



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 18-02734
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Andrea Corrales, Esq., Department Counsel  
For Applicant: *Pro se*

06/26/2019

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct) and E (Personal Conduct). Applicant has mitigated the security concerns raised by his criminal conduct, traffic infractions, and termination of employment. He has refuted the allegation that he falsified his security clearance application. Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on June 27, 2017. On December 6, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J and E. The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on December 19, 2018, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 7, 2019, and the case was assigned to me on April 23, 2019. On May 8, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 10, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. DOHA received the transcript (Tr.) on June 20, 2019.

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a-1.d, 2.a, and 2.c. He denied the allegation in SOR ¶ 2.b. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 24-year-old mechanic employed by a defense contractor. (Tr. 21.) He has never held a security clearance. He graduated from high school in June 2012 and attended a university for three months. He does not know his biological father, and he was raised by his grandparents. He left home after graduating from high school and lived in an apartment with his brother and his brother's girlfriend. He was evicted from the apartment because of noise coming from the apartment, apparently because of loud arguments between his brother and his brother's girlfriend, and he began living in his car. He now rents a house owned by his grandfather. (GX 4 at 2; Tr. 28-29.) He has never married, but he has a six-year-old son. (GX 1 at 21, 24.)

Applicant worked as a cook at a retirement facility from October 2012 to October 2015. He was fired because he was late for work twice and failed to have his badge with him when he clocked in. He explained that he was late for work because he was living in his car, overslept, and had problems with an unreliable car. He failed to swipe in with his identification card because he had lost it. (GX 4 at 3-4.)

Applicant was unemployed for two months and then worked as a cook at a golf course from November 2015 to February 2017. He worked for a defense contractor as a marine painter from February 2017 to September 2017, when he was laid off due to budget cuts. He worked for a defense contractor as a maintenance helper from January to June 2018. (GX 4 at 3-4.) His supervisor submitted a letter of recommendation for him, describing him as bright, personable, highly motivated, and a "valuable resource." (AX A.) Since September 2018, he has been employed by another defense contractor. His most recent supervisor submitted a letter of recommendation describing him as having a great attitude and a sense of urgency. (AX C.)

In September 2015, Applicant was involved in an altercation with his then cohabitant, when she tried to prevent him from moving out. She began hitting him as he gathered up his possessions, and he grabbed her around the waist to prevent her from hitting him. His cohabitant's sister called the police and accused him of choking his cohabitant. The police arrested him for domestic assault and battery. His cohabitant

denied that Applicant had choked her. Applicant and his then cohabitant agreed to have no contact with each other, and the prosecutor filed a *nolle prosequi*. (GX 3; GX 4 at 2; Tr. 25.)

When Applicant submitted his SCA in June 2017, he answered “No” to questions asking whether, during the last seven years, he had been issued a summons, citation, or ticket to appear in court in a criminal proceeding; had been arrested by any law-enforcement official; or had been charged, convicted, or sentenced for a crime in any court. He did not disclose that he was arrested and charged with domestic assault and battery in September 2015. In May 2018, he told a security investigator that he did not disclose his arrest and charge of domestic assault and battery because he did not understand the question. He fully disclosed the incident to the security investigator. (GX 4 at 3; Tr. 29.) In his answer to the SOR and at the hearing, he stated that he thought he was required to disclose only arrests that resulted in convictions, and he did not disclose the arrest for domestic assault and battery because he was not convicted. (SOR Answer; Tr. 30.)

Between April 13, 2018 and April 2, 2018, Applicant was charged with or cited for the following motor-vehicle offenses:

<b>OFFENSE</b>	<b>DATES</b>	<b>DISPOSITION (GX 2)</b>
Driving without a license	April 13, 2013 April 28, 2013 October 18, 2013	\$50 fine \$100 fine \$100 fine
Driving an uninsured vehicle	November 21, 2013	\$100 fine
Driving on a suspended or revoked driver’s license	November 21, 2013; January 12, 2014; May 3, 2014; July 30, 2014	Jail 4 days; probation Jail 90 days (suspended); \$50 fine \$100 fine \$100 fine
Seat-belt violation	June 17, 2016	\$25 fine
Speeding 40 miles per hour (mph) in a 25-mph zone	November 21, 2013	\$90 fine
Speeding 52 mph in a 35-mph zone	January 12, 2014	Dismissed
Speeding 39 mph in a 25-mph zone	May 14, 2016	\$84 fine
Speeding 49 mph in a 35-mph zone	June 27, 2016	\$84 fine
Speeding 74 mph in a 55-mph zone	April 2, 2018	Prepaid fine, amount not reflected in record

Even though the seat-belt violation and speeding tickets were alleged under Guideline J, the court records reflect that the seat-belt violation and speeding tickets were civil infractions and not criminal offenses. As such, they should have been alleged under Guideline E, and I have considered them under that guideline.

Applicant testified that he initially did not bother to obtain a driver's license due to immaturity and inexperience. He needed transportation to his job, and needed to work because he had a newborn son. (Tr. 22.) He now holds an unrestricted driver's license. He attached documentation to his answer to the SOR, reflecting that all fines and court costs had been paid.

Applicant's grandfather, with whom he lived while growing up, submitted a letter describing Applicant's involvement in youth activities. Applicant has volunteered to serve as an equipment and uniform specialist and an assistant coach three to five days a week. He has a reputation for being dependable, honest, loyal, and hardworking. (AX B.)

### **Policies**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

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

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant

from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr.20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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

## **Analysis**

### **Guideline J, Criminal Conduct**

The concern under this guideline is set out in AG ¶ 30: Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations. Applicant's record of traffic-related criminal conduct raises the following disqualifying conditions under this guideline:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

The following mitigating conditions are relevant:

AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

AG ¶ 32(c): no reliable evidence to support that the individual committed the offense; and

AG ¶ 32(d): there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶ 32(a) is established. Applicant's last criminal offense was in July 2014, almost five years ago.

AG ¶ 32(c) is established for the domestic assault and battery charge alleged in SOR ¶1.a. It is not established for the other offenses alleged in the SOR.

AG ¶ 32(d) is established. Applicant's last criminal offense was almost five years ago, and he has earned the respect of two recent employers and is actively involved in community activities.

### **Guideline E, Personal Conduct**

SOR ¶ 2.a cross-alleges the charge of domestic assault alleged in SOR ¶ 1.a and the traffic offenses alleged in SOR ¶¶ 1.b and 1.c. SOR ¶ 2.b alleges that Applicant falsified his SCA by failing to disclose that he was charged with the domestic assault alleged in SOR ¶ 1.a. SOR ¶ 2.c alleges Applicant's termination of employment for tardiness and loss of his identification card. The concern under this guideline is set out in AG ¶ 15:

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. . . .

The following disqualifying conditions are relevant:

AG ¶16(a): deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

AG ¶ 16(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; and

AG ¶ 16(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: . . . (3) a pattern of. . . rule violations . . . .

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant is young, has limited formal education, and no previous experience with the security clearance process. Under the circumstances, I found his explanation for not disclosing the unfounded charge of domestic assault plausible and credible. Accordingly, I conclude that AG ¶ 16(a) is not established by his failure to disclose it in his SCA.

I have considered Applicant's traffic infractions under this guideline, along with his termination of employment for tardiness and losing his identification card. These incidents are sufficient to establish AG ¶¶ 16(c) and 16(d).

The following mitigating conditions are potentially applicable:

AG ¶ 17(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; and

AG ¶ 17(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.

Both mitigating conditions are established. Applicant's traffic offenses were minor infractions and the last speeding ticket was more than a year ago. His termination of employment was for minor infractions and was more than three years ago. Applicant has acknowledged that his behavior was immature, and he appears to have matured, to the extent that his current and previous supervisors submitted letters strongly supporting his application for a security clearance.

### **Whole-Person Concept**

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guidelines J and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Applicant was well-prepared, sincere, candid, and credible at the hearing. I was impressed by the favorable recommendations from two recent employers. After weighing the disqualifying and mitigating conditions under Guidelines J and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his criminal conduct and personal conduct.

### **Formal Findings**

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

Paragraph 1, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 2.a-2.c:	For Applicant



## **Conclusion**

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman  
Administrative Judge