



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



In the matter of:)
)
-----) ISCR Case No. 23-00335
)
Applicant for Security Clearance)

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: *Pro se*

01/17/2024

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, and exhibits, Applicant did not mitigate criminal conduct security concerns. Eligibility for access to classified information or to hold a sensitive national security position is denied.

Statement of the Case

On May 30, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Service (CAS) issued a statement of reasons (SOR) to Applicant detailing reasons why under the criminal conduct guideline the DCSA CAS could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, Department of Defense (DoD) Directive 5220.6 (January 2, 1992) (Directive); and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

Applicant responded to the SOR on June 1, 2023, and requested a hearing. The case was assigned to me on October 24, 2023. A hearing was scheduled for December 7, 2023, and heard as scheduled. At the scheduled hearing, the Government's case consisted of four exhibits (GEs 1-4) that were admitted without objection. Applicant relied on one witness (herself) and 12 exhibits (AEs A-K) that were admitted without objection. The transcript (Tr.) covering the scheduled hearing was received on December 23, 2023.

Procedural Issues

Before the close of the hearing, Applicant requested the record be kept open to permit her the opportunity to supplement the record with updated medical health records covering the mental health counseling service she received and a curriculum vitae (CV) of her counselor. For good cause shown, she was granted 30 days to supplement the record. Department Counsel was afforded two days to respond. (Tr. 59)

Within the time permitted, Applicant supplemented the record with certificates of completion of course she completed while incarcerated and a CV of her mental health counselor. Applicant's submissions were admitted without objection as AEs L-M.

Summary of Pleadings

Under Guideline J, Applicant allegedly (a) was arrested and charged in 2008 in federal court with kidnapping (use of facility by offender) and interference with commerce by threat or violence (Hobbs Act violation) and (b) pled guilty to a kidnapping charge. Allegedly, she was sentenced to eight years in prison, followed by five years of supervised release, and ordered to pay \$29,281 in restitution.

In Applicant's response to the SOR, she admitted the allegations without explanations. She attached nine character references and requested that they be considered.

Findings of Fact

Applicant is a 40-year-old employee of a defense contractor who seeks a security clearance. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant has never married and has no children. (GE 1; Tr. 79) She earned a high school diploma in June 2002. Between August 2002 and August 2004, she attended college classes. She completed additional college classwork between January 2016 and August 2016 without earning a degree or diploma. Applicant earned an associate's degree in May 2019 and a bachelor's degree in fine arts with honors in December 2021. (GE 1; Tr. 78-79) Currently, she is exploring options of returning to college to pursue a master's degree in leadership. (GE 1 and AE K; Tr. 38-40) Applicant

reported no military service. Since August 2022, she has worked for her current employer as an aircraft maintenance mechanic. (GE 1) She reported unemployment between October 2021 and August 2022. (GE 1) Applicant has never held a security clearance.

Applicant's criminal history

In December 2007, Applicant forced a realtor at gunpoint in her state of residence to withdraw money from her business bank account. (GEs 2 and 4) At the time, she was living in the home she purchased sometime in 2007 with the aid of supplied financial information from her parents. (GE 4; Tr. 42, 45) From the outset, Applicant struggled with making her monthly mortgage payments and was working three jobs as a server and receptionist to make ends meet. (GE 4) Stressed and unable to find help from her mortgage company or other sources (even, reaching out to potential roommates), Applicant panicked and turned to exploring illegal alternatives.

Posing as a foreign person looking to purchase a new home, Applicant enlisted a realtor in December 2007 to take her through a listed home for sale. (GE 4) While in the home, Applicant pulled out a toy gun and told the realtor "that she was going to die." (GE 4) According to Applicant and supporting investigation records, the realtor initially struggled with Applicant before relenting and accompanying Applicant to the realtor's bank. (GE 4) Once inside the bank, the realtor (within sight of Applicant) instructed the teller to release \$8,000 from the realtor's bank account, to which the teller complied. (GE 4) With the \$8,000 of the realtor's withdrawn bank funds in hand, Applicant drove home. (GE 4)

Claiming she was too overcome with financial stress over her mortgage-related struggles to recall the details of the banking incident and timely report them, she "carried on with life" until she was identified by federal investigators as the assailant. (GE 4) Once identified, Applicant claims to have become horrified at what she had done and feigned disbelief of the incident. (GEs 1 and 4; Tr. 43-45, 49, and 67) Considering all of the facts and circumstances surrounding her reported preparations and execution of the incident, Applicant's claims of surprise and anguish are more reconcilable with calculated memory suppression than spontaneous inability to recall the motivational details that prompted her kidnapping actions. Without documented evidence of cognitive-related memory breakdown associated with her actions, her claims can be afforded little substantive weight.

In April 2008 (four months after her kidnapping offense), Applicant was charged with kidnapping under the Hobbs Act (federal kidnapping statute) and interference with commerce by threat or violence. (GEs 1-4) Court records confirm that she was evaluated by a court-appointed mental health professional before being determined by the court to be mentally competent to stand trial. (GE 2)

In December 2009, Applicant entered into a plea agreement with federal prosecutors. (GE 2) Because the terms of her plea agreement remained sealed, they are not available for external review. (GE 2). Accepting the terms of Applicant's guilty

plea in April 2010, the court-imposed sentence as follows: eight years in federal prison, followed by five years of supervised release, and ordered payment of \$29,281 in restitution. (GEs 1-4; Tr. 41) The court's docket text confirmed the entry of judgment against Applicant with the incorporated sentence in May 2010 (revised in July 2012). (GE 2) Court records document mental health treatment while incarcerated. (GE 2) As a part of her supervised release conditions, Applicant, *inter alia*, was directed to participate and successfully complete substance abuse and mental health treatment programs. (GEs 2 and 4)

Applicant reported no court-ordered mental health counseling in the electronic questionnaires for investigations processing (e-QIP) she completed in August 2022 (GE 1), despite claiming a mental health breakdown associated with her kidnapping incident and her acknowledged post-release order to consult a mental health professional. Court records do not reflect any raised mental health issues preparatory to her guilty plea and ensuing sentencing. From her produced training materials, Applicant appears to have taken full advantage of prison-offered training courses designed to help her achieve success with her life and documented a number of certificates of completed courses while in incarceration. (AE L; Tr. 43-45)

For good behavior, Applicant was granted early release from prison in September 2016, after five and one-half years of imprisonment. (Tr. 41, 49-50) While on supervised probation, Applicant resided in a halfway house, where she enjoyed ingress and egress privileges. (Tr. 44, 53) She expressed remorse for her actions and currently attends regular Catholic church services to help her atone for her prior mistakes and actions. (Tr. 39-40) And, she is credited with satisfying the court-ordered \$29,281 fine imposed on her. (GE 4)

Complaining of depression following her release from prison, Applicant accepted a U.S. probation office referral to a licensed mental health consulting service in 2016. (AE I; Tr. 54-55) Among her post-hearing submissions, Applicant provided a CV of the professional counselor she consulted with following her release from federal incarceration. (AEs I and M) This credentialed licensed family therapist is credited with earning a master's degree in clinical psychology and specializing in family mental health issues. (AE M). She is of record in providing mental health counseling services to Applicant following her U.S. probation referral acceptance. (AE I) The therapist's individualized treatment plan covered mental health issues, relapse prevention, community integration, and learning skills to manage symptoms unique to people diagnosed with mental health disorders. (AE I) Applicant's therapist described Applicant's individual sessions and credited her with a willingness to explore past maladaptive coping strategies. (AEs I and M)

Applicant was credited by her mental health provider with successfully completing her treatment program in 2018, with both good support from her treatment team and a positive prognosis for employing her learning skills in rebuilding and repairing her relationships at home and in her community. (AE I) Applicant's treatment protocol did not include any assessment of her mental state of mind associated with her charged kidnapping incident. Applicant's rehabilitation efforts draw reinforcements from

her recent initiatives to finance a home and explore future educational opportunities with her educational coaching specialist. (AE K) Her efforts are ongoing and still in the development stage.

Endorsements

Applicant is well-regarded by friends and colleagues (AEs A-H) Her supervisor credited Applicant with being a highly trusted technician and a “tremendous asset to our team,” who is currently serving as a team lead. (AE A) Friends of Applicant for many years highlighted her caring, polite, and her trusted relationships with them and her church, as well as the community volunteer relationships she shares with them. (AEs B-H) All of her character references credited her with a strong work ethic, willingness to help others in need, and commitments to making the life changes needed to turn her life around. (AEs B-H) And, all of her character references (save for two) were aware of Applicant’s criminal history. (Tr. 71-72)

Policies

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), “no one has a ‘right’ to a security clearance.” As Commander in Chief, “the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. Eligibility for access to classified information may only be granted “upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These AG guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified information. The AG guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any. These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Criminal Conduct

The Concern: 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 ¶ 30.

Burdens of Proof

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See *also* Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the

criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Security concerns are raised over Applicant's 2008 charges and ensuing 2010 conviction of Kidnapping (use of Facility by Offender) and Interference with Commerce by Threat or Violence (Hobbs Act Violation). Upon pleading guilty to the charges without any evidence of a mental breakdown defense, Applicant was sentenced to eight years in prison, followed by five years of supervised release, and was ordered to pay \$29,281 in restitution. Records document that Applicant was early released in 2016 after serving five-plus years of her prison sentence.

Applicant's criminal conviction and sentencing warrant the application of one disqualifying condition (DCs) of the Adjudicative Guidelines (AGs) for criminal conduct. Applicable to Applicant's situation is DC ¶ 31(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's federal kidnapping charge and conviction covered an exceptionally serious felony and one that resulted in a lengthy prison sentence (eight years) imposed on her by the federal court taking her guilty plea. Applicant's guilty plea was accepted by the court without any received evidence of a mental breakdown by Applicant preceding the kidnapping incident. She has expressed remorse for her actions and has taken full advantage of the learning and mental health treatment programs made available to her during her five-plus years of incarceration and post-release probation. And, she has made considerable progress in her post-release educational pursuits (earning a bachelor's degree in fine arts) and securing a good job in the defense contractor field.

Still, Applicant can be credited with little more than two years of time since she completed her post-release probation, and she was unable to document the mental breakdown she claims to have experienced prior to her 2007 kidnapping incident. For such a serious violation of federal law, safe predictions of recurrence aversion cannot be made at this time. Applicant's federal kidnapping conviction and lengthy incarceration placed a heavy burden on her to establish the level of rehabilitation necessary for the restoration of trust, reliability, and good judgment required to mitigate recurrence risks. More time is needed for Applicant to mitigate the Government's

