



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



In the matter of:)	
)	
)	ISCR Case No. 23-00203
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: *Pro se*

11/21/2023

Decision

HALE, Charles C., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 10, 2022. On March 22, 2023, the Department of Defense sent him a Statement of Reasons (SOR) alleging security concerns under Guideline J and Guideline E. The DoD 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 March 31, 2023, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on June 6, 2023, and the case was assigned to me on September 11, 2023. On September 29, 2023, the

Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for October 26, 2023. I convened the hearing on October 26, 2023, as scheduled. Government Exhibits (GE) 1 through 5 were admitted in evidence without objection. I kept the record open after the hearing to enable Applicant to submit documentary evidence. He timely submitted seven character letters, which were marked as Applicant Exhibits (AE) A through AE G and admitted without objection. The record closed on November 16, 2023. DOHA received the transcript (Tr.) electronically on November 2, 2023.

Findings of Fact

In Applicant's Answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a and 1.b. He did not address SOR ¶ 2.a in his Answer. After identifying the discrepancy and noting this was a cross allegation of SOR ¶¶ 1.a and 1.b, he admitted the allegation. (Tr. at 9.) Applicant's admissions in his Answer and at the hearing are incorporated in my findings of fact.

Applicant is a 29-year-old security guard employed by a defense contractor since February 2022. He is required to carry a firearm for his position and is licensed to carry the firearm by his state. He has never held a security clearance. He has never married and has two sons, ages 10 and 3. He is the custodial parent for his youngest son. He is one of eleven children and is the first of his brothers and sisters to earn a college degree. He earned his bachelor's in business administration in 2017 from an out of state university. While attending the university he played football for the university. (Tr. 16, 28.)

In March 2018, Applicant, was charged with possession of marijuana after a night out with friends. (SOR ¶ 1.b.) He was pulled over by a police officer for a turn on yellow and the police officer observed a baggie of marijuana on Applicant's passenger seat. The police conducted a formal search of the car and found no other inculpatory evidence. Applicant testified and stated in his statement that the marijuana was not his and had been left by the passenger, a relative, he had just dropped off. He accepted responsibility for the possession because he was the only occupant of the car. (Tr. at 21, 31.) He told the officer he did not smoke marijuana and reiterated he does not use marijuana and does not associate with people who do. He does not associate with that relative anymore. He has passed several random drug tests as part of the diversion program he was placed in to resolve his offense. (GE 1; Tr. at 22, 29, 30, 31.)

In February 2019, Applicant was charged with fleeing a law enforcement officer and reckless handling of a firearm. (SOR ¶ 1.a.) He was a passenger in a car driven by his younger brother when the incident occurred. His brother has a criminal record. His brother was pulled over by the police for vehicle infractions. The police officer informed his brother he was a suspect in a shooting and asked if there were any firearms in the vehicle. His brother had a handgun in the glovebox and because of his criminal record his brother drove away from the police for a short distance. Applicant took the gun from the glovebox and ran from the police. He tossed the gun into some bushes just before he surrendered himself. The police located the gun in the bushes. (Tr. at 23-24, 26-27.)

Applicant testified he ran to protect his brother because of his brother's criminal record and stopped when he realized what a mistake he was making by running from the police. At the hearing, he admitted he told the officers he thought he was being pursued for a child support arrearage as an excuse for his actions. (Tr. at 24-26, 39.) Without hesitation during his testimony, Applicant said he made that up and was not thinking of the consequences of his actions. (Tr. at 38.) He testified the officers were familiar with his family because of other incidents and that he had been a well-known football player at his high school. The police were aware he had just come home from school and that he would not have been involved in the shooting. He explained he had spent time working with the police doing community services and they were instrumental in getting his charges *nolle prosequi*. (Tr. at 25, 26, 37, 41, 42.)

Applicant testified his actions were mistakes due to youth. He now avoids the siblings who have troubled histories and is close with other siblings. One of his siblings is also a security guard at the same site. He said that his life four years later is completely different. He is focused on work and taking care of his kids. (Tr. at 37, 39, 41.) When asked whether he had any additional traffic violations since his security clearance interview, he responded no. (Tr at 47-48; GE 5.)

Applicant's character letters captured the qualities he demonstrated during the hearing, a direct and candid person who acknowledged without hesitation his mistakes. A retired law enforcement officer and education administrator both applied their vast experiences dealing with young men in describing why they were offering their favorable references for this Applicant. His present colleagues espoused their strong and favorable opinions of Applicant's work and his character. (AE A - AE G.)

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 that Applicant was charged with fleeing from a law enforcement officer and reckless handling of a firearm in February 2019 (SOR ¶ 1.a), and that he was charged in March 2018 with possession of marijuana (SOR ¶ 1.b). 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.”

The following disqualifying conditions are relevant:

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.

AG ¶ 31(a) is established. The two law enforcement events between 2018 and 2019 cast doubt on the Applicant's judgment, reliability, and trustworthiness AG ¶ 32(b) is established by his arrests and admission.

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.

AG ¶ 32(a) is established for the charges. 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 evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows a significant period 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. *Id.* Sufficient time has elapsed since Applicant's criminal behavior.

During this time Applicant has changed his lifestyle by disassociating himself from his family members who have a troubled history, making similar circumstances unlikely to recur. When these events occurred, he was just out of college and had not had a chance to establish himself in life or the workforce. The disposition of the 2019 offenses by *nolle prosequi*, his present employment, and positive family situation reflect these were isolated and unusual incidents in his life.

AG ¶ 32(d) is established. Applicant was remorseful, candid, and credible at the hearing. He readily acknowledged his mistakes. He has adjusted his lifestyle, avoids

potentially compromising situations, and focuses on his family. His youngest son, who was born after these incidents, lives with him. Raising his son has helped him recognize how he needed to change his life to be a good father to both of his sons. His character letters reflect his ability to rise above all circumstances. He is now working in a position of responsibility and is authorized to carry a firearm. He testified credibly that he has several siblings who are on his path and who he continues to associate with and maintain close ties to while disassociating himself from siblings and acquaintances who have criminal involvement. His decisions reflect he is applying his education, maintaining a high work ethic, and making necessary behavioral changes in his life. After carefully considering all the evidence, I am satisfied that Applicant is rehabilitated.

Guideline E, Personal Conduct

The SOR cross-alleges the criminal conduct alleged in SOR ¶¶ 1.a and 1.b under this guideline. 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.”

I have considered whether the following disqualifying conditions under this guideline are applicable:

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;

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; 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(c) is established by the evidence.

AG ¶ 16(d) is not applicable. Applicant's conduct was explicitly covered under Guideline J.

AG ¶ 16(e) is established. Applicant's conduct and initial responses when confronted about his criminal conduct could adversely affect his personal, professional, and community standing.

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;

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;

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

AG ¶ 17(g): association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶ 17(c) is established for the reasons set out in the above discussion of AG 32(a).

AG ¶¶ 17(d) and 17(e) are established. Applicant's acknowledgment of his criminal behavior, his outstanding performance as an employee of a defense contractor, as well as the reasons set out in the above discussion of AG 32(a) mitigate the disqualifying conditions.

AG ¶ 17(g) is established. Applicant no longer associates with persons involved in criminal activity.

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 those guidelines, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has mitigated the security concerns raised under Guidelines J and E.

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 and 1.b:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 2.a:	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.

Charles C. Hale
Administrative Judge