



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



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|----------------------------------|---|------------------------|
| In the matter of: |) | |
| |) | |
| [NAME REDACTED] |) | ISCR Case No. 15-01165 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Douglas Velvel, Esq., Department Counsel
For Applicant: Patrick K. Karody, Esq.

08/29/2016

Decision

MALONE, Matthew E., Administrative Judge:

Applicant mitigated the security concerns raised by his financial problems and his arrest record. Available information did not establish that he intended to make a false statement or to mislead the Government by omitting information about his arrest record from his most recent security clearance application. His request for a security clearance is granted.

Statement of the Case

On August 13, 2012, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain eligibility for a security clearance required for his employment with a defense contractor. Based on the results of the ensuing background investigation, Department of Defense (DOD) adjudicators could not

determine that it is clearly consistent with the national interest for Applicant to continue to hold a security clearance.¹

On November 2, 2015, DOD issued a Statement of Reasons (SOR) alleging facts which raise security concerns addressed under the adjudicative guidelines² for financial considerations (Guideline F) and personal conduct (Guideline E). Applicant timely responded to the SOR (Answer), provided Enclosures 1 - 9 thereto, and requested a hearing. The case was assigned to me on March 24, 2016, and I convened a hearing on April 26, 2016. The parties appeared as scheduled. Department Counsel presented Government Exhibits (Gx.) 1 - 5. Applicant and one other witness testified. Applicant also presented Applicant's Exhibits (Ax.) A - R. A transcript of the hearing (Tr.) was received on May 4, 2016. The record closed the same day when I received Applicant's post-hearing submissions, which were admitted without objection as Ax. S and Ax. T.

Findings of Fact

Under Guideline F, the Government alleged that Applicant filed Chapter 7 bankruptcy petitions in March 2011 (SOR 1.a) and October 2011 (SOR 1.b), both of which were dismissed. It was further alleged that Applicant owed at least \$31,751³ for five past-due or delinquent debts (SOR 1.c - 1.g). In response, Applicant admitted all but SOR 1.c.

Under Guideline E, the Government alleged at SOR 2.a that Applicant intentionally falsified answers in his EQIP by omitting the criminal conduct specified in SOR 2.b - 2.f. It was further alleged that in September 1992, Applicant was convicted of misdemeanor battery – domestic violence (SOR 2.b); that in September 1992, Applicant was arrested and charged with felony burglary and misdemeanor damaging property – criminal mischief (SOR 2.c); that in April 1996, Applicant was convicted of misdemeanor battery - domestic violence (SOR 2.d); that in March 1997, Applicant was charged with stalking – felony battery domestic, and child neglect no great bodily harm, a 3rd degree felony (SOR 2.e); and that in January 2008, Applicant was charged with aggravated stalking after an injunction, a 3rd degree felony (SOR 2.f). Applicant admitted SOR 2.b - 2.f, but denied 2.a and that he had any intent to mislead the Government by his false answers. In addition to the facts established by Applicant's admissions, I make the following findings of fact.

Applicant is 52 years old. He and his wife have been married since September 2013. Applicant was previously married from 1995 until the marriage was annulled in

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 SOR 1.f did not list an amount owed.

2009. They had one child, a daughter now 22 years old. (Answer Enclosure 5; Gx. 1; Ax. H; Tr. 15 - 16, 34)

Applicant enlisted in the United States Navy Reserve in March 1984. He served as a drilling reservist until retiring in May 2009. He was recalled to an extended period of active duty in 2006 and 2007. (Answer Enclosure 7; Gx. 1; Ax. O; Tr. 46 - 47)

Applicant's first marriage was tumultuous. The arrests alleged in SOR 2.b - 2.f occurred during the marriage and were the result of the couple's arguments and general inability to get along. Applicant has no record of misconduct occurring either before his first marriage or since. Although not included in the SOR, Applicant was arrested in 2006 and jailed for six months for violating a protective injunction. While he was jailed, his ex-wife forged his signature on an application to refinance a VA mortgage they had obtained in 1999 to buy their home. It was a 30-year note at 5.5 percent interest. By 2006, Applicant estimates they had about \$60,000 of equity in the house. Applicant's ex-wife was able to cash out the equity by fraudulently refinancing their mortgage at a new interest rate of 9.5 percent. (Answer Enclosures 2, 4 and 6; Ax. G; Tr. 15 - 16, 51 - 53, 57 - 58)

When Applicant was released from jail and realized what had happened, he separated from his ex-wife and took action against her by filing a criminal complaint against her with local law enforcement. He immediately contacted the mortgage company that approved the refinance application. After establishing through a handwriting expert that the signature his ex-wife presented was not his, he was able to have his name removed from the deed to the house, and to have the notary's certification revoked. Applicant also learned that his ex-wife had not obtained a divorce from her previous husband as she had told him. Based on the information about her fraudulent activities and the fact that she was married to another when she married Applicant, the union was annulled as void *ab initio*. (Answer Enclosures 3 - 6; Ax. G - I; Tr. 53, 59 - 60)

For the next three or four years, Applicant worked with attorneys to try to recoup lost funds and to correct his mortgage situation. The fraudulently refinanced mortgage had become delinquent because Applicant was not a party to the refinancing agreement and was not making any monthly payments. Applicant filed bankruptcy twice in 2011 as a last resort attempt to delay foreclosure but was unsuccessful and lost the house. He also was not paying some of his other obligations because he was led to believe he would receive a significant amount of money from the new lender. He took out a loan (SOR 1.d) to cover his legal fees, but did not timely repay the loan, again relying on an expected settlement from the mortgage lender. (Answer Enclosure 1; Gx. 2 and 3; Ax. A and J; Tr. 16 - 17, 61 - 65)

The debts alleged in the SOR all resulted from Applicant's inaction until after he lost the house to foreclosure. Only the debt at SOR 1.g remains unresolved. The debts at SOR 1.c and 1.f are the same account and have been resolved, as have the rest of the debts alleged. Applicant's current finances are sound. He has received annual pay

increases over the past few years and he has not incurred any new unpayable debts since 2011. (Answer; Ax. B - F; Ax. S; Tr. 65 - 69)

When Applicant submitted his EQIP, he did not list any of the arrests alleged in the SOR. He also did not list any of his financial problems or other salient information, such as foreign travel. Applicant had submitted a similar application in 2011 but was told to resubmit it. Applicant has never before held a security clearance for his work. Instead, he has a Common Access Card (CAC) required to access a controlled, but unclassified, work computer. Applicant thought the second application was a routine requirement for his CAC and he did not take much time to complete it using a work computer. The email directing him to resubmit his application mentions both CAC and a secret clearance as the purpose of the application. In his 2011 EQIP, he disclosed some of the information that he omitted from his 2012 application. (Answer; Gx. 1; Ax. M; Ax. N; Tr. 69 - 85, 87 - 89)

Applicant has an excellent reputation for reliability and integrity among his co-workers and personal associates. He is active in his community through his volunteer work as a youth sports coach. His references include a letter written by a woman who served for a time as his child's guardian. After Applicant separated from his ex-wife, his daughter remained with her mother. The child was sexually assaulted by Applicant's ex-wife's boyfriend. The guardian remarked favorably on Applicant's character, honesty, and reliability throughout the nine months before Applicant was able to regain custody of his daughter. He since has raised the girl responsibly and always had the girl's needs in mind. His current marriage is stable and reflective of Applicant's maturity and responsibility. (Answer Enclosures 8 and 9; Ax. K; Ax. P - R; Ax. T; Tr. 34 - 40)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁴ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the 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 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 interest⁵ 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.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

Available information is sufficient to support the SOR allegations under this guideline. The facts established reasonably raise a security concern about Applicant's finances that is 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.

Applicant accrued significant delinquent debt as a result of his ex-wife's fraudulent conduct in 2006. However, his financial problems were made worse by his unfounded expectation of some sort of settlement payout or recoupment of expenses

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

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; AG ¶ 2(b).

that never occurred. Also, his decision to resort to Chapter 7 bankruptcy petitions to delay foreclosure on his home was not well taken. As a result, his debts went unpaid. The foregoing 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 pertinent 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;

(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; and

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

AG ¶ 20(a) partially applies because the circumstances that caused Applicant's financial problems no longer exist and are unlikely to recur. AG ¶ 20(b) applies because the impetus for his financial difficulties was a bad marriage to a person who deliberately and fraudulently set out to abscond with the equity in the marital residence. Applicant bears some responsibility by neglecting his debts while waiting for funds that never materialized. Nonetheless, he has since resolved his debts and demonstrated financial responsibility in his current marriage. AG ¶¶ 20(c) and 20(d) apply for the same reasons. Once it was clear that he would not recover the money he lost from the repossession of his home and the legal fees he expended, Applicant set out to pay or otherwise resolve his past-due debts. With one exception, he has been able to correct his financial problems and his current finances are again sound. On balance, available information is sufficient to mitigate the security concerns raised by the Government's information about Applicant's finances.

Personal Conduct

Available information shows that Applicant was arrested five times between 1992 and 2008 for criminal offenses related to his first marriage. The record also shows he omitted information about his arrest record from his most recent EQIP. This information was relevant and material to an informed assessment by the Government about his

suitability to hold a security clearance. A security concern is, therefore, raised about Applicant's judgment, reliability, and trustworthiness, as expressed at AG ¶ 15:

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.

As to the SOR 2.a allegation that Applicant deliberately omitted information from his EQIP in 2012, I have considered 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*). Applicant denied any intent to falsify his answers to the EQIP questions about criminal conduct. Thus, the burden remained with the Government to present sufficient reliable information to establish this controverted issue of fact.

In light of all available information probative of Applicant's intent at the time he submitted the EQIP, I conclude the Government's information is not sufficient to establish AG ¶ 16(a). Applicant's explanation for leaving the information off his 2012 EQIP was both plausible and credible. He had submitted an EQIP the year before in which he had disclosed at least some of his criminal conduct, and the guidance he was given when told to submit another EQIP was contradictory as to its purpose. Applicant's explanation that he did not carefully review the 2012 EQIP was reasonable under the circumstances presented. Omission of the required information by mistake or confusion is not disqualifying. SOR 2.a is resolved for the Applicant.

As to the misconduct addressed in SOR 2.b - 2.f, those events occurred more than eight years ago and under circumstances not likely to recur. Applicant was in a tumultuous marriage to a person of questionable character, as shown by her fraudulent activities and her unwillingness to properly care for and protect their daughter. Applicant did not engage in any such misconduct before or after the marriage, and his circumstances since he remarried in 2013 are more indicative of his judgment, trustworthiness, and reliability than the information alleged in SOR 2.b - 2.f. On balance, Applicant has mitigated the security concerns raised by his arrest record.

I also have evaluated this record in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is a Navy veteran and has been steadily employed by the same company for 24 years. Despite the problems in his first marriage, he raised his daughter responsibly and resolved his financial issues. He now is in a stable, mature marriage with his current wife. His reputation in the community and at work reflects the requisite reliability and trustworthiness of one to whom the Government might entrust its sensitive information. Applicant's personal and professional circumstances, much improved over

the past several years, show that he is unlikely to experience future financial or personal conduct adversity. A fair and commonsense assessment of the record as a whole shows that Applicant has favorably resolved the Government's doubts about his suitability for access to classified information.

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 F: | FOR APPLICANT |
| Subparagraphs 1.a - 1.g: | For Applicant |
| Paragraph 2, Guideline E: | FOR APPLICANT |
| Subparagraphs 2.a - 2.f: | For Applicant |

Conclusion

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

MATTHEW E. MALONE
Administrative Judge