



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



In the matter of:)
)
) ISCR Case No. 23-00327
)
Applicant for Security Clearance)

Appearances

For Government: Nicholas T. Temple, Esq., Department Counsel
For Applicant: *Pro se*

06/13/2024

Decision

HALE, Charles C., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on July 25, 2022. The Department of Defense (DoD) determined that it was unable to find that it was clearly consistent with the national interest to grant him access to classified information, and on August 8, 2023, it sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J (Criminal Conduct). The DoD acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on August 10, 2023, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 28, 2023, and the case was assigned to me on April 2, 2024. On April 29, 2024, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for May 23, 2024. I convened the hearing as scheduled. Government Exhibits (GE) 1 through 7 were admitted in evidence without objection. Applicant did not submit Applicant's Exhibits (AE) at the hearing. I kept the record open, and he submitted AE A, a personal statement, addressing each SOR allegation and his efforts to obtain a statement from a healthcare provider. AE A was admitted without objection. DOHA received the transcript (Tr.) on June 4, 2024.

I took administrative notice of the definition of *nolle prosequi* as defined by the applicable state statute and that "nolle prossed" or a dismissal means no conviction. The applicable state websites were cited on the record. (Tr. at 122.)

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 47-year-old computer system analyst employed by a federal contractor in systems administration. He was hired by his current employer two weeks prior to the hearing. (Tr. at 26.) He has been employed by federal contractors for various jobs since he retired from the Navy. He served honorably in the Navy from 1995 to 2015. He earned a Navy-Marine Corps Commendation Medal and four Navy-Marine Corps Achievement Medals during his time of service, which included two combat deployments. He first held a security clearance while on active duty. (Tr. at 24, 26; GE 1; GE 2.)

Applicant married in April 2010, divorced in July 2015, and has a 14-year-old son. He is a high school graduate and has taken college courses in cybersecurity. (Tr. at 25.)

The SOR alleges three instances of criminal conduct. As presented at the hearing, the findings of fact are addressed in chronological order.

SOR ¶ 1.c. In July 2017 Applicant was arrested and charged with Felony Destruction of property. In about September 2017 you pled guilty and sentenced to 12-months unsupervised probation. On the night in question Applicant had been drinking with his former spouse earlier in the evening and had gone to sleep at his girlfriend's (GF1) apartment. He was awakened when GF1 tossed water on him. (Tr. at 29; GE 11; GE 12.) He described the incident as follows:

I jumped up out the bed because I'm asleep, startled, and I grabbed the posts of the bed and -- to walk around. And then when I did that, that's when the post fell. And then the mattress fell on my foot. And then I threw -- I just threw the mattress off my foot. Didn't hit her. And then I walked -- and she was still yelling. So I walked in the living room, and then I smashed my television. And then I left. And then -- but I didn't want to seem like I was

running. So I came back, and then that's when the police was there. (Tr. at 29.)

The incident occurred around midnight. The police were inside the apartment when he returned. He described himself as calm when he returned. He could not recall if the police questioned him but acknowledged the police probably had questioned him. The police reported "[Applicant] arrived back on scene, irate and banging on her apartment door." (Tr. at 41; GE 10 at 4.) The police listed the bedframe and two televisions as damaged in their report. (GE 10 at 2.) He told the police he did not know how the items got destroyed and denied the allegations. (GE 10 at 4; Tr. at 42.) He was taken into custody. (Tr. at 43.) He was not represented at court and accepted the plea deal offered by the prosecutor because he had destroyed the property. (Tr. at 44.)

SOR ¶ 1.b. In September 2021 Applicant was arrested and charged with Assault and Battery Against a Family Member. An Emergency Protective Order (Family Abuse) was entered him following the incident. The assault charged was nolle prossed in January 2022. Applicant and his girlfriend at the time (GF2) got into an argument. Both individuals had been drinking. (Tr. at 48-49.) He testified GF2 called a friend and said, "I got my friend on the phone." He described his response as:

So yeah. I grabbed -- then I -- and she put the phone in my face. I was like, man. Then I grabbed the phone. I threw it on the bed. And then when I threw it on the bed, that's when I walked out the door. (Tr. at 52.)

He denied putting hands on GF2 but said he might have "brushed up against her to walk out" because she was standing in front of the doorway when he left. (Tr. at 53.) He denied spitting in GF2's face. He denied that shoved her against the headboard and grabbed her arm and her throat. (Tr. at 54.) He admitted dumped soap in a sink. He denied saying "I hope you die tonight." (Tr. at 67; GE 3 at 7 (The police presumably inserted this page in this document as part of their investigation of SOR ¶ 1.a.)) He acknowledged the police report's description of the apartment being in disarray because a bag of corks had broken open. He stated when he was packing his "stuff out of the kitchen, the bag hit the wall" and "when the bag hit the wall, the corks fell down." (Tr. at 55.) GF2's son was in the home at the time of the incident. (GE 8 at 3.)

SOR ¶ 1.a. In March 2022 Applicant was and charged with (1) Assault and (2) Intentional Destruction of Property. An Emergency Protective Order (Family Abuse) was issued against him following the incident. In about June 2022, he pled guilty to Intentional Destruction of Property and was sentenced to 12-months (suspended) conditioned on one year of good behavior, keeping the peace, obeying the court's order, and paying fines and costs. The assault charge was nolle prossed. Applicant went to GF2's apartment to collect his things after they had broken up. (Tr. at 62.) He got into an argument with GF2, who was in her car. He was described by a witness as very aggressive, screaming and getting the face of GF2. (GE 3 at 3.) Another witness reported that he grabbed on to her car when she attempted pull away and pulled out her driver side window while she was driving with him holding on. After releasing himself from her car he pursued the car briefly on foot. He returned to his vehicle

and followed her. (GE 3 at 3.) She stopped when she turned into a dead end and asked a witness to call 911. Applicant was described as arriving at a high rate of speed and went to GF2's driver window and was screaming at her. (GE 3 at 2-3.) He stated the reason for pursuing her was because he believed he had dropped his phone in her car, and he needed to get it back because it served also as his wallet. (Tr. at 61-62.) He claimed he had been videoing the initial encounter with GF2. He does not have the video because he "got rid of it" because he did not want GF2 to be charged with "malicious manslaughter." (Tr. at 70-71.) He recovered the phone where the window had been broken and then left the scene. (Tr. at 77.) He was stopped shortly thereafter by the police who were looking for his vehicle and taken into custody. (Tr. at 78; GE 2 at 4.) He later plead guilty. He testified his motive for pleading guilty was to protect GF2 from being charged. (Tr. at 80.)

At the hearing, Applicant testified the Department of Veterans Affairs (VA) rated him as being 100 percent disabled due to depression. His initial VA rating at retirement was 80 percent. He has recently begun VA-sponsored therapy treatments.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

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, an administrative judge applies these guidelines 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 and reliable information about the person, past and present, favorable and unfavorable.

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 that 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 made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have

established for issuing a clearance.

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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline J, Criminal Conduct

The concern under this guideline 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.” Applicant’s admissions and the evidence presented at the hearing establish the following disqualifying conditions under this guideline:

AG ¶ 31(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

AG ¶ 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.

The following mitigating conditions are potentially relevant:

AG ¶ 32(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

AG ¶ 32(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.

AG ¶ 32(a) is not established for SOR ¶¶ 1.a-1.c. Applicant's arrests reflect a pattern of unlawful and disruptive conduct since 2017 going through 2022. The incidents did not occur under such unusual circumstances to make recurrence unlikely. I conclude that the instances of misconduct alleged in SOR ¶¶ 1.a-1.c are not mitigated by the passage of time.

AG ¶ 32(d) is not established. Insufficient time has passed to conclude that Applicant's criminal behavior will not recur once the pressure of regaining his security clearance is lifted. He has completed the terms imposed by the court, but he has not demonstrated rehabilitation by a sufficient the passage of time without recurrence.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guidelines J and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment. I have considered that Applicant served honorably under combat conditions in the U.S. Navy. I have considered his efforts to overcome his combative tendencies during confrontations. I have concerns about his less than full candor regarding the circumstances of his multiple criminal offenses. "Once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance." ISCR Case No. 09-01652 at 3 (App. Bd. Aug. 8, 2011), *citing Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After weighing the disqualifying and mitigating conditions under Guidelines J and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his criminal

conduct and personal behavior.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline J: AGAINST APPLICANT

Subparagraphs 1.a-1c.: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

Charles C. Hale
Administrative Judge