



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



In the matter of:)
)
) ISCR Case No. 21-01533
)
Applicant for Security Clearance)

Appearances

For Government: David Hayes, Esq., Department Counsel
For Applicant: William Paul Christian, Esq., Personal Representative

12/14/2023

Decision

MURPHY, Braden M., Administrative Judge:

In February 2020, Applicant was working as a bouncer at a bar. He engaged in a physical confrontation with a patron. As a result, Applicant was charged with aggravated battery. The case remains pending in state criminal court, though Applicant denies criminal culpability. Criminal conduct security concerns alleged under Guideline J are mitigated. Financial considerations security concerns arising from Applicant’s delinquent debts are mitigated. Applicant’s eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 2, 2020, in connection with his employment in the defense industry. On July 20, 2022, following a background investigation, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (CAS) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J (criminal conduct) and Guideline F (financial considerations). 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 4 (SEAD 4) *National Security Adjudicative Guidelines* (AG), which became effective on June 8, 2017.

Applicant answered the SOR on July 27, 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 July 6, 2023, DOHA issued a notice scheduling the hearing for July 27, 2023, with the hearing to occur via an online video-conferencing platform.

The hearing convened as scheduled. The attorney representing Applicant in his pending criminal case appeared on his behalf, acting as a personal representative. (Tr. 6-8) He also offered information on the current status of the criminal case. Department Counsel submitted Government's Exhibits (GE) 1 through 4. Applicant testified and submitted Applicant's Exhibits (AE) A through D. All exhibits were admitted without objection. At the end of the hearing, I held the record open until August 10, 2023, to enable Applicant the opportunity to submit additional information but he did not do so. DOHA received the hearing transcript (Tr.) on August 4, 2023.

Preliminary Issue

Because this case involved a pending criminal charge against Applicant, and because his criminal defense attorney participated in the hearing, I made them both aware of Paragraph 6.2 of the Directive, under which "an applicant is required to give, and to authorize others to give, full, frank, and truthful answers to relevant and material questions needed by the DOHA to reach a clearance decision, and to otherwise comply with the procedures authorized by this Directive." (Tr. 8, 77) Applicant testified, and did not exercise his constitutional right not to do so under the Fifth Amendment.

Findings of Fact

In his Answer to the SOR, Applicant admitted the sole Guideline J allegation, (SOR ¶ 1.a) and noted that the case remained pending in court. He denied the four debts alleged under Guideline F (SOR ¶¶ 1.a-1.d) noting that they had all been paid. His admission is incorporated into the findings of fact. After a thorough and careful review of the pleadings and the record evidence submitted, I make the following findings of fact.

Applicant is 47 years old. He earned a bachelor's degree in 2017. He has worked as an instructor with a defense contractor on a military base since February 2019, and he has had several prior jobs in the defense industry. After eight years on active duty in the Marine Corps (1994-2002), he served in the National Guard and Reserve from 2003 until July 2016, when he retired as a staff sergeant (E-6). He deployed to Iraq in 2004-2005 and again in 2009-2010. He worked as a police officer from 2014-2017. His first marriage ended in divorce (1999-2004). He remarried in 2009. They have two young children. (GE 2; Tr. 12 36-40, 61-62) He has held a clearance since his time in the

military, and was most recently granted a clearance in 2015, without any security violations. (Tr. 12, 85-86)

Under Guideline F, the SOR concerns four delinquent debts, totaling \$11,790. The debts are established by an April 2021 credit report. (GE 4) (SOR ¶ 2) Applicant denied all of the debts, and said they had been paid. (Answer; Tr. 43)

Applicant provided an e-mail about his attempts to contact his creditors. (AE A). He attached photographs of letters from two of the creditors (AE B, AE C) along with his credit score as of June 2023. (AE D) I was unable to print a “clean copy” of these exhibits for the case file, but they are part of the record in e-mail form, and they can be reviewed on appeal if needed.

SOR ¶ 2.a (\$7,283) is a charged-off consumer credit account. Applicant e-mailed a photo of a letter from the creditor, documenting that the account was paid and settled in December 2021. The account number on the letter is the same account number for this debt in GE 4. (AE A) This was a personal loan. It was the first debt he addressed after ending his contract with a debt consolidation firm, discussed below. He settled the debt for 35% of what he owed, and he paid it off. (Tr. 52-55)

SOR ¶ 2.b (\$1,640) is a charged-off credit card account with a department store. Applicant e-mailed a photo of a letter from the creditor, documenting that the account was paid and settled in July 2021. (AE B; Tr. 55)

SOR ¶ 2.c (\$1,171) is a charged-off credit card account with a bank. SOR ¶ 2.d (\$1,696) is a charged-off credit card account with a bank. Applicant said he paid both debts in 2021 but was not able to document it. (Tr. 32-33; 55-57)

When asked how he got into debt, Applicant explained that he wanted to get a better handle on his finances and cut down on high interest rates. He learned about a debt consolidation program through an acquaintance. He signed up for the program in January 2020. The monthly fee was \$700 a month. Applicant had seven or eight debts in the program. He was told to stop paying on his debts so the service could negotiate settlements. This led to a significant drop in his credit score, from about 700 to about 500. The company also kept 27% of any negotiated settlement amount. He believes he got bad advice, and he thinks he got scammed. Applicant was not happy with the program’s progress, so he paid all of the SOR debts himself by the end of 2021, well before he got the SOR. His credit score has improved to 682 as of June 2023. He said he pulls his credit score “daily” through a credit monitoring service. (GE 2; Tr. 31-35, 44-57, 63; AE D)

Applicant’s finances are now in good condition. He has no charged-off debts or debts in collection and his expenses are current. He used money from his 401(k) plan to pay some of his debts. Taxes were taken out when he withdrew the money. He has several thousand dollars in savings and checking accounts. (Tr. 57-59)

Applicant earns an \$80,000 annual salary. He also has a 100% service-connected disability and receives \$4,500 a month in disability compensation from the VA. He no longer works at his friend's nightclub. (Tr. 39-43) His wife is a registered nurse. She works full time and earns \$65 an hour. (Tr. 60)

Applicant was given the opportunity to submit post-hearing documents, such as an updated credit report, but did not do so. The April 2021 credit report (GE 4) is the only one in the record.

In February 2020, Applicant was working as a security manager (bouncer) at a friend's nightclub. (GE 2 at 2) He disclosed on his SCA that one evening that month, he had a physical altercation with an "unruly patron," D, who refused to leave the premises. He said that D "took an aggressive stance attempting to fight me and I went hands on causing him to have a hard landing on a take down." D "is now said to be paralyzed from the neck down." Applicant was later charged with aggravated battery. He said he believes this is because of the nature of the injuries, and because Applicant used to be a police officer. (GE 1 at 31-33)

Applicant provided further detail in his background interview. (GE 2) He said D had been arrested and banned from the premises by police two months beforehand for fighting. (GE 1, GE 2) On the night in question Applicant was on duty at about 4 am. He was told by another security guard, W, that D was on the premises. They agreed to leave him alone and let the police deal with him in the parking lot once he left. (GE 2)

About 15 minutes later, another security guard, C, was in an argument with a female patron, and was trying to get her to leave. The female patron was married to D, but Applicant was not aware of this. D was in the corner with several other patrons. D challenged Applicant with an "aggressive position" towards him. Applicant was aware that D had assaulted other security officers. (GE 2)

Another security guard, B, grabbed D's arm and said, "Hey, man, let's get you out of here." D then swung his arm at B and hit his arm away. Applicant then punched D and D fell down. When D got up, he put his hands into fists, so Applicant put him into an arm hold. D fell down and hit his head and was knocked unconscious. Applicant dragged D out into the parking lot where police could render him assistance. (GE 2)

Applicant was questioned by police at the scene and the next day. He was told he did nothing wrong. Days later he was told to come to the police station and explain what happened and he did so. He was then arrested and detained in county jail for four weeks until he could post bond. Applicant believes D's family made complaints to the police about Applicant getting special treatment as a former police officer. (GE 2)

Applicant believes that D and his family are accusing Applicant of being the aggressor, that D was trying to leave, that Applicant attacked D unprovoked, rammed his head into the bar, and stomped and kicked him. Applicant said that the family is claiming that D is now a quadriplegic as a result. They have filed suit against him and

the club, claiming several hundred thousand dollars in medical expenses, damages, and lost wages. (GE 2)

Applicant said he was acting in self-defense. He said he has used the arm hold numerous times before in prior law enforcement positions and no one has fallen as a result. He said in his interview that information available to him is that D is a known gang member, he has been jailed numerous times for gun, drug, and assault charges, and has a violent history of fighting security guards and police officers. He also believes D's alcohol level was "two times over the legal limit" on the night in question. (GE 2) These assertions are uncorroborated.

A police report narrative from that evening indicates that D and his wife got into an altercation with club security after D's wife had an argument with another female patron. D approached security in an aggressive manner. Security asked D and his wife to leave, but his wife did not want to. Security then grabbed D's arm to escort him out. D swatted the officer's hand away. "Security took that as an act of aggression and preemptively struck [D] before he could strike" the officer. D had consumed alcoholic beverages prior to this incident. (GE 3)

D attempted to snatch his arm away from security "to escape while being escorted. At that time, an arm bar take down was used to subdue [D] where he landed headfirst onto the establishment[s] floor." Surveillance footage showed that D "had gone limp upon contact with the floor. Security then [dragged D towards the door, where he was placed outside." He was placed in a chair and an ambulance was called. "There was visible swelling and bleeding on [D's] forehead and lips." While waiting for the ambulance, D's wife could be heard screaming and cursing. An ambulance took D to the hospital. (GE 3)

D was arrested and charged with disorderly conduct. The report lists D and his wife as "Suspects." A female patron is listed as "victim" and Applicant is listed as "Other." The report states, "[t]his is the second time that deputies know of that [D and his wife] have caused an incident" with the security staff at this club. In a prior incident, D was arrested for disorderly conduct at the same establishment. The police report noted that Applicant was 6 feet tall and weighed 230 pounds. D was listed as 5 feet, seven inches tall, and weighed 140 pounds. (GE 3) The security officer(s) involved are not identified in GE 3.

Applicant was later arrested and charged with aggravated battery. (SOR ¶ 1.a) Other than GE 3, there is no police report, indictment record, or other documentary evidence providing details of the incident relating to Applicant as a suspect, charged individual, or defendant.

Applicant's criminal defense attorney made certain representations about the current status of the case and about its procedural history. He said that the case remains pending. He has asked for a dismissal. He essentially asserted that it is difficult in the current political climate to avoid criminal charges when a former police officer (like

Applicant) is involved. The case was passed to several prosecuting attorneys before an indictment was brought in September 2022 but there is no pending court date. (Tr. 64-68, 75-76)

The attorney confirmed that the alleged victim has brought a civil suit against Applicant. There are multiple witnesses to, and videotapes of, the incident. (None of them are in evidence here). He believes that police officers who are familiar with the incident (on scene or having viewed the videos) would regard Applicant's actions as "textbook." The other party has a prior record. The attorney believes he has a strong case. He expressed doubt as to the severity of the alleged victim's injuries. (Tr. 68-70)

Applicant confirmed he is being sued, along with the county, the nightclub, and the property owner. He was not working as an off-duty police officer at the time. He believes he was charged because, since he was a former county police officer, the department did not want to be seen showing favoritism towards him. (Tr. 70-72)

Applicant affirmed what he said previously about the incident, both on his SCA and in his background interview. He was in a working capacity, and said, "I did my job." He does not believe it should have gone this far and turned into criminal charges. He believes the victim was banned from the property two months prior and chose to return. Applicant said his only intent "was to get him out the door, not to injure him. So it was a freak accident. He went down wrong and landed the way he did." (Tr. 80-81) Applicant denied committing the crime as alleged and as charged. (Tr. 82)

Applicant had an alcohol-related driving offense in the mid-1990s. He said he was found not guilty. He was charged with domestic violence in about 2000 but he said the case was dismissed. (Tr. 83-84)

Applicant attested to his long service in the military, with a clearance. He has taken many security courses. (Tr. 31) He wants to keep his clearance and his career, and he wants to protect his assets and his reputation. (Tr. 85, 93-94)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court has noted, "the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials." *Department of the 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 F, Financial Considerations

The security concern relating to the guideline for financial considerations is set out, in relevant part, in AG ¶ 18:

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. . . .

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

- (a) inability to satisfy debts; and
- (c) a history of not meeting financial obligations.

In about January 2020, Applicant had some debts that he wanted to resolve. He was advised informally to hire a debt consolidation firm to address them. He did so, and the firm charged a large fee for his services. They also told him to stop paying on his debts. This led to several delinquencies, four of which are alleged in the SOR, and established by GE 4, an April 2021 credit report. AG ¶¶ 19(a) and 19(c) apply.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 20 are potentially applicable:

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

Once Applicant realized that the debt firm was not doing what he hired them to do, he addressed the debts himself. Some of the debts he said he resolved were paid well before the SOR was issued, so they are not alleged. Two of the alleged debts (SOR ¶¶ 1.a and 1.b, totaling about \$8,900) are documented as having been settled, paid, and resolved, in 2021, before the SOR was issued. Applicant said he paid the other two debts (SOR ¶¶ 1.c and 1.d, totaling just under \$3,000) that year as well, and I believe he did so. The record does not contain a more recent credit report, but Applicant has ample assets, income, and savings, making future financial issues unlikely. The future financial impact of his ongoing criminal case, is, of course, unclear. However, based on his actions to address his prior debts, Applicant has shown sufficient evidence under AG ¶¶ 20(a) and 20(d) to mitigate financial security concerns.

Guideline J: Criminal Conduct:

AG ¶ 30 expresses 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 conditions are 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.

In February 2020, while working security at a nightclub, Applicant had a physical altercation with a patron. The patron had been barred from the club two months before. Applicant said the patron moved in on him in an aggressive manner. When Applicant took the patron down, the patron was evidently badly injured, though how badly is unclear. Applicant said the patron hit his head and was knocked unconscious. After Applicant dragged him outside, he was taken to a hospital in an ambulance. The patron has filed a lawsuit against Applicant and other entities. The patron was charged with disorderly conduct. Applicant was later indicted on a charge of aggravated battery. The charge remains pending, and no trial date is imminent. The record here does not contain any documentary evidence of the indictment or his arrest. The only police record provided concerns a charge against the patron, not the Applicant.

Applicant admits the arrest and the charge, which he disclosed on his SCA and discussed freely in his background interview. In his testimony, he stood by what he said previously about the incident. He denies any criminal intent and denies doing anything wrong. He believes he acted properly. This is the only criminal offense alleged in the SOR. (Applicant has two other prior charges, but they are many years old).

Applicant's statements are enough to satisfy AG ¶ 31(b), since he acknowledges that he was indicted and charged with felony aggravated battery. This is so despite the absence of additional related police or court documentation which might have shed additional light on the events in question.

AG ¶ 32 sets forth the following 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.

In this forum, the standard of proof is not “beyond a reasonable doubt” but rather, “substantial evidence,” that is “such relevant evidence as a reasonable mind might accept as adequate evidence to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1; see, e.g., ISCR Case No. 16-04094 at 2 (App. Bd. Apr. 20, 2018); ISCR Case No. 20-00354 at 5 (App. Bd. Feb. 9, 2022).

Since the charge has not been adjudicated fully (or at all) in criminal court, it is quite difficult to make an assessment here about what really happened that night at the club. Applicant provided a full explanation of his view of the events in his background interview, and he has asserted his innocence. He said he did not intend to injure D, the patron, that what happened was an accident, and that he did his job. He asserted that the patron, who had been banned from the property, was the aggressor. As Department Counsel noted in his closing argument, the police report would seem to support Applicant’s version of events. (Tr. 91)

The charge is serious and pending. It is also isolated and there is no indication of prior or subsequent similar conduct. Applicant is also no longer working as a bouncer. He continues to work at his job on a military base. He holds a current clearance, granted in 2015, without incident. I conclude that the incident occurred under such unusual circumstances that it is unlikely to recur. AG ¶¶ 32(a) and 32(d) both partially apply. They cannot fully apply since the case is pending.

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 F in my whole-person analysis.

The financial security concerns in this case are resolved and mitigated. As to the Guideline J case, the fact that the criminal charge remains pending cannot be ignored, and I decline to find in this forum that Applicant established his innocence by substantial evidence. He has been indicted and that indictment remains pending. The resulting events have yet to be adjudicated in state criminal court. However, I do conclude that Applicant testified credibly in this hearing about the events in February 2020. He also disclosed the charge on his SCA and discussed his version of events in his background interview. The only police report in the record also supports his assertions (though it was before he was indicted).

As Department Counsel acknowledged, a subsequent conviction would likely lead to an adverse information report to DOD security officials, given its security significance. (Tr. 92) As Applicant acknowledged, if he is convicted, he might go to jail. (Tr. 93-94)

With the arrest and indictment unadjudicated in criminal court, however, and with the financial case fully resolved, I conclude that Applicant has met his burden to establish that it is clearly consistent with the national interest to grant him eligibility for access to classified information based on the record before me.

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
Subparagraph 1.a:	For Applicant
Paragraph 2: Guideline F:	FOR APPLICANT
Subparagraphs 2.a-2.d:	For Applicant

Conclusion

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

Braden M. Murphy
Administrative Judge