



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 17-01591
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel  
For Applicant: *Pro se*

02/07/2018

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**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

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

**History of the Case**

Applicant submitted a security clearance application (SCA) on December 17, 2014. On July 26, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline E. The DOD acted under Executive Order (Exec. Or.) 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 adjudicative guidelines (AG) implemented by DOD on September 1, 2006.<sup>1</sup>

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<sup>1</sup> Security Executive Agent Directive 4 (SEAD 4), was issued on December 10, 2016, revising the 2006 adjudicative guidelines for all adjudicative decisions issued on or after June 8, 2017. The changes resulting from issuance of SEAD 4 did not affect my decision in this case.

Applicant answered the SOR on August 25, 2017, and requested a decision on the record without a hearing. Department Counsel submitted the Government's written case on September 7, 2017. On September 8, 2017, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on September 9, 2017, and did not respond. The case was assigned to me on January 30, 2018.

### **Findings of Fact<sup>2</sup>**

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a-1.e and denied the allegation in SOR ¶ 1.f. His admissions are incorporated in my findings of fact.

Applicant is a 35-year-old shipping and receiving clerk employed by a federal contractor since October 2014. He has never held a security clearance.

Applicant has never married and has no children. He attended a university from August 2002 to January 2005 but did not receive a degree.

In April 2003, Applicant was charged with unauthorized use of a vehicle. The charge is reflected in law enforcement records, and he admitted it in his response to the SOR. In response to DOHA interrogatories, he stated that he was required to attend driving school, but he provided no other information about the basis for charge, its disposition, or what punishment, if any, was imposed. This charge was alleged in SOR ¶1.a.

Law enforcement records reflect that, in June 2005, Applicant was charged with violation of the state firearms act. He disclosed this arrest in his SCA. In a personal subject interview (PSI) in September 2015, he told an investigator that the arrest occurred after he confronted a person whom he suspected of stealing his dog. The person threatened to call the police and told Applicant that he was armed. Applicant told the person that he also was armed. The police arrived and cited Applicant for possession of a pistol without a permit. He had a permit but was not carrying it with him at the time. Applicant was taken before a magistrate, but he was released after his mother brought his permit to the courthouse. This charge is alleged in SOR ¶ 1.b.

In May 2007, Applicant was terminated from employment at a discount department store. He disclosed his termination in his SCA, but he provided no details. In the September 2015 PSI, he told an investigator that a group of eight young males came to the store at night, started playing kickball with a large soft drink, and threw cans and soft drinks on the floor. When he told them to stop, they surrounded him, he felt threatened, and he punched and shoved one of them. The police arrived, but the group had already

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<sup>2</sup> Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

fled. Applicant's manager fired him for throwing the first punch. His termination is alleged in SOR ¶ 1.c.

Law enforcement records reflect that, in March 2012, Applicant was charged with driving while his license was suspended. In the September 2015 PSI, Applicant told an investigator that, unbeknownst to him, his license had been suspended for an unpaid ticket issued in 2002. He received the ticket after he gave a ride to a woman and her three children during a rainstorm, and he was ticketed because the children were not secured in car seats. He paid the fine and penalties and his driver's license was reinstated.<sup>3</sup> This charge is alleged in SOR ¶ 1.d.

Law enforcement record reflect that, in August 2014, Applicant was charged with receiving stolen property, a felony. In the PSI, Applicant told an investigator that his nephew stole money from him and bought a pistol. In an effort to recoup his money, Applicant pawned the pistol for \$280. Applicant told the investigator that he did not know the pistol was stolen. In February 2015, he pleaded guilty to a misdemeanor, and was sentenced to hard labor for 12 months, suspended for 24 months, and a \$100 fine and court costs. This charge is alleged in SOR ¶ 1.e.

When Applicant submitted his SCA, he answered "No" to a questions whether, in the past seven years, he had been arrested by any police officer, sheriff, marshal or other type of law enforcement official. He also answered "No" to a question whether he was on trial or pending trial on criminal charges. He did not disclose the August 2014 arrest for receiving stolen property. In the PSI, he told an investigator that he did not disclose the 2014 arrest because it occurred after he filled out his SCA, and he did not explain why he did not disclose that he was pending trial. His explanation is contradicted by the record, which reflects that he was arrested in August 2014 but did not submit his SCA until December 2014. He did not provide any further explanation in his answer to the SOR, and he did not respond to the FORM. His failures to disclose his arrest and pending trial are alleged in SOR ¶ 1.f.

## **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 adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge

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<sup>3</sup> Applicant disclosed an arrest for unpaid tickets in July 2008, which appears to be unrelated to this unpaid ticket. The arrest in July 2008 is not alleged in the SOR.

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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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.

## **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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

Applicant's disclosures in his SCA, his admissions in his answer to the SOR, and the documentary evidence in the record establish the following disqualifying conditions:

AG ¶16(a): deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

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 individual may not properly safeguard classified or sensitive 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 individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: . . . (3) 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 by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing . . . .

The following mitigating conditions are potentially applicable:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

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; and

AG ¶ 17(f): the information was unsubstantiated or from a source of questionable reliability.

There is insufficient evidence in the record regarding the allegation in SOR ¶ 1.a to establish any mitigating conditions. The conduct in alleged in SOR ¶¶ 1.b-1.d is mitigated under AG ¶ 17(c). The mitigating condition in AG ¶ 17(f) also applies to the unfounded weapons charge alleged in SOR ¶ 1.b. No mitigating conditions are established for the conduct alleged in SOR ¶¶ 1.e and 1.f.

### **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 and applying the adjudicative factors in AG ¶ 2(d).<sup>4</sup>

I have incorporated my comments under Guideline E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). 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 not mitigated the security concerns raised by his personal conduct.

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<sup>4</sup> The factors are: (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.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b-1.d:	For Applicant
Subparagraphs 1.e and 1.f:	Against Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman  
Administrative Judge