



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



In the matter of: )  
)  
) ISCR Case No. 19-03978  
)  
Applicant for Security Clearance )

**Appearances**

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

11/01/2021

**Decision**

GARCIA, Candace Le'i, Administrative Judge:

Applicant did not mitigate the criminal conduct security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On May 19, 2020, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J (Criminal Conduct). The action was taken 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) implemented by DOD on June 8, 2017.

Applicant responded to the SOR (Answer) on June 1, 2020, and elected to have a hearing before an administrative judge. The case was assigned to me on November 2, 2020. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing (NOH) on January 25, 2021, scheduling the hearing for February 8, 2021.

Applicant waived the 15-day hearing notice requirement and I convened the hearing as scheduled. (Tr. at 8)

I admitted Government Exhibits (GE) 1 through 6 in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through R, which I admitted in evidence without objection. DOHA received the hearing transcript (Tr.) on February 22, 2021.

### **Administrative Notice and SOR Amendment**

At Department Counsel's hearing request, I have taken administrative notice of a state code entitled "Parole Order." It provides:

- (a) A parole shall be evidenced by a written order.
- (b) Parole entitles the recipient:
  - (1) to leave the correctional facility in which the recipient was confined; and
  - (2) if the recipient satisfactorily complies with all the terms and conditions provided in the parole order, to serve the remainder of the recipient's term of confinement outside the confines of the correctional facility.
- (c) A parolee remains in legal custody until the expiration of the parolee's full, undiminished term.
- (d) The chairperson of the Commission shall file a copy of the parole order with the clerk of the court in which the parolee was sentenced.

Department Counsel also amended the SOR at the hearing, pursuant to ¶ E3.1.17 of the Directive, by adding the charge "False Statement to the Police" to ¶ 1.d and replacing the word "probation" with "parole" and adding the language, "You are currently on parole" in ¶ 1.e. Applicant admitted SOR ¶¶ 1.d and 1.e, as amended. Amended SOR ¶¶ 1.d and 1.e read as follows:

- d. You were convicted of Second Degree Assault, False Statement to the Police, and Use of Firearm/Commission Crime of Violence in about October 2000. You were sentenced to 30 years in prison and served approximately 13 years and 10 months in prison before being paroled.
- e. As a result of the criminal convictions described in subparagraphs 1.d., above, you were on parole until at least March 2018. You are currently on parole.

(Tr. at 24-27, 84-90)

## Findings of Fact

Applicant admitted all of the allegations in his Answer. His admissions are incorporated in my findings of fact. He is 46 years old, unmarried, and he has two adult children, the youngest of which was graduating from high school as of the date of the hearing. (Answer; Tr. at 9-10, 39, 46, 48, 83; GE 1; AE A)

Applicant obtained his General Education Development (GED) diploma in 1995. As of the date of the hearing, he was attending community college since 2018 but had not yet earned an associate's degree. He has worked for his current employer, a DOD contractor, since October 2017--initially as a temporary employee and then as a permanent employee since January 2018. He has never held a security clearance. (Answer; Tr. at 7, 9-11; GE 1, 2; AE A, B)

In June 1993, at age 17, Applicant was arrested and charged with attempted first degree murder, assault with intent to murder, rape, or rob, and robbery with a deadly weapon. He robbed a liquor store and shot at a liquor store employee. While on house arrest for his June 1993 charges, Applicant was arrested in August 1993, at age 18, and charged with armed carjacking and use of a handgun in the commission of a felony or crime of violence. His friends picked him up from his home in a car they had stolen. (SOR ¶¶ 1.a - 1.b; Tr. at 35-58, 84; GE 2, 4, 5).

Applicant's June and August 1993 charges were consolidated and he pled guilty in November 1993 to assault with intent to murder, robbery with a deadly weapon, use of a handgun in the commission of a felony or crime of violence, and armed carjacking. He was sentenced to 20 years in jail, with 10 years suspended and five years mandatory. He served four years and eight months, the remainder of his sentence was suspended, he was released in December 1997, and he was placed on two years of supervised probation. (SOR ¶ 1.c; Answer; Tr. at 35-58; GE 2, 4, 5; AE A)

In October 2000, at age 25, Applicant was charged with first degree attempted murder, first degree assault, second degree assault, use of a handgun in the commission of a crime of a felony or crime of violence, carrying a handgun, and giving false statements to the police. He and a female acquaintance were arguing in her apartment, the argument escalated into a fight, they attempted to grab the same gun, the gun discharged and they were both shot in their hands. He went to the hospital for treatment, where he lied and told the medical staff and the police that he was the victim of a robbery. (SOR ¶ 1.d; Tr. at 35-76; GE 1, 2, 3, 6)

Applicant was convicted of second degree assault, use of a handgun in the commission of a crime of violence, and giving false statements to the police. He was sentenced to 20 years in jail for the handgun charge and 10 years for the assault charge, to run consecutively. He served approximately 14 years and was paroled in February 2014. As of the date of the hearing, his appeal of his conviction was ongoing and he was on parole until 2030. (SOR ¶ 1.e; Tr. at 35-76; GE 1, 2, 3, 6)

Applicant attributed his criminal involvement in 1993 and 2000 to a lifestyle in which he was a drug dealer since the age of 14. After his February 2014 release from jail, he obtained full-time employment that July and, as of the date of the hearing, had since maintained gainful employment. He started his own consulting business in 2016 and has obtained multiple certifications. He received favorable performance evaluations from 2018 to 2020. His manager stated, in a 2020 performance review, that Applicant “has always been knowledgeable about the job” and his “ability to pick up new information and apply it has improved greatly over the year.” (Answer; Tr. at 35, 39, 41, 46-48, 68-72, 76-84; GE 1, 2; AE A-R)

In addition to working and attending school, Applicant cares for his elderly parents and his autistic sibling, and he helps with his seven grandchildren. He mentors youth and formerly incarcerated individuals in his community. He volunteers as a state notary public weekly. While he might see, in passing, some of the individuals with whom he previously associated, he does not socialize with them. He acknowledged the mistakes of his past and is committed to not repeating them. (Answer; Tr. at 35, 39, 41, 46-48, 68-72, 76-84; GE 1, 2; AE A-R)

### **Policies**

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(a), 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 Exec. Or. 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* Exec. Or. 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 pertaining to criminal conduct as follows: “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 security concern and may be disqualifying. I considered the following relevant: “(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted” and “(c) individual is currently on parole or probation.”

Applicant’s criminal conduct occurred over a span of eleven years, from the age of 14, when he began dealing drugs, to 2000. He was convicted of serious crimes in 1993 and 2000. As of the date of the hearing, he remained on parole until 2030. AG ¶¶ 31(b) and 31(c) are established.

AG ¶ 32 provides the following mitigating conditions:

- (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.

There is no evidence that Applicant was pressured or coerced into committing the conduct underlying his criminal convictions. His guilty pleas and his admissions in his Answer constitute evidence that he engaged in the conduct that led to his criminal convictions. AG ¶¶ 32(b) and 32(c) are not established.

I commend Applicant's involvement with his community as a mentor to youth and formerly incarcerated individuals, his college attendance, and his favorable employment record with his current employer since 2017. However, his criminal conduct spanned a period of eleven years, he was paroled only in 2014, and he remains on parole until 2030. As such, I find that not enough time has elapsed since his criminal behavior and without recurrence of criminal activity, and the record evidence still casts doubt on his reliability, trustworthiness, and judgment. AG ¶¶ 32(a) and 32(d) are not established.

### **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 have incorporated my comments under Guideline J in my whole-person analysis. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the criminal 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:	AGAINST APPLICANT
Subparagraphs 1.a - 1.b:	For Applicant
Subparagraphs 1.c - 1.e:	Against Applicant

## Conclusion

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

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Candace Le'i Garcia  
Administrative Judge