



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



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| In the matter of: |) | |
| |) | |
| [NAME REDACTED] |) | ISCR Case No. 10-10406 |
| |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Stephanie C. Hess, Esquire, Department Counsel
For Applicant: Kecia St. Clair, Personal Representative

05/23/2012

Decision

MALONE, Matthew E., Administrative Judge:

Applicant experienced financial problems resulting in bankruptcy in 2000 and 2010, but his current finances and ability to manage his money are satisfactory. Applicant also no longer uses marijuana or associates with drug users. He is not likely to become involved in illegal drugs in the future. He also did not deliberately omit relevant information from his 2002 and 2010 security clearance applications. After his driver’s license was revoked five times in three years, he has taken sufficient action to ensure his driving privileges will remain in good standing. Applicant mitigated the security concerns raised by his financial problems, drug involvement and personal conduct. His request for a security clearance is granted.

Statement of the Case

On July 13, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (eQIP) to obtain a security clearance required for his employment with a defense contractor. After reviewing the results of Applicant’s 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 November 23, 2011, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the adjudicative guideline (AG)² for financial considerations (Guideline F), drug involvement (Guideline H), and personal conduct (Guideline E).

Applicant answered the SOR (Answer) on December 19, 2011, and requested a hearing. On February 17, 2012, DOHA Department Counsel issued to Applicant an *Amendment to the Statement of Reasons* (Amendment). The Amendment added three factual allegations to the paragraph 2 Guideline E allegations. Applicant answered the Amendment (Second Answer) on October 2, 2011, and the case was assigned to me on February 29, 2012.

The Amendment and Applicant's Second Answer are included in the record as Hearing Exhibit (Hx.) 1. Attached to Applicant's Second Answer is a copy of a security clearance application (SF 86) he completed by hand and signed on May 12, 2010. It is included in the record with Applicant's response to the Amendment and will be referred to, as necessary, as Applicant's Exhibit (Ax.) A.

Pursuant to a Notice of Hearing issued on February 27, 2012, I convened a hearing in this matter on March 15, 2012. The parties appeared as scheduled. The Government presented ten exhibits, which were admitted as Government's Exhibits (Gx.) 1 - 10.³ Applicant testified and presented two witnesses. DOHA received a transcript (Tr.) of the hearing on March 26, 2012.

Findings of Fact

The Government alleged under Guideline H, that in February 2007, Applicant was arrested and charged with possession of marijuana, to which he pleaded guilty in May 2007, and was given 30 days in jail (suspended), was fined and placed on unsupervised probation (SOR 1.a); and that in June 2001, he was charged with driving on a suspended license and possession of marijuana, for which he was fined and ordered to attend an "ASAP" class (SOR 1.b).

The Government alleged under Guideline E, that Applicant's driver's license has been suspended five times since September 2009 for various traffic violations (SOR 2.a). The Amendment added the following allegations: that his 2007 drug arrest resulted in the revocation of a security clearance issued to him by the U.S. Navy (SOR 2.b); that Applicant deliberately made a false statement to the Government by failing to disclose, as required by eQIP question 25.b, that the Navy revoked his security clearance (SOR

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

² 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).

³ Tr. 19 - 32.

2.c); and that he deliberately made a false statement to the Government by failing to disclose, as required by question 23.f of a security clearance application submitted in May 2002, that he had been arrested in July 2001 and charged with assault and battery of a family member (SOR 2.d).

Under Guideline F, the Government alleged that Applicant filed Chapter 7 bankruptcy in January 2001 and was discharged of his debts in May 2001 (SOR 3.a); and that in February 2010, Applicant filed a Chapter 13 bankruptcy petition that "remain[ed] in bankruptcy court" when the SOR was issued (SOR 3.b)

In his Answer to the original SOR, Applicant admitted, with explanations, SOR 1.a, 1.b, 2.a, 3.a, and 3.b. In response to the Amendment, he denied, with explanations, SOR 2.b and 2.c. He admitted with explanation SOR 2.d. However, his explanation regarding SOR 2.d makes clear that he denies intentionally making a false statement by his answer to SF 86 question 23.f. Applicant's admissions are incorporated in my findings of fact. Having reviewed the response to the SOR, the transcript, and exhibits, I make the following additional findings of fact.

Applicant is 42 years old and employed by a defense contractor as a pipe fitter in a private shipyard that constructs and maintains U.S. Navy ships and submarines. Applicant has particular expertise in working with systems related to nuclear propulsion.

Applicant was married from August 1997 until he and his wife separated in March 2003. There is no information in the record about when or if a divorce was finalized. Applicant pays monthly child support for a son, now age 12, from his marriage. Currently, he is living with a woman, with whom he has a child under two years old, and her two children from a previous relationship, ages 12 and 14. (Tr. 40) Applicant and his girlfriend have known each other for about ten years and have been in a relationship for the last four years. They recently signed a two-year lease on a house, and she describes Applicant as a great father. (Tr. 33 - 34)

In June 2001, Applicant was arrested for driving on a suspended license and for possession of marijuana. He pleaded guilty and was assessed fines and court costs. (Answer; Gx. 9; Gx. 10; Tr. 57) In July 2001, he and his wife got into an argument that became physical when both parties grabbed and shoved each other. Applicant left the house, and he was later called by police. Applicant's wife had sworn out a warrant for his arrest, charging him with assault and battery on a family member. Applicant went to the police station, signed the warrant, was advised of a date to appear in court, and allowed to leave. The charge was eventually dismissed because his wife did not appear in court. (Second Answer; Gx. 8 Gx. 9)

In February 2007, he was again charged with marijuana possession. He was a passenger in a car that was stopped for speeding. Police determined the driver had a suspended license and asked all of the occupant's to exit the car. During a search incident to the driver's arrest, a small amount of marijuana was found. All of the occupants were issued citations charging them with misdemeanor possession of marijuana. Applicant denied the marijuana was his, but, in May 2007, he pleaded guilty because he could not afford the cost of an attorney to challenge the charge at a trial. He

was sentenced to 30 days in jail (suspended) and assessed fines and court costs. (Answer; Gx. 1; Gx. 2; Gx. 9)

Since September 2009, Applicant's driver's license has been suspended five times. In addition to numerous moving violations, Applicant has been slow to pay the required fines imposed. His last violation occurred in early 2010, after which Applicant took a driver improvement course. His driving privileges have been restored and Applicant averred that his car insurance rates have dropped. (Answer; Gx. 3; Tr. 59 - 60, 71 - 72)

Applicant was discharged of his debts in the Chapter 7 bankruptcy in 2001. He averred that his financial problems arose from a combination of loss of income during a four-month strike by the union to which he belongs, and from his wife's undisciplined use of credit cards. (Answer; Gx. 6; Gx. 8; Tr. 60) In 2010, Applicant filed for Chapter 13 bankruptcy protection. He chose to file bankruptcy because he was laid off in December 2009 and unemployed for six months before being hired by his current employer. Applicant lost his house to foreclosure, and he was unable to pay the remainder of the mortgage after the house was sold at auction. He is repaying about \$20,000 in debts through \$360 monthly payments. He has been making those payments as required since February 2010, and the balance on his trustee's account is in good standing, his creditors are being paid, and the total amount due is now about \$15,480. (Answer; Gx. 2; Gx. 4; Tr. 36)

In September 1990, Applicant began working as a pipe fitter at the same shipyard where he works now. He worked there until April 2000, when he was laid off for lack of work. Applicant held a security clearance as part of this employment. (Gx. 10) Thereafter, he worked as a pipe fitter for two different companies before he was hired as a pipe fitter by the Department of the Navy in March 2002. He was granted a security clearance in 2002 and worked at a Navy shipyard until March 2008, when his clearance was revoked, in relevant part, because of his 2007 arrest for marijuana possession. Applicant averred that he was allowed to resign rather than be fired, because of his good work record. Applicant appealed the revocation, but the decision to revoke was affirmed in February 2009. (Answer; Gx. 1; Gx. 2; Gx. 7; Tr. 54)

On May 2, 2002, Applicant submitted a security clearance application (SF 86) to renew his security clearance for his job with the Navy. He disclosed the June 2001 charges for marijuana possession and driving on a suspended license. He also disclosed prior drug use, and his Chapter 7 bankruptcy. Applicant admitted that he did not list his July 2001 assault and battery charge on his SF 86, but denied doing so intentionally. The charges were dismissed, and he either forgot about the event or mistakenly thought he did not have to list the charge because he was not actually detained after he turned himself in. He was not required to list the assault charge in his 2010 eQIP because it occurred more than seven years before. (Second Answer; Gx. 7; Gx. 8; Gx. 10; Tr. 60 - 61, 62)

The eQIP signed and submitted on July 13, 2010, disclosed Applicant's adverse financial information, as well as his 2007 marijuana possession charge. He did not disclose, however, the loss of his security clearance in 2008. (Gx. 1) Applicant did not

personally sit at a computer and complete the eQIP. Rather, he signed and submitted a hand-written security clearance application in May 2010, that was then used by his employer's security office to complete the eQIP. He was then presented with the final eQIP to sign. Applicant disclosed the 2008 clearance revocation in his hand-written application. (Ax. A) He admitted at hearing that he did not review the eQIP closely when he signed it in July 2010. (Second Answer; Tr. 62, 64 - 65, 73 - 74)

Applicant's marriage appears to have been tumultuous. In addition to his 2001 assault charge, the record shows he also may have been charged with domestic assault in 1998. He has not lived with his wife in nine years, and his current domestic situation is stable and peaceful. (Answer; Gx. 8; Tr. 33 - 34, 61 - 62) Applicant admits to having made bad choices and to associating with the wrong people. (Tr. 57) However, he has not used illegal drugs since 2001, and his current finances are sound. Applicant and his girlfriend jointly manage their finances, and they are meeting all of their current financial obligations. (Gx. 2; Gx. 8; Tr. 35, 37 - 43)

Applicant has a good reputation in the workplace. A former co-worker, who encouraged Applicant to seek employment with the Navy in 2002, is aware of the circumstances which led to Applicant's loss of clearance and departure from the Navy shipyard. Nonetheless, he praised Applicant's commitment to quality workmanship, calling Applicant "one of my best nuclear pipe fitters." He also testified that Applicant has a record of properly handling and safeguarding classified "packages" as part of his work with Navy nuclear propulsion systems. (Tr. 44 - 54)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent⁴ with the national interest 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.

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

⁵ 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. 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 "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.

In addition to Applicant's admissions, the Government presented information that showed Applicant experienced significant financial problems that resulted in bankruptcy petitions in 2001 and 2010. This information raises a security concern about Applicant's finances addressed, in relevant part, at AG ¶ 18 as follows:

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.

More specifically, the Government's information requires application of the disqualifying conditions at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*) and AG ¶ 19 (c) (*a history of not meeting financial obligations*).

Of the mitigating conditions listed at AG ¶ 20, I conclude that the following apply:

(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

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; AG ¶ 2(b).

doubt on the individual's current reliability, trustworthiness, or good judgment;

(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;

(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.

Applicant's current finances are sound, he has no new delinquent or excessive personal debt, and he has a positive cash flow. In 2001, he filed for liquidation of his debts after a period of unemployment exacerbated his inability to pay his marital debts. In 2010, he accrued past-due debts after he was laid off. Rather than seek liquidation a second time, Applicant established a repayment plan through a Chapter 13 petition. He has been paying according to that plan for about two years and has reduced his overall debt significantly. While bankruptcy is not the most desirable option to resolve one's debts, in this case, Applicant's current financial stability shows that he exhibited good judgment in choosing Chapter 13 to address his debt problem. On balance, Applicant has mitigated the security concerns about his finances.

Drug Involvement

In addition to Applicant's admissions, the Government presented information that showed Applicant used marijuana more than ten years ago; that he was charged and convicted of marijuana possession in 2001 and 2007; and that he lost a security clearance in 2008, in part, as a result of his 2008 drug charge. Although not directly alleged, it appears that Applicant used marijuana in 2001 while holding a security clearance he received before he was hired by the Navy in 2002. These facts raise a security concern addressed at AG ¶ 24, as follows:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

More specifically, available information supports application of the disqualifying conditions at AG ¶ 25(a) (*any drug abuse (see above definition)*) and AG ¶ 25(g) (*any illegal drug use after being granted a security clearance*).

By contrast, Applicant's drug use is not recent, he no longer associates with others who use drugs, and his personal and professional circumstances now support a clean, sober and responsible lifestyle. I conclude the record supports application of the following AG ¶ 26 mitigating conditions:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) dissociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence.

Applicant has mitigated the security concerns about his past drug involvement.

Personal Conduct

The Government's information also showed that in the past three years, Applicant's driver's license was suspended at least five times, either for moving violations, or for failure to timely pay the fines and costs imposed for those violations. The Government also established that Applicant's security clearance was revoked in 2008 after his 2007 drug-related arrest, and that he omitted his loss of clearance from his eQIP. The Government also showed that Applicant omitted from a 2002 SF 86 his 2001 domestic assault charge. These facts potentially raise a security concern about his personal conduct, which is addressed 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.

Applicant denied intentionally trying to mislead the Government by omitting his 2001 arrest from his 2002 SF 86. His denial kept the burden on the Government to prove that allegation, a burden I conclude was not met. Available information established that Applicant knew he had been charged with domestic assault in 2001 and that he should have listed that charge on his 2002 SF 86. Intent to make a false statement can be inferred from all of the pertinent circumstances; however, those circumstances also include Applicant's plausible explanation that he thought he did not have to disclose the charge because he was not taken into custody. Also to be considered here is Applicant's disclosure in the SF 86 of other adverse and disqualifying

information, such as his Chapter 7 bankruptcy, a drug-related arrest for which he was convicted, and his use of marijuana while holding a security clearance. It is unlikely that the one event he would intentionally omit would be an assault and battery charge that was never prosecuted.

Applicant denied the allegation that he intentionally withheld from his eQIP the Navy's 2008 revocation of his security clearance. The eQIP presented at hearing listed that he was granted a clearance in 2002, but contained a negative answer to question 25.b, which asked if his clearance had ever been revoked. The eQIP also listed his more recent adverse financial information and his 2007 charge of marijuana possession. In response to SOR 2.c, Applicant averred that he thought he had listed it when he submitted his application. He credibly explained that his responses were provided on a handwritten security clearance application and given to someone else to put into the automated eQIP form. Ax. B, as well as the other information probative of Applicant's intent, corroborates his claim. The most that can be said about Applicant's eQIP is that he should have reviewed it more closely before signing and submitting it. Applicant was responsible for the information presented in the eQIP, but his poor attention to detail, under these circumstances, does not equate to an intent to deceive or mislead the Government. SOR 2.c and 2.d are concluded for the Applicant.

As to SOR 2.b, the Government established, and Applicant admitted, that his security clearance was revoked in 2009, in part, because of his 2007 drug charge. Certainly, the loss of his clearance was one effect of the drug-related conduct addressed, above. However, while pertinent to other issues in this case, such as the allegation that he did not disclose it on his 2010 eQIP, the Navy's revocation does not carry any independent adjudicative significance. SOR 2.b is concluded for the Applicant.

Finally, the Government established, and Applicant admitted, that his driver's license has been suspended at least five times in the past three years. This requires application of the disqualifying condition at AG ¶ 16(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: ... (3) a pattern of dishonesty or rule violations.

This security concern can be mitigated by establishing the mitigating condition 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.

Applicant has acknowledged that he is not a very good driver and that he was not timely paying the fines and costs of his traffic violations. However, he has not had a ticket in more than a year, and he “obtained counseling” by taking a driver improvement class. His driving privileges have been restored and his car insurance premiums have gone down. On balance, and in consideration of the positive changes in his circumstances, SOR 2.a is concluded for Applicant. He has mitigated the security concerns about his personal conduct.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines H, F, and E. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). I further note that Applicant is 42 years old and presumed to be a mature responsible adult. Such a presumption seemed incorrect in light of Applicant’s conduct until recently. Information about his 2001 drug arrest showed that he was using marijuana at the time of his arrest. However, it was not conclusively shown that the marijuana found when he was arrested in 2007 was his or that he was using drugs then. Certainly, his choice of friends was not good. After he lost his clearance and his Navy job, Applicant started to change his circumstances for the better. He and his girlfriend have a stable relationship in which they care for their children and have made financial progress. Although he is still in Chapter 13 bankruptcy, he has established a track record of reliability, and all indications are that he is unlikely to repeat his drug-related conduct or that he will experience similar financial problems in the future. A fair and commonsense assessment of all information bearing on Applicant’s suitability for access to classified information shows that he has mitigated the security concerns presented by the Government.

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:

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| Paragraph 1, Guideline H: | FOR APPLICANT |
| Subparagraphs 1.a - 1.b: | For Applicant |
| Paragraph 2, Guideline E: | FOR APPLICANT |
| Subparagraphs 2.a - 2.d: | For Applicant |
| Paragraph 3, Guideline F: | FOR APPLICANT |
| Subparagraphs 3.a - 3.b: | For Applicant |

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest to grant Applicant's request for access to classified information. Request for security clearance is granted.

MATTHEW E. MALONE
Administrative Judge