



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



In the matter of:)	
)	
)	ISCR Case No. 23-02567
)	
Applicant for Security Clearance)	

Appearances

For Government: Adrienne M. Driskill, Esq., Department Counsel
For Applicant: *Pro se*

07/30/2024

Decision

OLMOS, Bryan J., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline J, Criminal Conduct. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on December 14, 2022. On January 9, 2024, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J. The DOD issued the SOR 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 Security Executive Agent Directive 4 (SEAD 4), *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

Applicant answered the SOR on January 23, 2024 and requested a decision based on the written record by an administrative judge from the Defense Office of Hearings and Appeals (DOHA), in lieu of a hearing. On February 8, 2024, Department

Counsel submitted the Government's File of Relevant Material (FORM), including Government's Exhibits (GX) 1 through 5. Department Counsel resubmitted the FORM and it was received by the Applicant on March 22, 2024. He was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He did not submit a response.

The case was assigned to me on July 8, 2024. The SOR (GX 1) and Answer (GX 2) are the pleadings in this case. GX 3 through 5 are admitted without objection.

Findings of Fact

In his Answer to the SOR, Applicant admitted all the SOR allegations and did not provide any additional information. His admissions are incorporated into my findings of fact. After a careful and thorough review of the pleadings and evidence submitted, I make the following additional findings of fact.

Applicant is 52 years old. He has never married but has lived with a cohabitant since March 2022. He has been with his sponsoring employer since November 2022 and is an operations manager. This is his first security clearance application. (GX 3-4)

The SOR alleged that Applicant engaged in an extended period of criminal conduct. The first event occurred in March 1993 when he was charged with stealing (SOR ¶ 1.f). He claimed that, in February 1993, he received a call from a friend who asked to be picked up from behind a large retail store. The friend loaded a stolen bicycle into Applicant's car, and they drove off. Applicant claimed he did not know the bicycle was stolen. An employee of the store recorded Applicant's license plate and he was subsequently located and questioned by police. A warrant was later issued, and he was arrested. In 1994, he pleaded guilty to stealing property of a value greater than \$150, a felony. He was sentenced to restitution, community service and three years of probation, which he completed without incident. (GX 3-5)

In 2002, Applicant was issued a citation for speeding in a construction zone. He was later charged with failing to appear at a related court proceeding (SOR ¶ 1.e). In January 2003, both charges were resolved and he was fined. (GX 4-5)

In June 2006, Applicant was pulled over after he was observed weaving and driving on the shoulder. After admitting to consuming alcohol earlier that day, a field sobriety test was conducted. He refused to take a breathalyzer test and was arrested for driving while intoxicated (DWI) (SOR ¶ 1.d). In December 2006, he pleaded guilty to DWI and traffic violations. He was fined, ordered to attend a victim's impact panel, and participate in a substance abuse traffic offender's program. He was also sentenced to two years of probation. He completed these obligations without further incident. (GX 4-5)

In October 2012, Applicant was pulled over after his vehicle was observed speeding and swerving. He admitted to consuming alcohol at a happy hour that day. He

failed a field sobriety test and refused a breathalyzer test. He was charged with DWI (SOR ¶ 1.c) and failure to maintain a single lane while driving. He was also charged with displaying improper plates as he had another vehicle's license plates on his vehicle. In October 2013, he pleaded guilty to DWI, his license was suspended, and he was fined. He received two years of a suspended imposition of sentence. (GX 3-5)

As part of his sentencing, Applicant was also ordered to complete another substance abuse traffic offender's program for his license to be reinstated. This time, however, he never completed the program and his license transitioned from being suspended to invalid. Beginning in about April 2013, he began driving without a valid license (SOR ¶ 1.a). (GX 4-5)

In July 2016, Applicant came home to find his cousin in bed with his girlfriend. Applicant stated that he had an altercation with his cousin that involved pushing and shoving, but that they did not swing at each other. However, his cousin's phone was damaged. According to Applicant, shortly after his cousin left, his girlfriend began receiving threatening text messages from the cousin's father and Applicant called the police. (GX 4-5)

However, police records reflect that Applicant's cousin called the police from a nearby convenience store after being struck by Applicant with a golf club. Police records reflect that the cousin had multiple bruises as well as the imprint of a golf clubhead on his left arm and abdomen. (GX 5)

Applicant also provided a statement to police. He claimed that, when he pushed his cousin out of the residence, his cousin immediately grabbed a pool cleaning device and turned back toward the door. Applicant then grabbed his golf club from its normal position behind the door and struck his cousin three times in self-defense. (GX 4-5)

Applicant was arrested and charged with misdemeanor assault in the third degree and misdemeanor property damage in the second degree (SOR ¶ 1.b). In May 2017, he pleaded guilty to these charges. He received a suspended sentence and was placed on probation for one year. At the completion of probation, the charges were dropped. He no longer associates with his cousin. (GX 3-5)

Meanwhile, Applicant continued to drive without a valid license. In June 2020, he was hired by Company A as an area manager. Applicant claimed that Company A knew that he did not have a valid driver's license but allowed him to drive his car while conducting business for the company. About six months later, Company A conducted an audit and Applicant was asked to produce his driver's license and insurance. When he informed them that he did not have a license, he was told he had 30 days to get it reinstated. (GX 4)

In about November 2020, Applicant completed the necessary substance abuse traffic offender's program relating to his 2012 DWI and his license was reinstated. Nonetheless, Company A removed him from his position and offered him a position in

the nightshift with less pay. Applicant declined the new position and left the company voluntarily. He described his decision to drive without a license as a “personal choice” and that he had been “lazy” in not getting his license reinstated sooner. (GX 4)

Policies

It is well established that no one has a right to a security clearance. As the Supreme Court held in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.” 484 U.S. 518, 531 (1988)

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 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, these guidelines are applied 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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.

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern regarding criminal conduct:

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 criminal conduct security concerns and may be disqualifying. I have considered all of them, and the following are potentially applicable:

(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

(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.

Applicant's admissions and the evidence reflect that he has engaged in multiple criminal events over several decades that include guilty pleas for felony stealing, two DWIs, and misdemeanor assault and property damage. Also, after failing to complete his court-ordered obligations relating to his 2012 DWI, he chose to drive for about seven years without a valid license. Security concerns are established under AG ¶¶ 31(a) and (b).

AG ¶ 32 provides conditions that could mitigate the criminal conduct security concerns, including the following which are potentially applicable:

(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

(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.

Eight years have passed since Applicant was last arrested or faced with criminal charges. However, for a seven-year period through late 2020, he failed to comply with his court-ordered obligations from his 2012 DWI and chose to drive without a valid license. His decision to consistently and routinely break the law, by driving without a license, reflects a disregard for the rule of law and a history of non-compliance with basic rules and regulations.

Since late 2020, Applicant has complied with the law by obtaining a valid license and avoiding criminal conduct. However, this recent compliance must be compared to his long history of criminal conduct and prior willingness to break the law when convenient. As such, he has not established sufficient changed circumstances to conclude that these types of actions and behaviors are behind him. Given the length and consistency of his criminal history, questions remain regarding his reliability, trustworthiness, and judgment. He has not met his burden of persuasion to establish mitigation under AG ¶¶ 32(a) or (d).

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 have incorporated my comments under Guideline J in my whole-person analysis.

Applicant did not request a hearing and I did not have the opportunity to question him further about his past conduct or to assess his credibility by observing his demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). However, the record reflects that he engaged in several criminal events over an extended period of time and, for a period of about seven years, repeatedly disregarded the law by choosing to drive without a license. He has not persuaded me that his decisions to disregard the law, when convenient to him, are truly in his past.

