



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 15-06032
	)	
Applicant for Security Clearance	)	

**Appearances**

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

10/06/2016

**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 a security clearance application on December 15, 2014. On March 25, 2016, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline J. The DOD acted 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 adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant answered the SOR on May 27, 2016, and requested a decision based on the administrative record. Department Counsel requested a hearing and was ready to proceed on July 11, 2016. The case was assigned to me on July 20, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 26, 2016, scheduling the hearing for August 16, 2016. I convened the hearing as

scheduled. Government Exhibits (GX) 1 and 3 were admitted in evidence without objection. GX 2, an unauthenticated summary of Applicant's interview by a security investigator on February 2, 2015, was not admitted. (Tr. 23-24.) Applicant testified but did not present the testimony of any other witnesses or submit any documentary evidence. DOHA received the transcript (Tr.) on August 25, 2016.

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

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

Applicant is a 31-year-old crane rigger employed by a defense contractor since April 2011. He was previously employed in the private sector. He has never held a security clearance.

Applicant married in May 2015. He has lived with his wife since January 2003. (GX 1 at 17; Tr. 33-34.) He has no children.

In January 2004, Applicant was charged with felony murder and felony use of a firearm in the commission of a felony. He was convicted of being an accessory after the fact, a misdemeanor. The charge of felony use of a firearm was dismissed. He was sentenced to 12 months in jail, with 4 months suspended, and he was placed on probation for a year. (GX 1 at 30-32; GX 3 at 1.)

Applicant testified that the incident began when he was leaving a New Year's party in his vehicle with another man and a woman. An individual started banging on the driver's side window of his vehicle. He opened the door, and the individual punched him. Applicant subdued the individual with a choke hold and a friend of Applicant broke up the fight. The individual then started punching Applicant's friend, and his friend shot and killed the individual. Applicant, his friend, and the woman drove away. Applicant's friend left the weapon under the passenger seat of Applicant's vehicle. After Applicant dropped off the woman at her nearby home, Applicant and his friend were stopped by the police. Applicant refused to provide any information about the shooting, because he did not want to "snitch" on his friend, resulting in his conviction of being an accessory after the fact. (Tr. 28, 35-45.) He was eighteen years old at the time. (Tr. 59.) He was not allowed to finish high school, but he obtained a general educational development (GED) certificate in January 2011. (Tr. 68; GX 1 at 9.)

Applicant testified that after the incident in 2004, he learned that he should not stay in a bar until 2:00 in the morning. He limited himself to going to a local bar, having dinner and a beer and going home. He spent his time fishing, hunting, and working.

However, in February 2013, Applicant's friends persuaded him to join them at a bar, where he became involved in a fight that began with name-calling, escalated to

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

shoving, and culminated in a fist fight in which he prevailed over a larger opponent. Applicant claimed that he left the bar and was walking toward his vehicle when his former combatant ran after him and shot him in the shoulder. Applicant was openly carrying a handgun, and he returned fire but did not hit anyone. He drove himself to a hospital, where he was admitted for a few days. He did not notify the police that he had been shot. After he was released, the police contacted him and informed him that two witnesses, including the bar's security guard, had stated that he fired the first shot.

Applicant was charged with felony attempt to commit a non-capital offense and reckless handling of a firearm. His lawyer negotiated a plea agreement, whereby he would plead guilty to a misdemeanor, and the felony charge of attempting to commit a non-capital offense would be dismissed. He was convicted of discharging a firearm in a public place and not causing injury. He was sentenced to 12 months and 5 days in jail, with 11 months and 5 days suspended, and he was placed on unsupervised probation for two years. (GX 1 at 28-30; GX 3 at 1-2.) He served the unsuspended 30 days of jail time on weekends and successfully completed his probation in April 2015. (Tr. 45-59.)

At the hearing, Applicant admitted that he did not consider retreating once the name-calling escalated to pushing. His first instinct was to push back and defend himself. (Tr. 65-66.) He expressed regret for his decision to join his friends at a bar in February 2013, but not for his decision to fight rather than retreat. He expressed pride at his decision to not "snitch" on his friend in 2004, when he "stood [his] ground and kept [his] mouth shut." (Tr. 73-74.)

### **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.

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.” See 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 J, Criminal Conduct**

The concern raised by criminal conduct 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 documentary evidence presented at the hearing establish two disqualifying conditions under this guideline: AG ¶ 31(a) (“a single serious crime or multiple lesser offenses”) and AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally 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;

AG ¶ 32(c): evidence that the person did not commit the offense; and

AG ¶ 32(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.

AG ¶¶ 32(a) and 32(d) are not established. The first prongs of AG ¶ 32(a) ("so much time has elapsed") and AG ¶ 32(d) ("passage of time without recurrence") focus on whether the criminal 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. 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." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

I conclude that Applicant's criminal conduct was recent. The two incidents were separated by nine years, but they both involved alcohol-fueled violence, use of deadly force, and failures to report criminal conduct to appropriate authorities. Applicant was on probation for the second incident until April 2015. Neither incident occurred under circumstances making them unlikely to recur. He expressed no remorse for his refusal to "snitch" on his friend in 2004. He expressed no remorse for his decision to not withdraw from the confrontation in 2013. He regretted only his decision to go to the bar and the adverse consequences of the incident on his life. He did not regret his aggressive participation in a volatile situation. He presented no evidence of good character, job performance, or community involvement.

AG ¶ 32(c) is applicable to the murder charge in 2004, because the evidence reflects that Applicant's friend was the perpetrator of the murder, but it is not applicable to the offense of being an accessory after the fact, of which he was eventually convicted. It is not applicable to the felony charges in 2013, because his conviction of a misdemeanor was the product of a plea agreement rather than evidence of his innocence.

### **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 J in my whole-person analysis, and I have considered the factors in AG ¶ 2(a). Applicant's pride in not being a "snitch" raises concerns whether he would self-report a security incident or report an incident involving a friend or co-worker. His aggressive attitude in confrontational situations precludes a finding that recurrence is unlikely. His criminal conduct demonstrates an unwillingness or inability to follow rules.

After weighing the disqualifying and mitigating conditions under Guideline J, 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. 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:

Paragraph 1, Guideline J (Criminal Conduct):                      AGAINST APPLICANT

Subparagraphs 1.a and 1.b:    Against Applicant

### **Conclusion**

I conclude that 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