



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



In the matter of:)
)
) ISCR Case No. 20-01591
)
Applicant for Security Clearance)

Appearances

For Government: Dan O’Reilly, Esq., Department Counsel
For Applicant: *Pro se*

09/17/2021

Decision

CERVI, Gregg A., Administrative Judge:

Applicant mitigated the security concerns under Guideline J, criminal conduct; Guideline D, sexual behavior; and Guideline E, personal conduct. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 6, 2019. On November 4, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J, D, and E. The DCSA 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) effective June 8, 2017.

Applicant answered the SOR (undated) (Ans.), and requested a decision based on the written record without a hearing. The Government’s written brief with supporting

documents, known as the file of relevant material (FORM), was submitted by Department Counsel on May 17, 2021. A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, rebut, or mitigate the security concerns. Applicant received the FORM on June 25, 2021, but did not submit a reply. The case was assigned to me on September 7, 2021. Government Exhibits (GE) 1 through 6 are admitted into evidence without objection.

Findings of Fact

Applicant is a 33-year-old administrative assistant, employed by a government contractor since May 2019. He attended community college and university from 2012 to 2017, but did not attain a degree. He served in the U.S. Marine Corps from 2007 to 2012, including a deployment to Afghanistan, and received an honorable discharge. (GE 3, Ans.) Applicant was never married, but has lived with a cohabitant since September 2015. Applicant was granted a security clearance in 2007 while he was on active duty. (GEs 3 and 4)

The SOR alleges under Guideline J (criminal conduct), that in May 2007, Applicant was charged with felony criminal abduction by force, intimidation or deception, and misdemeanor sexual battery by force or helplessness. He was convicted of misdemeanor assault and battery, and sentenced to 12 months of supervised probation (SOR ¶ 1.a). The remaining Guideline J allegations, SOR ¶¶ 1.b – 1.j, alleged traffic violations to include reckless driving (all related to excessive speed) in July 2008, December 2008, April 2009, and October 2010. He was convicted of misdemeanor reckless driving in all four cases (SOR ¶¶ 1.b – 1.e). In December 2014, he was charged and convicted of speeding (SOR ¶ 1.f).

Between July 2012 and February 2014, Applicant was charged and found guilty of at least five motor vehicle equipment safety violations such as improper exhaust system and tinted windshield (SOR ¶ 1.g). Between October 2012 and December 2014, he was charged and found guilty of at least three motor vehicle traffic violations, including improper lane change and disobeying highway markings or sign. (SOR ¶ 1.h). Finally, in April 2015 and March 2019, Applicant was charged with misdemeanor concealed weapon violations (SOR ¶¶ 1.i and 1.j).

SOR ¶ 1.a was cross-alleged under Guideline D (sexual behavior); and SOR ¶¶ 1.a – 1.j, were cross-alleged under Guideline E (personal conduct). Applicant admitted all of the SOR allegations, with explanations, except for the December 2008 reckless driving incident (SOR ¶ 1.c.), which he could not recall.

Applicant explained the circumstances of his criminal charges and motor vehicle violations in his Answer to the SOR and in his personal subject interview (PSI) conducted by a Government investigator. The gravest charge, and one that is alleged under Guidelines J, D, and E, is the 2007 charge of felony criminal abduction by force, intimidation or deception, and misdemeanor sexual battery by force or helplessness. The Government's evidence in the FORM includes Applicant's statements and an FBI record

showing the felony charge was *nolle prossed*, while he was convicted of misdemeanor assault and battery. No police records or contemporaneous witness statements were provided in the record, and neither Department Counsel nor Applicant requested a hearing.

Applicant explained that in 2007, while he was in high school, he and a female student had engaged in “consensual” touching with each other over their clothes while in private. He was 19 years old at the time, while she was under 18. On another occasion, they were walking to a bus stop after school while Applicant and she were “horsing around” and teasing. Applicant tried to convince her to stay with him until the bus arrived by pulling on her arm in a “kidding” way, but “not physically harming” her. After she returned home, she told her father about the touching and their behavior at the bus stop. The girl’s father called the school, and Applicant was called to the school resource officer and arrested. Applicant appeared in court and pleaded guilty to a reduced charge of misdemeanor assault and battery. Applicant stated that he received a 12-month suspended sentence and was put on supervised probation until he left for active duty in the Marine Corps. Since that time, Applicant served about five years in the Marine Corps and held a security clearance. Applicant averred in his Answer that this offense occurred 14 years ago, and that he and the girl were classmates and they “fooled around a lot.” He believes that her parents were unhappy with the relationship since the girl was under 18 years old, and reported their activity to the school. No similar incidents have been reported since.

The other serious charges involved misdemeanor possession of a concealed handgun in a car, without a permit in 2015 and 2019. The 2015 incident resulted from a traffic stop when the officer asked Applicant if he had a weapon in the car. Applicant answered affirmatively, and showed the officer the handgun between the center console and the driver’s seat and asserted that it was not concealed. The officer disagreed, and Applicant was cited, but the charge was eventually dismissed. The 2019 incident occurred when Applicant forgot he had a handgun under the driver’s seat after leaving a shooting range the night before. He put the gun there while he stopped at a convenience store because he could not legally carry it into the store without a concealed handgun permit and he did not want it visible in the car. The following day, he was stopped for having dark tint on his window. Applicant stated that he showed the officer a doctor’s note permitting the tinted windows, and he was free to go. However, before he left, the officer asked him if he had a weapon in the car and Applicant said no, having forgotten it was there. Applicant consented to allow the officer to search the car, and the gun was found under the seat. Applicant was cited, but this charge was also dismissed. Applicant stated that he obtained a state concealed handgun permit after the 2019 incident. In his state, a county district court judge issues the permit after a background check is conducted.

I take administrative notice of laws in Applicant’s state regarding the possession and transport of handguns and the issuance of concealed carry permits. Generally, the state law in question permits the “open” carry of handguns without a permit (provided it has a magazine capacity of 20 rounds or less, is not designed to accommodate a silencer, or does not have a folding stock), by any person over 18 years old. A weapon is deemed

to be hidden from common observation when it is observable but is of such deceptive appearance as to disguise the weapon's true nature. Typically, in a vehicle, a firearm may be considered "openly carried" if the firearm is openly visible. Generally, a permit is required to carry a concealed firearm in the state, including in a vehicle. A pistol may be transported concealed, without a permit, if a person is at, or going to or from, an established shooting range, provided that the weapon is unloaded and securely wrapped while being transported. The facts in the record are insufficient to draw legal conclusions regarding Applicant's firearms activity or criminal charges.

Applicant generally explained the circumstances behind most of the traffic violations, and stated that since 2014, he has matured and become a safer driver, watches for other drivers, obeys speed limits and signs, and cares for other people on the road. Applicant acknowledged that his past irresponsible actions put others on the road in danger. Applicant also noted that he gets migraine headaches from a bright sun, so he had his windows tinted. Once he learned that he needed a doctor's prescription for tinted windows, he obtained one. In addition, since he unknowingly paid a loud exhaust ticket online without challenging it, he has had another citation dismissed after showing that the exhaust system on his car is stock.

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or

mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that 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

The security concern for criminal conduct 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.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 31, and the following is potentially applicable:

(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

(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.

Based on Applicant’s admissions and the evidence in the record, the above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from criminal conduct. The following mitigating conditions under AG ¶ 32 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;

(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 Appeal Board has held in financial cases that failure to comply with tax laws suggests that an applicant has a problem with abiding by well-established government rules and systems. The same can be said for other laws and regulations in which we are expected to follow. Voluntary compliance with rules and systems is essential for protecting classified information. See, e.g., ISCR Case No. 16-01726 at 5 (App. Bd. Feb. 28, 2018). A person who fails repeatedly to fulfill his or her legal obligations, [such as filing tax returns and paying taxes when due], does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 17-01382 at 4 (App. Bd. May 16, 2018).

However, mitigating conditions AG ¶¶ 32 (a), (c), and (d) apply in whole or in part. The most serious SOR allegation involved criminal activity with a minor. However, the facts in the record do not support a conclusion that Applicant's activity when he was 19 years old in high school was of such a nature as to create doubt about his current judgment, reliability, and trustworthiness. The conduct is dated, to say the least, and the record contains limited facts surrounding the incident, especially aggravating factors. Applicant was found guilty of a misdemeanor offense, but has since grown up, completed an enlistment in the Marine Corps and deployment to Afghanistan, and started a civilian work life, with no similar conduct recurring. AG ¶¶ 32 (a) and (d) apply.

The traffic offenses may be compiled together to indicate a pattern of minor offenses that may cast doubt on Applicant's judgment. Applicant attributes his traffic violations to immaturity, a propensity for speeding, and at times, failure to assert legitimate defenses or obtain the appropriate documentation. Overall I agree that his behavior on the road until about when he turned 26 years old, was poor and disregarded the law. However, the SOR allegations related to traffic violations are also dated. They are at least seven years old, with no evidence of recurrence. Based on this, I attribute Applicant's encounters with the law while in a vehicle to be evidence of poor, youthful decision making that is unlikely to be repeated given his maturity and responsible employment status. His past conduct does not cast doubt on his current judgment, reliability, or trustworthiness. AG ¶¶ 32 (a), (c), and (d) apply.

Finally, the two concealed weapons charges are between two to seven years old, were appropriately disputed, and were both dismissed. Applicant has since applied for and received a court-issued concealed carry permit after undergoing a background check. Sufficient time has elapsed and no similar incidents have occurred. The conduct does not raise concerns about Applicant's current judgment, reliability, or trustworthiness. AG ¶¶ 32 (a), (c), and (d) apply.

Guideline D: Sexual Behavior

The security concern for sexual behavior is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of sexual orientation of the individual.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 13, and the following is potentially applicable:

(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted.

The evidence supports that Applicant committed a misdemeanor offense of assault and battery that involved a female high-school classmate that was under 18. He also admitted to limited sexual touching with the girl, outside of their clothes, despite his claim of mutual consent, while they were in high school. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from sexual behavior. The following mitigating conditions under AG ¶ 14 are potentially applicable:

(a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature; and

(b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment.

The conduct alleged and Applicant's subsequent conviction for misdemeanor assault and battery have been sufficiently explained and mitigated in my discussion above. The conduct is significantly dated, occurred when the participants were teenagers in high school, has not recurred, and the facts paint an opaque picture of serious past sexual conduct that would give rise to questions of Applicant's current judgment, reliability, or trustworthiness. AG ¶ 14 (a) and (d) apply.

Guideline E: Personal Conduct

AG ¶ 15 expresses 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying condition is potentially applicable:

(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 person may not properly safeguard protected information.

The personal conduct alleged in the SOR is generally sufficient to implicate AG ¶ 16(c).

Guideline E includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

(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

(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.

As discussed above and incorporated herein, the record establishes Applicant's history of questionable conduct that resulted in a significant amount of interaction with law enforcement during his youth and subsequent early adulthood. Cumulatively, Applicant's conduct raises doubts about his judgment, however, the mitigating factors discussed under Guidelines J and D above, apply to concerns raised under Guideline E. Applicant has honorably served in the Marine Corps and deployed to Afghanistan, has not had a recurrence of criminal conduct of significance for several years, advanced his education, obtained a concealed handgun carry permit, and established a mature lifestyle with professional civilian employment. I do not expect that similar immature conduct will recur, nor am I concerned about Applicant's current judgment, reliability, or trustworthiness. Mitigating conditions AG ¶¶ 17 (c) and (d) apply.

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), 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 have incorporated my comments under Guidelines J, D, and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines. The record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant mitigated the security concerns alleged.

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 – 1.j:	For Applicant
Paragraph 2, Guideline D:	FOR APPLICANT
Subparagraph 2.a:	FOR Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

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

GREGG A. CERVI
Administrative Judge