



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 21-01803
)	
Applicant for Security Clearance)	

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: *Pro se*

02/09/2023

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application on February 7, 2020. On January 27, 2022, the Defense Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline J. 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), and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on February 2, 2022, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on June 21, 2022, and the case was assigned to an administrative judge on November 1, 2022. It was reassigned to me on December 15, 2022, due to the medical inability of the assigned

administrative judge to travel. On December 27, 2022, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for January 18, 2023. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses or submit any documentary evidence. I kept the record open until January 27, 2023, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. DOHA received the transcript (Tr.) on January 26, 2023.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations, with explanations. His admissions are incorporated in my findings of fact.

Applicant is a 28-year-old employee of a defense contractor. He graduated from high school in June 2013 and worked at various jobs in the private sector until December 2019. He was unemployed from December 2019 to February 2020, when he was hired for his current job. He was trained as a welder but is working as an electrician. (Tr. 13.) He has never held a security clearance. He has never married and has no children.

In November 2011, while Applicant was in high school, he and two other juveniles were apprehended for shoplifting packages of cold medicine from a Navy Exchange store. They were issued "no trespass" orders and released to their parents. (GX 6.) This incident was not alleged in the SOR.

In January 2017, Applicant was driving without insurance, a misdemeanor. He was fined \$100 plus court costs. (GX 3 at 9.) This incident is alleged in SOR ¶ 1.g.

In April and May 2017, Applicant was charged with driving with a revoked or suspended driver's license, a misdemeanor, on two occasions. The offenses were within two days of each other but in different locations. For each offense, he was fined and assessed court costs. (GX 3 at 7-8.) These offenses are alleged in SOR ¶¶ 1.e and 1.f.

In July 2017, Applicant was charged with failure to appear, a misdemeanor. He was convicted and fined. (GX 3 at 6.) This offense is alleged in SOR ¶ 1.d.

In the summer of 2017, Applicant was charged with stealing a basketball pump from a Navy Exchange store, convicted, and sentenced to 24 hours of community service. In July 2017, he was barred from the Navy base where the theft occurred. In January 2021, he wrote a letter to the base commander, asking that the bar be lifted so that he could work on the base. The base commander granted his request and lifted the bar. (AX D.) This incident is alleged in SOR ¶ 1.a, but the date is incorrectly alleged in the SOR as 2018 instead of 2017.

In March 2018, Applicant was charged with possession of marijuana and driving without a license. In October 2018, he was convicted of both offenses. For the marijuana

offense, he was sentenced to 12 days in jail (suspended), placed on unsupervised probation for 36 months, and fined \$250 plus court costs. For driving without a license, he was sentenced to 60 days in jail (with 50 days suspended) and fined \$250. (GX 3 at 3; GX 4.) These offenses are alleged in SOR ¶¶ 1.b and 1.c.

At the hearing, Applicant testified that the marijuana incident happened because a friend had left a small quantity of marijuana in his car and that he was unaware of it until he was stopped by the police. When asked by Department Counsel when he had last used marijuana, he admitted that he used it about four months before the hearing. (Tr. 27.) He characterized this use as a “one time thing,” in which he went to a party and “got influenced” to use it. (Tr. 3.) This recent use of marijuana is not alleged in the SOR.

As of the date of the hearing, Applicant had not paid the fines and court costs for the convictions alleged in SOR ¶¶ 1.b and 1.c. (GX 3 at 5.) He paid the fines and costs totaling \$1,596 on January 23, 2023, five days after the hearing. On January 24, 2023, he paid \$82 in court costs, fines, and interest. His documents do not identify which offenses were the basis of these fines and court costs. (AX E.)

After the hearing, Applicant’s program manager submitted a letter attesting to his hard work, excellent performance, and good conduct. (AX A.)

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 shoplifting in November 2011 and his most recent use of marijuana were not alleged in the SOR and may not be an independent basis for denying his application for a security clearance. However, conduct not alleged in the SOR may be considered to assess an applicant’s credibility; to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; to decide whether a particular provision of the Adjudicative Guidelines is applicable; or to provide evidence for a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered the unalleged conduct for these limited purposes.

Applicant's admissions and the evidence submitted at the hearing established 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 potentially applicable:

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. The first prong of AG ¶ 32(a) focuses on whether the criminal conduct was recent. There are no bright line rules for determining when conduct is recent. The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without any evidence of misconduct, then an administrative judge must determine whether that period of time demonstrates changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

The most recent criminal conduct alleged in the SOR was in March 2018, more than four years ago, which is a "significant period of time." However, it was preceded by a long history of criminal conduct. Applicant did not pay the fines and court costs levied against him until he realized that they might be an impediment to obtaining a clearance. Furthermore, he volunteered that he used marijuana three or four months before the hearing, while his application was pending. His illegal use of marijuana was irresponsible and undercuts any claim of rehabilitation.

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 Guideline J in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline J 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.

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.g:	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