



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



In the matter of:)	
)	
)	ISCR Case No. 23-00583
)	
Applicant for Security Clearance)	

Appearances

For Government: Nicole Smith, Esq., Department Counsel
For Applicant: *Pro se*

10/30/2024

Decision

HYAMS, Ross D., Administrative Judge:

Applicant provided sufficient information to mitigate the criminal conduct and personal conduct security concerns. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 25, 2022. On April 28, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J (criminal conduct) and Guideline E (personal conduct). Applicant answered the SOR on May 10, 2023, and requested a hearing before an administrative judge. The case was assigned to me on April 4, 2024.

The hearing convened on August 22, 2024. Department Counsel submitted Government Exhibits (GE) 1-3, which were admitted in evidence without objection. Applicant did not provide any documentation at the hearing. I held the record open for two weeks after the hearing to provide Applicant with the opportunity to submit documentary evidence. He submitted Applicant Exhibits (AE) A-Q, which were admitted in evidence without objection.

Findings of Fact

Applicant admitted the SOR allegations. His admissions are incorporated into the findings of fact. Based on my review of the pleadings, evidence submitted, and testimony, I make the following additional findings of fact.

Applicant is 48 years old. He graduated high school in 1995. He was married in 1996 and divorced in 2018. He has three adult children. Since 2019, he has worked as a safety manager for a defense contractor. He served on active duty in the Marine Corps from 1995 to his retirement in 2018. During his service, he deployed to Afghanistan once and Iraq three times. (Tr. 16-20; GE 1)

Under Guideline J, the SOR alleges in 2022, Applicant was arrested in State A and charged with two counts of felony aggravated assault with a deadly weapon. A few months later, he entered a pre-trial intervention agreement. He underwent an anger management and psychiatric evaluation. He had check-ins with a probation officer until mid-2023.

Applicant was returning home from a shopping trip in a populated tourist area near his home. He was driving a large pickup truck in two lanes of traffic heading over a long bridge. He was in the left lane, behind a driver that started driving erratically. He was unable to go around the erratic driver because the right lane was congested with traffic. (Tr. 21-83; GE 2)

The driver in front "brake checked" him the first time without slowing down significantly. A brake check is when a driver hits their brakes, with a clear road in front of them, to cause the driver behind them to take evasive action to prevent a collision. The driver brake checked Applicant four more times, almost causing collisions between the two vehicles. Applicant stated he believed the driver mistook him for someone else and was acting aggressively at the wrong person. (Tr. 21-83; GE 2)

At the end of the bridge, Applicant wanted to get in front of the erratic driver so he would not have to continue to evade collision. In this popular congested area, there was too much traffic on the right to change lanes, so he drove in the gravel median on the left to get in front of the erratic driver. He assessed that it was critical to get in front of them for safety. When Applicant entered the median, the other driver stopped slowing down and sped up to drive along side of him to prevent him from getting in front of their vehicle. (Tr. 21-83; GE 2)

Applicant was able to go around the other vehicle, but once he did, there was a traffic bottleneck directly to his front and he could drive no further. He got out of his vehicle for two reasons, first, he thought if the driver mistook him for someone else, seeing that he was not that person would deescalate the situation. Second, Applicant feared for his personal safety. He was worried because the other driver was acting so aggressively, they could get out of their car with a gun and shoot him from behind. Sitting in his vehicle facing forward would put him in a position where he could not react or protect himself,

and he wanted to be able to protect himself head on. He stated in that situation, there was no time to call police for help, and he was unable to drive away. (Tr. 21-83)

After Applicant exited his vehicle, he yelled at the other driver “what are you doing.” At this moment his sandal broke, and when he reached down to fix it the other driver delivered a barrage of punches to his head. He did not hit the other driver back. He was knocked down by the attack and his vision became cloudy. He could only see blurry figures, but heard the other driver tell his passenger that he was going to “kill that Mother F#&%@r”. (Tr. 21-83)

After Applicant heard that declaration, he feared for his life. He stumbled back to his vehicle and obtained his pistol. He possessed a valid concealed carry permit for his pistol from State B, which has permit reciprocity with State A. He brandished his pistol, holding it at the low ready position – out front and pointed downwards at a 45-degree angle, he warned the other driver to leave. His vision was still clouded at this point. He could see blurry figures backing away and heard them leave. (Tr. 21-83; GE 2; AE B)

Some drivers in the area saw parts of the incident and called police. Police obtained a few brief statements from some of these persons. Most of these statements report small snippets of the entire interaction. Some contradict reporting from both Applicant and the other driver (AKA the “victim”) in the incident and do not make sense. One witness reported that Applicant was brake checking the other driver. (Tr. 21-83; GE 3)

When police arrived, Applicant was not asked his version of events, and did not have the chance to assert that he was acting in self-defense. Police only asked him if Applicant hit the other driver and if Applicant drew his pistol from his truck. He was arrested without any further questioning. His mug shot and post arrest photos showed his injuries from the other driver’s assault, and his injuries are mentioned in the police report. (Tr. 21-83; GE 2, 3)

After his arrest, Applicant found out that the other driver was a habitual felony offender and had three dozen arrests, including offenses involving firearms, drugs, aggravated battery with a deadly weapon, domestic battery, burglary, and assault. The passenger was his girlfriend who also had multiple arrests. Their arrest history was submitted into the record. Since their car had tinted windows, he later learned that they had children in their vehicle while driving erratically, trying to cause multiple collisions, and attacking him. (Tr. 21-83; Answer)

Applicant has no criminal record. He testified that he took the pretrial agreement over going to trial to prove self-defense, because of the financial burden the litigation would have caused. He had to take a loan from his 401K to pay his attorney fees to get to the pretrial diversion agreement offer. His attorney told him it would cost tens of thousands of dollars more to take his case to trial. The pretrial agreement was ten months of probation, fees, and a psychological and anger management evaluation. Applicant was cleared in both evaluations. His probation officer came to his home once, and he reported

she was so impressed with how orderly and clean his apartment was, that she stated she was never returning to check on it. He went to see her four times, and then was told just to call her to do his check-in. His probation was terminated early. (Tr. 21-83; AE A-E)

Applicant no longer has his pistol. He stated that his experience in self-defense with the State A justice system was so negative and costly, he will never carry it again. (Tr. 21-83)

Applicant's employer retained him after the incident and has since promoted him. He provided six character letters, which state he is a valuable employee, reliable, trustworthy, has good character, and should be granted a security clearance. He also submitted his DD 214 showing an excellent record of military service, and four performance evaluations from his current employer, which show effective and exceptional performance. (AE G-R)

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 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

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern for 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 31. The following are potentially applicable in this case:

(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 criminal conduct security concerns are established by the police and court records and Applicant's admissions. AG ¶ 31 (b) applies.

I have considered the mitigating conditions under AG ¶ 32. The following are potentially applicable:

(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

(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. Applicant was arrested almost three years ago. It occurred under unusual circumstances which are unlikely to recur. It does not cast doubt on his reliability, trustworthiness, or judgement.

Applicant's decision to get out of his vehicle, so that he would not get shot from behind, was sensible and consistent with logical self-defense principles. Given his interaction on the road with the other driver, it was reasonable for Applicant to believe the driver wanted to cause him harm. Applicant was legally carrying his firearm. Despite being physically attacked, Applicant used the proper amount of force, brandishing his pistol to prevent further assault. The evidence that the other driver was a habitual felony offender gives further credibility to Applicant's version of events and actions that day.

AG ¶ 32(d) applies. The incident that led to Applicant's arrest occurred almost three years ago. He had no criminal record before the event, and there is no recurrence of criminal activity. He complied with the terms of probation and completed it successfully. He has a documented good employment record and an honorable record of military service. He no longer carries or owns his pistol. There is no other conduct of concern. There is ample evidence to find there has been successful rehabilitation. The criminal conduct security concerns are mitigated.

Guideline E, Personal Conduct

AG ¶ 15 details the personal conduct security concern:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes...

SOR ¶ 2.a cross-alleges the Guideline J allegation (¶ 1.a) under Guideline E. Department Counsel argued that ¶ 16(c) applies (Tr. 89). Disqualifying condition ¶ 16(c) states:

(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 individual may not properly safeguard classified or sensitive information.

Under AG ¶ 17, the following mitigating conditions are potentially applicable:

(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.

I found for Applicant under Guideline J and the same reasoning applies to Guideline E. AG ¶ 17(c) applies. Applicant was arrested almost three years ago. It occurred under unusual circumstances which are unlikely to recur. It does not cast doubt on his reliability, trustworthiness, or judgement.

Applicant was legally carrying his firearm. He did not create the situation that led to the conflict. His decision to get out of his vehicle was sensible, and consistent with logical self-defense principles. Despite being physically attacked, Applicant used the proper amount of force, brandishing his pistol to prevent further assault. The personal conduct security concerns are mitigated.

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 relevant 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), 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. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered his military service, performance in his current employment, and six character letters. I have incorporated my comments under Guidelines J and E in my whole-person analysis.

I had the chance to observe Applicant's demeanor and assess his credibility. He adequately explained the circumstances surrounding the SOR allegations, and I found his testimony and explanations to be credible and substantially corroborated by documentary evidence.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility for a security clearance. He provided sufficient evidence to mitigate the criminal conduct and personal 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

It is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

Ross D. Hyams
Administrative Judge