



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



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| In the matter of: |) | |
| |) | |
| [NAME REDACTED] |) | ISCR Case No. 21-01985 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

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

05/22/2023

Decision

MALONE, Matthew E., Administrative Judge:

Applicant did not mitigate the security concerns about his history of criminal conduct. His request for a clearance is denied.

Statement of the Case

On November 18, 2020, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain eligibility for a security clearance required for his employment with a federal contractor. Based on the results of the ensuing background investigation, adjudicators for the Department of Defense Consolidated Adjudications Facility (DOD CAF) could not affirmatively determine that it is clearly consistent with the interests of national security to grant Applicant's request for a security clearance.

On June 27, 2022, the DOD CAF issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under the adjudicative guideline for

criminal conduct (Guideline J). This action was taken under Executive Order (EO) 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 implemented by the DOD on June 8, 2017.

Applicant timely responded to the SOR (Answer) and asked for a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on February 22, 2023, and I scheduled a hearing to be held on April 6, 2023, via video teleconferencing. The parties appeared as scheduled, and I received a transcript of the hearing (Tr.) on April 18, 2023. Applicant testified in his own behalf and proffered documents identified as Applicant Exhibits (AX) A – B. He also presented the testimony of four other witnesses. Department Counsel proffered Government Exhibits (GX) 1 – 9, as well as a copy of its exhibit list identified as Hearing Exhibit (HX) 1, and a copy of the discovery letter that forwarded to Applicant advance copies of GX 1 – 9 on August 30, 2022 (HX 2). No objections to admissibility were raised by either party and all proffered exhibits were admitted.

Findings of Fact

Under Guideline J, the SOR alleged that in 1999 or 2000, Applicant was arrested and charged with driving under the influence (DUI), for which he was placed on probation for one year (SOR 1.a); and that in June 2003, he was charged with being under the influence of a controlled substance (SOR 1.b). It also was alleged that in December 2003, he was charged with vehicle theft, burglary, and hit-and-run resulting in death or injury, for which he was sentenced to three years in jail (SOR 1.c); and that in August 2005, he was charged and convicted of receiving stolen property, for which he served 120 days in jail and was placed on probation for 36 months (SOR 1.d). The SOR further alleged that in March 2006, Applicant participated in a murder by stabbing the victim and helping to dispose of the body (SOR 1.e). It was further alleged that in May 2016, he was charged and later convicted of petty theft and placed on probation for 36 months (SOR 1.f); and that in December 2016, he was charged and later convicted of trespassing and larceny, for which he was placed on probation for nearly 12 months (SOR 1.g).

Applicant admitted all of the SOR allegations without comment. In addition to the facts established by Applicant's admissions, I make the following findings of relevant fact.

Applicant is a 42-year-old long haul truck driver employed by a defense contractor. He has worked for his current employer since November 2020. He and his wife, who is his driving partner, have been married since July 2017. They currently live in State A after relocating in 2016 from State B, where Applicant grew up. They completed their driver training and received their commercial driver's licenses in State A between June and August 2018. Thereafter, they ran their own trucking business, while also driving for at least three other companies. They stopped driving independently in October 2020 when

it became difficult, in part because of the COVID pandemic, to get enough loads to cover their insurance. (GX 1; GX 2; Tr. 31 – 33, 35)

Applicant was underage when he was arrested for DUI in either 1999 or 2000. He had been at a party with friends and claims to have had little to drink. He was stopped at a police checkpoint on the way home and administered a breathalyzer test. It showed he had alcohol in his system, albeit far less than the legal limit for intoxicated driving; however, because he was under 21 years old, he was charged with DUI. The court fined him, required him to complete an alcohol safety and awareness program (ASAP), and placed him on probation for one year. (Answer; Tr. 39 – 41)

As alleged in SOR 1.b, on June 9, 2003, Applicant was charged with being under the influence of a controlled substance. Aside from an entry in the FBI report admitted as GX 3, little else is known about what the substance was or under what circumstances he came to be charged. Nor is there any information about the disposition of the charge. In his personal subject interview (PSI) with a government investigator in December 2020, he denied the arrest. In response to the SOR, he admitted the allegation; however, based on his testimony, it appeared that he was unclear about what he was admitting. At hearing, he testified he does not specifically recall such an incident, but allowed that he “was probably under the influence at the time of one of [his other arrests].” (Answer; GX 2; GX 3; Tr. 41 – 45)

One night in December 2003, Applicant was stranded without a way home and found an unlocked car in which he spent the night. The next morning, he saw someone leave a different car running unattended and stole it. As he was driving away, he crashed into a telephone pole and left the scene, only to be apprehended a short time later. He was convicted of vehicle theft and hit and run, for which he was sentenced to 36 months in jail, but served only about three months and spent the rest of his sentence on probation. (Answer; GX 2; GX 3; GX 8; Tr. 45 – 47)

In August 2005, Applicant was arrested for having vehicle registration tabs from another car. He had stolen them a few months earlier and put them on his own car. He did so because he could not afford to renew his vehicle registration. He subsequently was charged with felony receipt of stolen property and forging or altering a vehicle registration. He was convicted of receipt of stolen property and sentenced to 120 days in jail. On March 2, 2006, after his incarceration, he was placed on another 36 months of probation because he had violated his earlier probation from his December 2003 arrest. (Answer; GX 2; GX 3; GX 5; Tr. 48 – 49)

In March 2006, Applicant began a live-in relationship with a woman (S) he met after he was released from jail. The couple lived in a recreational vehicle (RV) on property owned by C. At some point, S also developed a romantic relationship with V, someone known for his violent behavior. S and V started taking money from C’s bank account. Unbeknownst to Applicant, S and V then conspired to kill C to cover up their crimes against C. Applicant saw S and V stab C to death outside the RV on C’s property.

Applicant feared V, who threatened Applicant with death if he did not also stab C even though he was dead. V also forced Applicant to bury the body, and threatened to kill Applicant if he told anyone what had happened. The police eventually became aware that C was missing. After locating the body, Applicant, S, and V were arrested and charged with murder. Applicant was incarcerated for six years awaiting trial. In 2012, he was acquitted in a separate jury trial, and he testified against S and V, both of whom were convicted and are currently serving life sentences. (Answer; GX 2; GX 3; Tr. 49 – 63)

In May 2016, Applicant stole an electronic device from a department store. He was stopped by the store's security personnel and returned the item. He then fled the scene in his car, but store security recorded his license plate, and he was promptly arrested. Thereafter, while awaiting prosecution for a shoplifting charge, he and his wife moved to their current state of residence. In December 2016, in State A, Applicant and his wife were arrested and charged with trespassing, burglary of an unoccupied dwelling, and larceny. Around one a.m. on December 20, 2016, Applicant and his wife were together when, over her objections, he stole a tire from a dumpster on the property of an auto parts store to replace one of the tires on his car that had failed. It appears that this arrest and his May 2016 shoplifting charge were resolved together by a court in State A. In April 2019, he agreed to a plea deal whereby, he was given 36 months of probation, which he completed in April 2022. (Answer; GX 2; GX 3; GX 4; GX 6; GX 7; Tr. 63 – 70)

After their arrests in December 2016, and after brief periods of pre-trial confinement in 2017, Applicant and his wife found themselves homeless. They subsequently found food and shelter at a nearby Christian ministry. They stayed on to volunteer to help other homeless persons and have been active in that ministry ever since. Applicant credits the ministry with helping him get back on his feet and get started in the trucking industry. Two other members of that organization testified that Applicant is now reformed and committed to the ministry's cause, which he and his wife espouse when they are on the road for long stretches. The witnesses recommended Applicant for a position of trust based on their assessments of him as reliable and honest. (Tr. 34, 36 – 38, 77 – 86, 97 – 105)

For his part, Applicant blames his long history of misconduct on being young and stupid. A friend from high school, who has known Applicant for over 25 years, testified for Applicant and believes him to be reliable and someone who follows the rules. He, too, remarked on conduct Applicant engaged in when he was younger and believes that he now is more mature. Applicant's wife testified that she has seen growth in Applicant since they met, but she acknowledged that someone over 30 years old should not use "young and dumb" as an excuse for the decisions they make. (Tr. 87 – 96, 105 – 126)

Applicant's employer states that he is a reliable employee. His sister and stepfather also support Applicant's request for a clearance, stating that he is hardworking, reliable, and has learned from his mistakes. (AX A and B)

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 (1988))

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. (*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. (*Egan* at 531; see AG ¶ 2(b))

Analysis

Criminal Conduct

Available information shows that Applicant has engaged in criminal conduct on numerous occasions between 1999 and 2016. As to SOR 1.b, the record contains only an entry of a charge in June 2003 of being under the influence of a controlled substance. During his PSI, Applicant denied the charge. Although he admitted the SOR allegation, there is no other information about that event other than Applicant's assumption that he probably was under the influence of marijuana at some point around that time. SOR 1.b is resolved for Applicant.

As to SOR 1.e, available information shows that, at a minimum, Applicant was an accessory after the fact to C's murder by helping to bury the body and by failing to call the police. However, he was acquitted at trial of a murder charge, and it appears his actions after C was murdered resulted from a legitimate fear of bodily harm at the hands of V. He did not willingly engage in that criminal conduct, and SOR 1.e is resolved for Applicant. Nonetheless, the Government's information is sufficient to support the remaining SOR allegations. That information reasonably raises the security concern about criminal conduct stated at 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.

More specifically, this record requires application of the following AG ¶ 31 disqualifying conditions:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;
- (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
- (d) violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program.

AG ¶ 31(a) applies because, when taken as a whole, Applicant's long history of criminal conduct significantly undermines confidence in his judgment and reliability. As already discussed, there is insufficient information to show he engaged in the criminal conduct discussed in SOR 1.b and 1.e. AG ¶ 32(b) does not apply to SOR 1.b and 1.e; however, it does apply to the remaining allegations. AG 30(d) applies because Applicant

committed the offenses described in SOR 1.g while on probation for the offenses described at SOR 1.f.

I also have considered the following pertinent AG ¶ 32 mitigating conditions:

(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;

(b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) no reliable evidence to support that the individual committed the offense; and

(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.

AG ¶¶ 32(b) and 32(c) are applicable only to SOR 1.b and 1.e. Applicant was coerced into his participation in C's murder in March 2006, and there is insufficient information to support the charge of being under the influence of a controlled substance in June 2003. Otherwise, the record shows he knowingly and willfully engaged in the conduct alleged.

AG ¶¶ 32(a) and 32(d) do not apply. While it has been about seven years since Applicant's last arrest, he violated probation by committing his most recent offense. As to SOR 1.g, he decided to steal the tire over the objections of his wife, who also was arrested for that offense. By contrast, the record also shows Applicant is active in the community through his ministry, he has completed training as a truck driver and has a good employment record. Nonetheless, he has a long record of criminal conduct that began as a teenager and ended in his mid-thirties. He has only recently completed the terms of his probation because of the added time from a probation violation.

The security concerns raised by the Government's information are not mitigated. I also have considered the potential application of the whole-person factors at ¶ 2(d). Applicant's witnesses and written character witnesses showed that he has greatly changed and that he is on the right track. Applicant has characterized the underlying cause of his misconduct as being young and stupid; however, his two most recent offenses occurred while he was in his mid-thirties. I am also mindful that he only recently emerged from probationary status. When balanced against his long record of misconduct, it is too soon at this time to conclude his criminal conduct will not recur. As a result, doubts

remain about his suitability for a security clearance. Because protection of the national interest is the paramount concern in these adjudications, such doubts must be resolved against the granting of access to classified information.

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 J: AGAINST APPLICANT

Subparagraphs 1.b and 1.e: For Applicant

Subparagraphs 1.a, 1.c, 1.d, 1.f, 1.g: Against 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