



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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[NAME REDACTED]) ISCR Case No. 10-04607
)
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Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esquire, Department Counsel
For Applicant: *Pro se*

03/07/2014

Decision

MALONE, Matthew E., Administrative Judge:

Applicant failed to mitigate security concerns raised by his extensive arrest record and his other adverse conduct since at least 1999. Additionally, he failed to mitigate the security concerns resulting from his numerous and intentional false statements to the Government about his illegal use of drugs, and about his treatment for drug and mental health issues. Clearance is denied.

Statement of the Case

The results of a recent background investigation, which included Applicant's responses to interrogatories¹ from Department of Defense (DOD) adjudicators, did not support a determination that it is clearly consistent with the national interest to grant

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

Applicant's request for access to classified information.² On September 11, 2013, DOD issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the adjudicative guidelines³ regarding personal conduct (Guideline E).

Applicant timely responded to the SOR (Answer) and requested a hearing. The case was assigned to me on December 11, 2013, and I convened a hearing on January 22, 2014. Department Counsel presented Government Exhibits (Gx.) 1 - 29, which were admitted without objection.⁴ Applicant testified and offered eight notarized reference letters that were admitted collectively as Applicant's Exhibit (Ax. A).⁵ DOHA received the transcript of hearing (Tr.) on February 6, 2014.

Findings of Fact

Under Guideline E, the Government alleged that Applicant failed to register for the draft as required by federal law (SOR 1.a). The Government also alleged that between June 1999 and April 2011, Applicant was cited or charged with various civil infractions and criminal offenses, including speeding and other driving offenses (SOR 1.b, 1.c, 1.bb, and 1.ff); violations of state natural resources and wildlife management ordinances regarding trees, clams, lobsters, and fish (SOR 1.e, 1.m, 1.n, 1.q, and 1.s - 1.t); and theft of property (SOR 1.r). Some of the SOR allegations of criminal conduct also involved failure to abide by court orders and terms of sentencing or probation (SOR 1.n, 1.r, 1.s, and 1.t).

The SOR contained other allegations that Applicant was arrested for offenses involving violent and threatening conduct, as well as twice being issued temporary protective orders (SOR 1.h, 1.p, 1.u, 1.w, and 1.gg); that he had several instances of aggressive behavior, rules violations, or other inappropriate conduct in the workplace, for which he was disciplined or fired (SOR 1.d, 1.f, 1.g, and 1.l); and that on one occasion at his current workplace, his employer filed an adverse information report with DOD (SOR 1.cc).

The Government also alleged that between 2003 and 2005, Applicant illegally abused and became addicted to Oxycontin; that he failed drug tests while on probation; that he received outpatient drug treatment in 2003 and 2004; and that he requested detoxification treatment in 2005 while incarcerated for an assault charge (SOR 1.i - 1.k,

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

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).

⁴ Gx. 29 was received for administrative notice purposes only. An index listing each exhibit is included in the record as Hearing Exhibit (Hx.) 1. See Tr. 18 - 49.

⁵ Tr. 50 - 51.

and 1.v). It was further alleged that in 2004, after he threatened to kill himself, Applicant was involuntarily admitted to inpatient mental health treatment, where he was diagnosed with intermittent explosive disorder and adjustment disorder with possible depressed mood (SOR 1.o).

Additionally, the Government alleged that, on several occasions during the investigation and adjudication of his request for clearance, Applicant made deliberate false statements to the Government. Specifically, it was alleged that he failed to disclose adverse information about his illegal use of prescription drugs in multiple Electronic Questionnaires for Investigations Processing (EQIP) submitted on February 28, 2006 (SOR 1.y), December 9, 2010 (SOR 1.ee), and September 24, 2012 (SOR 1.hh). It was further alleged that he deliberately failed to disclose his illegal use of prescription drugs when he was interviewed by Government investigators in May 2006 (SOR 1.z), and in response to DOD interrogatories on February 1, 2007 (SOR 1.aa) and on March 11, 2013 (SOR 1.kk).

Applicant is also alleged to have deliberately withheld information about his drug treatment from his February 2006 EQIP (SOR 1.x) and from his September 2012 EQIP (SOR 1.ii). Finally, the Government alleged that Applicant deliberately omitted the fact that he received mental health counseling from his December 2010 EQIP (SOR 1.dd) and in response to DOD interrogatories in October 2012 (SOR 1.jj).

Applicant admitted with explanations all of the SOR allegations. (Answer) In addition to his admissions, I make the following findings of fact.

Applicant is 32 years old. He has never been married, but has one child, now age 11, who has lived with Applicant since 2006. Applicant is currently engaged to be married in March 2014. In February 2006, he was hired by a defense contractor for work as a laborer and installer. He started working as an installer and technician for his current employer in October 2008. (Gx. 1; Gx. 2; Tr. 68 - 70)

Applicant grew up and lived in State A until 2005, when he moved to his current residence in State B. After graduating from high school in June 2000, he attended college for about six months. While in college, he used marijuana between 10 and 20 times in response to peer pressure. (Gx. 1 - 3)

From August 2000 until late 2005, Applicant held various jobs, including six jobs in restaurants, two in boat shops, one as a roofer, and one as a clam harvester. As alleged in SOR 1.d, 1.f, and 1.i, Applicant left some of his jobs under unfavorable circumstances. He also accrued multiple misdemeanor violations of state laws. His work as a clam harvester from April 2004 until December 2005 coincided with numerous citations for violating laws and regulations concerning harvesting of clams, shellfish, and other natural resources, as alleged in SOR 1.m, 1.n, and 1.p - 1.t. Also, he was cited in November 2001 for cutting Christmas trees or boughs (SOR 1.e). Between June 1999 and November 2005, Applicant was charged with three motor vehicle-related offenses (SOR 1.b, 1.c, and 1.g). (Answer; Gx. 1 - 3; Gx. 14 - 17, 19 - 20)

Also before he moved to State B, Applicant was arrested, in June 2002 (SOR 1.h) and in October 2005 (SOR 1.u), for assault and criminal terrorizing. In 2002, a 45-day jail sentence was suspended. In 2005, he served 45 days in jail. When he was released from incarceration, a temporary abuse order was entered against him at the request of the victims in that case (SOR 1.w). (Answer; Gx. 1 - 3, 4, 13)

Between 2002 and 2005, Applicant became addicted to prescription painkillers he started taking after he broke his leg. Chief among the medications he abused was Oxycontin, an opiate-based controlled substance. (SOR 1.i) His addiction led him to fail court-ordered drug tests when he was on probation from his SOR 1.h arrest. When he was in jail in 2005, he requested treatment for opiate detoxification. (SOR 1.v) After his arrest in 2002, Applicant was placed on probation for a year and ordered to have periodic drug testing. After he failed a test, he was ordered to undergo treatment at a state chemical dependency agency (SOR 1.j and 1.k). In 2010, Applicant's father died unexpectedly. Applicant relapsed in his recovery from opiate addiction and used Oxycontin and other painkillers for about two weeks. He self-referred to drug treatment and claimed he has not abused prescription medications since. Applicant acknowledges he is always going to be a recovering addict, but he discontinued medical treatment for his addiction in 2010. He has not participated in any 12-step program or other structured rehabilitation effort. (Answer; Gx. 4, 26; Tr. 62, 66 - 69, 72 - 74)

Applicant moved to State B in 2005. After living with his parents for a time, he was hired for his first job with a defense contractor. He worked as a laborer with his first company from February 2006 until October 2008, when he was hired by his current employer. He now works as an installer and often travels to military installations in the United States and abroad. (Gx. 1 - 4)

Since moving to State B, Applicant has been twice cited for moving violations and driving on a revoked or suspended license (SOR 1.bb and 1.ff). (Answer; Gx. 1, 2, and 4)

Applicant struggled with anger management issues before 2005, as shown by the nature of his violent behavior offenses in 2002 and 2005. His anger has also been a concern since he moved in 2005. In April 2007, Applicant's employer submitted an adverse information report to DOD regarding an incident in which Applicant had used profane language and had threatened some of his coworkers. (SOR 1.cc) The report indicated that it was not the first time this had happened. (Answer; Gx. 4 and 27)

Applicant has been seen for his anger management problem by at least three mental health professionals. In September 2004, police were called when he and a girlfriend were arguing. In their presence, he stated that he would rather be dead than put up with his domestic circumstances. As a result, the police were required to take Applicant to the local hospital for psychiatric evaluation. Applicant has tried to downplay the incident as nothing more than exasperation. However, as alleged in SOR 1.o, a mental health professional diagnosed him with intermittent explosive disorder with possible depressed mood. When Applicant was discharged, he was referred to another

mental health professional, who confirmed that Applicant had anger management issues. The record also shows, as alleged in SOR 1.dd, that Applicant has since been seen by two other mental health professionals based on referrals by his primary care physician, who confirmed that Applicant has a problem with anger management. (Answer; Gx. 1, 5 - 7)

Another incident occurred in April 2011, while Applicant was on an extended temporary assignment for work (SOR 1.gg). He and his fiancée had agreed to suspend their relationship for a while. Applicant began seeing a woman in the city where he was working. One night, when that woman was staying overnight with Applicant at his hotel, Applicant's fiancée called and the woman answered because Applicant was sleeping. The woman became enraged that Applicant's fiancée would call him and started hitting Applicant. He awoke and grabbed the woman to stop her from hitting him, and he physically removed her from the hotel room. The police were called and he was arrested. No charges were entered against him, but the woman involved obtained a temporary protective order against Applicant. (Answer; Gx. 1 and 4; Tr. 90 - 92)

Applicant first submitted an EQIP on February 28, 2006 (Gx. 3), after he was hired by his first defense contractor employer. During the ensuing background investigation, he was interviewed by DOD investigators on May 15, 2006, and responded to six sets of DOD interrogatories (Gx. 4 - 11, dated April 10, 2006; February 1 and 16, 2007; July 5, 2007; December 31, 2007; and April 8, 2008). However, that background investigation was not adjudicated. After he started working for his current employer, he submitted another EQIP on December 9, 2010 (Gx. 2). Thereafter, he responded to DOD interrogatories on April 12, 2011. (Gx. 5) Again, it does not appear his request for clearance was adjudicated, and he was asked to submit another EQIP, which he did on September 24, 2012. (Gx. 1) Applicant was interviewed by a Government investigator on October 11, 2012, and responded to additional interrogatories on March 11, 2013. (Gx. 4)

Applicant has not registered for the draft with the U.S. Selective Service. Federal law (50 U.S.C. § 453) requires this of all male citizens between the age of 18 and 26. Applicant disclosed his failure to register when he submitted his first EQIP. When he was interviewed in May 2006, he stated that he intended to do so and "would look into it." He was 25 years old at that time. During his October 2012 subject interview, at age 31, he stated he did not register because he did not want to serve in the military. (Answer; Gx. 4; Tr. 58 - 60)

When Applicant submitted his first EQIP (Gx. 3), he disclosed that he had left jobs under adverse circumstances, as alleged in SOR 1.d, 1.f and 1.i. He also disclosed that he had been arrested as alleged 1.h and 1.u. He also disclosed, as alleged in SOR 1.h, that he had received counseling for anger management as part of his probation after a June 2002 arrest for criminal terrorizing. Finally, he disclosed that he used marijuana "10 to 20 times" while in college. As alleged in SOR 1.y, he did not disclose that he had illegally abused prescription medications. As alleged in SOR 1.x, he also did

not disclose that, in addition to his 2002 anger management counseling, he had received psychiatric treatment in 2004 after police heard him express suicidal thoughts.

When Applicant was interviewed by a Government investigator in May 2006, he discussed his use of marijuana. However, he also claimed that he had not illegally abused any legal drugs, such as pain medication. As alleged in SOR 1.z, his statement omitted his use of prescription medications up to 2005. As alleged in SOR 1.z, in response to DOD interrogatories, Applicant repeated his claims that he had not abused prescription drugs. (Gx. 4)

In his December 2010 EQIP (Gx. 2), Applicant updated certain personal information, such as his home address and his work history. He also disclosed his college marijuana use, a 2007 citation for driving on a suspended license, and his 2005 arrest and conviction for assault and terrorizing. As to mental health counseling, Applicant disclosed only his court-ordered anger management counseling after his 2002 arrest for terrorizing. Applicant again did not disclose that he had abused prescription medications. He also failed to disclose that he had received additional counseling for anger management since he submitted his first EQIP.

In his September 2012 EQIP (Gx. 1), Applicant updated his personal information to reflect that he was cohabiting with his fiancée, and that his father had passed away since his last EQIP. He also deleted reference to his marijuana use because it had been more than seven years since he used the drug. He still did not disclose his illegal use of prescription medications as recently as 2010 after his father died. He also added information about the temporary protective order against him in 2011. Applicant still did not list any mental health counseling or drug treatment despite the fact he had been seen by multiple mental health professionals for anger management issues since 2006, and that he had received detox treatment while incarcerated in 2005 and after his relapse in 2010. When Applicant was interviewed by a Government investigator in October 2012, he again omitted information about his mental health counseling over the previous seven years. (Gx. 4)

Applicant responded to DOD interrogatories on March 11, 2013. As to his drug involvement, he was asked the following question:

Have you **ever** used any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP) and/or any Cannabis (to include marijuana and hashish), except prescribed by a licensed physician?(emphasis in original)

Applicant answered “yes,” but discussed only his use of marijuana while in college. (Gx. 4)

In response to the SOR allegations that his false statements were made intentionally, Applicant claimed he did not intend to mislead the Government about his past. He further claimed he was advised by his late father to omit information about his illegal use of and addiction to Oxycontin and other pain medications. Applicant’s father

was retired from active duty in the Navy and was, at the time of his death, a civilian employee of the DOD agency Applicant's employer supports. To the best of Applicant's knowledge, his father was not involved with or experienced in the adjudication of DOD security clearances when he advised Applicant about his clearance applications. At his hearing, Applicant acknowledged that, despite his late father's advice, he knew his statements were false when he made them. Applicant did not explain the false statements he made after his father passed away. (Answer; Gx. 4; Tr. 63 - 66)

In all three of his EQIPs, Applicant stated that his record of misconduct was in the past. He asserted that, since moving to State B in 2005, he had left behind the influences and circumstances that contributed to his poor record. At his hearing, Applicant averred that he has matured since 2005 and that his improved circumstances indicate he is more responsible and trustworthy. Applicant has sole custody of his child, in whose life he is actively involved with the help of Applicant's mother, who lives nearby. Applicant is now a homeowner and has a good reputation at work and in the community. (Answer; Gx. 1 - 3; Ax. A; Tr. 53 - 57)

In response to the most recent set of DOD interrogatories, Applicant disclosed that he was arrested in November 2013 while on a temporary work assignment. He was charged with driving while intoxicated and with having an open container of alcohol in his vehicle. As of the hearing in this matter, Applicant was to appear in court at the end of January 2014. Applicant informed his supervisor of this event when he returned from travel, and an adverse information report was entered in the Joint Personnel Adjudication System (JPAS). This matter was not alleged in the SOR; however, I have considered it as probative of Applicant's claim that his adverse personal conduct will not recur. (Gx. 4; Gx. 28; Tr. 42 - 45, 104 - 105)

Policies

Each security clearance 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 policy in the adjudicative guidelines (AG). 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.

⁶ See Directive. 6.3.

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 interest⁷ for an applicant to either receive or continue to have access to classified information. 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.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, along with Applicant's admissions, is sufficient to raise a reasonable security concern about Applicant's suitability for access to classified information. That security concern is articulated in the guideline for Personal Conduct 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.

⁷ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁸ See *Egan*, 484 U.S. at 528, 531.

⁹ See *Egan*; AG ¶ 2(b).

Applicant has a well-documented record of criminal offenses, illegal use of drugs, and other misconduct over the past 15 years. Most recently, he has engaged in repeated attempts to conceal from the Government information in his background that is relevant and material to a determination of Applicant's suitability to hold a clearance. The facts contained in this record require application of the following AG ¶ 16 disqualifying conditions:

(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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(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; 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 person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; (2) disruptive, violent, or other inappropriate behavior in the workplace; and (3) a pattern of dishonesty or rule violations.

In response to the Government's information, it was Applicant's obligation to provide information sufficient to mitigate these security concerns. Available to Applicant were the following pertinent mitigating conditions under AG ¶ 17:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(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;

(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; and

(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.

AG ¶ 17(a) does not apply because Applicant failed to correct his omissions from his first EQIP and repeatedly falsified his EQIP answers in subsequent submissions. Applicant also intentionally made false statements in his subject interviews and in his responses to DOD interrogatories. AG ¶ 17(b) does not apply because Applicant's father was not an appropriate source of advice on how to complete an EQIP. Even if he was, Applicant knew at all times that he was intentionally trying to hide from the Government important information in his background. All available information probative of Applicant's intent when he was responding to the Government's inquiries shows that he engaged in a deliberate and persistent effort to mislead the Government so he could get a security clearance.

AG ¶ 17(c) does not apply because nothing about Applicant's falsifications or his lengthy history of criminal conduct, drug abuse, and deceit, when taken as a whole, can be considered minor or remote in time. For most of his adult life, he has shown he is unwilling to comply with the law. He has also shown a propensity for substance abuse and that he has trouble acting in a reasonable way with persons with whom he works or has a relationship. At all stages of the Government's efforts to assess his suitability for access to classified information, he has acted in ways that are fundamentally at odds with the Government's need for accurate information about him.

Finally, AG ¶ 17(d) does not apply. Applicant has not acknowledged that he has any behavioral issues or that he should not have lied about his background. To his credit, Applicant has not illegally used prescription medications since 2010. However, he has not sought treatment or counseling on his own. Further, his recent DWI charge and his extensive record of misconduct and his intentional false statements undermine my confidence that his substance abuse will not recur. Applicant has not mitigated the security concerns about his personal conduct.

Whole-Person Concept

I have evaluated the facts and have applied the appropriate adjudicative factors under Guideline E. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is a 32-year-old single father. He is engaged to be married this year, and he has made several positive changes in his life since 2005. However, these positive developments, when weighed against the extensive record of misconduct and falsification amassed by Applicant, are not sufficient to counter the disqualifying security concerns presented here.

Applicant also has a solid record at work. His supervisors have recommended that he be given a security clearance. However, Applicant's references did not articulate what, if anything, they know about his background. Accordingly, I have assigned little persuasive value to their recommendations. Significant doubts remain about Applicant's suitability for access to classified information. Because protection of the national interest is the principal goal of these adjudications, those doubts must be 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.kk:	Against Applicant

Conclusion

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

MATTHEW E. MALONE
Administrative Judge