



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [NAME REDACTED]) ISCR Case No. 12-01433¹
)
 Applicant for Security Clearance)

Appearances

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

02/19/2014

Decision

MALONE, Matthew E., Administrative Judge:

Applicant’s financial problems remain a concern because his debts are largely unaddressed. Allegations of criminal conduct also cause doubts about Applicant’s suitability for a security clearance. He was charged at least 13 times with various criminal offenses between 1995 and 2008. Although several years have passed since his last offense, his conflicting statements about some of the charges, combined with the scope of his criminal record, undermine confidence that he is wholly rehabilitated. Clearance is denied.

¹ The case number assigned to the Statement of Reasons in this case (12-01438) is incorrect. The case number assigned to this decision (12-01433) is correct and is the same as has been assigned to this matter throughout its adjudication.

Statement of the Case

On October 5, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his employment with a defense contractor. The results of the ensuing background investigation, which included his responses to interrogatories² from Department of Defense (DOD) adjudicators, did not support a finding that it is clearly consistent with the national interest to grant Applicant's request for access to classified information.³ On July 31, 2013, DOD issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the adjudicative guidelines⁴ for criminal conduct (Guideline J) and financial considerations (Guideline F).

Applicant timely responded to the SOR (Answer) and requested a hearing. The case was assigned to me on October 23, 2013, and I convened a hearing on November 20, 2013. Department Counsel presented Government Exhibits (Gx.) 1 - 7, which were admitted without objection. (Tr. 19 - 25) Applicant testified, but offered no documents. I left the record open after the hearing to allow Applicant additional time to submit documents in support of his case. DOHA received the transcript of hearing (Tr.) on December 4, 2013. The record closed on December 11, 2013, when I received Applicant's post-hearing submission. It has been admitted without objection as Applicant's Exhibit (Ax.) A.

Findings of Fact

Under Guideline J, the Government alleged that between August 1995 and September 2008, Applicant was charged 13 times with various criminal offenses (SOR 1.a - 1.m). The allegations at SOR 1.a, 1.h, and 1.i were misdemeanor offenses for criminal mischief, reckless driving, and providing false information to law enforcement, respectively. The allegations at SOR 1.b, 1.g, 1.j, 1.k, and 1.m were for drug or alcohol-related offenses, one of which (SOR 1.b) involved felony possession of cocaine. SOR 1.e and 1.f concerned assault or battery offenses. SOR 1.c and 1.d alleged probation violation offenses. Applicant admitted all of these allegations without explanation. (Answer)

Under Guideline F, the Government alleged that Applicant owed \$7,734 for seven past-due or delinquent debts (SOR 2.a - 2.g). The largest debts listed were a \$3,004 past-due child support obligation (SOR 2.d) and a \$2,141 debt for the remainder due after a car repossession (SOR 2.e). Applicant admitted SOR 1.c and 1.e, and

² Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

³ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

⁴ 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).

denied the rest. (Answer) In addition to his admissions under both guidelines, I make the following findings of fact.

Applicant is 36 years old. He has never been married, but has one child, now age nine, whom he supports through monthly child support payments of about \$550. Applicant is employed by a large defense contractor as a media production analyst. He has worked there, initially as a temporary staffer, since July 2011. He also has a second job as a chef, which he has held since March 2011. (Gx. 1; Gx. 2; Tr. 68 - 70)

Applicant has worked in the visual media and productions industry since 1997. He worked for a local television station from September 1997 until September 2006, when he resigned after allegations of misconduct. Applicant stated that he was accused of coming to work with alcohol on his breath, and that there were other instances when he was accused of making mistakes at work. He denied those allegations, but averred that he and his employer mutually agreed that he should leave that job. Applicant then worked as a freelance media specialist until February 2009, when he was hired by a private media relations firm. He was laid off from that job in December 2010 and was unemployed until March 2011, when he started working as a chef. (Gx. 1; Gx. 2)

Applicant had a turbulent childhood. At age 15, he was thrown out of the house by his father, with whom Applicant never had a good relationship. Applicant fell in with the wrong crowd and began selling marijuana and cocaine to support himself. The first arrest alleged in the SOR was for criminal mischief in August 1995, but that charge was disposed of as *nolle prosequi*. The record contains no detailed information about this event. (SOR 1.a) A month later, he was arrested and charged with felony possession of cocaine, misdemeanor possession of marijuana, smuggling contraband into prison (because drugs were found on him when he was being processed for incarceration), and misrepresenting his age regarding underage possession of alcohol (he was 18 at the time). Applicant was convicted of all but the smuggling charge, and was sentenced to six months "community control" (house arrest), four-and-a-half years of probation, and his driver's license was suspended for two years. (SOR 1.b) During the first year of probation, Applicant was tested every week for drugs and had to report to a probation officer each week. (Answer; Gx. 1; Gx. 2; Gx. 5)

After he was released from house arrest, Applicant moved away from his home town and his past criminal associations. He obtained his high school general education development (GED) certification in 1997, then began his career in the visual media and production industry. (Gx. 1; Gx. 2; Gx. 5; Tr. 72)

In August 1996, he was charged with violating his probation (SOR 1.c). Applicant believes this was the result of his failure to timely pay court costs and fines. In February 1998, he was required to register as a repeat offender (referred to as "criminal registration") because of his arrest record at that point. (SOR 1.d) Applicant admitted this allegation, but the record does not provide any further detail about this allegation. (Answer; Gx. 2; Gx. 5; Tr. 65)

In March 1998, Applicant was arrested and charged with aggravated assault (SOR 1.e). Applicant believes the charge stemmed from a bar fight that he was not involved in. He was arrested after he left the bar and was found in possession of a knife. The charges were later dismissed because there were no witnesses to support the charge. (Answer; Gx. 2; Gx. 5)

In March 2001, Applicant was charged with misdemeanor battery. (SOR 1.f) Although Applicant admitted this allegation, the charge does not appear in the arrest records presented by the Government. A March 2003 arrest for battery was discussed with Applicant during his subject interview (SI) with a Government investigator in November 2011. However, he could not recall any details about the charge or what may have led to an arrest. (Answer; Gx. 2; Gx. 3; Gx. 5)

In July 2001, Applicant was arrested and charged with driving under the influence of alcohol or drugs (DUI). (SOR 1.g) The charge was dismissed, but Applicant has no recollection of this arrest. (Answer; Gx. 2; Gx. 5)

In September 2001, Applicant was charged with reckless driving and driving on a suspended license. He was subsequently charged in December 2001 for failing to appear in response to the September 2001 charges. (SOR 1.h) In March 2003, all charges were dismissed after a 12-month deferred adjudication. Although his license had been suspended, Applicant was not driving illegally because he was still allowed to drive to work. (Answer; Gx. 2; Gx. 3; Gx. 5)

SOR 1.i alleged that in November 2001, while awaiting disposition of the charges listed in SOR 1.h, Applicant was charged with providing false information on an accident report and obstruction of justice. In January 2002, adjudication was withheld pending completion of six months of probation, payment of a fine, and performance of 20 hours of community service. In discussing this event during his SI, Applicant recalled rear ending another car in 2000 and being ticketed. He denied giving false information and, despite admitting to this SOR allegation, claims he was not aware of the charges. (Answer; Gx. 2)

Between April 2004 and May 2005, Applicant and his infant son were living with Applicant's friend after Applicant and his child's mother split up. Applicant's friend, who recently died accidentally, was a drug dealer. Large amounts of marijuana were stored in their apartment, but no sales actually took place there. On May 4, 2005, Applicant and the other residents were arrested by police at the house and charged with various drug-related offenses. Applicant was charged with misdemeanor possession of marijuana and drug paraphernalia. In October 2005, he was placed on one year probation, assessed about \$500 in fines and court costs, and adjudication of the charges was deferred. (SOR 1.j) Applicant averred that he was only arrested because he was in the house and the drugs were in a common area. He denied any knowledge of or participation in drug trafficking, or that he actually possessed any drugs. However, the police report he provided in response to DOD interrogatories stated that plastic bags commonly used to package marijuana for sale were found in Applicant's bedroom, and

that marijuana was found in plain sight in the kitchen and other common areas of the residence. Applicant was not incarcerated, and he later pleaded guilty to the misdemeanor charges because he could not afford a lawyer. (Answer; Gx. 1 - 3; Gx. 5; Tr. 32, 57)

In February 2007, Applicant was cited for having an open container of alcohol. (SOR 1.k) In his SI, Applicant denied ever having been charged with this offense. However, a police report he provided in response to DOD interrogatories supports the allegation. Applicant was walking on a public sidewalk with a plastic cup containing beer he had bought at a nearby bar. In May 2008, Applicant was arrested for violating probation (SOR 1.l), ostensibly because of the 2007 open container charge. Applicant admitted the SOR allegation, but had denied in his SI that he had been charged with open container. (Answer; Gx. 2; Gx. 3)

On September 6, 2008, Applicant was driving to see his son, but was stopped for speeding. A check by police revealed there was a May 2008 outstanding warrant for his arrest for failure to appear on a violation of probation charge. Applicant was arrested and an inventory search of the car produced a backpack containing 4.4 grams of marijuana and a pipe containing marijuana residue. According to a police report provided by Applicant in response to DOD interrogatories, he admitted the marijuana was his but that he had packed it two weeks earlier and forgot it was in the car. Applicant was arrested and charged with misdemeanor possession of marijuana and drug paraphernalia. He also had to answer the probation violation and failure to appear charges that provided probable cause for the search of his car. In November 2008, he pleaded guilty to all charges, was assessed a \$688 fine, and was placed on 180 days of house arrest. He was also ordered to complete a substance abuse evaluation, his driver's license was suspended for two years, and he was subjected to random drug testing. (SOR 1.m) At his SI and in his testimony, Applicant claimed that the marijuana was in a diaper bag that the boy's mother had left in the car during a previous visit, and he claimed the marijuana must have been hers. As his son at that time had been out of diapers for about two years, Applicant claimed that the bag and its contraband had been in the car for over a year and had been forgotten. Applicant repeated this version of events in his testimony. (Answer; Gx. 1 - 3; Gx. 5; Tr. 31 - 32)

Applicant averred that he has never used illegal drugs. None of the court-ordered drug tests detected any illegal drugs.

When Applicant submitted his eQIP, he disclosed that he was about \$9,000 in arrears on his child support payments. Available information on which the SOR was based showed his past-due payments totaled \$3,004. (SOR 2.d) He also disclosed that he owed about \$5,000 for a vehicle that was repossessed. Available information on which the SOR was based showed he owes \$2,141 for the balance due after the vehicle was resold. (SOR 2.e) Applicant established that he incurred both delinquencies when he lost his television job in 2006. In May 2013, Applicant and the lender had agreed to a lump sum, principal only payment. After the hearing, he again contacted the creditor for the car loan to ask if he could make monthly payments. The lender did not approve and

referred Applicant to the deal they struck in May. Applicant has not made any payments on this debt. (Answer; Gx. 1; Gx. 2; Gx. 4; Gx. 6; Gx. 7; Ax. A; Tr. 49 - 50)

Applicant has made progress in repaying his child support arrearage. Monthly payments of \$550 are being deducted from his paycheck. The original amount he was ordered to pay each month was \$610, but his obligation was adjusted over the years in response to his and the boy's mother's changing circumstances. The current payment includes money assigned to the missed payments. The arrearage has also been reduced through annual diversion of his income tax refunds. The total amount past-due is now about \$1,470. (Gx. 4; Ax. A; Tr. 26 - 27, 35 - 43, 53)

In response to the SOR, Applicant acknowledged that he owed \$634 for a past-due cell phone account (SOR 2.c). In response to DOD interrogatories, he claimed he settled the debt for \$126.87 in May 2013, but he did not provide any support for his claim. At hearing, he testified that he was still trying to resolve this debt. He denied the other debts alleged, which total \$1,955 (SOR 2.a, 2.b, 2.f, 2.g). The Government's information, including his discussion of these debts and credit reports obtained during the background investigation, supports the allegations. Applicant allowed at hearing that the insurance debt at SOR 2.g may be related to the repossessed vehicle addressed in SOR 2.e. As to the \$905 credit card debt alleged at SOR 2.b, Applicant believes this was generated through theft of his personal information. (Gx. 2; Gx. 4; Gx. 6; Gx. 7; Ax. A; Tr. 45 - 53, 75)

Applicant is meeting all of his current obligations. However, a personal financial statement (PFS) he submitted in May 2013 showed that, after expenses, he has less than \$100 remaining each month. At his hearing, he stated that the information in the PFS has not changed since it was submitted. Applicant has not sought help from any financial counselors or other financial professionals in managing his personal finances. (Gx. 4; Tr. 76)

Applicant has a solid reputation in the workplace. His co-workers and supervisors are aware of his criminal conduct. Applicant testified he told them about the adverse information in his background because he did not expect to be hired. (Ax. A; Tr. 73 - 74)

Policies

Each security clearance 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 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:

⁵ See Directive. 6.3.

(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 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 interest⁶ 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.⁷

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.⁸

Analysis

Criminal Conduct

The Government's information, combined with Applicant's admissions to the SOR 1.a - 1.l allegations, reflect an extensive history of criminal conduct. Applicant's

⁶ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; AG ¶ 2(b).

numerous arrests between 1995 and 2008 support application of those security concerns 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.

More specifically, available information requires application of the following AG ¶ 31 disqualifying conditions:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

In 1995, 2005, and 2008, Applicant was convicted of drug-related offenses that required varying degrees of incarceration. He was also arrested multiple times for violating the terms of his probation from those offenses. Although some of the charges were dropped because there was no basis for prosecution, Applicant's record of drug-related conduct and other offenses over the course of his adult life presents a significant security risk.

In response, Applicant avers that his circumstances have changed and that he has matured significantly in the past few years. I have considered the following AG ¶ 32 mitigating conditions:

- (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;
- (c) evidence that the person did not commit the offense; and
- (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.

As to the offenses alleged at SOR 1.e, 1.f, and 1.g, the record either is not sufficient to support the SOR allegations, or the underlying charges were dismissed for want of evidence. AG ¶ 32(c) applies here. As to AG ¶¶ 32(a) and 32(d), Applicant presented information showing he has a good reputation at work, and that his co-workers and supervisors are aware of his criminal record. He also claims his last arrest,

almost six years ago, was for possession of marijuana that belonged to his son's mother and that he was not culpable. However, Applicant's testimony conflicts with what he told police at the time of his arrest. A similar discrepancy exists between Applicant's statements about his 2005 arrest for drug possession and the version contained in the police report. In discussing his 2008 arrest for a probation violation, Applicant denied that he was cited in 2007 for the underlying charge of open container. However, information he provided documented the open container charge.

Despite leaving his home town in the late 1990s to get away from circumstances that had promoted his earlier criminal conduct, Applicant's criminal conduct continued. All of the foregoing undermines confidence in his claims of rehabilitation and precludes full application of AG ¶¶ 32(a) and 32(d). On balance, I conclude Applicant did not mitigate the security concerns about his criminal conduct.

Financial Considerations

Applicant accrued significant unpaid or past-due debt consisting mostly of a child support arrearage and the remainder after resale of a repossessed vehicle. Available information also attributes to Applicant five other delinquent debts that remain unpaid. These facts are sufficient to raise a security concern about Applicant's finances. That concern is expressed, 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, available 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*).

I have also considered the following AG ¶ 20 mitigating conditions:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

To his credit, Applicant has paid down his child support debt to roughly half of the amount alleged in the SOR. His past-due debts generally arose from his loss of employment in 2006, and Applicant is meeting all of his current obligations. He claimed he settled SOR 2.c, but he did not corroborate his claim. He also claimed identity theft as the reason for the debt at SOR 2.b, and that he resolved other debts. However, they still appear on his credit reports and he provided no proof of payment. Applicant's ability to pay is also in question given his cash flow of less than \$100 each month. Available information does not support application of the mitigating conditions listed above. On balance, Applicant has not presented sufficient information to mitigate the security concerns about his finances.

Whole-Person Concept

I have evaluated the facts and have applied the appropriate adjudicative factors under Guidelines J and F. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 36 years old and presumed to be a mature, responsible adult. In many respects, the positive changes in his personal and professional circumstances support that presumption. He disclosed his past criminal conduct to his current employer, and he has done what he can to provide for his son. However, concerns about his criminal conduct are not mitigated, chiefly because he did not sufficiently account for his most recent arrests. Applicant's burden of establishing rehabilitation is significant given the scope of his arrest record. His inconsistent statements about some of his arrests indicates he is unwilling to fully accept responsibility for his conduct. Likewise, as to his finances, Applicant told adjudicators that he had resolved some debts, but later had to acknowledge that all but one of his debts remain unresolved. His lack of action and his limited resources indicate that resolution of his remaining debts is not likely to happen in the foreseeable future. As a result, the totality of positive information about his current circumstances is not sufficient to overcome the security concerns raised by the facts established by the Government's information.

Accordingly, 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 J:	AGAINST APPLICANT
Subparagraphs 1.a - 1.m:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a - 2.g:	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