

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant answered the SOR on November 16, 2010, and initially indicated he did not wish to have a hearing. On December 12, 2010, he submitted a request for a hearing. The case was assigned to me on March 28, 2011. DOHA issued the Notice of Hearing on April 13, 2011. The hearing was held as scheduled on April 26, 2011. Department Counsel offered exhibits (GE) 1 through 9 that were admitted into evidence without objection. Applicant testified, called two witnesses, and offered exhibits (AE) A through M, which were admitted without objection. The record was left open for Applicant to submit additional matters. He requested an extension of the deadline for submitting matters, and his request was granted. Before the new deadline, he timely submitted AE N through S, which were admitted without objection. DOHA received the transcript (Tr.) of the hearing on May 5, 2011.

Procedural Ruling

Applicant waived the 15-day notice requirement imposed by ¶ E3.1.8 of the Directive.¹

Findings of Fact

Applicant is a 24-year-old commercial diver employed by a defense contractor. He has worked for that contractor since August 2010. He graduated from high school in June 2005 and attended one semester of community college. In September 2009, he graduated from a commercial diving academy and has obtained advance diving qualifications and certifications. He has never been married and has no children. He is engaged to get married next year. This is the first time that he has applied for a security clearance.²

Burglaries

In 2006, Applicant and four or five other individuals twice burglarized a commercial welding business. None of the burglars were employed at that business. None of them were armed with weapons during the burglaries. Both burglaries occurred in the evening. The business had a six-foot chain link fence surrounding two structures,

¹ Tr. 11-12.

² Tr. 68-69, 71-74, 96; GE 1; AE A, J. Applicant worked for one defense contractor from September 2009 to August 2010 and another defense contractor from August 2010 to the date of the hearing.

a two-story commercial building and a detached garage. Applicant was 18 years old when he committed the burglaries.³

The first break-in occurred on about March 18, 2006. A section of the fence was pulled down and a crowbar was used to pry open the front door of the building. Applicant was not involved in prying open the door, but he entered the building. On this occasion, Applicant stole a plasma cutting torch. Another burglar stole an air compressor and others took various tools, a 12-pack of beer, and \$2 from the cash box. Applicant took the plasma cutting torch to a friend's house where it remained until turned over to the police.⁴

The second break-in took place on about April 9, 2006. The fence was cut completely and rolled back. By the time Applicant arrived at the detached garage, the break-in had already occurred. They entered the garage. During this incident, Applicant and the other burglars stole a dirt bike, golf cart, and all-terrain vehicle (ATV). The golf cart and ATV were driven about three or four miles from the welding business. The dirt bike was loaded onto the back of a pickup truck. The golf cart and dirt bike were hidden in the woods near one of the burglar's house.⁵

On the afternoon following the second burglary, Applicant and another burglar went to the hiding place in the woods and were apprehended at gunpoint by the owner and an employee of the welding business. The owner and employee had followed the tracks of the vehicles to the hiding place, and they hid in the woods waiting for the burglars to return. They held Applicant and other burglar for 9 to 12 hours and, at some point, transported them back to the welding business in the trunk of a car. Applicant and other burglar were cooperative with the owner, but claimed they did not steal the property. Applicant stated the owner and employee threatening them while they were being held. The owner photocopied Applicant's and other burglar's driver's licenses and released them. Within a couple of days, the police contacted Applicant to question him about the burglaries. He cooperated with the police. He was arrested and charged with burglary of a structure, a felony. Eventually, Applicant entered into an agreement that the burglary charge against him would be dropped if he did not pursue kidnapping charges against the owner and employee of the welding business. He paid some fees and the burglary charge was dropped.⁶

³ Tr. 47-50, 57-59, 65-66, 69-71, 74- 96; GE 3, 4, 5; AE A, K. In his Answer to the SOR, Applicant denied that he was charged with commercial burglary, but admitted he was charged with burglary of a structure. However, the police reports, GE 4 and 5, identify the charge as commercial burglary.

⁴ Tr. 47-50, 57-59, 65-66, 69-71, 74-80, 96; GE 2, 3, 4, 5.

⁵ Tr. 47-50, 57-59, 65-66, 69-71, 80-83, 96; GE 2, 4, 5. In GE 5, the owner indicated the lock on the garage door did not work due to a previous burglary.

⁶ Tr. 47-50, 57-59, 69-71, 83-86; GE 2, 3, 4, 5; Applicant's Answer to the SOR. At Tr. 58, Applicant testified that he was charged with two counts of burglary of a structure. The court documents have conflicting information as to the number of counts. The Information reflects that he was charged with

Motorcycle Offenses

From late-2007 to early 2008, Applicant and a coworker occasionally switched vehicles over weekends. Applicant would borrow the coworker's motorcycle and the coworker would borrow Applicant's car. Applicant did not have a motorcycle driver's license when he drove the motorcycle. In early 2008, he was thinking about purchasing the motorcycle, but final arrangements for the sale had not been made. Before the police stopped him on the motorcycle, Applicant became aware that the motorcycle's tags had expired. The police report reflects that Applicant stated he placed his car's registration sticker on the motorcycle's license plate. He made that switch to make it appear that the motorcycle's registration was current. Consequently, when Applicant later operated the motorcycle, he knew it was not properly registered and had a false registration sticker on the license plate.⁷

In January 2008, the police stopped Applicant on the motorcycle for not wearing protective eyewear. When he was stopped, his face shield was retracted in his motorcycle helmet. During the traffic stop, the police determined the motorcycle was stolen. Applicant was arrested and charged with grand theft motor vehicle, no driver's license for motorcycle operation, and attaching tag/sticker not assigned. The grand theft charge was later dropped. The prosecutor's Announcement of No Information for that grand theft charge stated, "The actual theft of the vehicle occurred too far in the past to prove he had knowing possession of a stolen vehicle." The police report indicated the motorcycle was stolen on September 20, 2007. Applicant assumed his coworker also did not know the motorcycle had been stolen, because the coworker was never arrested for possessing the stolen motorcycle. In February 2008, Applicant pled no contest to the amended charges of operating a motorcycle without license and attaching a registration license plate not assigned. Both of those offenses were misdemeanors. For these offenses, he was awarded 30 hours of community service, fined \$295, and six months' probation for each offense that ran concurrently. He successfully completed his probation.⁸

Operating a Vehicle While Driver's License was Suspended

In 2009, Applicant accumulated about 52 electronic vehicle toll pass violations. The electronic vehicle pass is an automated system for paying highway tolls. He had borrowed his father's electronic vehicle pass, but the battery in that device had burned out. Consequently, the pass did not register when Applicant drove his car through the tolls. He stated that he incurred the toll violations over a period of about two weeks. Each toll violation was initially \$1. If a toll violation is not paid within 30 days of

only one count. GE 7 indicates the Information would have been amended to add another burglary count had the decision not been made to drop the burglary charges.

⁷ Tr. 50-53, 59-62, 71-74, 86-87; GE 6; AE A, K.

⁸ Tr. 50-53, 59-62, 67, 71-74, 86-87; GE 6, 8; Applicant's Answer to the SOR.

notification, a ticket is issued in the amount of \$180 and, at some later point, increases to \$280 per violation. Applicant's violation notices were mailed to his father's house where he was then residing. Because Applicant did not pay the toll violations in a timely manner, tickets totaling approximately \$10,000 were issued. Applicant made about four court appearances in an effort to resolve this matter. During one of those appearances, he was informed that his driver's license was suspended. His driver's license, however, was not seized or marked "suspended." Eventually, he was able to negotiate a settlement of this matter with a representative of the state toll agency. The settlement provided that he was to make two payments totaling \$1,000. According to Applicant, one \$500 payment was made on June 3, 2009, and the other on August 27, 2009.⁹

Applicant's girlfriend testified that Applicant's father gave her a receipt on August 27, 2009, showing the toll violations were paid. She testified that she passed the receipt to Applicant because he was having an out-of-town job interview the next day, and it might be needed to show the matter was resolved. Applicant testified that, upon payment of the settlement amount, he thought his license was no longer suspended. During the hearing, Applicant did not present the receipt from the state toll agency reflecting the payment on August 27, 2009. In his post-hearing submission, he presented two cancelled money orders and two state toll agency "shipping receipts." One of the money orders was dated June 3, 2009, and the other August 27, 2009. Neither of the state toll agency receipts reflected the date of August 27, 2009. The receipt for the money order dated August 27, 2009, has a "purchase date" of October 2, 2009, which is apparently the date the agency presented the money order for payment. In short, no document was presented that confirmed the final payment was made to the state toll agency on August 27, 2009. I did not find credible Applicant's claim that he believed his driver's license was reinstated on August 27, 2009.¹⁰

On August 28, 2009, Applicant, his girlfriend, and others went to dinner. Because his girlfriend consumed alcohol, Applicant decided to drive her father's car back to a hotel. When they arrived at the hotel, police cruisers were present. Unbeknownst to them, the hotel was known for illegal drug activity. The police report indicated that a traffic stop was conducted because their vehicle's tag light was inoperative. The police officer asked everyone in the vehicle to show their identification. During this police stop, Applicant was arrested and charged him with driving while his license was suspended or revoked, a misdemeanor, and driving a vehicle in unsafe condition. The police officer was told that the tickets that resulted in the driver's license suspension had been paid, but the officer indicated that was not sufficient. In October 2009, he pled no contest to an amended charge of no valid driver's license, a misdemeanor. He was fined and adjudication of guilt was withheld. He eventually had to go to the department of motor

⁹ Tr. 39-46, 53-57, 62-65, 87-100; GE 9; AE A, K, N-S. The electronic toll violations were not alleged in the SOR and were not considered in applying the disqualifying conditions, but were considered in applying the whole-person concept.

¹⁰ Tr. 39-46, 53-57, 62-65, 87-100; GE 9; AE A, K, N-S. A copy of the money order may have been presented to Applicant on August 27, 2009.

vehicles to get his driver's license reinstated. His driver's license was reinstated on September 30, 2009.¹¹

Character Evidence

Applicant's best friend testified that he has known him for about 13 years. He described Applicant as friendly and outgoing. He would not hesitate to loan Applicant his cars or equipment. He also trusts him to watch his two children and indicated that he does not trust people lightly when it comes to his children. He believes Applicant's criminal behavior was totally out of character for him. Applicant's girlfriend also testified that the burglaries were not typical of Applicant's behavior, and she has never known him to do anything of that nature. Applicant stated that the burglary charge was "an incident of idiotic adolescent behavior." Furthermore, he stated that he offers no justification or excuse for that incident. He also pointed out that, since graduating from the commercial diving academy, he has not been in any trouble.¹²

Applicant submitted letters of recommendation from his current and former employers and coworkers. Those letters commend him for his excellent service, attitude, work ethic, and professionalism. He is described as trustworthy and reliable. Furthermore, he submitted newspaper articles reflecting that he and two fellow high school students rescued a family from drowning in 2004.¹³

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are

¹¹ Tr. 39-46, 87-100; GE 9; AE A, K, N-S; Applicant's Answer to the SOR. See also Florida Statutes §§ 322.03, 322.34(2), and 322.39.

¹² Tr. 33-38; AE A, L, M.

¹³ AE B-H, K.

applied in conjunction with an evaluation of the whole person. An administrative judge's 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 to reach his decision.

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 of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "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. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 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 or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[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

AG ¶ 30 expresses the security concern for 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 a security concern and may be disqualifying. I have considered all of them and the following disqualifying conditions potentially apply:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegations or admissions of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

In 2006, Applicant committed two felony offenses. He twice burglarized a commercial business and, in doing so, stole expensive equipment. He was arrested and charged with burglary of a structure. Due to the conduct of the owner and employee of the commercial business in capturing him, Applicant was able to avoid prosecution for his criminal conduct. In 2008, he drove a motorcycle without having a motorcycle license and while knowing its license plate displayed a false registration sticker. He pled no contest to those offenses and was awarded community service, probation, and a fine. In 2009, he was arrested and charged with driving a vehicle while his license was suspended and driving an unsafe vehicle. Applicant claimed he thought his driver's license was reinstated before his arrest because the toll violations were paid. I did not find that claim credible. Although he presented documents concerning the payment of the toll violations, none of them confirmed that the toll violations were paid before his arrest. Furthermore, even if the toll violations were paid before his arrest, such action would not have resulted in reinstatement of his driver's license. Action by the department of motor vehicles – instead of the state toll agency – was needed to reinstate his license. He pled no contest to the charge of no valid driver's license. Substantial evidence exists to establish he committed that offense. Both of the above disqualifying conditions are established by Applicant's criminal conduct in 2006, 2008, and 2009.

AG ¶ 32 contains conditions that could mitigate security concerns arising from criminal conduct. I have considered all of them and two 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;
- (c) evidence that the person did not commit the offense;
- (d) 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 committed the two burglaries five years ago when he was 18 years old. He has acknowledged his wrongdoing and accepted responsibility for those crimes. Since then, however, he has engaged in other criminal conduct.

In 2008, Applicant was arrested and charged with grand theft motor vehicle, operating a motorcycle without a license, and attaching tag not assigned. He borrowed a motorcycle from a coworker that had been stolen. His claim that he had no knowledge of the motorcycle being stolen is believable. I find he did not commit the grand theft motor vehicle offense. AG ¶ 32(c) applies to the grand theft motor vehicle offense. Nevertheless, he drove the motorcycle knowing that he did not have a motorcycle license and knowing it was not properly registered. The registration offense was not an act of negligence, but one of willful deception. Specifically, he placed a false registration sticker on the motorcycle's license plate to make it appear to be properly registered.

In 2009, Applicant drove a vehicle while his driver's license was suspended. As noted above, his claim that he thought his driver's license was reinstated before his arrest was not credible. I find that AG ¶ 32(c) does not apply to that offense.

In the past five years, Applicant has committed a number of criminal offenses. The burglaries are serious crimes. His latest offense occurred less than two years ago. His criminal conduct did not occur under such unusual circumstances that would make recurrence of this behavior unlikely. His misconduct casts doubt on his reliability, trustworthiness, and good judgment. While he has been gainfully employed since September 2009 and has not committed any offenses since then, it is too soon to conclude that his criminal conduct is safely in the past. Given the recency and nature of his criminal conduct, additional time is needed to conclude he has successfully reformed and rehabilitated himself. I find that AG ¶¶ 32(a) and 32(d) do not apply.

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(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.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. 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. I considered Applicant's character references and his work performance since graduating from the commercial dive academy. I also considered his act of heroism in saving a family from drowning. Nevertheless, his repetitive criminal conduct is troubling and raises serious security concerns. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. Considering all the evidence, I conclude Applicant failed to mitigate the security concerns arising under the guideline for Criminal Conduct.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant

Decision

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

James F. Duffy
Administrative Judge