DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	USA-C No. 22-02418-R
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Andre Gregorian, Esq., Department Counsel
For Applicant: Ronald Sykstus, Esq.

03/02/2023

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Decision

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RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Guideline J, criminal conduct security concerns. Eligibility for access to classified information and sensitive compartmented information (SCI) is denied.

Statement of the Case

On November 2, 2020, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Letter of Intent to Revoke Eligibility for Access to Classified Information, Assignment to Duties that have been designated National Security Sensitive and Access to SCI. The Statement of Reasons (SOR) detailed security concerns under Guideline J, criminal conduct.

On December 2, 2022, Under Secretary of Defense, Intelligence and Security (USD (I&S)) Ronald S. Moultrie issued a memorandum that provided that any individual whose clearance eligibility was revoked or denied between September 30, 2020, and the date of that memorandum, shall be afforded the opportunity to pursue the Defense Office of Hearings and Appeals (DOHA) hearing and appeal process set forth in DOD Directive

5220.6. On October 25, 2020, the DOD CAF revoked Applicant's eligibility for access to classified information and SCI and he appealed that revocation under the provisions of DOD Manual 5200.02. As a result of Under Secretary Moultrie's Memorandum, he was given the opportunity to receive the process set forth in DOD Directive 5220.6. On January 19, 2023, Applicant elected that process. As a result of his election, this case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, as amended; and the adjudicative guidelines (AG), which became effective on June 8, 2017. (Hearing Exhibit 1)

The case was assigned to me on January 10, 2023. DOHA issued a notice of hearing on January 18, 2023, scheduling the hearing for February 14, 2023, via Microsoft Teams. I convened the hearing as scheduled. The Government offered exhibits (GE) 1 through 9. Applicant and seven witnesses testified on his behalf. He offered Applicant Exhibits (AE) A through FF. There were no objections, and all exhibits were admitted into evidence. HE II is the Government's discovery letter. Post-hearing, both parties provided emails and copies of pertinent state statutes. They are marked as HE III through VI. DOHA received the hearing transcript on February 22, 2023.

Findings of Fact

Applicant denied the SOR allegations. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 41 years old. He graduated high school in 2000. He served in the military from July 2000 to November 2008 and was honorably discharged. He is a disabled veteran. He earned an associate degree in 2011, a bachelor's degree in 2013, a master's degree in 2015, and a second master's degree in 2016. He began working for the federal government in 2010 and has been employed in his current position since September 2019. He has never married. He has a 23-year-old son from a previous relationship and a 15-year-old daughter (DT) from a previous relationship. He has held a security clearance since approximately 2003. (Transcript (Tr.) at 9-27, 42; AE G, N, O, P)

Applicant and the mother (M) of DT have joint custody. He has complied with providing child support for this daughter and has maintained a relationship with her through his visitation rights. (Tr. 23-25)

Applicant testified that in 2017, DT was using her cell phone while visiting him and was videotaping him and his family. He said that she videotaped him napping and going into the bathroom. He believed that M had asked her to spy on him by videotaping him. He said he called M and told her to stop making those requests of DT. He testified that he told DT that she was no longer permitted to bring a cell phone to his house during her visitation. (Tr. 28, 41, 58-60)

In May 2020, Applicant picked up his daughter from a designated location. Due to the acrimonious relationship between Applicant and M, a neutral place was arranged.

Applicant planned to take DT to his parent's house. It was his birthday. After she entered the car, they began arguing because DT did not want to stay with him and wanted to remain with M. He testified that DT had an uncooperative attitude, and he pulled the car over to the side of the road and pulled her out of the car. He said that he did not want DT to destroy his birthday. He testified that he was getting ready to call M to ask her to come and pick up DT, when he noticed she had a cell phone and ear pods. She was not using them. He said he told DT that she was not permitted to have a cell phone when she visited. They got back in the car. While driving to his parent's house, he said he told DT he was going to spank her with a belt for having her cell phone with her, which was forbidden. She was 12 years old at the time. (Tr. 28, 49-55, 61-62, 91-92)

Applicant testified that when he and DT arrived at his parent's house, they got out of the car, and he took off his leather belt and hit her four to five times. He testified that he "popped" her and when he struck her, she jumped. (Tr. 56) She was wearing shorts and he hit her on her buttocks and bare legs. She attempted to run away, and he grabbed her by the arm. He admitted that his blows left welt marks on her body. After DT was struck, M drove up in her car and DT ran to her car and got in it. Applicant believes DT texted M after he told her he was going to hit her. Applicant said that M said, "you beat her ass." (Tr. 30) Applicant told M she was not supposed to be there according to the child custody order. (Tr. 28-31, 37, 54-58, 67-69)

Applicant explained that if he let DT get away with disobeying him that her conduct would escalate. He said his thought process was "I'm going to nip this in the bud as quick as possible." (Tr. 31) He explained that he hit her because he had not given her permission to have a cell phone when she was visiting. About a month prior to this incident, DT had asked Applicant if she could bring her cell phone with her when visiting him, and he said he had to be able to trust her. At that time, he still did not trust her. He testified when he struck her with the belt it was to discipline her and make her understand the importance of complying with rules. When asked why he used a belt, he said "I didn't want to pop her with my hand because I thought that would be more of an assault, and the way I grew up, you know, the belt was a proper form of discipline." (Tr. 94) His daughter at the time was approximately five feet two inches tall and 120 pounds. He is six feet tall and 238 pounds. He said the marks he left on her skin "were just welts." He said when he was growing up the preferred method of disciplining was using a belt. (Tr. 30, 37-42, 57-63, 88-98)

When questioned if Applicant had previously hit DT with a belt, he said that on one occasion in 2019, he had "popped" her about three times with a belt when she had taken his debit card without permission and purchased a math game. He testified that he previously had conversations with her about following rules and regulations to succeed in life. He admitted that DT began saying she did not want to be with him sometime after the 2019 spanking, but he really believed that M was influencing DT. He also attributed DT

not wanting to be with him due to his rules on the use of cell phones.[1] (Tr. 40, 47-53, 62-64, 67-69)

Applicant testified that after he hit DT, he went to the courthouse to file a complaint of "parental interference," presumably against M. He was detained by the police and investigated on the charge of child abuse. He said he was shocked by the allegation. (Tr. 31-32)

On the day of the incident, M filed a petition for protection from abuse against Applicant. The petition was granted by the court, enjoining Applicant from threatening to commit or committing acts of abuse against M and DT. In addition, he was restrained and enjoined from annoying, harassing, stalking, threatening, and engaging in conduct that would place M and DT in reasonable fear of bodily harm. He was enjoined from contacting either M or DT. Visitation by Applicant was denied. The order was granted on June 2, 2020. On June 22, 2020, the order was dismissed because the terms of Applicant's bond precluded him from having contact with the DT. (GE 6)

Applicant reported to his command that he was arrested on May 24, 2020, for willful abuse of child. He reported that he had custody of his child, and she had stolen his credit card and made unauthorized charges. He was arrested on the day of the incident and charged with a Class C felony for willful abuse of a child, which carries a sentence if convicted of no less than one year and one day and no more than ten years, if there are no prior offenses. The command's report did not mention the cell phone incident and that Applicant had hit the child with a belt. (Tr. 70-73; GE 3)

A forensic exam report from the state stated there were injuries to DT's upper and lower extremities and buttocks. The report reflected the different parts of her body where the injuries were specifically located, the size of each injury, and the placement. Applicant acknowledged DT had injuries on her body. He stated that she tried to run away when he was spanking her, and he grabbed her. Applicant testified that the forensic report did not report that DT had mental health issues. He testified that DT had a fight with her maternal grandmother earlier in the day. (AE CC)

On June 30, 2020, the state department of human resources sent Applicant a letter stating it had investigated the allegation of child abuse. Its investigation found reasonable cause to believe the reports were true, using the standard that there is more credible evidence than not, based on the professional judgment of the social worker that child abuse or neglect occurred. The assessment revealed that there was evidence of physical abuse, as noted by cuts and bruises on DT's legs and arm. The disposition was based on credible evidence from the observation of the investigative worker and other collateral contacts. The letter informed Applicant that he had a right to have the written report reviewed by an independent panel. Applicant exercised his right and the independent panel concurred with the original findings of abuse. (Tr. 75-77; GE 4)

[1] Any derogatory information that was not alleged will not be considered for disqualifying purposes. It may be considered in the application of mitigating conditions, making a credibility determination, and in the whole-person analysis.

On July 1, 2022, Applicant was indicted by a Grand Jury for torture, willful abuse, cruelly beating, or otherwise willfully maltreating a child under the age of 18 to wit: DT by "whipping her on the back with a belt and hitting her chest", in violation of the state statute. (Tr. 76-77; GE 5)

On November 30, 2022, Applicant's criminal defense attorney advised him to accept a plea agreement, which reduced the felony to a misdemeanor of reckless endangerment and/or harassment. His attorney explained that a potential conviction for child abuse would severely and negatively affect his life and career. Applicant explained to her that his intent was to discipline his child. He did not believe he had physically abused her. He stated if she had been cruelly beaten, she should have gone to the hospital. He did not want to plead guilty to the lesser charge. (Tr. 32-33, 77-78; AE U, V)

On December 1, 2022, Applicant voluntarily accepted a plea agreement to have the felony charge reduced to the misdemeanor of harassment. He was represented by his criminal defense attorney. His plea of guilty was accepted and the court adjudicated his guilt. He was given a three-month jail sentence that was suspended for two years and was placed on probation for two years. He was also given a fine and required to pay court costs. (GE 5)

On December 23, 2022, Applicant filed a motion to set aside his guilty plea. The motion was granted on February 9, 2023, and the plea agreement was set aside. The plea to harassment was removed and the original case has been reinstated, which means the pending charge of child abuse is a felony. As of February 13, 2023, a trial by jury date had not been scheduled. Applicant testified that when he entered into the plea agreement he did not disagree with the facts, but he was unaware of the collateral consequences, namely, that he would not be permitted to carry a gun, which would jeopardize his ability to maintain a part-time job he had as a security officer and his security clearance. (Tr. 33-37, 77-81; GE 9; AE S, T, FF) (AE W, X, Y, BB are various court documents associated with the pending case.)

Applicant testified that as a parent he is permitted to discipline his child and spank her. He believes his actions were not cruel because she did not require hospitalization. He testified that they were "just welts." (Tr. 97) He admitted that he was arguing with DT and the welts from him striking her with a belt could be observed on her body. When asked if he would "spank" her again, he said no because she is older, and he is cognizant of the collateral implications that could transpired. He does not believe he willfully and cruelly abused his daughter. He did not believe he went too far in disciplining her. Applicant stated that his daughter has mental health issues and has a propensity to defy him to aggravate and get a rise out of him. He wants her to follow rules and not assume that she can evade them and the law. (Tr. 37, 70-74, 82-83; 93-98; AE AA, EE)

Applicant has participated in therapy from December 2018 to 2022 for depression, post-traumatic stress disorder, and anxiety. He saw a therapist every three to four months. Since May 2022, he has seen a therapist every six months. His last visit was in November or December 2022. He takes medication for anxiety. He has not attended

counseling for anger management. He provided a document showing that in December 2020, he signed up for an online six-week parenting class. (Tr. 83-87; AE H, Z)

Applicant provided numerous letters of reference and character letters. He provided performance evaluations from 2018 through 2022; and a letter of commendation; and various military documents and evaluations. He has helped fellow veterans navigate through the various programs offered and helped them secure employment. He is a valued coworker. His evaluations reflect that he is consistently rated "fully successful" or "outstanding." (AE A through M, Q, R)

Seven witnesses testified on Applicant's behalf and were aware of the pending charges against him. His pastor believes Applicant is committed to his faith and would not intentionally harm his child. Supervisors and coworkers testified that he does outstanding work. He is accountable and trustworthy and a person of integrity. They have not observed him being violent, angry, or aggressive. One witness is from the same neighborhood where Applicant grew up, He stated that it was a "rough" area and parents were strict with discipline to keep their children from getting into trouble. One witness testified that as a paralyzed disabled veteran, he was unaware of benefits he was entitled to receive, and Applicant helped him navigate the process and apply for jobs. On one occasion, this witness was distraught and suicidal, and Applicant visited him in the middle of the night to help him. None of the witnesses have concerns about him holding a security clearance. (Tr. 101-151)

In Applicant's answer he provided a personal statement, court documents and other documents in mitigation. I have considered all of them. (Answer)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. 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(c), 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 avoided drawing 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. Directive ¶ E3.1.15 states 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 as to obtaining 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 as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J: Criminal Conduct

The security concern 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.

The guideline notes several conditions that could raise security concerns. I have considered all the disqualifying conditions under AG ¶ 31, and 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 individual was formally charged, prosecuted, or convicted.

Applicant is charged with a Class C felony for torture, willful abuse, cruelly beating, or otherwise willfully maltreating a child under the age of 18 to wit: DT. There is substantial evidence that he intentionally struck his daughter with a belt on her buttocks and bare legs, which left welts on her body. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from criminal conduct. The following mitigating conditions under AG ¶ 32 are potentially applicable:

> (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 admitted that in May 2020 he used a belt to strike his daughter on the legs and buttocks leaving welts on her body. Applicant is charged with a felony for child abuse that has not yet been adjudicated and is pending in a criminal court. Despite that charge and a finding by the state human resource center of a finding of abuse, which he appealed and was affirmed by an independent panel, he continues to assert that his conduct was not inappropriate, cruel, or criminal. He believes his decision to discipline his daughter harshly with a belt is an acceptable method of punishment He candidly admitted he had previously struck her with his belt after she used his debit card without authorization. Based on these two incidents and his unwavering belief that his conduct is acceptable, I cannot find that future similar conduct is unlikely to recur. His conduct casts doubt on his good judgment, trustworthiness, and reliability. AG ¶ 32(a) does not apply.

Applicant has not had contact with his daughter since the May 2020 incident. He provided character evidence and documented his good employment record and community involvement. I have considered all of it but conclude that it is insufficient to overcome his actions and failure to take responsibility for his conduct. There is insufficient evidence of rehabilitation to fully apply AG ¶ 32(b).

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 have incorporated my comments under Guideline J in my whole-person analysis.

I have considered Applicant's military service and character evidence. I have weighed the favorable and unfavorable evidence. A security clearance determination hearing is not a criminal court and is not required to adhere to the higher standard of proof. Any doubt about anyone being considered for national security eligibility will be resolved in favor of the national security. I have carefully considered all the factors in AG ¶ 2. Applicant has not met his burden of persuasion. Overall, the record evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the criminal 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:

Guideline J: Criminal Conduct	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 security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information and SCI is denied.

_____
Carol G. Ricciardello
Administrative Judge