



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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SSN: -----) ISCR Case No. 09-03742
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Applicant for Security Clearance)

Appearances

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

November 30, 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 February 19, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request for access to classified information. On March 15, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) alleging

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

facts which, if proven, raise security concerns addressed in the adjudicative guidelines (AG)² for criminal conduct (Guideline J) and personal conduct (Guideline E).

Applicant timely responded to 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 13, 2010. The parties appeared as scheduled. The Government presented eight exhibits (Gx. 1 - 8), which were admitted without objection. Applicant testified on his own behalf. DOHA received the transcript of hearing (Tr.) on July 27, 2010.

Findings of Fact

Under Guideline J, the Government alleged that in March 2005, Applicant was charged with trespassing (SOR 1.a); that in June 2007, he was arrested and charged with contempt of court for non-support, for which he was fined and ordered to pay a \$548 arrearage as a condition of his release from jail (SOR 1.b); that in February 2008, he was arrested and charged with the felony offenses of motor vehicle theft and all other larceny, and that in March 2009, he was convicted of felony grand larceny of a vehicle >\$1,000 and <\$5,000, for which he was sentenced to 18 months in jail (suspended) and placed on five years probation (SOR 1.c); and that he violated Title 18 U.S.C. 1001 by deliberately making false statements to the Government, as alleged in SOR 2.c - 2.d (SOR 1.d).

Under Guideline E, the Government alleged that in August 2006, Applicant was terminated from his job for venturing out of his assigned work area (SOR 2.a); that in February 2008, he deliberately failed to report his February 2008 arrest for felony car theft, because he was concerned that he would be fired from his job if he disclosed his arrest (SOR 2.b); that he deliberately falsified his February 2009 e-QIP by answering "no" to question 23.a (felony arrests) and failing to list his February 2008 arrest for felony car theft (SOR 2.c); that he deliberately falsified his February 2009 e-QIP by answering "no" to question 23.b (pending charges) and failing to list his February 2008 arrest for felony car theft (SOR 2.d); and that he deliberately falsified his February 2009 e-QIP by answering "no" to question 23.d (other arrests last 7 years) and failing to list his February 2008 arrest for felony car theft or his 2005 arrest for trespassing and his 2007 arrest for contempt (SOR 2.e).

Applicant admitted all of the SOR allegations. He also provided a one-page notarized statement with his answer. That statement provided argument for mitigation, but also made clear that he denied intentionally making false statements as alleged in SOR 2.c - 2.e. Accordingly, I entered denials on his behalf as to SOR 2.c - 2.e. (Tr. 10 - 11) Having reviewed Applicant's response to the SOR, the transcript, and exhibits, I make the following findings of relevant fact.

² 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.

Applicant is 22 years old and has worked since December 2008 as a stock clerk for a defense contractor. He requires a security clearance to perform his duties. Applicant is not married, but he has two children, ages 2 and 4, by two different women. Applicant lives with and supports his younger child and her mother. In November 2006, he was ordered to pay \$253 each month as support for his other child. (Gx. 1; Gx. 2) In June 2007, Applicant was arrested and jailed for failing to pay the court-ordered child support. He was released after satisfying a two-month arrearage and paying court costs. In May 2007, a bench warrant for his arrest was issued for the same offense (contempt of court) when he accrued an arrearage of about \$754. Applicant's pay is currently being garnished to satisfy his ongoing child support obligations and an arrearage of about \$554 as of September 2009. (Gx. 5; Tr. 76)

In March 2005, when he was still in high school, Applicant was arrested and charged with trespassing. A homeowner called the police when he saw Applicant and a friend in the yards of two nearby houses where neither of the youths lived. Applicant's friend explained to the police that they were trying to find a shortcut back to school. Applicant had no explanation at the time. (Gx. 4) When Applicant was interviewed by a Government investigator in April 2009, he stated that he was not trespassing and that his friend was going to the bathroom next to someone's house. (Gx. 2)

In May 2008, a grand jury indicted Applicant for grand larceny of a vehicle worth more than \$1,000 and less than \$5,000, a felony in the state where the offenses occurred. In October 2007, Applicant's cousin had stolen a car, which Applicant has since claimed belonged to his cousin in the first place. There is no information to corroborate this claim. Applicant was initially arrested for this offense in February 2008. In March 2009, Applicant pleaded guilty and was sentenced to 18 months in jail, which was suspended. He also was placed on probation for five years. A condition of his probation was that he pay restitution of about \$3,500. Applicant testified that he has paid about half, but acknowledged that he will remain on probation until he has paid the full amount. (Gx. 2; Gx. 6; Tr. 59 - 64, 73 - 74)

Applicant has not yet told his supervisors at his current job that he was arrested for grand larceny, because he is concerned that he will lose his job if they find out. (Gx. 2; Gx. 3; Tr. 83 - 84) He also did not disclose his arrest in his e-QIP, because he was concerned about not being able to get a clearance or keep his job. (Gx. 2; Tr. 46 - 48)

In August 2006, Applicant was working as a painter for a non-defense contractor company. While on his way to a job assignment with co-workers, he stopped at his house to retrieve his driver's license for identification needed to access the job site. While at his house, one of his co-workers spilled paint along the curb. A neighbor asked them to clean it up, but they left instead. Applicant and his co-workers were subsequently fired for their conduct. Applicant also lied to his boss about details of this incident. (Gx. 3; Gx. 7)

At the time Applicant submitted his e-QIP, he had not yet appeared in court to answer the grand larceny charge for which he was arrested in February 2008. However, he failed to disclose that pending charge as required by e-QIP question 23.c. He also did not disclose his grand larceny arrest or his contempt of court and trespassing

charges, as required by e-QIP question 23.f (other arrests in the preceding seven years).

Applicant was interviewed by Government investigators twice during his background investigation. In an April 6, 2009, interview, he discussed his 2007 arrest for contempt of court due to a child support arrearage. He denied having any other arrests; however, the interviewer confronted him with the record of his February 2008 grand larceny arrest. (Gx. 2) In his second interview, on September 10, 2009, Applicant admitted intentionally trying to conceal the grand larceny arrest during his first interview. He further explained that, because the security process is slow, he thought he would have been able to pay the court-ordered restitution and have his record expunged before that interview. (Gx. 3)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest³ 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,⁴ 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) 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

³ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁴ Directive. 6.3.

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.⁵ 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.⁶

Analysis

Criminal Conduct

All of the information presented, including Applicant's admissions, raises a security concern that is expressed 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.

The Government presented sufficient reliable information to support the SOR allegations that Applicant engaged in criminal conduct three times between 2005 and 2008. Available information also shows that Applicant is still on probation for a felony conviction based on his February 2008 guilty plea. Finally, as discussed more fully under Guideline E, below, Applicant deliberately falsified answers to e-QIP questions about his criminal conduct. Intentionally providing such false statements to an agency of the United States Government concerning matters within its jurisdiction is a violation of 18 U.S.C. § 1001, a felony. Accordingly, the record 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(d) (*individual is currently on parole or probation*).

I have also considered the potential applicability of the mitigating conditions listed under AG ¶ 32. Applicant did not present any information that supports application of any of those factors. Applicant failed to establish that he did not commit any of the offenses listed, or that he was somehow pressured into committing any of the offenses. He is still on probation for a felony offense that occurred less than three years ago, and any claim of rehabilitation is wholly undermined by his deliberate falsifications (discussed more fully under Guideline E) about his criminal record. Applicant has not

⁵ See *Egan*, 484 U.S. at 528, 531.

⁶ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

mitigated the security concerns raised by the Government's information about his criminal conduct.

Personal Conduct

All of the information presented, including Applicant's testimony, raises a security concern about his personal conduct that is expressed 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.

The Government presented sufficient reliable information that shows Applicant deliberately withheld relevant and material information about his criminal conduct from his e-QIP because he was afraid he would lose his job. He also admitted that he has not disclosed to his current employer his 2008 felony arrest for the same reason. Available information also shows that when Applicant was fired from an earlier job in 2006, he lied to his boss about his involvement in the incident that led to his firing. Finally, although not alleged in the SOR, Applicant lied to a Government investigator about his arrest record during a subject interview in April 2009, when after discussing his arrest for contempt of court, he denied any other arrests. All of the foregoing requires application of the disqualifying conditions listed at 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities*) and AG ¶ 16b) (*deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative*).

In response to the Government's information, Applicant did not provide any information that supports application of the mitigating conditions listed at AG ¶ 17. AG ¶ 17(a) (*the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*) does not apply because Applicant had to be confronted with his falsifications in his first subject interview before discussing the events at issue. There is also no record of Applicant trying to resolve the inaccuracies in his e-QIP.

AG ¶ 17(b) (*the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully*) does not apply because Applicant did not claim or establish that anyone told him it would be appropriate to withhold information about his arrests when he submitted his e-QIP or

when he spoke with Government investigators. He also has not provided an appropriate reason for not disclosing his grand larceny arrest to his employer, who is required as a contractual partner with the DoD to help ensure the suitability of its employees for access to classified information. Likewise, the mitigating condition at AG ¶ 17(e) (*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*) does not apply because Applicant has continued to withhold adverse information from his employer because he fears that he will lose his job or will suffer some other adverse consequence.

The mitigating condition at 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*) does not apply because Applicant's willingness to lie to the Government about important information in his background is a fundamental breach of the fiduciary relationship Applicant seeks to have with the Government. His felonious conduct in trying to conceal his arrests cannot be characterized as minor, and it must be considered recent as it is part of his current request for a clearance.

The mitigating conditions at AG ¶ 17(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur*) and AG ¶ 17(f) (*association with persons involved in criminal activities has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations*) are inapposite to the facts and circumstances of this case.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E 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 22 years old, and he has worked for his current employer for almost two years. He has also been employed in one job or another since 2005. Normally, it would be reasonable to presume that a gainfully-employed 22 year old is also a mature, responsible adult. That is not the case here. Applicant's conduct since high school is best characterized by his involvement in criminal activity, an inability or unwillingness to adhere to court orders about his child support obligations, and an apparent willingness to lie to protect his own interests. He presented nothing to indicate that his conduct has changed or that it will not recur. A fair and commonsense assessment⁷ of all available information bearing on Applicant's past conduct and current circumstances shows he has failed to address satisfactorily the Government's doubts about his ability or willingness to protect the Government's interests as his own. Because protection of the national interest is

⁷ See footnote 4, *supra*.

paramount in these determinations, such doubts must be resolved in favor of the Government.⁸

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 - d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.e:	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 6, *supra*.