



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



## **Appearances**

For Government: Alison O'Connell, Esq.

For Applicant: *Pro se*

02/24/2025

## Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct) and E (Personal Conduct). Clearance is denied.

## **Statement of the Case**

Applicant submitted a security clearance application (SCA) on February 21, 2023. On May 21, 2024, the Defense Counterintelligence and Security Agency (DCSA) sent him a Statement of Reasons alleging security concerns under Guidelines J and E. The DCSA acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), which became effective on June 8, 2017.

Applicant answered the SOR on July 30, 2024, and requested an expedited hearing. Department Counsel was ready to proceed on September 3, 2024, and the case

was assigned to me on December 5, 2024. On December 19, 2024, the Defense Office of Hearings and Appeals notified Applicant that the hearing was scheduled to be conducted by video teleconference on January 16, 2025. I convened the hearing as scheduled. Government Exhibits 1 through 4 were admitted in evidence without objection.

Applicant testified but did not present the testimony of any other witnesses or submit any documentary evidence. I kept the record open until January 31, 2025, to enable him to submit documentary evidence. He did not submit any additional evidence. DOHA received the transcript on January 28, 2025.

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted all the allegations in the SOR. His admissions are incorporated in my findings of fact. Applicant is a 37-year-old candidate for employment by a defense contractor who is sponsoring him for a security clearance. He obtained a general educational development certificate in 2006. He is engaged to be married, and his fiancée is pregnant. He has never held a security clearance.

In August 2005, Applicant robbed a patron at gunpoint behind a bar. While he was being questioned by police about this robbery, he admitted three other armed robberies. He was charged with four counts of robbery in the 2<sup>nd</sup> degree and possessing a pistol without a permit. He was convicted and sentenced to incarceration for ten years, with five and a half years suspended, and placed on probation for five years. (GX 3) When he was questioned by a security investigator in April 2023, he claimed that his confession to the three additional robberies was coerced. (GX 2 at 6)

Between September 2006 and October 2008, Applicant was disciplined while incarcerated for two instances of disobeying an order, giving false information, causing disruption, and interfering with safety. He testified that he was disciplined when he was having a conversation with a security officer, and he reached toward the officer to put more space between them. (Tr. 33) He testified that he was uncertain of the basis for the allegation of giving false information, but it probably was when he provided the last four digits of his Social Security number instead of his inmate number. (Tr. 34) While he was incarcerated, he was required to complete a drug-education program and anger-management classes. (GX 2 at 6)

In June 2011, while on probation, Applicant was charged with possession of narcotics and possession of drugs near a prohibited location. He testified that he had started to use cocaine about a month before this arrest, and this charge arose when he was arrested at a public beach where he had gone to exchange narcotics. (Tr. 24-25) This incident was the basis for the probation violation alleged in SOR ¶ 2.c.

Before the June 2011 drug charges were resolved, Applicant was arrested in August 2011 for armed robbery of a convenience store. (Tr. 27). He was charged with robbery in the first degree, criminal possession of a pistol or revolver, burglary in the third degree, interfering with or resisting apprehension, two counts of larceny in the sixth degree, and criminal mischief in the third degree. He entered an Alford plea to the robbery charge and pleaded guilty to criminal possession of a pistol or revolver. For the robbery,

he was sentenced to twelve years of incarceration with five years of special parole. For the criminal possession of a pistol or revolver he was sentenced to three years of incarceration, to be served concurrently with the sentence for robbery. (GX 4) He was released from prison and placed on special parole in April 2021. (GX 1 at 22) As a condition of the special parole, he is tested for illegal drug use every three months. (Tr. 30) He will be on special parole until 2029. (GX 4; Tr. 29-30)

When Applicant was questioned by a security investigator about his criminal record, he attributed it to being young, impulsive, and not thinking clearly because of his heavy use of marijuana. He told the investigator that he has not used marijuana for over 11 years. (GX 4 at 7)

Since February 2022, Applicant has been employed by a tire distributor as the assistant manager of a tire store. His current lifestyle is busy. He awakens at 4:00 am, walks his two puppies, makes sure that everything is in order in his house, leaves for work at 6:30 am, and starts work at 7:00 am. He works long hours, as much as 14 hours a day, six days a week. He prides himself for providing exceptional service to the store's customers and takes credit for doubling the store's sales since he started working there. (Tr. 35-36)

## 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 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* at 531. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” See ISCR Case No. 17-04166 at 3 (App. Bd. Mar. 21, 2019) It is “less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “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. 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* at 531.

## Analysis

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

The concern under this guideline 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 evidence submitted at the hearing establish the following disqualifying conditions under this guideline:

AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and

AG ¶ 31(c): individual is currently on parole or probation.

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; and

AG ¶ 32(d): there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Neither mitigating condition is established. The first prong of AG ¶ 32(a) focuses 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. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant's last criminal conduct was in June 2011, and a significant period of time has passed without further misconduct. He is engaged and will soon be a father. He is gainfully employed. However, Applicant was incarcerated until April 2021 and will be on special parole until 2029. He has a long record of violent criminal conduct fueled at times by illegal drug use. I am not convinced that he will not revert to his previous criminal conduct when he is no longer constrained by the terms of his special parole. "Once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance." ISCR Case No. 09-01652 at 3 (App. Bd. Aug. 8, 2011), *citing Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Applicant has made considerable progress toward becoming a reliable and responsible person, but he has not yet overcome this strong presumption.

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

The security 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. . . ."

SOR ¶ 2.a cross-alleges Applicant's conduct, convictions, criminal convictions, and sentences alleged in SOR ¶¶ 1.a-1.c above. SOR ¶ 2.b alleges the disciplinary action imposed on Applicant between September 2006 and October 2008, while he was incarcerated. SOR ¶ 2.c alleges Applicant's probation violation in July 2012.

The following disqualifying conditions under this guideline are relevant:

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 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 . . (2) any disruptive, violent, or other inappropriate behavior; [and] (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 . . engaging in activities which, if known, could affect the person's personal, professional, or community standing.

AG ¶ 16(d) is established by Applicant's his infraction of prison rules while incarcerated, alleged in SOR ¶ 2.b, and his probation violation, alleged in SOR ¶ 2.c.

AG ¶ 16(e) is established by Applicant's criminal convictions, alleged in SOR ¶¶ 1.a-1.c, and cross-alleged in SOR ¶ 2.a, which adversely affected his personal, professional, and community standing.

The following mitigating condition is potentially applicable:

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.

This mitigating condition is established for Applicant's violations of prison rules alleged in SOR ¶ 2.b, and probation violation alleged in SOR ¶ 2.c, which occurred many years ago. It is not established for the serious misconduct cross-alleged in SOR ¶ 2.a.

## **Whole-Person Analysis**

Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. An administrative judge must evaluate an appellant's security eligibility by considering the totality of the appellant's conduct and all the relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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 Guidelines J and E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under those guidelines 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 and personal conduct.

## **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-1.d:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraphs 2.b and 2.c:	For 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