



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



In the matter of:)
)
) ISCR Case No. 21-02727
)
Applicant for Security Clearance)

Appearances

For Government: William H. Miller, Esq., Department Counsel
For Applicant: Matthew L. Hickman, Esq.

11/21/2023

Decision

MURPHY, Braden M., Administrative Judge:

The Government alleged criminal conduct security concerns, cross-alleged under the guideline for personal conduct, due to several misdemeanor offenses when Applicant was between 18 and 21 years old, and a 2021 domestic violence charge. The most recent offense was dismissed following his participation in a pretrial diversion program, including anger management counseling, a program which Applicant has voluntarily continued. Applicant’s eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on April 17, 2021, in connection with his employment. On February 11, 2022, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J (criminal conduct), cross-alleged under Guideline E (personal conduct). The CAF issued the SOR under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense

(DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective within DOD on June 8, 2017.

Applicant answered the SOR on March 8, 2022 and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on June 1, 2023. On August 16, 2023, DOHA issued a notice scheduling the hearing for September 15, 2023.

The Government's Exhibit List is Hearing Exhibit (HE) II. In a January 2022 letter to Department Counsel (HE I), Applicant objected to certain Government exhibits and other matters. HE III is the Government's Discovery letter, and HE IV (not identified as such during the hearing) is Applicant's Exhibit list.

The hearing convened as scheduled. Department Counsel offered Governments Exhibits (GE) 1 through GE 8. GE 1-3 were admitted without objection, and GE 4-8 were admitted over Applicant's objections. (HE I; Tr. 11-16, 25). Applicant's first 8 Exhibits on HE IV (numbered 1-21) are the same as GE 1-8, so only Applicant's Exhibits (AE) 9 through 21 (some in subparts) were offered at the hearing. AE 9-17, 18a, 18b, 19a, 19b, 20, 21a, 21b, and 21c were all admitted without objection. AE 18 and 19 were withdrawn. (Tr. 29-40) Applicant also testified. After the hearing, Applicant provided one additional document (AE 22), which was admitted without objection. The record closed on September 21, 2023. DOHA received the hearing transcript (Tr.) on September 22, 2023.

Pre-hearing Objections

In his January 2022 letter to Department Counsel (HE I), Applicant's counsel raised several evidentiary matters that I addressed at the start of the hearing. He objected to admission of GE 4 through GE 8, as noted above, and the objections were overruled. (HE 1; Tr. 11-16, 25) He objected to the inclusion of Guideline E (SOR ¶ 2.a) in the SOR and to the offense at SOR ¶ 1.d as a current security concern and as part of the Government's *prima facie* case. (HE 1) Those objections were overruled. (Tr. 16-19)

Findings of Fact

Applicant denied SOR ¶ 1.a; he admitted SOR ¶¶ 1.b, 1.c, and 1.d; and he denied the cross-allegation at SOR ¶ 2.a, all with explanations. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 33 years old. He has never married and has no children. He earned an associate degree in 2014 and a bachelor's degree in 2018. He is pursuing a master's degree through his employer. He has worked as a research engineer for a university

research institute since September 2019, with a clearance. He has an annual salary of \$105,000, plus a bonus. (GE 1; Tr. 9, 53-55, 112-113)

The SOR concerns four criminal offenses, three of which occurred when Applicant was between the ages of 18 and 21. In November 2008, Applicant, then age 18, was living with his parents. Police came to the home while investigating a serious crime in the neighborhood and asked to search the home for suspects. When his parents allowed police to search Applicant's room, they found an ounce of marijuana. Applicant went to the police station for questioning, and he was arrested and charged with possession of marijuana along with a friend. In March 2009, he pleaded guilty to a charge of public nuisance and was fined \$390. (SOR ¶ 1.d) (GE 1 at 49; GE 2 at 5, 12) Applicant engaged in marijuana use between 2008 and 2011, but he has not done so since then. He has no other drug-related citations or charges. (Answer; GE 2 at 6, GE 3; Tr. 86-88)

In April 2011, when he was 21, Applicant was attending a friend's birthday party at an apartment complex. A police report indicates that he and another person were driving recklessly ("laying drag") in the parking lot. A neighborhood "courtesy officer," Mr. K. (an off-duty police officer who lived there) gave the men a "criminal trespass warning" and warned them not to return to the property, including to collect their cars, since the men had been drinking. Applicant left and walked to a friend's house nearby. When he returned to the property hours later to retrieve his car and drive home, he was held at gunpoint by Mr. K and charged with criminal trespass when police arrived. The police report reflects that the arresting officer smelled alcohol on both men. The case was nolle prossed in July 2011 and he was told not to return to the property. (SOR ¶ 1.c) (Answer; GE 1 at 50-51; GE 2 at 6, 11, GE 6, GE 8)

Applicant was at the party and said it was "a bit loud," which made Mr. K upset because he lived in the unit below. Applicant denied drag racing in the parking lot, but said he pulled out "more quickly than [Mr. K] had liked." (Tr. 80-81) He denied consuming alcohol that evening, but said it was possible that was why he was not allowed to drive away or come back later for his car. Applicant went around the corner to a friend's house. When he returned later to get his car to go to work. Mr. K was in the parking lot. He called police and held Applicant at gunpoint until police arrived. Applicant denied threatening Mr. K. (Answer; Tr. 80-86, 89-93)

Months later, in September 2011, Applicant drove to the same apartment complex and dropped a friend off. He was pulled over by police when he was leaving the property. He had forgotten that he was barred from the property when his friend asked to be dropped off there. He called it a "dumb, absent-minded thing." (Tr. 71) When Applicant attempted to converse with the arresting officers while he was being handcuffed, he was subdued with a taser. He was arrested and charged with criminal trespass and two counts of willful obstruction of law enforcement officers. In December 2011, Applicant pleaded guilty to one count of criminal trespass and the other two counts were dismissed. He was sentenced to two days in jail (time served), 12 months of probation and 24 hours of community service, which he completed. He was ordered

not to return to the property. Applicant had friends who lived there at the time, but he has never again visited the apartment complex in question, and no longer associates with anyone there. (Answer; GE 1 at 51-52; GE 2 at 6-7, 12; GE 5, GE 7; Tr. 70-80, 93-98, 116-117)

In March 2021, Applicant was arrested and charged with two domestic violence (DV) offenses: felony aggravated assault-strangulation and simple battery. (SOR ¶ 1.a) He disclosed the charges on his April 2021 SCA and discussed them in his June 2021 background interview and noted that they were still pending. (GE 1 at 47-48 GE 2 at 5) He said he kept his employer's security office informed as to the status of the case. (Tr. 114-115)

Applicant explained that he had known C for about 15 years. They met and dated in high school. They had dated occasionally but had spent years out of touch, until they reconnected in April 2020 when she moved back home from out of state. They began dating again but Applicant did not want to renew a serious relationship. In part, he said, this was because he had learned that C was involved with recreational drugs, like marijuana. (GE 2 at 5; AE 10; Tr. 56-57, 98-101)

On the night in question, in March 2021, Applicant and C went out for an evening of bowling. He said when he picked her up at her house, she had a "big gulp" of wine or liquor, 9-12 inches tall. He believed she was intoxicated. (Tr 45-46, 64) They each had one long island iced tea at the first bowling alley. (GE 2 at 5; Tr. 101)

Applicant and C went to another bowling alley and got there 30 minutes before closing. He spoke to a woman behind the counter about keeping a lane open for them to use until closing time. He said C was upset because Applicant was talking to this woman, and she left the bowling alley. Applicant and C then drove to his house, where he hoped to "smooth things over" and relax. His house was closer than hers, so they went there. (Tr. 59-61, 101-103)

Applicant said C was upset and irate on the drive home. This continued when they arrived at his house. (Tr., 62) He said he went to his room and told her to leave. He gave her money (for the ride share) and she left. He heard her outside crying. (Tr. 45-48, 62-63, 104) He denied grabbing her with both hands, choking her, lifting her up and slamming her down. He said he never touched her. He said she was intoxicated. They each had a long island iced tea at the bowling alley, and she continued drinking rum at his house when they got there. (Tr. 63-64, 66) He did not see C again after she left that evening. He went to sleep. He denied hearing the police when they knocked on his door. He said his first interaction with police was the next day, when he was arrested. (Tr. 47, 66-67, 104-105)

The police report indicates that they were called to Applicant's apartment around midnight. When they arrived, they found C outside crying uncontrollably. C said she and Applicant had gone to the bowling alley and gotten into an argument. C believed

Applicant had treated a female employee there poorly and C became upset, so they left. (GE 4 at 4-5)

According to the police report, the argument continued at Applicant's apartment. They separated and C decided to leave and go home by calling a ride service. Applicant then re-engaged, she called him a liar, and he became enraged and choked her, placing both of his hands on her, slamming her down on her back on the kitchen floor. She told the officer she could not breathe, and she described her pain level as "10" on a scale of 1-10. (GE 4 at 5)

The investigating officer noted that he looked at C's neck and "didn't see any physical injury" either there or on the back of her head. C declined medical treatment and declined an ambulance. The officer noted an odor of alcohol on C's breath but noted that she did not appear intoxicated. She said she was not sure if Applicant had been drinking, but she said that they both had used marijuana that evening. (GE 4 at 5-6) Applicant denied using marijuana that evening. (Tr. 65-66)

The report indicated that C said that Applicant "was a good person and he has never physically hurt her in the past. She stated he has a good job and "didn't want to ruin his life" by going to jail because of this incident. Police officers' attempts to engage with Applicant that evening were unsuccessful, as he did not come to the door. C left the premises via a ride service. (GE 4 at 6; Tr. 104) Applicant was later charged as alleged. (SOR ¶ 1.a)

Applicant began his testimony by repeatedly asserting that "the allegations against me never happened. They were fabricated," and "simply did not happen." (Tr. 41, 106; Answer) He denied hitting or choking C, and said, "none of those allegations are true." (Tr. 44, 118) He believes C fabricated the police report in an effort to retaliate against him for rebuffing her romantic interest. (Tr. 56-57) He denied putting his hands on her in any way. (Tr. 106) He and C have not spoken since that evening. (Tr. 106)

In January 2022, prosecutors agreed, with the victim's consent, to allow Applicant to enter into a diversion program. It included supervised probation and 40 hours of community service. He was also required to abstain from alcohol and drugs. He completed the program, in June 2022. Once that occurred, the case was nolle prossed. (AE 9, 11, 18a, 18b; Tr. 68-70, 106-107)

Applicant also began anger management counseling in September 2021, following an assessment. Applicant's explanation to the assessor about what happened with C is fairly similar to his other explanations. He "adamantly denies not [sic] putting his hands on the young lady." (AE 19a at 3) He reported that he stopped smoking marijuana at age 21. The licensed professional counselor noted that the precipitating incident appears to be "isolated and a one-time incident" though she noted that he had an "alleged physical altercation without diffusing it." A four-week anger management course was recommended. (AE 19a at 9)

Applicant found the anger management counseling helpful and has continued participating in hour-long counseling sessions long after his requirement ended. He documented six sessions (some double sessions) between September 2021 and November 2021, 15 sessions between February and December 2022, and six sessions between March and September 2023. (AE 19a, 19b, 22) He gained insight from the classes, and said they helped with his communication skills and interaction with his community and family, and with awareness of his emotions and thought process. Applicant denied any subsequent history of violence or issues at work. He has had no other subsequent criminal charges. (Tr. 43, 49-50, 87-88, 106-112, 122-123; Answer)

Applicant acknowledged mistakes. It had been years since he had been in trouble with police. He had made many decisions to step away from people and environments of trouble and focus on his career. He allowed himself to get “sucked in” to a bad situation that jeopardized his career and his family. Applicant’s life is “exponentially” better than it was when he was in his early 20s. He loves his job and is dedicated to his profession. He does not want to jeopardize the progress he has made in his career. (AE 10, 21a at 5, 21b, 21c; Tr. 41-45, 117-118)

Multiple personal and professional references provided recommendation letters attesting to Applicant’s character. The letters stated that he is a leader and good human being. He had a difficult upbringing. He worked to put himself through school. He is a success story. (AE 12) His girlfriend has never witnessed any violent behavior. He is respectful and gentle. He takes pride in his career and is very focused. He would not jeopardize what he has worked hard for. (AE 13) He has a strong work ethic, is devoted to his career and family. He is capable of protecting secrets and is very trustworthy, (AE 14-17) His supervisor at work, Mr. B., attested that he performs his work, including classified work, with responsibility and seriousness. He is a tremendous asset to the team and adds significant value. Mr. B strongly endorses Applicants’ continued eligibility for access to classified information. (AE 20)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court has held, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

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 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.” 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 not drawn inferences grounded on mere speculation or conjecture.

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 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.

Analysis

Guideline J: Criminal Conduct

AG ¶ 30 details the security concern for 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 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition 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 individual was formally charged, prosecuted, or convicted.

Applicant was charged with three misdemeanor offenses between ages 18 and 21, including a marijuana possession charge at 18 (in 2008) and two criminal trespassing charges at the same apartment complex months apart at age 21, in 2011. He was also arrested on felony aggravated assault and simple assault domestic violence charges in March 2021. AG ¶ 31(b) applies.

AG ¶ 32 sets forth the potentially applicable 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.

The misdemeanor offenses from years ago are mitigated by the passage of time. Applicant exercised some instances of poor judgment in possessing marijuana as a teenager and in being in the wrong place at the wrong time at the apartment complex. He matured, got away from that environment, and has not been back. He also worked his way through school, earned a bachelor's degree, and has established an excellent career in his field. He continues to pursue professional and educational opportunities for improvement. AG ¶¶ 32(a) and 32(d) fully apply to his earlier offenses.

The DV charges are more serious and more recent, as they involve allegations of aggravated assault and serious bodily harm. Applicant strenuously denied harming C in any way and denied putting his hands on her. It is hard to know what really happened that evening, particularly when the police report does not corroborate evidence of physical violence and C declined medical treatment at the scene. Applicant was recommended for a pretrial diversion program, including community service and anger management counseling. The counselor felt that the incident was an isolated, one-time episode. Applicant has not had any contact with C since then. He only completed the required anger management counseling sessions, and the other requirements of the diversion program and the case was nolle prossed in June 2022. Applicant is also credited with continuing to pursue anger management counseling on an ongoing basis. Applicant is also highly regarded at work. While the offense is recent, it is also isolated, and Applicant fulfilled and exceeded the requirements of the diversion program. AG ¶¶ 32(a) and 32(d) apply to mitigate resulting criminal conduct security concerns.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern for 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 proceedings. . .

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

(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.

SOR ¶ 2.a is merely an additional cross-allegation, under Guideline E, of conduct already alleged and “explicitly covered” under Guideline J, as it is more properly addressed as criminal conduct. AG ¶ 16(d) is therefore not established. Because Applicant’s conduct is fully addressed under Guideline J, above, I consider the personal conduct cross-allegation to be duplicative, and I find SOR ¶ 2.a for Applicant on that basis.

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 has mitigated security concerns relating to his past conduct. He participated in and completed a diversion program and has continued with anger management counseling. He has an established career in which he excels and is highly valued. He testified credibly that he will not find himself in position where he might jeopardize his clearance and his career. I conclude that criminal conduct and personal conduct security concerns are mitigated. Overall, the record evidence leaves me with no questions or doubts as to Applicant's eligibility for a security clearance.

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.d:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances, it is clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is granted.

Braden M. Murphy
Administrative Judge