



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



In the matter of:)	
)	
)	ISCR Case No. 22-00761
)	
Applicant for Security Clearance)	

Appearances

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

March 11, 2024

Decision

TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns under Guidelines J (criminal conduct) and E (personal conduct). Eligibility for access to classified information is granted.

Statement of the Case

On April 20, 2020, Applicant submitted a Questionnaire for National Security Positions (SF-86). On August 8, 2022, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines J and E. The SOR detailed reasons why the CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On September 7, 2022, Applicant submitted his Answer to the SOR, and requested a decision based on the administrative (written) record, without a hearing before an Administrative Judge. Pursuant to ¶¶ E.3.1.7 and E.3.1.8 of the Additional Procedural Guidance in Enclosure 3 of DOD Directive 5220.6, Department Counsel requested that a hearing before an Administrative Judge be held in this case. On December 5, 2022, Department Counsel was ready to proceed.

On December 13, 2022, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On January 6, 2023, DOHA issued a Notice of Microsoft Teams Video Teleconference Hearing scheduling the hearing for February 1, 2023. On January 26, 2023, DOHA issued an Amended Notice of Microsoft Teams Video Teleconference Hearing rescheduling the hearing for February 28, 2023. The hearing was convened as rescheduled. Department Counsel offered Government Exhibits (GE) 1 through 8, which I admitted without objection. Applicant testified, and offered Applicant Exhibits (AE) A through I, which I admitted without objection. On March 8, 2023, DOHA received the hearing transcript (Tr.).

Findings of Fact

Background Information

Applicant is a 33-year-old cyber operations lead analyst who has been employed by a defense contractor since September 2022. He seeks to retain his Top Secret/Sensitive Compartmented Information (TS/SCI) Clearance, which is requirement of his continued employment. (Tr. 17-18, 83, 96-99) Applicant successfully held Secret and Top Secret clearances while he was on active duty in the U.S. Army, discussed below. (Tr. 97)

Applicant graduated from high school in May 2009. He was awarded a Bachelor of Science Degree in Criminal Justice and Cyber Security in August 2018; and a Master's Degree in Organizational Leadership in August 2019. At the time of his hearing, Applicant was pursuing a Ph.D. in Cyber Security. (Tr. 19-20; 22-25) Applicant has been married two times. His first marriage was from August 2012 to December 2017, and his second marriage was from March 2019 to May 2022. Both marriages ended by divorce. Applicant does not have any children. (Tr. 25-26, 32-38, 44-45, 55-57, 61-73, 84-87; AE H, AE I)

Applicant's first wife was an active duty Army soldier, who he met on post. She has since separated from the Army. Applicant's second wife was a Japanese flight attendant, who he met online. When Applicant and his second wife divorced, she was working in a Japanese restaurant. (Tr. 74-76, 78-79, 83) Applicant initiated divorce proceedings to end both of his marriages. Neither of his wives wanted a divorce. (Tr. 101)

Applicant served in the Army from November 2009 to January 2017, and in the Army Reserve from January 2017 to January 2020. He was honorably discharged as a sergeant (pay grade E-5). He was subsequently awarded a Veterans Affairs (VA) 100% disability rating as a result of injuries he sustained on active duty. (Tr. 26-29) Since his release from active duty, he has worked exclusively for defense contractors. (Tr. 97-98)

Criminal Conduct/Personal Conduct

The concerns identified under these Guidelines are listed as three separate allegations and are discussed in order as listed in the SOR. Applicant testified on his own behalf, and I found his testimony to be credible.

SOR ¶ 1.a – In May 2017, Applicant was arrested and charged with abuse of a family member and household members, and a temporary restraining order (TRO) was entered against him. The complainant was Applicant's first wife. The charge was initially dismissed without prejudice and later dismissed with prejudice. (Tr. 39-43; GE 2, GE 5, AE A, AE F) Applicant was not required to attend domestic violence counseling following this arrest. (Tr. 79-80)

SOR ¶ 1.b – In July 2019, Applicant was arrested and charged with abuse of family and household members. The complainant was Applicant's second wife. (Tr. 50-51, 57-59) The charge was dismissed with prejudice for lack of evidence. (Tr. 103; AE A)

SOR ¶ 1.c – In February 2020, Applicant was arrested and charged with a domestic violence crime and a TRO was entered against him. Again, the complainant was Applicant's second wife. (Tr. 52, 59; GE 6; AE E). The charge was dismissed with prejudice, as in the two previous cases, because his former spouse failed to appear. (Tr. 60, 101; AE A)

All three arrests were subsequently expunged, and the records of arrest were annulled. The State's Attorney General issued Applicant expungement certificates. The certificates authorized Applicant to state in response to any question or inquiry, whether or not under oath, that he had no record regarding these arrests. Applicant testified that his case was dismissed because his former spouses failed to appear and added, "[y]es, [a]nd I just didn't do the crime." (Tr. 43-44, 49-50, 79-83, 101-102; 103, GE 1, GE 8; AE A, AE C, AE D)

Following his TRO hearing in February 2020, Applicant volunteered to attend domestic violence classes. He did so for the duration of the active restraining order. These classes were online and consisted of sharing experiences with other people and teaching different approaches to communicating with one's spouse. In August 2020, Applicant's TRO was dismissed, and he stopped taking the online classes. (Tr. 49-50, 79-83, 101-102; GE 1, GE 8)

Applicant reiterated the reason the domestic violence charges/TRO petitions were dismissed in all three cases was because neither of his wives appeared in court because "there wasn't any proof that [he] actually did these (offenses)." He added that he was never abusive to either of his wives. (Tr. 101)

In November 2021 Applicant applied for, and in December 2021 he received, an eight-year restraining order until December 2029 against his second spouse. Since

Applicant's appearance in divorce court in May 2021, he has had no contact with his second spouse and has no idea where she is. (Tr. 70-74, 76-78; AE C, AE B)

During the timeframe of August 2017 to December 2017, Applicant consulted a psychiatrist at the VA for stress related to his 2017 divorce. Applicant does not recall being given a diagnosis but was provided medication to help him sleep that he no longer takes. At the time of his hearing, Applicant was seeing a psychologist on an as-needed basis to help him cope with depression following his divorces. (Tr. 47-49, 101; GE 1)

Applicant asserts that he is a law-abiding citizen who respects the law. He added that he is a ten-year Army veteran who lived by Army core values of loyalty, duty, selfless service, honor, integrity, and personal courage. He acknowledges making poor choices in his personal life but is not a threat to national security. He considers himself a patriot and loves his country. (Tr. 102; AE A)

Law and Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing 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."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate,

or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant 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.

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

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to 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 two conditions that could raise a security concern and may be disqualifying in this case:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual’s judgment, reliability, or trustworthiness; and
- (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.

The record evidence establishes possible concerns under AG ¶¶ 31(a) and 31(b). Further inquiry is required to determine the applicability of mitigating conditions.

AG ¶ 32 provides conditions that could potentially mitigate security concerns in this case:

- (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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; 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.

A review of the facts supports partial application of AG ¶ 32(a) and full application of AG ¶¶ 32(c) and 32(d). The earliest 2017 incident occurred six years before Applicant's hearing, and the latest 2020 incident occurred three years before his hearing. Applicant presented evidence that undermined the validity of the three charges alleged against him. With regard to the first charge, his first wife failed to appear, and the case was dismissed with prejudice. With regard to the second and third charges, his second wife failed to appear, and the cases were dismissed with prejudice.

Applicant received expungement orders for all three charges. Notably, Applicant applied for and received an eight-year restraining order against his second wife. This is quite an extraordinary outcome in today's environment. The trial judge had an opportunity to review the case file and assess the credibility of the respective parties before granting such a lengthy restraining order. No such similar order was entered against Applicant. Apart from these allegations, there is no record evidence that Applicant has engaged in violence or is a violent person. Absent corroboration beyond what is available in the record, there is not reliable evidence to support a finding that the allegations occurred as alleged. In short, Applicant refuted the allegations.

Additionally, Applicant sought counseling in 2017 for stress related to his first divorce, and at the time of his hearing he was receiving counseling on an as-needed basis to cope with depression following his divorces. In the midst of all of the domestic turmoil he was experiencing, he managed to earn a bachelor's degree in 2018, a master's degree in 2019, and at the time of his hearing he was working on his Ph.D. Since he was released from active duty in the Army in 2017, he has been gainfully employed as a defense contractor.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes one condition that could raise a security concern and may be potentially applicable in this case:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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 person may not properly safeguard protected information.

The record evidence establishes possible concerns under AG ¶ 16(c). Further inquiry is required to determine the applicability of mitigating conditions.

The SOR cross-alleged the three Guideline J allegations under this concern. Guideline J is the most appropriate guideline for Applicant's conduct. AG ¶ 17 provides conditions that could potentially mitigate security concerns in this case:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

AG ¶¶ 17(d) and 17(e) partially apply, as does AG ¶ 17(c) because the alleged misconduct would have occurred under unique circumstances as Applicant is no longer married, and domestic violence is unlikely to recur. AG ¶ 17(f) fully applies for the reasons discussed under the criminal conduct analysis, *supra*. Applicant fully mitigated security concerns under this guideline.

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), "[t]he ultimate determination" of whether to grant national security eligibility "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guidelines J and E are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 33-year-old cyber operations lead analyst employed by a defense contractor since September 2022. He enlisted in the U.S. Army right after graduating from high school. He honorably served on active duty from 2009 to 2017, and in the Army Reserve from 2017 to 2020. He was subsequently awarded a 100% VA disability rating as a result of injuries sustained on active duty. Since his release from active duty, he has worked exclusively for defense contractors. He successfully held Secret and Top Secret clearances while he was in the Army, and he currently holds a TS/SCI Clearance as a defense contractor. He has diligently pursued higher education as discussed, *supra*, and was working to complete his Ph.D. at the time of his hearing.

Apart from his professional development and accomplishments, Applicant encountered significant disappointments in his personal life, notably his two divorces. His first spouse leveled a domestic violence charge against him in 2017, and his second spouse leveled domestic violence charges against him in 2019 and 2020. Neither spouse appeared at any of the scheduled hearings. All three charges were dismissed with prejudice, and Applicant received judicial expungement orders for all three of those charges. Applicant stated that his spouses failed to appear because they were unable to prove the charges they filed against him.

As noted, I found Applicant to be credible. He was consistent in his recollection of events and did not waiver or hedge in his testimony. I did not have the option of evaluating any of the complainants' testimony. As such, I was limited in reaching my

credibility assessment based on the record evidence, which not only included Applicant's testimony, but included evidence of the expungement of all charges and an eight-year restraining order filed against Applicant's second spouse. I also note that Applicant initiated divorce proceedings against both of his spouses, versus the other way around. He said neither spouse wanted a divorce. Applicant is also credited with seeking counseling on his own volition to cope with the disappointment from two failed marriages. I have also taken into account Applicant's military service, his service-connected disabilities, and his successful employment as a defense contractor.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Applicant's evidence was sufficient to overcome the *Dorfmont* presumption with respect to the security concerns alleged in the SOR.

I have carefully applied the law, as set forth in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant mitigated the Guidelines J and E security concerns.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline J:	For Applicant
Subparagraphs 1.a – 1.c:	For Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraph 2.a:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. National security eligibility is granted.

Robert Tuidor
Administrative Judge