



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 15-04611
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Rhett E. Petcher, Esq., Department Counsel  
For Applicant: *Pro se*

08/15/2016

---

**Decision**

---

FOREMAN, LeRoy F., Administrative Judge:

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

**Statement of the Case**

Applicant submitted a security clearance application on September 22, 2014. On December 4, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline E. The DOD CAF acted under 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) implemented by the DOD on September 1, 2006. The adjudicative guidelines are codified in 32 C.F.R. § 154, Appendix H (2006), and they replace the guidelines in Enclosure 2 to the Directive.

Applicant answered the SOR on January 13, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 28, 2016, and the case was assigned to me on May 4, 2016. On the same day, the

Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for May 25, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified, but did not present the testimony of any witnesses or submit any documentary evidence. I kept the record open until June 10, 2016, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. DOHA received the transcript (Tr.) on June 2, 2016.

### **Findings of Fact<sup>1</sup>**

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

Applicant is a 40-year-old electrical engineer employed by defense contractors since August 2014. (Tr. 25-26.) He has never held a security clearance.

Applicant grew up in an underprivileged community in a large city. His mother was mentally ill and his father left the family when Applicant was seven years old. (Tr. 22.) He was a member of a gang from age 15 to 25. (Tr. 27.) While a gang member, he used marijuana frequently, and he supported himself by selling marijuana. (Tr. 30.)

The SOR alleges 12 gang-related and drug-related activities and 6 employment-related events. For clarity, the specific paragraphs of the SOR are parenthetically cited below in the factual narrative.

In September 1994, Applicant was charged with aggravated battery likely to cause great bodily harm (SOR ¶ 1.q). He was charged with battery in December 1994 (SOR ¶ 1.p) and February 1995 (SOR 1.o) (GX 2 at 2.) He testified that these charges probably were based on gang fights. He testified that he was charged with the December 1994 battery solely because he was present during a fight. (Tr. 29.)

The SOR alleges that Applicant was charged with disorderly conduct in November 1992 and May 1997 (SOR ¶¶ 1.l and 1.r). There is no evidence in the record supporting these allegations.

In July 1995, Applicant was charged with possession of 5-10 grams of cannabis (SOR ¶ 1.n). (GX 2 at 3.) He admitted this charge but could not remember any details about it. (Tr. 30.)

In February 1996, Applicant was charged with possession of under 15 grams of cocaine (SOR ¶ 1.m). (GX 2 at 3.) He testified that on this occasion he had \$1,000 in his possession from selling marijuana and he intended to use the money to buy a car. Although he sold cocaine while a member of the gang, the \$1,000 was from selling

---

<sup>1</sup> Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

marijuana, not cocaine. He testified that he never used cocaine. He denied having any drugs in his possession on this occasion. The police seized the \$1,000. (Tr. 31-32.)

In February 1998 and April 2000, Applicant was charged with possession of cannabis (SOR ¶¶ 1.j and 1.k). Applicant admitted these allegations and testified that the marijuana was for his personal use. (Tr. 32-33.)

Applicant testified that he left the gang in 2001, when he moved to another city and enrolled in a university. (Tr. 34.) He had a part-time job working in the university cafeteria, but he did not earn enough to support himself. Around 2003, he started selling small quantities of marijuana to earn additional money. (Tr. 35-38.)

In March 2004, Applicant was charged with assault, possession of drug paraphernalia, and selling cannabis (SOR ¶¶ 1.g-1.i). (GX 2 at 3.) At the time, he was living in student housing and selling marijuana. He was afraid that his roommate would “turn on him,” and he tried to make the roommate move out. He was involved in a physical altercation with his roommate, who called the police and told them that Applicant had marijuana in the room. (Tr. 38.) Applicant was convicted of possessing 10-30 grams of cannabis, a felony, and sentenced to probation. The other charges were *nolle prosequi*. (GX 1 at 41.)

Applicant continued to smoke marijuana until 2008. He stopped smoking marijuana because it made it difficult for him to focus and was interfering with his school work. He testified that he has not used any illegal drugs since 2008. (Tr. 41-42.)

Applicant graduated from college in December 2012 with a bachelor's degree in electrical engineering. (Tr. 25.) He worked full time at various non-government jobs while attending college. He testified that he would go to work at 11:00 p.m., work until 7:00 a.m., go directly to school from work, sleep three hours, and repeat the cycle. (Tr. 23, 43-44.) He worked as a concierge for several apartment communities, manning the front desk during the evening and overnight hours. He was fired from a concierge position in September 2007 for falling asleep at work (SOR ¶ 1.f). He left a concierge position in March 2009 by mutual agreement because he was falling asleep at work (SOR ¶ 1.e). He was fired from a concierge position in February 2012 for routine tardiness (SOR ¶ 1.d). He testified that his falling asleep was not intentional and not intended to show disrespect for his employer, but his jobs were second in priority to graduating from college. (Tr. 44-46.) His tardiness in 2012 was due to his participation in a research project at school, in addition to his classes and his employment. (Tr. 47.)

In May 2013, Applicant left a concierge position at a commercial location by mutual agreement, after falling asleep at work (SOR ¶ 1.c). (GX 1 at 18-26.) This incident occurred after he graduated from college. He testified that he was looking for a job during the day, worrying about finding a job, not sleeping well, and working at this job at night. (Tr. 58-61.)

Applicant was unemployed from May 2013 to January 2014. He worked as a railcar electrical installer from January to March 2014. He found the work unsatisfying and not a good use of his expertise as an engineer. As a result, he underperformed, was notified of his substandard performance, and left by mutual agreement in March 2014 (SOR ¶ 1.b). (Tr. 50-53.)

Applicant worked as a concierge in an apartment building in May and June 2014 and was fired after becoming belligerent with his supervisor (SOR ¶ 1.a). (GX 1 at 15-18.) He testified that this incident occurred when he allowed a security officer to enter an apartment without notifying his site supervisor. The supervisor scolded him in the presence of his immediate supervisor and several residents. He shouted back at the supervisor, and he was fired. (Tr. 55.)

One of Applicant's college professors submitted a letter describing Applicant's performance as a student. The professor described Applicant as "readily able to apply complex theoretical principles of communication systems engineering to general problem solving." He states that Applicant "consistently demonstrated commitment, dedication and the highest level of excellence in the roles he has assumed." He found Applicant to be highly organized, dependable, and supportive of others with whom he interacted. (AX A.)

Applicant's former career manager and current supervisor submitted a letter stating that he was impressed with Applicant's flexibility and eagerness to take on new challenges. He stated that Applicant recognized that he need to learn how to be a productive employee, and he took advantage of every opportunity to expand his knowledge and skills. (AX B.)

## **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 AG. 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. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

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; see AG ¶ 2(b).

## **Analysis**

### **Guideline E, Personal Conduct**

The 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 information.” The issue in this case is whether Applicant has put his gang-related and drug-related conduct behind him and has become able and willing to comply with rules and regulations. His history of misconduct and neglect of workplace duties raises the following disqualifying conditions under this guideline:

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 person may not properly safeguard protected 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 person may not properly safeguard protected information. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The following mitigating conditions are potentially relevant:

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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

AG ¶ 17(c) is established. Applicant's drug-related and gang-related conduct was not minor or infrequent, and it did not occur under unique circumstances. The issue is whether the 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 totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time 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.*

Applicant left the gang in 2001 and stopped his drug involvement in 2008. After 2008, his worked-related misconduct was the product of sleep deprivation and a heavy academic schedule. His last employment-related incident, a relatively minor act of insubordination, was more than two years ago. His current supervisor indicates that he is well on his way to becoming a valuable and productive employee. He has not repeated his earlier inattentive or insubordinate conduct. I conclude that AG ¶ 17(c) is established.

AG ¶ 17(d) is established. Applicant has acknowledged his past. He left the gang, moved to a new community, and doggedly pursued a college degree as his ticket to a better life. He impressed his college professor with his commitment and dedication. He has impressed his current supervisor with his flexibility and eagerness to succeed.

AGA ¶ 17(e) is established. Applicant has been open and candid about his past throughout the security clearance process. He is not vulnerable to exploitation, manipulation, or duress.

### **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(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.

I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline(s), but some warrant additional comment.

Applicant was candid, sincere, contrite, and credible at the hearing. He was 25 years old when he decided to leave the gang and make a better life for himself. He is now 40 years old, a college graduate, and employed by a defense contractor. His

transition from gang member to a college-educated engineer has been remarkable. He is older than most recent college graduates and relatively new to the professional workplace. He is still learning some of the social and personal skills necessary to succeed as a professional engineer. However, he is determined to establish himself as a responsible, reliable member of the defense community, and his track record to date is encouraging.

After weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his personal conduct. Accordingly, I conclude he has 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:

Paragraph 1, Guideline E (Personal Conduct):                      FOR APPLICANT

Subparagraphs 1.a-1.r:    For Applicant

### **Conclusion**

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman  
Administrative Judge