



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 19-02322
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Alison O’Connell, Esq., Department Counsel  
For Applicant: *Pro se*

05/12/2022

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**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct and E (Personal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application on March 22, 2017. On July 20, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J and E. The 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 August 11, 2021, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 9, 2021, but scheduling of the hearing was delayed by COVID-19. The case was assigned

to me on February 15, 2022. On March 25, 2022, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be heard by video teleconference on April 2, 2022. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 9 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses or submit any documentary evidence. I held the record open until April 15, 2022, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibit (AX) A, which was admitted without objection. DOHA received the transcript (Tr.) on April 18, 2022.

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a and 1.b, with explanations. He admitted the allegation in SOR ¶ 1.c in part and denied it in part. He did not expressly admit or deny the allegation in SOR ¶ 2.a, which cross-alleges the allegations in SOR ¶¶ 1.a-1.d. He denied the allegations in SOR ¶¶ 2.b and 2.c. His admissions are incorporated in my findings of fact.

Applicant is a 33-year-old software developer employed by a defense contractor since February 2022. He has worked intermittently for various federal contractors since March 2015 and worked for various non-federal employers in information-technology jobs since about August 2011. He attended college from August 2007 to May 2013 and from January to May 2014, but he has not received a degree. He has never married. He has a four-year-old daughter. He received a DOD security clearance in May 2011.

In November 2012, Applicant was convicted in absentia of reckless driving by speeding in excess of 80 miles per hour in a 45 miles-per-hour zone. He was fined \$200 plus court costs. (GX 3.)

In November 2015, Applicant was charged with petit larceny from a department store. A cashier in the store, who was a friend of Applicant, did not ring up everything in his shopping cart. Applicant knew that his friend was not ringing up all his purchases. He was stopped by a store employee, arrested by the police, and charged with petit larceny. (GX 2 at 7.) In November 2017, he pleaded guilty and was sentenced to 90 days in jail, with 88 days suspended, and placed on probation for two years. (GX 4.)

In March 2016, Applicant was charged with driving while intoxicated (DWI), first offense. He pleaded not guilty, was convicted, was sentenced to six months in jail, with all but five days suspended, and fined \$250. He was placed on unsupervised probation for two years and his driver's license was restricted. In October 2017, he was convicted of violating probation, because he failed to provide documentation that he had completed an alcohol-education class. (GX 5.) As of the date of the hearing, his driver's license had not yet been reinstated. (Tr. 25-26.)

In June 2016, Applicant hired a credit-repair company that provided him with a "credit privacy number" (CPN) to use in lieu of a Social Security number for purchasing items on credit. He used the CPN to purchase a car with no money down. Three days

later, the car dealership told him to return the car because the CPN he used for the purchase belonged to another person. He was charged with identity theft with intent to defraud and two counts of forgery of public records, both felonies. In August 2017, he was convicted of obtaining money by false pretenses and sentenced to two years in jail, suspended for two years. The charge of forgery of public records was disposed of by *nolle prosequi*. (GX 6.)

In January 2017, Applicant was barred from entry onto a military installation when authorities discovered that his motor vehicle was improperly registered and he had falsified information to register it. He had wrecked his vehicle in an accident, and he removed the registration sticker from the wrecked vehicle and put it on a new vehicle. He used the unauthorized registration sticker to obtain a parking permit on the military installation. The illegal transfer of the sticker was discovered when he was given a ticket for parking in a commuter van space. The parking ticket was dismissed. (AX A.) However, he was terminated from his federal employment because the bar to entry onto the installation made him unable to perform work. (GX 7; Tr. 34-36.) He testified that the debarment from the installation was eventually lifted. (Tr. 36-37.)

In January 2020, Applicant was terminated from another job with a defense contractor for falsifying records, misrepresenting facts, and withholding information in order to obtain employment. After he had failed the test for certification credentials allowing access to a sensitive computer network, he went online and created false credentials. He testified that he created the false credentials because he needed the job. (GX 8 and 9; Tr. 17, 36-40.)

## **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 SOR alleges a conviction of reckless driving (SOR ¶ 1.a), a conviction of petit larceny (SOR ¶ 1.b), a conviction of DWI and a violation of probation imposed for the DWI (SOR ¶ 1.c), and a conviction of felony obtaining money by false pretenses. (SOR ¶ 1.d). 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 admissions and the evidence submitted at the hearing establish 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;

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; and

AG ¶ 31(d): violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program.

The following mitigating conditions are potentially 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; 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.

Neither mitigating condition is established. Applicant's offenses are recent, numerous, and did not occur under unusual circumstances. He still has not completed the requirements for reinstatement of an unrestricted driver's license. His employment record is poor, characterized by failure to obey rules and falsifying credentials. He submitted no evidence of constructive community involvement.

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

SOR ¶ 2.a cross-alleges the criminal conduct set out in SOR ¶¶ 1.a-1.d. SOR ¶ 2.b alleges the conduct that resulted in Applicant being barred from entering a military installation. SOR ¶ 2.c alleges his falsification of credentials for access to a sensitive computer system. The security 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. . . ."

Applicant's admissions and the evidence submitted at the hearing establish the following disqualifying conditions under this guideline:

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(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 . . . : a pattern of dishonesty or rule violations; and

AG ¶ 16(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 . . . engaging in activities which, if known, could affect the person's personal, professional, or community standing.

AG ¶ 16(a) is established by Applicant's falsification of his employment qualifications. AG ¶ 16(d) is established by his improper transfer of the registration certificate of his wrecked vehicle to another vehicle and his failure to follow the rules for access to sensitive computer systems. AG ¶ 16(e) is established by his record of criminal conduct, which makes him vulnerable to exploitation, manipulation, or duress and adversely affects his personal, professional, and community standing.

The following mitigating conditions are potentially applicable:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

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.

Neither mitigating condition is established. It is not clear from the record how Applicant's falsification of credentials was discovered, but he did not make any effort to correct the falsification until he was caught. The violations pertaining to the registration of his vehicle were arguably minor, but they were among many violations of law and regulations, and they did not occur under unique circumstances.

## **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). 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 not 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): **AGAINST APPLICANT**

Subparagraphs 1.a-1.d: **Against Applicant**

Paragraph 2, Guideline E (Personal Conduct): **AGAINST APPLICANT**

Subparagraphs 2.a-2.c: **Against Applicant**

### **Conclusion**

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman  
Administrative Judge