



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. 09-04819

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

January 7, 2011

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 January 24, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain 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 grant Applicant's request

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.

for a security clearance. On February 5, 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) and criminal conduct (Guideline J).

Applicant timely answered the SOR, and requested a hearing. The case was assigned to me on August 3, 2010. Pursuant to a Notice of Hearing issued on August 6, 2010, I convened a hearing in this matter on August 24, 2010. The parties appeared as scheduled. The Government presented six exhibits (Gx. 1 - 6), which were admitted without objection. Applicant testified and proffered five exhibits, which were admitted without objection as Applicant's Exhibits (Ax.) A - E. Additionally, I left the record open after the hearing to give Applicant time to submit additional relevant information. The record closed on September 8, 2010, when I received Applicant's post-hearing submission, which was admitted without objection as Ax. F. DOHA received the transcript of hearing (Tr.) on September 14, 2010.

Findings of Fact

Under Guideline E, the Government alleged that in July 1991, Applicant was charged with assault with a deadly weapon and with intent to kill or inflict serious injury (a felony), and that he was convicted and sentenced to three years in prison (SOR 1.a); that in November 1991, he was charged with attempted robbery with a dangerous weapon (a felony), that he pleaded guilty to a lesser charge of attempted common law robbery (also a felony), and that he was sentenced to three years in prison (SOR 1.b). The Government further alleged that in October 1992, Applicant was charged with and convicted of misdemeanor larceny, for which he was sentenced to six months in jail and two years of probation (SOR 1.c); that in April 1994, he was charged with taking indecent liberties with a child (a felony), and that he was convicted and sentenced to three years in prison (SOR 1.d). In response to the SOR, Applicant denied SOR 1.c, and admitted SOR 1.a, 1.b, and 1.d.

The Government also alleged under Guideline E that in December 1995, Applicant was charged with assault on a female, was convicted, sentenced to 45 days in jail, and placed on probation for 12 months (SOR 1.e); and that in April 1997, Applicant was again charged with assault on a female, for which he was required to attend a counseling program before the charge was dismissed (SOR 1.f). In response, Applicant denied SOR 1.e and 1.f.

At SOR 1.g, the Government alleged that Applicant intentionally failed to disclose in his e-QIP the arrests alleged at SOR 1.a - 1.f, as required by the questions in e-QIP section 23 (*Your Police Record*). At SOR 1.h, the Government alleged that Applicant intentionally failed to disclose, as required by the questions in e-QIP Section 28 (*Your Financial Delinquencies*), that he had been 180 days past due on any debt in the

³ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006). Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

previous seven years, or that he was currently more than 90 days past due on any debt. More specifically, the Government alleged that Applicant failed to disclose 12 delinquent debts (SOR 1.h.1 - 1.h.12) totaling \$6,063. In response to SOR 1.h itself, Applicant admitted not listing any debts. In response to SOR 1.h.1 - 1.h.12, Applicant denied all but SOR 1.h.12.

Under Guideline J, the Government cross-alleged at SOR 2.a, the arrests and charges alleged at SOR 1.a - 1.d. The Government also cross-alleged at SOR 2.b, the arrests at SOR 1.a - 1.f. Finally, the Government cross-alleged at SOR 2.c, Applicant's allegedly deliberate omissions from his e-QIP. If proven, such conduct is a violation of 18 U.S.C. § 1001, which makes it a crime to deliberately make a false statement or representation to any department or agency of the United States concerning a matter within its jurisdiction. Applicant's answers to SOR 1.a - 1.f serve by reference as his answers to SOR 2.a - 2.c. (Tr. 12 - 15)

At the close of the Applicant's case, Department Counsel moved to amend the SOR⁴ by withdrawing the allegations at SOR 2.a and 2.b. Department Counsel also moved to amend the last sentence of the allegation at SOR 1.g by changing "sub-paragraph 1.a" to "sub-paragraph 1.c." Applicant did not object and I granted the motions. (Tr. 87 - 94) 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 November 2007 by a defense contractor as an automotive mechanic in support of Department of Defense activities overseas. From June 2004 until October 2007, Applicant worked for another defense contractor doing similar overseas work. He has worked as an automotive mechanic since at least October 1999, when he was 26 years old. (Gx. 1; Gx. 2)

Applicant has been married twice. He and his current wife have been married since August 2006. They have one child, who was born in April 2009. Applicant was also married from August 1997 until June 2006, when the marriage ended by divorce. Applicant had two children with his ex-wife. He also has another child from before his first marriage. (Gx. 1; Tr. 65)

In 1991, Applicant was twice arrested and charged with felonies. In July that year, at age 17, Applicant assaulted a police officer, who was questioning Applicant about possibly being intoxicated. Although he was charged with doing so with a deadly weapon, it appears that Applicant used only his fists to batter and injure the victim. In November that year, at age 18, Applicant was accused of using a knife to steal jewelry from a student at a local high school. A felony charge of attempted robbery with a dangerous weapon was later amended to attempted common law robbery, also a felony. Both the assault and armed robbery charges were adjudicated in a single court action in March 1992, at which Applicant pleaded guilty to both charges. Applicant was

⁴ See Directive E3.1.17.

sentenced to three years in prison on each charge, but he was paroled in July 1994. (Gx. 2; Gx. 3)

In September 1994, at age 20, Applicant was arrested and charged with taking indecent liberties with a minor, a felony. He was dating a 16-year-old girl, whose mother knew and approved of the relationship. However, when the girl became pregnant, her grandfather went to the police and had charges filed. Applicant received a three-year prison sentence, but was released for good behavior after eight months. (Gx. 2; Gx. 3; Tr. 43)

In October 1992, Applicant and another man got into a fistfight at a local nightclub. Applicant won the fight and, as an insult to the other man, decided to take the NFL team jacket the other man was wearing. The next day, the other man swore out a warrant charging Applicant with misdemeanor larceny. According to a summary of Applicant's June 10, 2009, subject interview, before the matter went to trial, Applicant returned the jacket, the men resolved their differences, and the victim asked that the charges be dismissed. (Gx. 2) At SOR 1.c, it was alleged that Applicant was convicted of misdemeanor larceny, fined \$250, and sentenced to six months in jail. A record of arrests provided at this hearing (Gx. 3) did not reflect the arrest alleged at SOR 1.c.

Applicant's first marriage was tumultuous. He and his ex-wife argued several times, and Applicant's ex-wife sometimes punched or kicked him. Whenever he pushed her or otherwise made contact with her to defend himself or extricate himself from these confrontations, his ex-wife would file assault charges against him. Applicant estimated that this happened between five and ten times during their marriage. Except for one occasion, in December 1995, his ex-wife had the charges dropped within a day or so. (Gx. 2; Tr. 44 - 45, 67 - 69) In December 1995, after his ex-wife had him charged with assault on a female, as alleged at SOR 1.e, Applicant pleaded guilty, was fined, and placed on unsupervised probation. (Gx. 2) The record of arrests presented at hearing (Gx. 3) does not reflect the December 1995 arrest alleged at SOR 1.e, but reflects the April 1997 assault on a female charge (but no sentence) alleged at SOR 1.f. Applicant denied that he served any jail time or attended counseling in either instance.

Available information shows that Applicant accrued at least \$6,000 in delinquent debt for 12 unpaid accounts (listed at SOR 1.h.1 - 1.h.12) between 2004 and 2007. (Gx. 5; Gx. 6) Nine of those accounts (SOR 1.h.3 - 1.h.11) were unpaid medical bills referred to collection. Applicant testified that the debts were for services his medical insurance did not cover. Two other debts (SOR 1.h.1 and 1.h.2) were for delinquent credit cards. The twelfth debt was a bill for a mechanic's tool set he financed in 2008. Applicant disputes the validity of this debt, claiming his payments were misapplied.

When Applicant submitted his e-QIP, he did not list any of his past-due debts (listed at SOR 1.h.1 - 1.h.12) as required. At hearing, Applicant claimed that he had taken action to pay or otherwise resolve his debts and that he did not think any of them were delinquent within the meaning of the relevant e-QIP questions. He also submitted information showing that he had paid some of the debts. (Ax. A; Ax. B) However, the payments reflect action as of July 2010 rather than at or before the time he submitted his e-QIP in 2008.

In response to e-QIP questions in Section 28 about his arrest record, Applicant listed a felony arrest for assault in August 1992. (Gx. 1) Through his hearing testimony, it became clear that he meant to disclose both of his 1991 arrests (alleged at SOR 1.a and 1.b), which were disposed of jointly in 1992. (Tr. 57 - 58) He did not list the felony arrest alleged at SOR 1.d.

When Applicant was interviewed by a Government investigator in June 2009, he acknowledged that he had withheld information about his arrest record because he feared it would reflect negatively on him. (Gx. 2) At hearing, he testified that he knew, if he disclosed his felony arrests, he would have difficulty getting a job. He had withheld such information from his previous employer when he applied for that job in 2004. (Tr. 22, 45 - 46, 70 - 75)

Applicant submitted personal and professional references that reflect well on his character and dedication to his work. A personal reference who has known him for several years characterized him as a role model for young people in the town where Applicant grew up. However, that reference was based, in part, on an understanding that Applicant had not been in any trouble. Another reference was informed only of the arrest alleged at SOR 1.a. (Ax. E) The maintenance supervisor at Applicant's overseas job site since 2007 praised Applicant's expertise and reliability. His most recent job performance appraisal was a satisfactory interim assessment of his progress on the goals for his current position. (Ax. F)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁵ 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,⁶ 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.

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ Directive. 6.3.

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 reliable, 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.⁷ 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.⁸

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.⁹

Analysis

Personal Conduct

The Government's information showed that between 1991 and 1997, the Applicant was arrested or charged with several violations of criminal law. Available information shows that he was convicted of three felonies as alleged in SOR 1.a, 1.b, and 1.d. The record also shows that Applicant was arrested at least five times in response to his ex-wife's accusations of assault. He was convicted on only one occasion, as alleged in SOR 1.f, and it appears that the incidents in question may have been more mutual affray than misconduct by the Applicant. In 1992, Applicant fought another man and stole his jacket. As to SOR 1.c. the record does not show that he was charged or convicted and given a jail sentence for this conduct. Nonetheless, Applicant admitted that he fought the victim and stole his jacket.

Available information also shows that Applicant deliberately falsified his e-QIP by omitting one of his three felony arrests. Applicant admitted to a history of withholding information about his arrests because he was concerned that such information would keep him getting or keeping his job. I have considered the fact that he disclosed the

⁷ See Directive, E3.1.14.

⁸ See *Egan*, 484 U.S. at 528, 531.

⁹ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

felony convictions at SOR 1.a and 1.b. However, all of the information probative of this issue shows that he intended to mislead the Government by minimizing the full scope of his arrest record. As to his omission of his debts from his e-QIP, Applicant claimed that he did not think they were delinquent within the meaning of the questions in Section 28. In support of his claim, he submitted information showing he had acted to resolve some of the debts he omitted. However, that information (Ax. A; Ax. B) shows, at best, that his debts were resolved in July 2010, more than two years after he answered the questions at issue in SOR 1.g and 1.h. All of the foregoing raises a security concern 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 omission of information about his arrests and his finances requires application of the disqualifying condition 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*). The allegations of arrests and other criminal conduct were properly withdrawn as potentially disqualifying under Guideline J. Nonetheless, when considered along with Applicant's attempts to mislead the Government, which constitute violations of federal criminal law, all of the available information about Applicant's conduct requires application of the disqualifying condition at AG ¶ 16(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 person may not properly safeguard protected information*).

By contrast, I have considered the potential application of those mitigating conditions listed under AG ¶ 17 germane to these facts and circumstances. The mitigating condition at 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 did not correct his e-QIP falsifications until he was interviewed by a Government investigator four months later. The mitigating condition at 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 establish that he received any guidance or advice when he completed his e-QIP. 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) might apply to Applicant's past criminal conduct were it not for his recent misconduct in falsifying his e-QIP.

Available information continues to cast doubt on Applicant's trustworthiness and good judgment, because his 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. On balance, Applicant has not mitigated the security concerns about his personal conduct.

Criminal Conduct

The Government presented sufficient reliable information to support the allegation that he violated 18 U.S.C. § 1001 by deliberately withholding relevant information about his arrest record and his finances when he submitted his e-QIP in 2008. 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*), and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*).

Given the facts and circumstances of this case, I also have considered the possible application of the mitigating conditions listed under AG 32. The mitigating condition 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*) does not apply. Applicant's falsifications must be considered recent insofar as the e-QIP is part of his current request for a clearance. Further, there is nothing unusual about circumstances that require candid disclosure of an applicant's background information.

The mitigating condition at 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*) applies, in part, because it appears Applicant now appreciates the importance of being candid at all times about matters relevant to an assessment of his clearance suitability. He also has a solid record of employment since 1999. However, as to the passage of time without recurrence, this was the first time Applicant applied for a clearance. It remains to be

seen how or if he will comply with future requests for information. Also, as previously noted, his e-QIP falsification must be considered recent. On balance, I conclude that Applicant has failed to mitigate the security concerns about his criminal conduct.

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 in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 37 years old and presumed to be a mature adult. He has been steadily employed since 1999. After a disastrous first marriage ended in 1996, he has remarried and started a new family. His co-workers and others are confident in his character, but they do not appear to have been well-informed about Applicant's past. Although much of the adverse information about Applicant's arrests is dated, a conclusion that he is now rehabilitated is undermined by his willingness to break federal law by deliberately withholding from the Government information needed to make an accurate assessment of his suitability to hold a security clearance. A fair and commonsense assessment¹⁰ 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.¹¹

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
Subparagraph 1.a - 1.d:	Against Applicant
Subparagraphs 1.e - 1.f:	For Applicant
Subparagraphs 1.g - 1.h:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a - 2.b:	Withdrawn
Subparagraph 2.c:	Against Applicant

¹⁰ See footnote 6, *supra*.

¹¹ See footnote 9, *supra*.

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