



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



In the matter of:)
)
) ISCR Case No. 23-01252
)
Applicant for Security Clearance)

Appearances

For Government: Jenny Bayer, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

09/13/2024

Decision

HARVEY, Mark, Administrative Judge:

Applicant failed to mitigate security concerns arising under Guideline J (criminal conduct). Eligibility for access to classified information is denied.

Statement of the Case

On April 11, 2022, Applicant completed and signed a Questionnaires for Investigations Processing or security clearance application (SCA). (Government Exhibit (GE) 1) On April 11, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a statement of reasons (SOR) to Applicant. (Hearing Exhibit (HE) 2) This action was taken under issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; 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. (HE 2)

The SOR detailed reasons why the DCSA CAS notified Applicant that it intended to deny or revoke his security clearance because it did not find that it is clearly consistent with the interests of national security to grant or continue a security clearance for him. Specifically, the SOR set forth security concerns arising under Guidelines J and F

(financial considerations). (Hearing Exhibit (HE) 2) On November 13, 2023, Applicant responded to the SOR. (HE 3)

On February 5, 2024, DOHA issued a notice of hearing, setting the hearing for April 23, 2024. (HE 1B) On March 19, 2024, DOHA issued an amended notice, setting the hearing for June 25, 2024. (HE 1A) Applicant's hearing was held as scheduled on June 25, 2024, using the Microsoft Teams video teleconference system.

During the hearing, Department Counsel offered nine exhibits, and Applicant offered 38 exhibits. (Tr. 12-15; GE 1-9; Applicant Exhibit (AE) A-AE LL) All proffered exhibits were admitted into evidence without objection. (Tr. 13, 15; GE 1-9; AE A-AE LL) On July 2, 2024, DOHA received a transcript of Applicant's security clearance hearing.

Department Counsel moved to withdraw the allegation under Guideline F (financial considerations), SOR ¶ 2, Applicant did not object, and I granted the motion. (Tr. 10)

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, 1.c, and 1.d with clarifications, and he admitted the allegation in SOR ¶ 1.e. (HE 3) He also provided mitigating information. (*Id.*)

Applicant is a 24-year-old technician, and he has worked for a government contractor at a location outside the United States for two years. (Tr. 16-17) He is not married, and he does not have any children. (Tr. 17) He served for three years in a military branch of service, and he received an Other Than Honorable discharge. (Tr. 17) He received a Commendation Medal and a Certificate of Commendation during his military service. (Tr. 51; AE B at 7; AE W) He has applied for an upgrade for his discharge. (Tr. 17) He completed numerous training courses and received a diploma and certificates. (AE O, AE S-W) His resume provides additional information about his professional background and accomplishments. (AE B)

Criminal Conduct

SOR ¶ 1.a alleges in August 2020, Applicant was arrested and charged with malicious wounding in a state court. (Tr. 18) In about August 2023, Applicant pleaded guilty to unlawful wounding. He was sentenced to five years of incarceration (4 years and 11 months suspended), a \$2,500 fine, and to attend anger management counseling classes. Applicant admitted the charges, pleas, and sentence, and he said he completed all sentencing requirements. (Tr. 22, 32; HE 3; GE 4) He provided an August 17, 2023 certificate of completion for a 16-hour anger management course. (AE N)

In his April 11, 2022 SCA Applicant said:

While I was on the bed, [his girlfriend, Ms. C] grabbed the knife out [of] the drawer and lunged at me. This is when I grabbed it out of her hand, got up and started swinging towards her to get her away from me. I believe the blade hit her arm at least once while swinging. (GE 1 at 42)

In his SOR response, Applicant said Ms. C came to his hotel room uninvited. (HE 3) While they were together in the hotel room, the following altercation occurred:

After hours of her abuse, [Ms. C] yanked a blanket off of me, removed the knife from the drawer, and stated she would kill herself, a threat she had made before using a kitchen knife. She then lowered the knife from her throat and advanced toward me after making a verbal threat to kill me. I struggled with her to attempt to protect myself. At some point in the struggle, she was struck by the blade while she was holding the knife. I called the police. She attempted to flee the scene but was intercepted by the police responding to my 911 call. I cooperated with the police and surrendered peacefully.

I acknowledge the seriousness of what occurred, and I agreed to the plea deal offered by the prosecution. I did this in an effort to save my career and to try to save the relationship. I self-reported this incident to the chain of command. (HE 3, ¶ 1a; see Tr. 20-22, 31, 33 (Applicant said he did not recall how she was stabbed); GE 4)

Applicant told the police that he stabbed Ms. C. (Tr. 34; GE 6 at 6) Ms. C was treated at a hospital. (GE 6) Applicant was released on bond after his arrest, and one condition was that he have no contact with Ms. C. (Tr. 35) Applicant said she initiated contact with him, and the altercation alleged in SOR ¶ 1.b occurred. (Tr. 35-36) Applicant received five years of unsupervised probation, and he will be on probation until August of 2028. (Tr. 33; GE 4) However, Applicant believes his probation will be completed when he completes a course, which he is unable to complete because he is overseas. (Tr. 52)

SOR ¶¶ 1.b and 1.c allege in about October 2020, Applicant was arrested and charged with attempted strangle of another (Ms. C) causing wounding or injury. The charge was dismissed in about December 2020 in exchange for his agreement to plead guilty to assault and battery in the Juvenile and Domestic Relations Court. He received deferred disposition for 24 months. He was sentenced to supervised probation and prohibited from assaulting or harassing Ms. C. Applicant admitted the charges, pleas, and sentence. (Tr. 38; HE 3) He did not remember whether his plea agreement restricted his access to weapons or prohibited him from contacting Ms. C. (Tr. 39)

In his April 11, 2022 SCA Applicant said Ms. C was about to break his laptop computer. Applicant said, "I wrapped my arms around her to get her to stop. She proceeded to fight me, and she slipped from my bear hug that I performed. She then

ended up with my arms around her neck in a choke hold briefly before she freed herself.” (GE 1 at 44)

At his hearing, Applicant said she made a copy of his house key and could enter his house whenever she desired. (Tr. 23) He said he told Ms. C that the relationship was over, and he wanted her to leave his residence. (HE 3) He said, “She gathered her belongings and while doing so, attempted to destroy property that belonged to me. I attempted to stop her using a bear hug, and she slipped free, ending in a position where I had my arms around her neck briefly.” (HE 3; see Tr. 22-23) The police report indicates he put her into a chokehold. (Tr. 36; GE 7) He denied that he choked her sufficiently to cause a bruise on her neck. (Tr. 37)

SOR ¶ 1.d alleges in about December 2020, Applicant was arrested and charged with assault and battery against a family or household member and with pointing, holding, or brandishing a firearm. He pleaded guilty to pointing, holding, or brandishing a firearm. He was sentenced to 180 days of incarceration (176 days suspended) and 12 months of supervised probation. Applicant admitted the charges, pleas, and sentence. (Tr. 23-24; HE 3) Applicant said he “loaded a rifle he owned and ordered [Ms. C] to leave his home.” (*Id.*) She videotaped Appellant’s conduct and used it to coerce him into continuing their relationship. (*Id.*) He continued the relationship; however, he eventually informed the police of the “blackmail video.” (*Id.*)

In his April 11, 2022 SCA Applicant said:

After refusing [to leave his apartment] for several hours and my patience growing thin, I picked up my rifle, loaded it, and removed her from the apartment with verbal threats and a show of force. . . . While this was occurring, she was recording from her smart phone. (GE 1 at 40)

At his hearing, Applicant said he did not remember loading the firearm in front of Ms. C. (Tr. 39-40) He did not remember threatening to kill Ms. C while pointing the firearm in her direction. (Tr. 40) On the video Applicant said he would shoot her in the head, and it is going to make her bleed out. (Tr. 40; GE 8 at 5) He said he did not remember telling the police about the video. (Tr. 41-42) Alcohol and illegal drugs were not involved in the altercation with Ms. C. (Tr. 42)

Applicant said Ms. C was a toxic relationship for him. (Tr. 27) He could not remember when he first dated her. (Tr. 27) He could not estimate how long the relationship lasted. (Tr. 28) He denied that he lived with her. (Tr. 27) He attempted to break up with Ms. C several times; however, they subsequently resumed their relationship. (Tr. 29) Ms. C keyed Applicant’s car, and she called him about 200 times in a day. (Tr. 20) He filed or attempted to file several restraining orders against Ms. C. (Tr. 30-31) He said he did not remember whether he was still in a relationship with Ms. C in July 2021. (Tr. 44) He provided a statement from her dated March of 2024, and he said he arranged for one of his friends to contact her. (Tr. 44) Applicant said he has not had any contact with Ms. C since December 2020. (Tr. 24) Later, he said his most recent contact was in June 2022 before he went overseas. (Tr. 30)

SOR ¶ 1.e alleges and Applicant admitted in about September 2021, he was administratively discharged from a military service, and he received an Other Than Honorable discharge. He is not eligible for reenlistment. (Tr. 42-43; HE 3) He has requested an upgrade of his discharge from the Discharge Review Board. (Tr. 26)

Ms. C's March 12, 2024 statement indicates she suffers from "deep-seated insecurities and mental health issues including anxiety and a pervasive fear of abandonment." (AE BB) She said, "my irrational action in wielding a knife not only endangered both of us but also set off a regrettable chain of events. My actions in this instance were unjustifiable and stemmed from my untreated mental health issues." (*Id.*)

As to the instance when Applicant put her in a choke hold, Ms. C said, "I was not being strangled with harmful intent. I was simply being restrained and prevented from causing more damage than I already had. While [Applicant's] response was not appropriate, it was a reaction to the immediate circumstances I had created, including damaging his property." (*Id.*) For his threat with a firearm, she said, "His demeanor, although involving a firearm, was not intended to harm, but to address the deadlock situation created by my actions and can be seen as very calm and collect[ed] although the threatening words were used to get me to vacate the premises." (*Id.*) She is receiving treatment for Borderline Personality Disorder, Anxiety, Depression, and potential Post Traumatic Stress Disorder. (*Id.*)

Applicant also provided a background report from an Internet investigative company concerning Ms. C. (AE CC) Ms. C's background report indicates she has reports of misdemeanor larceny in 2018, misdemeanor stalking and simple assault in February 2023, a domestic violence protective order in April 2023, and several traffic infractions. (AE CC)

Character Evidence

Applicant donates funds to several charities. (Tr. 26; AE EE) On July 26, 2021, Ms. C provided a statement recommending Applicant receive a General discharge from the Marine Corps, and she said that they were "both at fault" in the problems in their relationship. (Tr. 19; AE D) She described him as diligent, dedicated, and honest. (AE D) He has learned from his mistakes and will not repeat them in the future. (AE D)

On November 5, 2023, Applicant's current girlfriend wrote that Applicant is a professional. (AE C) He is honorable, dedicated, and committed to national security. (AE C) She recommended approval of his security clearance.

Applicant provided 14 character statements from coworkers and friends. (AE E-L, AA, GG-KK) The general sense of Applicant's character evidence is that he is professional, diligent, responsible, intelligent, honest, and respectful. He demonstrates excellent leadership and contributes to mission accomplishment. The character evidence supports his continued access to classified information.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s 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.

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 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. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI 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 Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant’s security eligibility. Direct or objective evidence of nexus is not required.” ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020) (citing ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018)).

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

Criminal Conduct

AG ¶ 30 describes the security concern about 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 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;
- (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; and
- (c) individual is currently on parole or probation.

AG ¶¶ 31(a), 31(b), and 31(c) are established. Discussion of the disqualifying conditions is in the mitigating section *infra*.

AG ¶ 32 lists conditions that could mitigate security concerns:

- (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 individual 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.

The record contains police reports regarding the altercations between Applicant and Ms. C. In ISCR Case No. 22-02391 at 4 (App. Bd. Oct. 17, 2023) The Appeal Board said:

Police reports, which are admissible both as an official record under Directive ¶ E3.1.20 and as a public record under Federal Rule of Evidence 803(8), are presumed to be reliable by virtue of the government agency's duty for accuracy and the high probability that it has satisfied that duty. See, e.g., ISCR Case No. 15-02859 at 3 (App. Bd. Jun. 23, 2017); ISCR Case No. 16-03603 at 4 (App. Bd. May 29, 2019).

In August 2020, Applicant stabbed Ms. C in her arm with a knife during an altercation. In about August 2023, he pleaded guilty to unlawful wounding. He was sentenced to five years of incarceration (4 years and 11 months suspended), a \$2,500 fine, and to attend anger management counseling classes. He completed all sentencing requirements. He is scheduled to be on probation until August 2028, and he is currently on probation. He may be able to end probation before August 2028.

In about October 2020, Ms. C was about to damage Applicant's computer, and he described the subsequent altercation as follows: "I wrapped my arms around her to get her to stop. She proceeded to fight me, and she slipped from my bear hug that I performed. She then ended up with my arms around her neck in a choke hold briefly before she freed herself." (GE 1 at 44)

In about December 2020, Applicant loaded his rifle and pointed it at Ms. C. During the altercation, Ms. C was videotaping his behavior. On the video Applicant said he would shoot her in the head, and it is going to make her bleed out.

Applicant received an Other Than Honorable discharge. He has requested an upgrade in his discharge. His most recent criminal offense was in December 2020 and involved Ms. C. He is no longer involved with Ms. C. Applicant has an excellent employment record as indicated by his character statements. AG ¶¶ 32(a) and 32(d) are partially established.

The evidence against mitigation is more persuasive. Applicant made inconsistent statements. For example, in his SCA he said he stabbed Ms. C in the arm after taking the knife away from her. In his SOR response, he said, "At some point in the struggle, she was struck by the blade while she was holding the knife." At his personal appearance, he said he did not recall how she was stabbed. His statements at his hearing about not remembering events relating to the altercations and relationship with Ms. C damaged his credibility and reflect poorly on his rehabilitation. His three crimes are serious and too recent to be fully mitigated. Criminal conduct security concerns are not mitigated.

Whole-Person Analysis

In all adjudications, the protection of our national security is the paramount concern. A careful weighing of a number of variables in considering the whole-person concept is required, including the totality of his or her acts, omissions, and motivations. Each case is decided on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Under the whole-person concept, 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 a security clearance “must be an overall commonsense judgment based upon careful consideration of the guidelines” and the whole-person concept. My comments under Guideline J are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 24-year-old technician, and he has worked for a government contractor at a location outside the United States for two years. He served for three years in a military branch of service, and he received an Other Than Honorable discharge. He has applied for an upgrade for his discharge. He received a Commendation Medal and a Certificate of Commendation from the military service. He completed numerous training courses and received a diploma and certificates.

Applicant donates funds to several charities. On July 26, 2021, Ms. C said that they were “both at fault” in the problems in their relationship. Applicant provided 16 character statements from coworkers, friends, Ms. C, and his current girlfriend. The general sense of Applicant's character evidence is that he is professional, diligent, responsible, intelligent, honest, and respectful. He demonstrates excellent leadership and contributes to mission accomplishment. The character evidence supports his continued access to classified information.

The evidence against mitigation is more persuasive. In 2020, Applicant committed three assaults and batteries on Ms. C. One assault involved him stabbing her with a knife, in another he choked her, and in the third incident, he threatened to kill her and pointed a loaded rifle toward her. These are serious crimes. Applicant is currently on probation. He was not honest and candid at his hearing when he claimed a lack of memory of details about his relationship with Ms. C and specifics of the assaults.

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*, 913 F. 2d at 1401. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

I have carefully applied the law, as set forth in *Egan*, 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 failed to mitigate Guideline J (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:

Paragraph 1, Guideline J: Subparagraphs 1.a through 1.e:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline F: Subparagraph 2.a:	WITHDRAWN Withdrawn

Conclusion

Considering all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge