



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



In the matter of:)
)
 [Name Redacted]) ISCR Case No. 23-01269
)
 Applicant for Security Clearance)

Appearances

For Government: Karen Moreno-Sayles, Esq., Department Counsel
For Applicant: *Pro se*

09/30/2024

Decision

HOGAN, Erin C., Administrative Judge:

Statement of the Case

On August 16, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a statement of reasons (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.

The SOR detailed reasons why the DCSA CAS did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline J – Criminal Conduct. Applicant timely responded to the SOR and requested a hearing.

On September 27, 2023, Department Counsel was ready to proceed. On April 2, 2024, the case was assigned to me. On May 30, 2024, the Defense Office of Hearings

and Appeals (DOHA) issued a notice of hearing, setting the hearing for August 1, 2024. The hearing was held as scheduled using Microsoft Teams video teleconference.

During the hearing, Department Counsel offered eight exhibits, which were admitted as Government Exhibits (Gov) 1-8 without objection. Applicant did not offer any exhibits. The record was held open until August 14, 2024, to allow Applicant to submit additional exhibits. He timely submitted an 8-page exhibit which was admitted as Applicant Exhibit (AE) A without objection. DOHA received a transcript of the hearing on August 15, 2024. The record closed on that date.

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

Findings of Fact

In Applicant's SOR response, he admitted to all of the SOR allegations. (Response to SOR). His admissions are accepted as findings of fact.

Applicant is a 31-year-old employee of a defense contractor. He graduated from high school and completed an apprenticeship with his employer. He has worked for the same defense contractor since 2013. He has held a SECRET security clearance for seven years. He is divorced and has a ten-year-old daughter from a prior relationship. (Tr. 18, 26-29; GE 1; GE 2)

Security concerns were raised under criminal conduct in relation to two domestic incidents. One involved Applicant and his former live-in girlfriend, the other involved his then wife. The specific SOR allegations are: Applicant was arrested in February 2015 and charged with Assault and Battery of a Family Member, who was his then girlfriend. In April 2015, he entered into a deferred disposition agreement and the criminal case against him was dismissed in April 2017. (SOR ¶ 1.a: GE 3 at 5; GE 5); on May 23, 2022, he was arrested and charged with Assault and Battery of a Family Member, who was his then spouse. A protective order was issued against him. He plead guilty and entered into a deferred disposition agreement and will be under supervision until November 2024. (SOR ¶ 1.b: GE 4 at 1-2; GE 4 at 6; GE 7)

In June 2022, Applicant was charged with violating a protective order. The charge was Nolle Prosequi. The protective order will remain in effect until November 2024. (SOR ¶ 1.c: GE 4 at 2; GE 7) On September 23, 2022, he was charged with violating the protective order for a second time. He was found not guilty in November 2022. (SOR ¶ 1.d: GE 4 at 2; GE 8)

February 2015 Arrest

Applicant dated his live-in girlfriend for over five years. He admits it was a toxic relationship. He and his girlfriend would argue and engage in mutual pushing and shoving. In the early morning hours of February 2, 2015, they had an argument regarding a fan that his girlfriend liked to have running while sleeping. They slept with their baby

daughter in the bed and Applicant was concerned the baby would catch a cold. Applicant's girlfriend picked up the baby and laid down on the living room floor. He came out to get the baby. His girlfriend started shoving him. He shoved her back. His girlfriend left the room and called the police. She falsely claimed that Applicant punched her. The police arrested him and charged him with Assault and Battery of a Family Member. On April 28, 2017, Applicant appeared in court. He agreed to enter the Deferred Disposition program. He was put on a one-year probation and ordered to take a course on relationships. The course was one day a week for two months. He completed the course and the charge was dropped. He and his girlfriend split up. After they split up, their relationship improved. They see each other once a week to discuss their daughter. Their co-parenting relationship is positive. (Tr. 19, 29-32; AE 3 at 5; GE 5; Response to SOR)

May 2022 Arrest

Applicant had met Ms. V via a pen-pal relationship while they were younger. His wife lived overseas. She has a daughter from a prior relationship who is close in age to Applicant's daughter. Their relationship developed further. Ms. V and her daughter became permanent U.S. residents and moved in with Applicant. Applicant married Ms. V in March 2021. He describes his wife as being very emotional. One of the requirements of his job involves travel to different jobsites and working there for several months. Applicant had his mother move in with his family so she could help his wife while he was working out of town. In May 2022, Applicant worked at a jobsite in a northern state. He drove home over the weekend to visit his wife. His wife had learned a close friend had died and she became very upset. He and his mother attempted to calm his wife down. His wife pushed him several times until he was at a doorway. She was pushing and yelling at him while she pushed her way through the doorway. He moved out of her way when he realized she was trying to get through the door. His wife went into a bedroom. He asked his mother to help calm her down as he needed to leave for his jobsite out of state. (Tr. 36-37, 39-43; Response to SOR)

Approximately 15 minutes after Applicant left, his mother called him and told him that police were at the house. His wife had called the police and claimed that she was scared for her safety. She claimed he pushed her in the door frame and squeezed her. Applicant denies this and claims the officer did not see any marks on his wife. On May 23, 2022, Applicant was arrested for Assault and Battery of a Family Member. He was taken to the police station and was told there was a 48-hour protective order in place. He was to have no contact with his wife during this time-period. (Tr. 44-46, 50; Response to SOR)

On November 18, 2022, Applicant was found guilty of the May 23, 2022 offense of Assault and Battery of a Family Member. He was represented by counsel. His counsel advised him to plead guilty and then he would be placed in the Deferred Disposition Program. As part of the program, he was ordered to take a 32-week domestic violence treatment program with the Center for Child and Family Services and pay a \$100 fee. He was also to avoid additional misconduct. On November 17, 2023, he was released early from probation because he successfully completed the course and paid all fees. A record check also revealed he had not incurred any new charges or had outstanding warrants.

He was released from probation a year early. (Tr. 50-52; AE 8; AE A at 6; Response to SOR)

June 2022 Protective Order Violation

In June 2022, Applicant sent his mother-in-law a message. He believed they were close so he wanted to tell her what happened and that he never wanted to see her daughter again. His mother-in-law gave her daughter the message. She immediately filed a violation of a protective order. The protective order only stated there was to be no contact with his wife. It did not specify other family members. As a result it was Nolle Prosequi. A new Protective Order was extended until November 2024. (Tr. 57; GE 7, Response to SOR)

September 2022 Protective Order Violation

On September 23, 2022, Applicant and his father were at the courthouse to attend a preliminary proceeding. Upon leaving the courtroom, they walked to a private area near the vending machines to talk. They looked up and saw Applicant's wife crying. They did not talk to her. She immediately filed a Violation of Protective Order. Applicant appeared before the magistrate and explained that he did not talk to his wife. He and his father were not aware that she was sitting near where they sat down. The courthouse cameras revealed that they did not speak to his wife. The judge found him not guilty of violating the protective order. (Tr. 38, 57-60; GE 8; Response to SOR)

Applicant and his wife separated on May 23, 2022. He has had no contact with her since that time. Their divorce was final in April 2024. (Tr. 38-39)

Whole-Person Evidence

Applicant's performance evaluation dated January 29, 2024 indicates he meets expectations. His manager indicated Applicant continued to be essential to the mission. He has "greatly increased his communications and contributions to the team dynamic and demonstrates his growth professionally." (AE A at 2-5) In addition, Applicant received an award in August 2024 for his positive contributions to the mission. (AE A at 8)

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

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

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. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2, [App. A] ¶ 2(b).

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 lists 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.

Applicant was arrested for Assault and Battery of a Family Member in February 2015 and in May 2022. These misdemeanor-level offenses are serious in that they entailed a risk of bodily injury to his live-in girlfriend in 2015 and his wife in May 2022. As of the date of the SOR, Applicant was on probation for the May 2022 offense until November 2024. Applicant was also charged with violating the protective order issued to him as a result of the May 2022 incident on two occasions in June 2022 and September 2022. AG ¶¶ 31(a), 31(b), and 31(c) are established. I do note that AG ¶ 31(c) was applicable when he was on probation. It is no longer applicable because he is no longer on probation.

AG ¶ 32 describes four conditions that could mitigate security concerns including:

- (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.

AG ¶ 32(a) applies. It has been more than nine years since the February 2015 arrest. Applicant and his girlfriend were in a troubled relationship. After the February 2015 incident they agreed to part ways. Applicant successfully attended a relationship class as part of his deferred disposition agreement for this offense. He met all of the terms of the agreement. He has since matured and he and his former girlfriend, the mother of his child, have a good relationship focused on co-parenting their daughter. It has been more than two years since the May 2022 incident involving Applicant's then wife. The record is not clear that he actually assaulted his wife during the argument. Regardless, Applicant agreed to attend another deferred disposition program. He successfully completed a 32-week domestic violence course and was released early from the terms of his probation. He testified that he learned a lot from the course which he hopes to apply to future relationships. He and his wife separated after the May 2022 incident and are now divorced.

AG ¶ 32(b) does not apply based on the facts of this case. There is no evidence Applicant was pressured or coerced into committing the act.

AG ¶ 32(c) applies with respect to the SOR ¶¶ 1.c and 1.d related to his alleged violations of the protective order to stay away from his wife. Regarding the May 2022 offense alleged in SOR ¶ 1.c, he contacted his wife's mother to explain why he was breaking up with her daughter. While he probably did not use the best judgment when contacting his mother-in-law, he did not violate the protective order because the protective order at that time only covered that he have no contact with his wife. His communication with his mother-in-law was not threatening to his wife or his mother-in-law. The disposition of the offense was Nolle Prosequi.

AG ¶ 32(c) applies with respect to SOR ¶ 1.d, because Applicant was acquitted by the judge on this allegation. While Applicant and his wife were in the courthouse at the same time, he did not attempt to communicate with her. He was with his father. They sat in an area that they thought was private and discovered his wife was sitting nearby. She immediately ran out of the area and filed for a violation of the protective order. The courthouse cameras revealed Applicant did not attempt to communicate with his wife so he was found not guilty.

AG ¶ 32(d) applies because Applicant has provided evidence of successful rehabilitation. He met all of the terms of his probation. In fact, he was released early from probation related to the May 2022 offense. He has not had any subsequent criminal offenses since May 2022. He has since matured and developed a good rapport with his former girlfriend, the mother of his child. He and his wife separated after the May 2022 incident and are divorced. He has no contact with her. Finally, he has a good employment record.

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 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 those guidelines but some warrant additional comment.

Applicant is a 31-year-old employee working for a defense contractor. I considered he is a high school graduate with technical training. I considered Applicant's favorable employment history for over 11 years. He has moved up after successfully completing apprenticeships and training.

While the issue of domestic violence is a serious one, the incidents in question appear to be mutual arguments which resulted in little to no physical harm. Each charge was a misdemeanor-level offense. Applicant took courses and successfully completed his deferred disposition programs. He has a better understanding of how to interact in future relationships. Criminal Conduct concerns are mitigated.

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: FOR APPLICANT

Subparagraphs 1.a through 1.d: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is granted.

Erin C. Hogan
Administrative Judge