



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



In the matter of:)
)
) ISCR Case No. 22-02527
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

03/07/2024

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 5, 2022. On March 17, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines J, H, and E. The DCSA CAS acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (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 21, 2023, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on May 23, 2023,

and the case was assigned to me on January 4, 2024. On January 11, 2024, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on February 1, 2024. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 15 were admitted in evidence without objection. Applicant testified but did not present the testimony of any other witnesses or submit any documentary evidence. DOHA received the transcript (Tr.) on February 9, 2024.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.b, 1.c, 1.d, 1.h, 1.j, and 1.l. He stated that he admitted SOR ¶ 3.c, but his explanation amounts to a denial. He denied the allegations in SOR ¶ 1.a, 1.e-1.g, 1.i, 1.k, 3.b, and 3.d. He did not admit or deny the allegation in SOR ¶ 2.a, which cross-alleges the conduct in SOR ¶ 1.a, or the allegation in SOR ¶ 3.a, which cross-alleges the conduct in SOR ¶¶ 1.a-1.i. His admissions are incorporated in my findings of fact.

Applicant is a 41-year-old maintenance helper employed by a defense contractor since April 2022. He previously was employed in the private sector. He has never held a security clearance. He married in February 2018 and divorced in July 2021. He has a 10-year-old daughter. (Tr. 61)

Applicant has a lengthy arrest record, which is alleged in reverse chronological order in the SOR and summarized below.

SOR ¶ 1.i: February 20, 1997, arrest for assault and battery by a mob and malicious wounding by a mob. Applicant was arrested for these offenses when he was 15 years old. (GX 3) He testified that he remembers being arrested and the charges were dismissed, but he does not remember any of the details. (Tr. 17-18) In his answer to the SOR, he admitted being arrested. There is no documentary evidence in the record reflecting the circumstances of this arrest or its disposition.

SOR ¶ k: May 1997, arrest for trespassing. Police records reflect this arrest but do not reflect any other information. (GX 15) Applicant testified that he has no recollection of the circumstances of this arrest. (Tr. 20) He denied this allegation in his answer to the SOR. There is no documentary evidence in the record reflecting the circumstances of this arrest or its disposition.

SOR ¶ 1.j: March 2003, arrest for making an oral threat to kill or injure a school employee. (GX 4) Applicant testified that a teacher questioned him about ownership of a book and his absence from class. He testified that the teacher threatened him and he "said words" to the teacher. (Tr. 21-22) He admitted this allegation in his answer to the SOR and at the hearing. There is no documentary evidence in the record reflecting the disposition of this arrest.

SOR ¶ 1.i: June 2005, charged with disturbing the peace and littering or dumping. (GX 5) Applicant testified that an unfriendly neighbor falsely accused him of these offenses, and the charges were dismissed. (Tr. 25) He denied this allegation in his answer to the SOR. There is no documentary evidence in the record reflecting the circumstances or disposition of these charges.

SOR ¶ 1.h: February 2006, charged with destruction of property valued greater than \$1,000, a felony. Applicant was accused of making scratch marks on a neighbor's vehicle. (GX 6) He testified that a neighbor's wife falsely accused him of "keying" their car but later admitted that she lied, and the charges were dismissed. (Tr. 28) In his answer to the SOR, he admitted being arrested, but at the hearing he denied the underlying conduct. There is no documentary evidence in the record reflecting the circumstances or disposition of these charges.

SOR ¶ 1.g: April 2006, charged with failure to appear on a felony charge (alleged in SOR ¶ 1.h). Applicant was charged with failure to appear in court to answer the charge of making scratch marks on a neighbor's vehicle. (GX 7) Applicant denied this allegation in his answer to the SOR and at the hearing. He testified, "I always go to my court dates." (Tr. 29) There is no documentary evidence in the record reflecting the disposition of this charge.

SOR ¶ 1.f: September 2007, charged with threatening a fast-food employee. Applicant was involved in an argument with a cashier at a fast-food restaurant. According to the cashier, Applicant threatened to shoot her if she came out from behind the cashier's counter and to have his gang members come to the restaurant. Applicant denied this allegation in his answer to the SOR and at the hearing. (Tr. 31-32) The case was closed because the cashier would not cooperate in the police investigation. (GX 8)

SOR ¶ 1.e: April 2009, charged with carrying a concealed weapon without a permit. Police responded to a disturbance in which Applicant was involved. They observed a firearm under the passenger seat of a vehicle, and Applicant admitted that it was his firearm and he did not have a permit for a concealed weapon. He was issued a summons but was not arrested. (GX 9) There is no documentary evidence of the disposition of the summons. At the hearing, Applicant admitted this offense. He testified that he still owns the weapon and he sometimes carries it at night. (Tr. 37) He testified that he has been unable to renew the permit for his weapon because of the felony charges against him. (Tr. 69)

SOR ¶ 1.d: February 2010, charged with assault and battery and hit and run resulting in injury. Applicant admitted this allegation in his answer to the SOR. He testified that he was at a car wash and got into an argument with another person who cut in front of him in the line. He punched the other person in the mouth and later followed the other person into a parking lot where he sideswiped the other person's vehicle, causing damage of more than \$1,000. He was charged with hit and run, a felony. The hit-and-run charge was reduced to not reporting an accident, a misdemeanor. He pleaded guilty. He was convicted of the assault and battery charge and sentenced to a \$100 fine

and 90 days in jail, suspended for 12 months, and he was placed on unsupervised probation for 12 months. (GX 10; GX 11; Tr. 38-40)

SOR ¶ 1.c: October 2015, charged with assault and battery and brandishing a firearm. Applicant was charged with assault and battery and brandishing a firearm. Applicant testified that he was with his brother when they were involved in an altercation as they were trying to protect their sister. He did not provide any further details. In his answer to the SOR, he admitted that he was arrested. At the hearing, he admitted that he was involved in an altercation but denied that he had a firearm with him during this incident. The charges against him were dismissed. (GX 12; GX 13; Tr. 43-47)

SOR ¶ 1.b: November 2019, charged with assault and battery on a family member. Applicant admitted this allegation in his answer to the SOR. His then wife told police that he had choked her and attempted to hit her with his car. He told a security investigator that he grabbed her by the shirt and pushed her against the car. (GX 2 at 6) At the hearing, Applicant denied choking her, but admitted that he “poked” at her. (Tr. 49) The charges were dismissed after he completed a batterer intervention program. (GX 1 at 24; GX 14)

SOR ¶ 1.a: Used marijuana with varying frequency from approximately May 2015 to at least April 2022. Applicant denied this allegation in his answer to the SOR. When he was interviewed by a security investigator in June 2022, he admitted that he used marijuana five or six times between April and May 2022, at parties where it was supplied by someone else and passed around. He told the investigator that he does not intend to use it again because he has a good job and does not want to lose it. He also told the investigator that he did not disclose his marijuana use in his “case papers” because he thought the question asked only about “regular use.” (GX 2 at 9)

When Applicant submitted his SCA on May 5, 2022, he answered “No” to questions asking if he had ever been charged with a felony and if he had ever been charged with an offense involving firearms. He also answered “No” to the question asking if he had illegally used any drugs or controlled substances in the last seven years. At the hearing, he testified that he answered “No” to the questions about felonies and firearms because the charges in each case were dismissed, and he believed that if a charge is dismissed, it no longer exists. (Tr. 60)

Applicant testified that he answered “No” to the question in his SCA about drugs or controlled substances because he had not used marijuana in the last seven years. (Tr. 54) He denied telling a security investigator that he used marijuana in April and May 2022. (Tr. 51-53) When he responded to DOHA interrogatories in January 2023, he had the opportunity to review and correct the investigator’s summary of the interview, but he did not correct or object to the part of the investigator’s summary that reflected his admission of marijuana use in April and May 2022.

In Applicant’s closing statement, he admitted that he grew up and lived in a violent environment. He testified that he lives in a rough neighborhood and carries a handgun in

plain view when he goes out at night. He declared, "I need to get up out of there." (Tr. 68) He explained, "I've been living here 40-some years of my life. I never been out of town. So this is all I know. So if I can go out of town and see the reasons and stuff like that, maybe I can grow and not going to be around all this stuff." (Tr. 79)

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 admissions and the evidence submitted at the hearing establish the following disqualifying condition under this guideline:

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 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) and 32(d) are not established. Applicant's criminal behavior was recent. Although his two arrests in 1997 were a long time ago, they were the beginning of a long pattern of criminal conduct that continued until recently. The domestic violence incident was in November 2019 and his marijuana use was in April 2022. None of his criminal conduct occurred under unusual circumstances. He presented no evidence of his job performance. He appears to find his current job rewarding, but it is too soon to determine if he has left his criminal conduct behind him.

Guideline H, Drug Involvement and Substance Misuse

The concern under this guideline is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

Applicant's admission to the security investigator that he used marijuana in April and May 2022 establishes the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse (see above definition); and

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The following mitigating conditions are potentially relevant:

AG ¶ 26(a): the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 26(b): the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used; and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

AG ¶ 26(a) is not established. Applicant's marijuana use was recent. It was arguably "infrequent" but it was consistent with his pattern of criminal conduct.

AG ¶ 26(b) is not fully established. Applicant acknowledged his marijuana use during his security interview, but it is not clear whether he still associates with drug users or has changed his environment. He testified that he will not use marijuana again because he wants to keep his job, but he has not provided the signed statement of intent set out in AG ¶ 26(b)(3).

Guideline E, Personal Conduct

SOR ¶ 3.a cross-alleges the conduct alleged in SOR ¶¶ 1.-1.i. SOR ¶¶ 3.b, 3.c, and 3.d allege falsification of the May 2022 SCA. 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

The relevant disqualifying condition for the conduct cross-alleged in SOR ¶ 3.a is:

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.

This disqualifying condition is established by Applicant's admissions and the evidence submitted at the hearing.

In Applicant's answer to the SOR, he denied intentionally failing to disclose that he was charged with an offense involving firearms and his marijuana use during the last seven years preceding his SCA of May 2022. In his testimony, he admitted the underlying conduct underlying the firearms charge but denied that he was "charged," because he believed the charge no longer existed after it was dismissed. However, he admitted that he deliberately failed to disclose his marijuana use during the last seven years preceding his May 2022 SCA.

The conduct alleged in SOR ¶ 3.d is established by the evidence and is sufficient to establish the following disqualifying condition 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.

The following mitigating conditions under this guideline are potentially relevant:

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.

AG ¶ 17(a) is not established. Applicant did not attempt to correct his falsification until he was questioned by a security investigator in June 2022. Even then, he falsely asserted that he thought the question in the SCA about drug use only applied to "regular use."

AG ¶ 17(c) is not established. Although some of Applicant's criminal conduct cross-alleged in SOR ¶ 3.a would qualify as "minor," it was frequent, did not happen under unique circumstances, and was part of a long chain of criminal conduct. Applicant's falsification was recent, it did not occur under unique circumstances, and was not "minor." Falsification of an SCA is a serious offense that "strikes at the heart of the security clearance process." ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.)

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, H, 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 Applicant has not mitigated the security concerns raised by his criminal conduct, drug involvement, 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**

Subparagraph 1.a: Against Applicant (Except the words, “from approximately May 2015 to”)

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: For Applicant

Subparagraphs 1.d and 1.e: Against Applicant

Subparagraphs 1.f-1.i: For Applicant

Subparagraph 1.j: Against Applicant

Subparagraphs 1.k and 1.l: For Applicant

Paragraph 2, Guideline H (Drug Involvement): **AGAINST APPLICANT**

Subparagraph 2.a: Against Applicant

Paragraph 3, Guideline E (Personal Conduct): **AGAINST APPLICANT**

Subparagraph 3.a: Against Applicant

Subparagraphs 3.b and 3.c: For Applicant

Subparagraph 3.d: 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