



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 08-11706

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: *Pro se*

October 28, 2010

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and transcript, Applicant's request for a security clearance is denied.

On July 5, 2008, Applicant submitted a Questionnaire for Sensitive Positions (SF 86) to renew a security clearance required for his job with a defense contractor. After the ensuing background investigation was completed, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a set of interrogatories¹ to clarify or augment information in his background. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative finding² that it is clearly consistent with the national interest to continue Applicant's access to classified

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

information. On February 4, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the adjudicative guidelines (AG)³ for personal conduct (Guideline E), financial considerations (Guideline F), and criminal conduct (Guideline J).

Applicant timely answered the SOR, and requested a hearing. The case was assigned to me on June 21, 2010. Pursuant to a Notice of Hearing issued on June 24, 2010, I convened a hearing in this matter on July 15, 2010. The parties appeared as scheduled. The Government presented 11 exhibits (Gx. 1 - 11), which were admitted without objection. Applicant testified and proffered six exhibits, which were admitted without objection as Applicant's Exhibits (Ax.) A - F. Additionally, I left the record open after the hearing to give Applicant time to submit additional relevant information. DOHA received the transcript of hearing (Tr.) on July 29, 2010. The record closed the same day when I received Applicant's post-hearing submission, which I admitted without objection as Ax. G.

Findings of Fact

Under Guideline J, the Government alleged that in September 2000, Applicant was charged and convicted of uttering a fraudulent check (SOR 1.a); that in January 2004, his driver's license was suspended for failure to show proof of auto insurance (SOR 1.b); that in March 2004, the January 2004 suspension of his driver's license was extended because he was driving on that suspended license (SOR 1.c); that in April 2004, he was charged and convicted of the felony offense of breach of trust with fraudulent intent over \$1,000 but less than \$5,000, for which he was sentenced to five years (suspended) in jail, placed on three years probation, and ordered to pay restitution (SOR 1.d); that in April 2006, his probation was extended for two years for failing to pay restitution, fines, and costs as ordered by the court when he was convicted as alleged in SOR 1.d (SOR 1.e); that in August 2006 he was charged with driving on a suspended license (SOR 1.f); and that in November 2007, his probation from April 2004 was again extended for failure to pay restitution, fines, and costs as ordered by the court in April 2006 (SOR 1.g). In response, Applicant admitted SOR 1.a, 1.b, 1.c, and 1.e, and he denied SOR 1.d, 1.f, and 1.g.

Under Guideline E, the Government alleged that Applicant deliberately made a false statement to a Government investigator during his October 13, 2008, subject interview. Specifically, the Government alleged that the Applicant attempted to minimize the criminality of his conduct that led to his arrest in April 2004 as alleged in SOR 1.d (SOR 2.a). In response, Applicant admitted this allegation.

Under Guideline F, the Government alleged that Applicant accrued approximately \$22,724 of delinquent debt for 16 accounts (SOR 3.a - 3.p). The Government also cross-alleged as disqualifying financial information the allegations in

³ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

SOR 1.a, 1.e, and 1.g (SOR 3.q) In response, Applicant denied SOR 3.a - 3.o, but admitted SOR 3.p. His answers to SOR 1.a, 1.e, and 1.g serve by reference as his answer to SOR 3.q. In addition to Applicant's admissions, and having reviewed Applicant's response to the SOR, the transcript, and exhibits, I make the following findings of relevant fact.

Applicant is 32 years old and has been employed since June 2008 by a defense contractor in a position that requires a security clearance. He also is in the U.S. Army National Guard, where he holds the rank of staff sergeant (paygrade E-6). In 2003, he was recalled to active duty and deployed to Iraq for 12 months. He again deployed to Iraq from May 2009 until May 2010. Applicant also served in the U.S. Navy from June 1996 until June 1999, then affiliated in a reserve status with the Army National Guard in February 2000. Applicant first obtained a security clearance while in the Navy, and he still holds a clearance through his Army National Guard affiliation. (Gx. 1)

Applicant and his wife have been married since March 2008, and they have three children (ages 13, 8, and 3). Applicant also has a 13-year-old child by another woman to whom he pays \$250 each month in child support. (Gx. 1; Tr. 82 - 83)

After he left the Navy in 1999, Applicant began to have financial problems because he was either unemployed or under-employed. In August 2001, he was hired by a franchise of a nationally-known auto parts chain. He eventually became the store manager. However, in 2004 he converted approximately \$1,463.26 of store refunds into cash, which he then used for his own purposes. In April 2004, Applicant pleaded guilty to a felony charge of breach of trust with fraudulent intent over \$1,000 but less than \$5,000. Applicant was sentenced to five years in jail, which was suspended. He was placed on three years probation, and ordered to perform 100 hours of community service. He was also ordered to pay back the money he stole plus fines and court costs. (Gx.1; Gx. 3; Gx. 4) Applicant testified that he did this because, as a store manager, he worked nearly 70 hours each week yet was paid only \$9 hourly. He felt underpaid and decided to take what he felt was due him. Applicant acknowledged this did not justify what he did. (Tr. 69 - 70)

Applicant was twice charged with violating the terms of his probation. Specifically, he was delinquent in making the required restitution payments ordered by the court. Applicant was not convicted of the actual charges; rather, the terms by which he was to pay were revised by the court and he was put on a new payment plan. He otherwise complied with the terms of his probation, from which he was released in March 2008, one year later than originally intended. (Ax. F)

Applicant disclosed his felony conviction on his September 2008 SF 86. However, in October 2008, when he was interviewed by a Government investigator, Applicant stated that he was charged with theft because an engine was missing from the store's inventory. Applicant went on to explain that, because he was the store manager he was told he would have to pay for it. He told the Government agent that, rather than pay for the engine, he quit his job. Applicant characterized the resolution of this event as a civil action (See Gx. 2: "The case was found in favor of the company and [Applicant] had to pay for the missing property.") in which the company prevailed. He

also stated that he paid for the missing property and that “no further action was taken.” (*Id.*) According to police and court records, Applicant was charged through a grand jury indictment with the felony specified in SOR 1.d. He pleaded guilty and received the sentence specified in SOR 1.d. Applicant has admitted that he intentionally falsified his statements about this allegation during his subject interview, but did not otherwise address his conduct in response to the SOR or at his hearing.

The financial problems Applicant experienced after he left the Navy were exacerbated by the loss of his job at the auto parts store. According to available credit reports, he amassed approximately \$22,724 of delinquent debt for 16 unpaid accounts. Of those debts, one is for \$16,199 and represents a car loan he obtained while he was in the Navy, and on which Applicant defaulted in February 2002. (Gx. 9; Gx. 10; Gx. 11) The car was repossessed and Applicant believes it was resold, with the proceeds to be applied to the loan obligation. However, Applicant has not verified that his actual debt is less than that listed in the credit reports. Nor has he contacted that creditor to try and resolve the debt. (Tr. 54 - 55) Of the remaining 10 debts totaling \$6,525, Applicant established that he has resolved six of them (SOR 3.a - 3.d, 3.g, and 3.i) totaling approximately \$2,382. (Ax. G)

Applicant also established that he and his wife bought a house in March 2010 after they resolved other (unalleged) debts to raise their credit score and qualify for a Veterans’ Administration mortgage subsidy program. That effort began in late 2009. Applicant and his wife were able to make progress on resolving their debts because Applicant’s military pay when he was deployed was significantly higher than the pay from his defense contractor job. (Ax. C; Tr. 45) Applicant also testified that he has taken advantage of financial counseling programs offered through the Army, and that his command made financial responsibility a training priority. (Tr. 59, 66, 77 - 78) Applicant further testified, but did not document, that he has about \$8,000 in savings, he has a positive monthly cash flow of about \$2,500, and the balance on a retirement account he started while he was in the Navy is now about \$125,000. (Tr. 63 - 65)

In addition to Applicant’s 2004 felony conviction and his subsequent probation violations, in September 2000, Applicant was also charged with uttering a fraudulent check in September 2000. He was found guilty through a bench trial in May 2001, and he was fined and ordered to make restitution. In January 2004, Applicant’s driver’s license was suspended after he was charged with not having car insurance. He was also charged in March 2004 with driving on that suspended driver’s license. However, Applicant explained that his license was suspended without his knowledge while he was deployed to Iraq in 2003. (Tr. 43) Available information showed that this charge actually stemmed from the aforementioned license suspension in January 2004, because Applicant had not yet resolved the question of his insurance so he could get his license back. (Gx. 6 and 7) In August 2006, Applicant was again charged with driving on a suspended license. Applicant denied the SOR allegation (SOR 1.f) regarding this charge, and aside from a listing of an arrest in Gx. 3 there is no other information available about what happened.

Applicant's performance in the Army during his active duty recalls was excellent. He received numerous awards and other forms of recognition for his work. (Ax. B) His personal references describe Applicant as reliable and of good character. (Ax. A)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁴ for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁵ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new 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, by itself, conclusive. 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. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under AG ¶ 15 (Guideline E - Personal Conduct), AG ¶ 18 (Guideline F - Financial Considerations), and AG ¶ 30 (Guideline J - Criminal Conduct).

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.⁶ 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

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ Directive. 6.3.

⁶ See *Egan*, 484 U.S. at 528, 531.

“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.⁷

Analysis

Financial Considerations

The security concern about Applicant’s finances, as stated in AG ¶ 18, is that:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The Government presented sufficient information to support the allegations in SOR 3.a - 3.q; that is, that Applicant accrued about \$22,724 of delinquent debt for 16 unpaid accounts. Applicant’s financial problems arose from uneven employment after he left the Navy in 1999, but were exacerbated by the loss of his job in 2004 when he was arrested for stealing from his employer. Applicant presented information showing he has paid some of his debts, but he still owes more than \$20,000 in delinquencies. Further, he twice violated the terms of his probation after his 2004 arrest by failing to pay restitution as ordered by the sentencing court, and he was convicted in 2001 of issuing a worthless check. All of the foregoing requires application of the disqualifying conditions listed at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*) and AG ¶ 19(c) (*a history of not meeting financial obligations*), and AG ¶ 19(d) (*deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust*).

Given the facts of this case, I have considered possible application of the mitigating conditions at AG ¶ 20(a) (*the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*); AG ¶ 20(b) (*the conditions that resulted in the financial problem were largely beyond the person's control (e.g. loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances*); AG ¶ 20(c) (*the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control*); and AG ¶ 20(d) (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*). However, I conclude the record does not support application of any of these factors.

⁷ See Egan; Adjudicative Guidelines, ¶ 2(b).

In response to the SOR and at hearing, Applicant established that he has paid or otherwise resolved six of the debts listed in the SOR. Applicant also established that he started paying his debts in late 2009, in an effort to clean up his credit so he and his wife could buy a house. Applicant established through Ax. C that he and his wife bought a house in March 2010. But while Applicant asserted that he completed financial counseling through the Army, that he has significant positive cash flow each month, and that he has savings in excess of \$130,000, he has not corroborated his current finances through any documentation. Given his previous misrepresentations about relevant information in his background, the Government is entitled to such proof before concluding that his current finances are sound. On balance, Applicant still carries significant delinquent debt, but he has not presented sufficient information to show how, if at all, his debt was due to unusual or unforeseen circumstances, or why he did not act sooner to resolve his debts despite being steadily employed since 2008. On balance, he has not met his burden of persuasion in response to the adverse information that supports the Government's decision to refuse his application for a security clearance.

Criminal Conduct

The Government presented sufficient reliable information to support its allegations that Applicant has engaged in criminal conduct on several occasions in the past 10 years. His crimes range from minor bad check charges to a felony conviction for theft from his employer. He also twice violated the terms of his probation after his felony conviction. The security concern raised by the facts established by the Government's information is stated at AG ¶ 30 as follows:

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, Applicant's conduct requires application of the disqualifying conditions at AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*), AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*) and AG ¶31(e) (*violation of parole or probation, or failure to complete a court-mandated rehabilitation program*).

In response, Applicant has argued that he is now more mature and responsible. Thus, he avers that his criminal conduct is remote in time and circumstance, and not likely to recur. Given the facts and circumstances of this case, I have considered the possible application of the mitigating conditions listed at 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 or 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, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*).

Applicant's position is that he accepts responsibility for his past actions and that he is not likely to engage in illegal conduct. His last known criminal conduct occurred in

2007, when he violated the terms of his probation. Thus, court oversight of his conduct did not end until March 2008. Seven months later, when he was interviewed for his security clearance, he lied to a Government investigator about his felony arrest, essentially denying that he did anything wrong. At hearing, he did not address this conduct other than to admit that his falsification was intentional. His lack of candor undermines any claim that he is rehabilitated and has accepted responsibility for his actions. Applicant was 26 years old and a veteran of the military when he stole from his employer. He was 30 years old when he lied during his subject interview. These facts weaken his claim that age and maturity will preclude future criminal conduct. The foregoing persuades me that Applicant has not met his burden in response to the Government's information and that he has not mitigated the security concerns about his criminal conduct.

Personal Conduct

The Government presented sufficient information to support its allegation that Applicant deliberately made false statements about his 2004 felony arrest during his subject interview with a Government investigator. Additionally, Applicant admitted the allegation in response to the SOR and did not provide any explanation for his conduct in this regard. The security concern raised by this conduct is stated at AG ¶ 15 as follows:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

More specifically, Applicant's conduct requires Application of the disqualifying condition at AG ¶ 16(b) (*deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative*). By contrast, Applicant presented no information to explain, refute, or mitigate his deliberate falsification to a Government investigator. Accordingly, none of the mitigating conditions at AG ¶ 17 apply, and this guideline is resolved against the Applicant.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E, F, and J. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 32 years old and presumed to be a mature adult. He served in the U.S. Navy until 1999, and he has served, by all accounts, with distinction in the U.S. Army National Guard. His service included two deployments to Iraq and he was personally commended for his performance on several occasions. Although Applicant's finances continue to be of concern relative to his suitability for a security clearance, he appears to be trying to improve his financial standing and his personal circumstances. Unfortunately, he has not documented those efforts sufficiently to outweigh the negative inferences raised by

his recent criminal conduct and his deliberate misrepresentations about that conduct. He has not yet established a documented track record of personal and financial reliability that is consistent with the level of trust which the Government must be able to place in him for continued access to classified information. A fair and commonsense assessment⁸ of all available information bearing on Applicant's past and current circumstances shows that doubts remain about his ability or willingness to protect the Government's interests as his own. Because protection of the national interest is the most important consideration in these determinations, any doubts about Applicant's suitability to hold a security clearance must be resolved in favor of the Government.⁹

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.a - 1.g:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraphs 3.a - 3.d, 3.g, 3.i:	For Applicant
Subparagraphs 3.e - 3.f, 3.h, 3.j - 3.q:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is denied.

MATTHEW E. MALONE
Administrative Judge

⁸ See footnote 5, *supra*.

⁹ See footnote 7, *supra*.