



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



In the matter of:)
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[NAME REDACTED]) ISCR Case No. 19-03099
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Applicant for Security Clearance)

Appearances

For Government: Allison Marie, Esq., Department Counsel
For Applicant: *Pro se*

10/31/2022

Decision

MALONE, Matthew E., Administrative Judge:

Applicant did not mitigate the security concerns about his long history of confrontational behavior, rules violations, and other misconduct. His request for a security clearance is denied.

Statement of the Case

On October 2, 2017, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain eligibility for a security clearance in connection with his prospective employment with a federal contractor. Based on the results of the ensuing background investigation, adjudicators for the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) could not affirmatively determine, as required by Security Executive Agent Directive (SEAD) 4, Section E.4, and by DOD Directive 5220.6, as amended (Directive), Section

4.2, that it is clearly consistent with the interests of national security to grant Applicant's request for a security clearance.

On January 3, 2020, DCSA CAF issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under the adjudicative guideline for personal conduct (Guideline E). The guideline cited in the SOR is one of the adjudicative guidelines (AG) issued by the Director of National Intelligence on December 10, 2016, to be effective for all adjudications on or after June 8, 2017.

Applicant timely responded to the SOR (Answer) and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). I received the case on April 8, 2022, and scheduled a virtual hearing for July 1, 2022. The parties appeared as scheduled. I received a transcript of the hearing (Tr.) on July 12, 2022.

Department Counsel proffered Government Exhibits (GX) 1 – 8. Additionally, a list of the Government's exhibits and a copy of a discovery letter dated January 20, 2022, are included in the record as Hearing Exhibits (HX) 1 and 2, respectively. Applicant testified and produced Applicant Exhibits (AX) A – H. I admitted GX 5 over Applicant's objection. (Tr. 21 – 22), and I admitted all of the other exhibits without objection. The record closed at the end of the hearing.

Procedural Issue

On January 20, 2022, as provided for by paragraph E3.1.13 of the Directive, Department Counsel amended the SOR to add an additional Guideline E allegation. Applicant submitted his response on June 1, 2022. The SOR amendment and Applicant's response are included in the record as HX 3. (Tr. 9 – 11)

Findings of Fact

Under Guideline E, the SOR alleged that in September 2003, Applicant was arrested and charged with assaulting and harassing his girlfriend and that in January 2005, the assault charge was *nolle prosequi*, he was convicted of the harassment charge, and he was ordered to complete an anger management class (SOR 1.a). The SOR also alleged that in April 2011, while serving in the U.S. Army, Applicant received non-judicial punishment (NJP) under Article 15 the Uniform Code of Military Justice (UCMJ) for violating orders to have no contact with a female co-worker when he confronted her and had an argument with her (SOR 1.b); that in December 2021, he again received Article 15 NJP and was ordered to complete anger management training after he assaulted a female with whom he was in a relationship (SOR 1.c); and that in June 2013, he was administratively separated from the Army and given a general discharge under honorable conditions (SOR 1.d).

The SOR further alleged that in August 2014, Applicant was terminated from his civilian employment after arguing with co-workers (SOR 1.e); and that in June 2016, he was terminated from another job for having a relationship with a co-worker at an overseas job site (SOR 1.f).

Additionally, the SOR alleged that in April 2017, Applicant was charged with misdemeanor possession of less than one-half ounce of marijuana and driving while impaired (DWI) and while his license was revoked; however, the charges were dismissed when the arresting officer did not appear in court (SOR 1.g).

The SOR alleged that in May 2017, Applicant was charged with misdemeanor assault on a female and violation of a domestic violence protective order (DVPO), those charges being dismissed when the victim did not appear in court the following month (SOR 1.h). Finally, Department Counsel amended the SOR to add, as SOR 1.i, an allegation that in March 2021, Applicant was arrested and charged with violating another DVPO.

In response to the SOR (Answer) and the SOR amendment, Applicant admitted with explanations all of the Guideline E allegations. In addition to the facts established by Applicant's admissions, I make the following findings of fact.

Applicant is 41 years old. In October 2006, he enlisted in the U.S. Army and served on active duty as an imagery analyst in the military intelligence community. He first received a security clearance early in his Army career. He deployed to Iraq four times between 2008 and 2011. In June 2013, the Army administratively separated him for misconduct involving a serious offense. He received a general discharge under honorable conditions. (Answer; GX 1; AX I; Tr. 43, 70 – 73)

After leaving the Army, Applicant obtained employment with a series of defense contractors in jobs that required a security clearance and the skills he learned in the Army. Those jobs sometimes required Applicant to work in Afghanistan, Iraq, and other overseas locations in support of U.S. military operations. He still held the last of those jobs at the time of his most recent personal subject interview (PSI) with a government investigator in June 2018. He has since left that job (the record is silent as to when), but now has a pending job offer with another contractor contingent on his eligibility for another security clearance. In the meantime, he has been working in the real estate industry. (GX 1; GX 2; Tr. 37)

Applicant was married between December 2006 and September 2011. He has one child with his ex-wife from before they were married. He has two other children with an ex-girlfriend. In September 2003, he and that ex-girlfriend got into an argument and he became violent, punching the woman in the head with his fist two or three times. A few days later, the police arrested him and charged him with assault and harassment. In court, the assault charge was *nolle prosequi* and he pleaded guilty to harassment. He was fined, placed on probation for 90 days, and ordered to complete an anger management class.

Although he completed all of the terms of his sentence, he also was jailed for 30 days after failing to appear at one of the hearings in that case. (Answer; GX 1 – 3; Tr. 32, 36 – 39)

In 2011, while in the Army and assigned in an overseas combat-zone, Applicant got into an argument with a female soldier with whom he worked and with whom he had been in a relationship. Because the two had gotten into several arguments, Applicant's chain of command ordered him to have no contact with that female soldier outside of the workplace (a joint operations center). In April 2011, Applicant approached the female soldier in an operations trailer and they argued. During the argument, he pushed her against the wall. Applicant's deployment was terminated early and he was returned to the United States. In July 2011, he received NJP for violating a lawful order, an offense punishable under UCMJ Article 92. He was reduced in rank from sergeant (E-5) to specialist (E-4), assigned 45 days of extra duty, and ordered to complete anger management training. Additionally, his clearance was suspended locally while he completed his extra duty and the anger management training. His access was restored in August 2011 after he completed his punishment. (Answer; GX 1; GX 2; GX 4; GX 6; Tr. 33, 39 – 41)

In December 2012, after Applicant transferred to another overseas duty station, he began a sexual relationship with a female soldier. He had regained his rank of sergeant and the female was a private first class (E-3). One evening he went to her room to tell her that he did not like the fact that she was friendly with other men. The two argued and the encounter escalated to the point he choked the female on her bed. Applicant's command sent him back to the United States and awarded him NJP in April 2013 for assault consummated by a battery, a violation of UCMJ Article 128. Although he denies choking the woman, he was found guilty. He was demoted to specialist (E-4), awarded 45 days extra duty and placed on restriction for 45 days. He also was fined half of his monthly pay for two months; however, that part of his sentence was suspended for 90 days. Additionally, Applicant was ordered to have no contact with the female soldier and to complete anger management training. (Answer; GX 2; GX 5; Tr. 33, 41 – 44)

Sometime after his Article 15 punishment, despite having been ordered to have no contact with her, Applicant decided he could approach the female soldier. He believed it was not inappropriate to try to resume their relationship because he no longer was a non-commissioned officer. His chain of command became aware of this and decided to commence administrative separation proceedings against Applicant. The Army discharged him as a specialist on June 18, 2013. Applicant's Certificate of Release or Discharge from Active Duty, better known as a DD-214, lists "misconduct (serious offense)" as the reason for separation. (GX 2; AX H)

In March 2014, Applicant began working for a defense contractor as an imagery analyst in support of overseas U.S. military operations. In that job, he was part of a team that worked in round-the-clock shifts. On August 1, 2014, Applicant was late in reporting for his assigned shift. When his supervisor addressed Applicant's tardiness, Applicant

took issue with rules for shift turnover with which he disagreed. He argued with his supervisors, reacting aggressively, profanely, and in a threatening manner towards them, as well as towards the government program manager. Applicant was subsequently sent back to the United States. His company's investigation into this incident was well-documented and showed that Applicant did not take full responsibility for his actions and that Applicant did not want to comply with "stupid little rules" in the workplace. At hearing, he testified about the incident and gave his side of the story, but he stopped short of accepting responsibility for his behavior. (Answer; GX 1; GX 2; GX 7; Tr. 44 – 49)

In September 2014, Applicant found employment in a similar position with a defense contractor. Again, he was assigned to work overseas in support of U.S. military operations. He was fired from that job in April 2016 after violating rules against being in the quarters of someone of the opposite sex. Applicant and a female co-worker had been in a romantic and sexual relationship before being sent overseas. Both of them knew the rules regarding fraternization. (Answer; GX 1; GX 2; Tr. 49 – 52)

In April 2017, Applicant was arrested and charged with assault on a female. The victim in that incident was the same co-worker with whom he had a sexual relationship overseas in 2016. Applicant and the victim got into an argument, and he became angry and pushed her against a refrigerator, hit her in the face with an open hand, and pushed her to the floor. He then left, but returned later the same day and pushed her to the ground. The victim texted a friend and asked her to call the police, and Applicant was arrested. She also obtained a DVPO against Applicant. (Answer; GX 1 – 3; GX 6; AX E; Tr. 33, 55 – 57)

Applicant was unemployed between June and November 2016, when he was hired by another defense contractor for imagery work overseas. In April 2017, after his arrest for assault, and before he could deploy for work, he was involved in a traffic accident with a police car. Applicant insists the police car was at fault. Nonetheless, Applicant was determined to be under the influence of alcohol and was found to be in possession of less than one-half ounce of marijuana. He was arrested and charged with misdemeanor drug possession and DWI. The charges were dismissed when the police officer failed to appear in court, having left the police department sometime before the trial date. Applicant admits that he was illegally in possession of marijuana and that he was impaired by alcohol while driving. In June 2017, Applicant lost his job because his legal problems prevented him from deploying overseas. Thereafter, he was unemployed until September 2017, when he was hired by the defense contractor for whom he worked until he started in the real estate industry. (Answer; GX 1; GX 2; AX C; AX D; Tr. 33 – 34, 52 – 55, 68 – 70)

When Applicant was arrested for DWI and drug possession as discussed above, he was held in jail overnight before being released on his own recognizance. After getting out of jail, he went to the home of the woman who had just obtained the DVPO against him. He left a note on her door saying he would leave her alone. The next day, he appeared in court to answer the assault charge, which was dismissed because the victim did not appear to support the charges. However, when he appeared at the courthouse,

he was arrested and jailed for violating the DVPO. Applicant and the victim subsequently lived together as platonic roommates for a few months, and he feels they are on good terms. The victim submitted a letter in support of Applicant's request for a clearance; however, that letter makes no mention of the adverse events addressed by the SOR. (Answer; GX 1 – 3; GX 6; AX E; AX G; Tr. 33, 55 – 57, 66 – 68)

On March 4, 2021, Applicant was arrested and charged with violating a DVPO. He and a woman he was seeing in late 2019 or early 2020 got into an argument that became so heated that she obtained the protective order for a year. Applicant violated the order by contacting her on social media (he "liked" a picture or comment she had posted on Facebook). The violation charge was dismissed after Applicant completed an anger and emotional management class. The DVPO has since expired. (HX 3; GX 8; Tr. 34 – 35, 57 – 61)

All of the anger management training or counseling Applicant has received has been ordered by the military or a civilian court. Apart from engaging in meditation and speaking with a therapist "a few years back," he has not sought any sustained counseling or therapy to address his history of anger-related misconduct or personal relationship difficulties. Applicant testified he believes his anger management difficulties are hereditary, because he has seen the same issues in his parents and in his children. (Tr. 61 – 65)

Applicant testified that his performance in the Army and in his civilian positions was professional and noteworthy despite the adverse information presented by the Government. He presented a letter from an Army officer dated October 4, 2016, after he was sent home for violating fraternization rules overseas. The officer praised Applicant's professional expertise and dedication to the mission at hand, but made no mention of any transgressions Applicant may have committed. Applicant also submitted two character references from military and civilian co-workers. Both authors praised his dedication and expertise. Again, there was no mention of any adverse conduct or other issues raised through the SOR. His DD-214 lists numerous decorations, including the Iraq Campaign Medal with three stars, a Joint Service Commendation Medal, and two Army Achievement Medals. (Answer; AX A; AX B; AX F; AX H; Tr. 51 – 52)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). (See Directive, 6.3) Decisions must also reflect consideration of the factors listed in ¶ 2(d) of the guidelines. Commonly referred to as the "whole-person" concept, those 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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest for an applicant to either receive or continue to have access to classified information. (See *Department of the Navy v. Egan*, 484 U.S. 518)

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion. (See *Egan*, 484 U.S. at 528, 531) A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. (See *Egan*; AG ¶ 2(b))

Analysis

Personal Conduct

Available information supports all of the SOR allegations; however, the SOR 1.d allegation regarding Applicant's discharge from the Army does not allege any specific misconduct. Applicant's DD-214 specified that his discharge was for "misconduct (serious offense)," ostensibly based on the conduct for which he received NJP in December 2012, and for his subsequent disregard for orders to have no contact with the female soldier he assaulted. However, the SOR addressed that conduct through separate allegations. I find that SOR 1.d is duplicative and it is resolved for Applicant.

Nonetheless, this record reasonably raises the security concern about personal conduct under Guideline E, stated, in relevant part, at 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.

More specifically, the Government's exhibits, along with Applicant's admissions and testimony, require application of the following AG ¶ 16 disqualifying conditions:

(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; and

(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: . . .

(2) any disruptive, violent, or other inappropriate behavior; [and]

(3) a pattern of dishonesty or rule violations. . . .

The Government established a *prima facie* case for disqualification based on Applicant's 18-year record of domestic violence, disruptive behavior in the workplace, failure to follow workplace rules, multiple instances of disregarding lawful orders of his military superiors, drug and alcohol-related criminal conduct, and inability to control his temper in a variety of interpersonal contexts. Because most of his arrests resulted in dismissal after the complaining party or arresting officer failed to appear in court, disqualification under the criminal conduct guideline might be unlikely. Nonetheless, this information undermines any confidence in his judgment and reliability, specifically as it pertains to his ability or willingness to control his impulses or follow rules and regulations for the protection of classified information.

In response, it was the Applicant's burden to present information that would refute, extenuate, or mitigate the concerns raised by the Government's information. The

following AG ¶ 17 mitigating conditions are potentially applicable to the facts and circumstances presented here:

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability.

I conclude Applicant has not established any of these mitigating conditions. AG ¶¶ 17(c) and 17(d) do not apply because the events and behavior documented by the Government's information are numerous and have occurred for most of the past 18 years, most recently in 2021. Applicant has completed involuntary anger management counseling on at least four occasions to no apparent avail. He has not himself engaged in any structured therapy or counseling to change his anger issues, and he has not accepted responsibility for his actions. AG ¶ 17(f) does not apply because Applicant did not present information to refute the bases for the SOR allegations or to undermine the credibility of any of the sources of that information. Rather, his testimony largely confirmed the facts established by the Government's exhibits. On balance, Applicant did not mitigate any of the security concerns established by the Government.

I also have evaluated this record in the context of the whole-person factors listed at AG ¶ 2(d). I am mindful of the positive aspects of Applicant's military service as well as the positive information about his character and reliability. However, that information does not outweigh the concerns about his long record of misconduct. The record as a whole leaves unresolved the doubts about his suitability for clearance raised by the Government's information. Because protection of the national interest is the principal focus of these adjudications, any remaining doubts are resolved against the Applicant.

Formal Findings

Formal findings 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 E: AGAINST APPLICANT

Subparagraphs 1.a – 1.c, 1.e – 1.i: Against Applicant

Subparagraph 1.d:

For Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for a security clearance is denied.

MATTHEW E. MALONE
Administrative Judge