



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 08-08019
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

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

January 15, 2010

**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 his security clearance application on October 16, 2007 (Government Exhibit (GX) 5). On August 10, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline J (GX 1). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on August 14, 2009 (GX 3); answered it on August 31, 2009 (GX 4); and requested determination on the record without a hearing.

Department Counsel submitted the government's written case on October 6, 2009. On October 7, 2009, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the government's evidence. Applicant received the FORM on October 14, 2009, and responded on November 13, 2009. His response to the FORM was admitted in evidence as Applicant's Exhibit (AX A), without objection. The case was assigned to me on December 14, 2009.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted all the allegations in the SOR. His admissions are incorporated in my findings of fact.

Applicant is a 27-year-old employee of a defense contractor. He began working for his current employer in May 2006, while he was a senior in college. He has never been legally married, but he has joint custody of a nine-year-old son who was born during a 5-year common-law marriage (GX 6 at 8). He has four brothers and two sisters. He has never held a final security clearance, but he has held an interim clearance while working for his current employer (AX A at 3).

Applicant graduated from high school in 2000 and began attending college (GX 5 at 11-12), but he apparently has not yet completed his degree requirements for a bachelor's degree in engineering (AX A at 3). He worked part-time at various jobs from January 1998 to August 1998, from January 2002 to May 2004, and from July 2005 to May 2006, when he was hired by his current employer (GX 5 at 13-18).

In September 1999, when Applicant was 16 years old, he was arrested while driving a stolen car. He was with five friends in the stolen car when he was stopped by police, and he told the police that his friends were not involved in the theft (GX 7 at 90). The evidence of the charges filed against him is conflicting. The police records reflect that he was charged with aggravated motor vehicle theft and "theft by receiving" (GX 7 at 84-91), but the court records reflect that he was charged with aggravated motor vehicle theft and theft of rental property. The court records also reflect that the charge of aggravated motor vehicle theft was dismissed and that he pleaded guilty to theft of rental property (GX 7 at 25). He was sentenced to 30 days in juvenile detention (suspended), unsupervised probation for 12 months, and fines and restitution of \$875 (GX 7 at 25). He worked at a fast food restaurant to pay the fines and restitution (AX A at 1).

In November 2004, Applicant and several family members, including his son and nephew, gathered in his apartment for a birthday celebration. Neighbors on the floor below them complained to police about loud noise and the sounds of constant movement, as they had done two or three times previously (GX 7 at 12). Applicant was cited for a nuisance offense. He elected to pay a \$50 fine rather than demand a trial and take time away from school and work (AX A at 2). He and his brothers negotiated with the landlord to terminate the lease early, and they moved elsewhere (GX 7 at 13).

In January 2007, Applicant, his siblings, and several of their spouses went to a restaurant for dinner. Several siblings, but not Applicant, had been consuming alcohol. They became upset about the service when they waited for more than an hour for their food and the wrong food was served. Some of Applicant's party directed vulgar language and ethnic slurs toward the staff and the manager, who was of Hispanic origin. Applicant's party started to leave the restaurant but was willing to pay only for the food they had received instead of everything they had ordered (GX 7 at 77-78). According to Applicant, the restaurant manager directed a racial slur toward his group, all of whom are of Asian descent. At that point, Applicant either pushed or punched the manager (GX 7 at 17, 60, 66, 75, 78-79). After the police arrived at the restaurant, they administered two breathalyzer tests to Applicant, both of which registered 0.00 (GX 7 at 17).

Applicant was charged with misdemeanor battery. He pleaded guilty and was placed on supervised probation for 12 months, ordered to attend a conflict management class, and ordered to undergo alcohol evaluation (GX 7 at 23). According to Applicant, his probation officer did not require the alcohol evaluation because he had not been drinking on the night of the incident and did not have any alcohol-related or drug-related incidents in his past (AX A at 2).

In January 2008, Applicant was at a bar with a group of friends. One of the group, apparently intoxicated, was involved in an incident on the dance floor that began with an apparently accidental bumping and progressed to what was described by a witness as "staring at [another man] in a threatening manner" and a hand gesture of unknown meaning. Applicant's friend was asked to leave the premises but refused. His friend was taken into custody, removed from the premises, and placed in a police patrol car. Several of Applicant's group gathered around and began shouting at the police, some of them using vulgar language (GX 7 at 32). They were ordered by police to leave the premises (GX 7 at 28).

Applicant was not identified as one of those who were shouting at the police, but he was identified as one who refused to leave when ordered (GX 7 at 33). In an interview with a security investigator, he stated that he complied with the police directive by getting into one of the cars driven by members of the group. He was sitting in the passenger seat when he was directed by the police to get out of the car. He was cited for trespassing and obstruction of a police officer, and released on the scene (GX 7 at 33, 41). According to Applicant, he asked the police officer why he was being cited, and the officer responded that he had not listened to the police (GX 6 at 6; AX A at 3).

Applicant pleaded not guilty to both offenses. He was acquitted of trespassing but convicted of obstruction. He told the security investigator he believed his conviction of obstruction was based on mistaken identification, and that he was convicted for the actions of one of his brothers (GX 7 at 6). He was sentenced to supervised probation for 12 months and ordered to undergo alcohol evaluation, obtain alcohol counseling, and attend conflict management classes (GX 7 at 23).

Applicant underwent a drug and alcohol evaluation in September 2008, and the evaluator concluded there was insufficient evidence to regard him as a candidate for treatment. As a precautionary measure, the evaluator recommended random breath tests twice a week for three months (GX 6 at 8). He completed an anger management seminar in October 2008 (GX 6 at 9)

In his response to the FORM, Applicant insisted he had done nothing wrong during the January 2008 incident, but he acknowledged that he was found guilty of obstructing a police officer. He also stated he was a stronger and wiser person as a result of the experience, and he is now more cautious when going out in large groups (AX A at 3).

### **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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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; see AG ¶ 2(b).

## **Analysis**

### **Guideline J, Criminal Conduct**

The SOR alleges Applicant was arrested for trespassing and obstructing a police officer, and convicted of the latter offense (SOR ¶ 1.a); he was arrested and convicted of battery (SOR ¶ 1.b); and he paid a fine for causing an unlawful nuisance (SOR ¶ 1.c). It also alleges he was arrested as a juvenile for aggravated motor vehicle theft and theft of rental property, and he was convicted of theft of rental property (SOR 1.d). The concern raised by criminal conduct is set out in AG ¶ 30 as follows: “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.”

Conditions that could raise a security concern and may be disqualifying include “a single serious crime or multiple lesser offenses” and “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.” AG ¶¶ 31(a) and (c). Applicant’s criminal record raises both disqualifying conditions, shifting the burden to him evidence 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).

Two mitigating conditions, AG ¶¶ 32(a) and 32(d), are relevant. None of the other enumerated mitigating conditions under this guideline apply to this case.

Under AG ¶ 32(a), security concerns under this guideline may be mitigated by evidence that “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." Applicant's juvenile felony conviction in 1999 was the beginning of a pattern of criminal conduct in which he either succumbed to peer pressure or was swept along in a boisterous, unruly group. None of the incidents happened under unusual circumstances. The incidents, considered together, cast doubt on Applicant's reliability, trustworthiness, and good judgment. I conclude AG ¶ 32(a) is not established.

Under AG ¶ 32(d), security concerns based on criminal conduct also may be mitigated if "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement." Applicant's latest conviction is recent. Although he has worked for his current employer for almost four years, he presented no evidence of his performance at work. He has expressed remorse for some of his offenses in his written responses, but he has denied culpability for the nuisance violation and the January 2008 incident. My ability to judge his sincerity and credibility is limited because he did not request a hearing. I conclude AG ¶ 32(d) is not established.

### **Whole-Person Concept**

Under 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 the relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a young man with a gregarious family. He has worked hard since high school. He has held an interim clearance with his current employer. He acknowledged in his response to the FORM that he needs to be more cautious in a large group. It is too soon to tell whether he will implement that wisdom at future social events. He has not yet demonstrated the maturity and good judgment expected of a

person entrusted with classified information. See Directive ¶¶ E.3.1.17 through E.3.1.40 (reconsideration of a denial of a security clearance authorized after one year).

After weighing the disqualifying and mitigating conditions under Guideline J, evaluating all the evidence in the context of the whole person, and mindful of my obligation to resolve doubtful cases in favor of national security, I conclude Applicant has not mitigated the security concerns based on criminal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant

### **Conclusion**

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman  
Administrative Judge