



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



In the matter of:)
)
) ISCR Case No. 23-00942
)
Applicant for Security Clearance)

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: *Pro Se*

04/04/2024

Decision

HARVEY, Mark, Administrative Judge

Security concerns arising under Guideline E (personal conduct) are mitigated; however, security concerns under Guideline J (criminal conduct) are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On March 2, 2017, and June 10, 2022, Applicant completed and signed Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance applications (SCA). (Government Exhibit (GE) 1 and GE 2) On July 19, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; Department of Defense (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. (Hearing Exhibit (HE) 2)

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. (HE 2) He provided an undated response to the SOR. (HE 3) On October 2, 2023, Department Counsel was ready to proceed. On November 15, 2023, Department Counsel issued an amended SOR to Applicant which set forth security concerns under Guideline E. (HE 4) Applicant provided an undated response to the amended SOR. (HE 5)

On October 18, 2023, the case was assigned to me. On November 17, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice, setting the hearing for December 15, 2023. (HE 1) The hearing was held as scheduled.

Department Counsel offered seven exhibits into evidence; and Applicant offered two exhibits into evidence. (Transcript (Tr.) 26-28, 115-116; GE 1-GE 7; Applicant Exhibit (AE) A-AE B) There were no objections, and all proffered exhibits were admitted into evidence. On January 4, 2024, DOHA received a transcript of the hearing. Applicant provided one exhibit after his hearing, which was admitted into evidence without objection. (AE C) The record closed on January 22, 2024. (Tr. 17, 116, 119)

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 and amended SOR response, he admitted all of the SOR and amended SOR allegations. (HE 3; HE 5) He also provided mitigating information. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 32-year-old principal systems engineer who has been employed by a large defense contractor since 2016. (Tr. 6-8) In 2010, he graduated from high school. (Tr. 6) In 2014, he received a bachelor's degree in engineering physics. (Tr. 7) In 2016, he was awarded a master's degree in electrical and computer engineering. (Tr. 7) In 2021, he married, and he does not have any children. (Tr. 8) His spouse is a teacher for fourth-grade students. (Tr. 8, 92) His resume provides additional information about his background and experience. (AE C)

Criminal Conduct

The four allegations in SOR ¶ 1 involved domestic violence against his future spouse and spouse, and they are addressed in chronological order. SOR ¶ 1.d alleges in about 2017 to 2018, Applicant spanked his spouse leaving a handprint mark. He said his spouse was disrespectful to him, and he decided to treat her like a child. (Tr. 86) He bent her over the couch, and he spanked her on her bare buttocks with his hand. (Tr. 86-87; GE 3 at 8) The police were not contacted about the spanking incident. (Tr. 87)

SOR ¶ 1.c alleges in about April 2019 (the SOR was amended at the hearing to change the year from 2018 to 2019 (Tr. 84-85)), Applicant was arrested for a battery-related charge. The charge was dismissed.

In April 2019, Applicant was in a coffee shop sitting at a table with his spouse, and they were arguing. (Tr. 57-58, 84; GE 7 at 2) She covered his mouth with her hand because she did not agree with what he was saying; he pushed her; and she fell from her chair. (Tr. 58, 82) A police officer was in the coffee shop near their table, and the police officer arrested him. (Tr. 57-58, 80-81) He stayed in jail overnight. (Tr. 83)

SOR ¶ 1.b alleges in about February 2020, Applicant was arrested and charged with domestic battery with bodily harm. He pleaded guilty. After he completed a domestic violence course and paid a fine and costs, the charge was dismissed. (Tr. 77; GE 3 at 7) On April 19, 2021, he filed for expungement, and the record indicates it was "stricken off." (GE 5 at 3)

In February 2020, Applicant and his future spouse were arguing. (Tr. 63) She was sitting on the couch, and she said he struck her head with a bag of pills. (Tr. 56, 62-63) He said he was trying to convince her that the way she was talking to him was not "how you talk to a loved one." (Tr. 76) He swung a bag containing a bottle of pills. (Tr. 76) The bag tore open, and the bottle of pills hit her head. (Tr. 76) He denied that he intended to hit her with the pills. (Tr. 76; GE 3 at 7)

Applicant completed a 26-week domestic violence course after the February 2020 domestic battery with bodily harm. (Tr. 41) He said this course did not develop constructive tools to deescalate interactions. (Tr. 42) When he saw injustice, he did not learn how to correctly apply justice or to take appropriate actions. (Tr. 42) The action plan for the course indicates that he was supposed to contact the provider in the event of recurrence of symptoms of emotional distress or relapse. (Tr. 78; GE 6 at 4)

SOR ¶ 1.a alleges in about April 2022, Applicant was arrested and charged with aggravated domestic battery and unlawful restraint, which are both felonies. (GE 7) He pleaded guilty to lesser offenses, and the court placed him on probation for 24 months. The Lexis Record shows for disposition of a Class A misdemeanor for both offenses and "Stricken off-Leave Reinstate." (GE 7 at 2)

Applicant said he was having an argument with his spouse about how much money she allowed him to spend each month. (Tr. 90) He said he felt it was "not appropriate for one spouse to control the other, so I pinned her to the wall and said, you do not do this to a loved one, and that was me setting a boundary in an unhealthy manner and that-that is not how you go about doing that." (Tr. 30) Initially at his hearing, he admitted he pushed her "around her neck area." (Tr. 31) During his November 4, 2022 Office of Personnel personal subject interview (OPM PSI), he denied that he choked his spouse. (GE 3 at 9) Towards the end of the hearing, he clarified his use of his hands on her neck at his personal appearance as follows:

I was aggressive around her neck and that was to push her off out of what we were having a tussle about, but it was not - it was not, as described ... based on the police report ... [She pushed me, and then] I pushed her around her neck very aggressively to prove a point of you don't push me. And she was thrashing, and I remember grabbing her hand [and] her wrists very firmly, to say this is not okay ... I pushed her very aggressively. And it

was my-my fingers and my thumbs were encircling-were-effectively, around her neck. It-it was not something that I would encompass as strangulation, but I can see how, based on the moment, I could see how she could fear for, you know, permanent injury or anything along that nature. It just-it was not my intent to strangle her [The touching of her neck] was [with] both hands. It-it was-it was just like, I'd pushed her around her clavicle area, just to get her away from me and to deliver a message and that was the-the-that message was received. (Tr. 103-105)

Applicant's spouse accused him of strangling her, and she said she thought she was going to die. (Tr. 31; GE 4 at 5) He accused her of misrepresenting what happened. (Tr. 31) The police observed "a red mark on the right side of [her] neck." (Tr. 32; GE 4 at 5) The report also states, "There were areas of slight redness to the neck/throat area that could not be measured." (*Id.* at 7) There were several bruises on her arms and wrists. (*Id.*)

After Applicant pushed her into the wall, he also pushed her "quite aggressively" when she was sitting on the toilet. (Tr. 32-33) He tried to keep her from leaving the bathroom by holding the bathroom door closed, which resulted in the unlawful restraint charge. (Tr. 34-35; GE at 5) While she was in the bathroom, she called 911. (Tr. 34-36) The police arrested Applicant, and he was in jail for 24 hours. (Tr. 40) Applicant is 69 inches tall, and in April 2022, he weighed about 135 pounds. (Tr. 41) His spouse is 60 inches tall, and she weighs about 125 pounds. (Tr. 41) When he went to court, he pleaded guilty to misdemeanor domestic violence or possibly assault and battery. (Tr. 43, 106-107) He was sentenced to probation until December 2024, and to pay court costs. (Tr. 44)

Applicant's spouse said there have been a few times when he has assaulted her, and she did not call the police. (Tr. 61) She did not call the police because she did not think the police would believe her. (Tr. 61) His spouse said she did not remember the incident described in SOR ¶ 1.d. (Tr. 62)

Applicant said he regrets his past conduct, and the therapy after April 2022 has "clicked" for him. (Tr. 21, 100) He learned in the Physical Abuse Intervention Program (PAIP) that abuse is a "clear no-no;" boundaries and control need to be maintained; and he should hold himself accountable. (Tr. 22, 24) He has yelled at his spouse after the 2022 assault. (Tr. 87) In an argument with his spouse in which she was being disrespectful to him and scolding him, he walked away until they were calm. (Tr. 23) Applicant said his spouse instigates things that lead to stress or pressure in the relationship. (Tr. 102) However, she was not the instigator of physical violence. (Tr. 102)

Applicant's spouse said Applicant had been physically abusive to her previously; however, the incident in April 2022 was the first and only time he choked her, and she said it was scary. (Tr. 50-51, 66-67) She said that after his arrest in April 2022, he has been more patient and understanding. (Tr. 48) He handles conflict "in a more healthy manner." (Tr. 48, 66) He has made progress, and she does not believe future violence will occur. (Tr. 48) She has learned to step away from him when she is feeling strong emotions. (Tr. 49) She has never sought medical help after domestic violence incidents.

He has learned from his mistakes, and their relationship has improved because of the intervention of therapists and the justice system. (Tr. 70)

Applicant's probation officer said:

He is currently on adult probation supervision for the charge of misdemeanor [domestic battery]. Currently, [he] reports in person to my office every other week and has remained arrest-free to date. In addition to reporting, he has completed a 26 week [domestic violence] program in March 2023. [He] has expressed his willingness to address volatile situations with calm, collective skills to de-escalate these types of situations. He continues to be in compliance with probation reporting and completing his probation conditions. (AE B)

After the 2022 offense, Applicant and his spouse continue to engage in verbal arguments; however, they do not resort to physical violence. (Tr. 72) He disclosed the arrests and charges relating to the criminal offenses in 2020 and 2022 on his June 10, 2022 SCA. (GE 1 at 36-38)

Personal Conduct

SOR ¶ 2.a alleges during 2017 and 2018, Applicant wrote about 20 papers for his spouse, who was a college student studying to become a teacher. Applicant admitted that he wrote about 20 papers for her when she was in college. (Tr. 92; GE 3 at 8) He believes his spouse is an excellent teacher. (Tr. 93) He acknowledged it was not ethical for him to write her papers for her. (Tr. 93)

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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 Director of National Intelligence 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 criminal conduct security concern and may be disqualifying in this case as follows:

- (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 criminal conduct security concerns as follows:

(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.

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).

The SOR alleges and the record establishes four domestic violence incidents in which he committed an assault and battery upon his spouse. Three incidents resulted in his arrest and court appearances.

Applicant presented some important mitigating evidence. He is compliant with all probation requirements. He completed a 26-week domestic violence program in March 2023. He has received therapy and has learned some coping mechanisms which should help him avoid violence in his relationship with his spouse. He and his spouse have learned to separate from each other when their arguments become too emotional and not to resort to physical violence. He has not physically abused his spouse since April 2022. She has not required medical care after any of the domestic violence incidents.

Applicant's criminal offenses show a pattern of poor judgment. None of the mitigating conditions are fully established because he is currently on probation and not enough time has elapsed since the most recent incident in April 2022. The fourth incident in 2022 was particularly egregious. I believe his spouse's statement that she was choked, and she feared she might lose her life. Applicant attempted to minimize his culpability by saying he aggressively pushed her clavicle or in her neck area; however, at one point he said he had both hands on her neck. The police observed some redness on her throat or neck corroborating his spouse's statement that he choked her. Criminal conduct security concerns are not mitigated.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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

AG ¶ 16 includes two conditions that could raise a personal conduct security concern and may be disqualifying as follows:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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. This includes, but is not limited to, consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information,

unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

The record establishes AG ¶¶ 16(d) and 16(e). Discussion of the disqualifying conditions is in the mitigating section, *infra*.

AG ¶ 17 provides conditions that could mitigate personal conduct 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; and

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

SOR ¶ 2.a alleges during 2017 and 2018, Applicant wrote about 20 papers for his spouse, who was a college student studying to become a teacher. He acknowledged it was not ethical for him to write her papers for her. Applicant's unethical behavior occurred about six years ago; this type of unethical behavior has not recurred; and it is unlikely to occur in the future because she is not in college. I do not believe he would compromise national security to avoid disclosure that he helped his future spouse cheat on papers when she was in college. AG ¶ 17(c) applies. 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 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 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 32-year-old principal systems engineer who has been employed by a large defense contractor since 2016. In 2014, he received a bachelor's degree in engineering physics, and in 2016, he was awarded a master's degree in electrical and computer engineering. His resume provides additional information about his background and experience.

Applicant has complied with all probation requirements and has attended and completed a 26-week therapy program. He and his spouse believe his behavior has changed and their verbal arguments will not escalate into domestic violence in the future.

The evidence against grant of a security clearance is more persuasive at this time. Applicant admitted that he committed four incidents of domestic violence upon his future spouse and spouse. She said there were additional incidents that she did not report to the police. The additional incidents were not considered for disqualification purposes. He will be on supervised probation until December 2024. His decisions to repeatedly engage in such conduct are indications he currently lacks the qualities expected of those with access to national secrets.

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 mitigated personal conduct security concerns;

however, he failed to fully mitigate criminal conduct security concerns. More time without criminal conduct is necessary to establish he has control of his anger and behavior in stressful situations involving his spouse.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to be eligible for a security clearance. The determination of applicant's eligibility and suitability for a security clearance is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under his current circumstances, a clearance is not warranted. In the future, he may well demonstrate persuasive evidence of his security worthiness.

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:	AGAINST APPLICANT
Subparagraphs 1.a through 1.d:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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

Mark Harvey
Administrative Judge