her that evening, rather he was trying to deescalate the situation. She does not believe her children were put at risk. She said that Applicant had one glass of champagne that night. She has been in an alcohol-treatment program in the past that included medication. She is not in a program now. She claims about one year of sobriety, off and on. I find Applicant's wife's statements to the police on the night of the incident more

credible than her hearing testimony. (Tr. 35-38, 40, 45, 47; GE 2 (Affidavit of Probable Cause))

In May 2021, as part of a court-ordered referral, Applicant began seeing Ms. B, a licensed professional counselor. Applicant engaged in 10 months of domestic-violence therapy and approximately 12 weeks of anger-management therapy. He successfully completed his treatment regimen and Ms. B opined that he was at the “low to medium end” of the scale regarding future recidivism. Ms. B also stated Applicant was honest, accountable and took responsibility for his actions. She believed that alcohol contributed to his action the night in question. Contrary to Applicant’s claims at hearing, Ms. B believed he was intoxicated the night of his arrest. She concluded this based upon the police report and his admissions to her during treatment. (Tr. 18-26; AE A-B)

Applicant testified he accepts responsibility for his actions the night of his arrest. He maintains that he only had one glass of champagne that evening and was not drunk. One of the Officers described his observation of Applicant upon his arrival as such, “I observed [Applicant] to have bloodshot and watery eyes, slurred speech and difficulty with balance.” Applicant testified that he now abstains from alcohol use. He believes the police report describing the evening’s events is inaccurate. He learned self-control and how to avoid conflict from his therapy with Ms. B. (Tr. 79-80; 83-84, 90; GE 2 (Police Report, Case # 2020-00036075, p. 5 of 6)

Two witnesses who have worked with Applicant for approximately 12 years testified on his behalf. Both believed Applicant is a peaceful person, that they have never seen him abuse alcohol, and that they would trust him holding a security clearance. One witness stated that he was aware of the incident in question, but that knowledge did not change any of his opinions about Applicant. Applicant also presented five letters from coworkers and former coworkers who universally laud his trustworthiness, worth ethic, and reliability. (Tr. 58-63, 65-69; AE F-J)

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 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, these guidelines are applied 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 careful weighing 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

The security concern 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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was charged with multiple offenses arising from the October 2020 incident at his home and he ultimately pleaded guilty to a misdemeanor assault in March 2021. I find that the above disqualifying condition applies.

I have also considered all the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

(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 has made positive strides toward rehabilitation by successfully completing his domestic-violence and anger-management therapy. There is no evidence of any subsequent violent behavior towards his family. However, I am concerned that he continues to minimize his actions that contributed to the domestic violence charge the night of his arrest. He has denied his assault (hitting or striking her) on his wife that conflicts with the physical injuries she suffered and her statements made to the police and her daughters. He denied damaging the door in his home, despite contrary statements by his daughters. He denied the extent of his alcohol use that night, despite the contrary observation of the responding Officers and his statement to the contrary to Ms. B. I also must temper the amount of stock I put into his subsequent clean record since the incident because he was under the terms of his probation through March 2023. It is too soon to tell, at this point, whether he will continue to abstain from domestic violence incidents without the threat of a probation violation hanging over him. Therefore, his actions cast doubt on his current reliability, trustworthiness, and good judgment. His rehabilitation is not sufficiently established. AG ¶¶ 32(a) and 32(d) do not fully apply.

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), 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 considered Applicant's military service, including his combat deployments, and the testimony and statements of support by his colleagues. However, I also considered his continued minimization of his actions the night of his arrest.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns under Guideline J.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

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

Robert E. Coacher
Administrative Judge