



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 14-06321
)	
Applicant for Security Clearance)	

Appearances

For Government: Gina L. Marine, Esq., Department Counsel
For Applicant: *Pro se*

03/08/2016

Decision

MALONE, Matthew E., Administrative Judge:

Applicant failed to mitigate the security concerns raised by his criminal conduct and personal conduct. He also did not mitigate the security concerns raised by his unresolved financial problems. His request for a security clearance is denied.

Statement of the Case

On May 25, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to renew his 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 January 22, 2015, DOD issued a Statement of Reasons (SOR) alleging facts which raise security concerns addressed under the adjudicative guidelines² for criminal conduct (Guideline J), personal conduct (Guideline E), and financial considerations (Guideline F). Applicant timely responded to the SOR (Answer) and requested a hearing. The case was assigned to me on October 1, 2015, and I convened a hearing on October 23, 2015. The parties appeared as scheduled. Department Counsel presented Government Exhibits (Gx.) 1 - 10. Applicant and one witness testified. Applicant also presented Applicant's Exhibits (Ax.) A - D. All exhibits were admitted without objection. Additionally, I held the record open until November 6, 2015, so that Applicant could submit additional relevant information. However, Applicant did not provide a post-hearing submission. DOHA received a transcript of the hearing (Tr.) on November 6, 2015.

Findings of Fact

Under Guideline J (SOR 1.a), the Government alleged that in January 2004, Applicant was charged with sexual battery - capital felony, 3rd degree felony child abuse, two counts of misdemeanor violation of a protective injunction against domestic violence, and 3rd degree felony neglect of a child. SOR 1.a further represented that in a January 2006 plea agreement, he was found guilty of the 3rd felony degree child abuse and the misdemeanor violation of a protective injunction charges. The other two charges were not further prosecuted, and Applicant was assessed a fine and court costs, and placed on a total of five years of supervised probation for both convictions. (SOR 1.a) The foregoing was cross-alleged under Guideline E. (SOR 2.a)

Under Guideline F, the Government alleged that Applicant owed \$124,658 for four past-due or delinquent debts (SOR 3.a - 3.d), the largest of which was a delinquent \$124,074 mortgage debt (SOR 3.a); and that he was 120 days past due for a mortgage, with the property secured by that mortgage being in foreclosure. (SOR 3.e)

Applicant admitted, with explanations, the SOR 1.a allegations. (Answer; Tr. 60 - 62) He denied, with explanations, the SOR 2.a and 3.a - 3.e allegations. (Answer) In addition to the facts established by Applicant's admissions, I make the following findings of fact.

Applicant is 69 years old. He and his wife have been married since August 1993. Applicant was also married from 1969 until divorcing in 1993. From both marriages, Applicant has two children of his own, now in their forties, and seven stepchildren

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).

between the ages of 24 and 43. His youngest child is a girl born in 1991 to Applicant's current wife. Applicant adopted the girl as his own when she was 18 months old. (Gx. 1; Gx. 2; Tr. 120)

Applicant enlisted in the U.S. Navy in August 1964. He served until April 1976, when, after advancing to radioman chief petty officer (RMC), he was commissioned as a limited duty officer (LDO). Applicant continued to serve until retiring in June 1988 as a lieutenant commander with 24 years of honorable service. (Gx. 1; Gx. 2)

After he retired from the Navy, Applicant worked in the defense contracting industry both as a direct employee and as an independent consultant. Most recently, Applicant entered into a joint venture with a small defense contractor that was bought by another company that is the current sponsor of Applicant's request for clearance. He has held a security clearance continuously and at various levels during his Navy career and since he retired in 1988. As noted below, the adverse information that is at issue in this case was the subject of an interview of Applicant by Government investigators in March 2005; however, available information shows that only during the background investigation subsequent to his 2013 EQIP was this information used to question Applicant's suitability for access to classified information. It is possible only his access to sensitive compartmented information (SCI) was revoked, but he has retained his clearance without interruption. (Gx. 1; Gx. 2; Tr. 62 - 62, 120 - 121)

In February 2004, Applicant was indicted for sexual battery, a capital felony; for lewd and lascivious behavior, a first degree felony; and for two misdemeanor counts of violating an injunctive protection order. He turned himself in to the local police on January 4, 2004, and was released on bail soon after. The charges were amended in February 2004 to add a charge of child neglect. In January 2006, the charges were further amended to change the charge of lewd and lascivious behavior to one of child abuse, a third degree felony. Applicant pleaded guilty on January 10, 2006, to the charges of child abuse and violating a protection order. The sexual battery and child neglect charges were entered as *nolle prosequi*. He was placed on five years probation, assessed fines and court costs, and ordered to complete counseling and therapy for sex addiction. He was not required to register as a sex offender. Applicant completed all of the court-imposed requirements and was released from probation two years early. (Answer; Gx. 1; Gx. 2 - 7; Ax. C)

According to the final version of the indictments to which Applicant pleaded guilty in January 2006 (Gx. 6), and the information about those charges contained in police investigative records (Gx. 7), in 2003, Applicant committed several acts of sexually inappropriate behavior with his adopted daughter. She was 12 years old at the time. Those acts included touching the girl's breasts as he observed that she was developing in puberty. Also, he slept in the same bed as the girl on several occasions, but he did not engage in intercourse with her. It also appears he engaged in other sexual acts with the girl beginning when she was about seven years old. Information produced in interviews with the girl (victim), her mother, and her mother's sister suggests that, at various times over the course of several years, Applicant placed his mouth on his

daughter's vagina, put her hand on his penis, and had her watch pornographic videos with him.

The victim brought Applicant's conduct to her mother's attention after her mother became upset about the fact that Applicant had been having an affair with the mother's sister beginning in July 2003. Applicant has admitted inappropriate touching of his daughter's breasts in November 2003 and that he violated his daughter's "boundaries." He also claimed that the pornography in question was on the victim's computer, and that Applicant regrets not making her remove it or counseling her about it. Applicant further asserts that, at the time, his conduct was influenced by his addiction to alcohol, and that his drinking had become markedly worse in July 2003. Police reports contain statements by Applicant's wife and the victim that corroborate Applicant's alcoholism. His wife expressed her hope that Applicant would get help with his drinking. She also stated her belief that Applicant would not repeat his sexual misconduct in the future. She further hoped that Applicant would not have to spend time in jail, and that he would not lose his security clearance so he could keep working to support their family. In this regard, Applicant's wife cited medical problems she has had that prevent her from working. (Answer; Gx. 7; Tr. 102 - 116)

As to the charges that Applicant twice violated injunctive protection orders, pending the outcome of the other charges against him, he was ordered to have no contact with his daughter. However, when all concerned were required to appear at the courthouse for a preliminary hearing, the girl saw Applicant and went to hug him. On another occasion, Applicant attended a church service, but did not know that his wife and daughter had also begun attending the same church. Again, the girl went to Applicant when she saw him. Applicant did not live with his wife and daughter from November 2003 until February 2005. (Answer; Gx. 2 - 4; Gx. 7)

Applicant disclosed his arrests and his problems with alcohol to his facility security officer (FSO) at or near the time of his arrest in January 2004. At that time, he had stopped drinking and was in intensive outpatient alcohol rehabilitation. Based on an adverse information report submitted by Applicant's FSO, he was interviewed by a Government investigator on March 3, 2005. When Applicant submitted his EQIP, he disclosed the same information. On June 2013, he was again interviewed by a Government investigator about the allegations at SOR 1.a, and about the financial alleged at SOR 3.a - 3.e. Applicant had disclosed that information in his 2013 EQIP as well. (Answer; Gx. 1 - Gx. 4; Ax. B; Tr. 63 - 64)

During Applicant's June 2013 subject interview, he gave the investigator a letter written by his daughter, who was then 22 years old. That letter was also presented at hearing. In it, the purported author "disclaim[ed] the charges filed and eventual felony conviction related to . . . , the victim identified by the police and court proceedings." The author goes on to state that Applicant "has accepted responsibility for what can be categorized as boundary issues," and that his poor judgment was the result of alcohol, which he has not used since the incident in question. The author goes on to say that she and Applicant "have enjoyed a normal and happy reunion and relationship for over

three years now.” Taken in context, that reunion occurred in about 2010, when his daughter was about 19 years old. (Answer; Ax. A; Gx. 2; Tr. 45 - 46, 96 - 101)

In his 2013 EQIP, Applicant also disclosed several past-due or delinquent debts. Credit reports obtained during the investigation and adjudication of his application documented the debts alleged at SOR 3.a - 3.e. Applicant testified that he does not have any clear recollection of the medical debts at SOR 3.b and 3.d, but thinks they are among several bills for medical services for his wife, who has had significant health issues over several years. He has paid the debt at SOR 3.d, and he also believes he paid the debt at SOR 3.b, but he could not provide any corroborating documentation. The debt at SOR 3.c is for a cable television and internet account that transferred with him from his former residence in State A to his current residence in State B. The most recent credit report available lists this account as a “paid collection.” (Answer; Gx. 1; Gx. 2; Gx. 8 - 10; Ax. D; Tr. 65 - 67, 82 - 83)

The largest debt alleged is a \$124,074 mortgage that has been charged off as a business loss. (SOR 3.a) The mortgage at issue is a second mortgage on a house that Applicant owned in State A from 2001 until it was conveyed through a short-sale in 2012. Applicant fell behind on his ability to pay either mortgage when, in 2010, he found himself unemployed. Applicant consulted an attorney who negotiated a short-sale that clearly resolved the first mortgage. To complete the short-sale, the first mortgage holder secured approval of the SOR 3.a lender to sell the house for less than the total remaining balance of both mortgages. Applicant was relieved of his obligation for the first mortgage, but the second remains unresolved. Applicant insists that the short-sale satisfied both mortgage obligations. In support of his claim, he presented a court record showing that a mortgage related to the property at issue was satisfied in March 2012. However, it is not clear to which mortgage it pertains. Applicant also presented a November 2014 letter from him to the SOR 3.a lender requesting confirmation that he no longer is obligated for the second mortgage. No reply or other information about the mortgage was presented. (Answer; Gx. 1; Gx. 2; Gx. 8 - 10; Ax. D; Tr. 65 - 66, 69 - 81)

The debt alleged at SOR 3.e is for a delinquent mortgage on undeveloped land in State B. In 2008, Applicant bought 20 acres of land as a real estate development investment. Unfortunately, the economic recession of 2007 caused the land’s value to plummet and he was forced to sell. He executed a short-sale of all but eight acres, choosing to retain the remaining land at a monthly mortgage payment of about \$300. Eventually he could not make those payments because his income had declined and he was saddled with the costs of his legal defense for the matters addressed in SOR 1.a. (For those costs, he borrowed \$60,000 from a former employer and is repaying the loan at \$750 each month. See Tr. 92) The mortgage was foreclosed and Applicant claims he has no remaining obligation. (Answer; Gx. 1; Gx. 2; Gx. 8 - 10; Ax. D; Tr. 83 - 87)

Applicant earns sufficient income from his Navy retired pay, VA disability benefits, and Social Security to cover his routine monthly expenses. When he is engaged in consulting agreements, he earns on average another \$2,500 to \$4,000

monthly. Aside from the debts alleged in the SOR, Applicant has no other delinquent debts. (Ax. D; Tr. 120 - 123)

Applicant presented a witness who owns the defense contractor that is sponsoring Applicant's current request for clearance. Applicant is responsible for up to half of the business revenue earned by the company. She has known Applicant for about 30 years, beginning when both were in the Navy. She recommended Applicant for a position of trust, but it was unclear from her testimony that she was fully informed of the issues raised by the Government through the SOR. Applicant also provided recommendations from current and former professional associates. He has a reputation for trustworthiness and integrity, as well as professional expertise and solid performance. One letter is from a former associate who was Applicant's FSO when he was arrested, and corroborates Applicant's statement that he timely disclosed his criminal charges and his alcohol problems. (Ax. B; Tr. 47 - 59)

Applicant also provided several letters of recommendation and support. Two of the letters were submitted by fellow members of the church Applicant has attended for the past 11 years. Applicant began his alcoholism recovery through intensive inpatient treatment in November 2003 and subsequent participation in Alcoholics Anonymous (AA) for another year or two. Since about 2004, he has participated in a faith-based 12-step recovery program through his new church. Both letters from his fellow parishioners show that Applicant is active and fully vested in the church's recovery group. They also extol Applicant's leadership in the church's volunteer and missionary work. (Ax. B)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,³ 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.

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

³ See Directive. 6.3.

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 interest⁴ 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.⁵ 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.⁶

Analysis

Criminal Conduct

The Government presented sufficient information to support the criminal conduct allegations at SOR 1.a. Applicant was convicted of two counts of misdemeanor violation of a protective injunction pertaining to his child pending the outcome of a law enforcement investigation into his conduct with his daughter. Applicant also was convicted of a third degree felony child abuse charge. This information reasonably raises a security concern addressed at AG ¶ 30:

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, these facts and circumstances require application of the disqualifying conditions at AG ¶¶ 31(a) (*a single serious crime or multiple lesser offenses*) and 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*).

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

⁵ See *Egan*, 484 U.S. at 528, 531.

⁶ See *Egan*; AG ¶ 2(b).

Of the mitigating conditions listed at AG ¶ 32, I have considered, as pertinent to these facts and circumstances, the following:

(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; 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.

The conduct for which Applicant was convicted occurred about 12 years before the SOR was issued. He completed all of his counseling requirements without issue, and he was released from supervised probation two years early. One of the factors underlying his conduct was his abuse of alcohol, which had worsened in the months leading up to his arrest. He is active in his church and, by extension, in his community. All of his references express knowledge, not otherwise specified, of accusations made against him, and they recommend him for continued access to classified information.

A remaining concern is that Applicant has tried to minimize the severity of the conduct documented by the Government's information. The letter from Applicant's daughter was admitted without objection, but I have afforded it little weight, for two reasons. First, although most of the information presented by both parties is hearsay, the rules of evidence are relaxed in these adjudications to allow the development of a full record of reliable information on which an informed decision about Applicant's suitability for access may be based. While the police records provided by the Government fall loosely within the business records or official records exceptions to the hearsay rule, Applicant's daughter's letter does not. Second, although the letters of reference may be afforded some persuasive value as the authors' observations of Applicant's conduct in different facets of his current life, his daughter's letter offers to contradict the validity of Applicant's felony conviction. The DOHA Appeal Board has consistently held that a person is collaterally estopped from relitigating facts and findings from a previous felony conviction.⁷ Even were Applicant allowed to contest the basis of his 2006 felony conviction, there was no opportunity to cross examine the author of the letter to establish its value.

Applicant did not fully establish that he has accepted responsibility for the conduct of which he was convicted. Without such acceptance, and given the serious nature of the conduct at issue here, the passage of time and change of circumstances

⁷ DOHA Appeal Board Decision, ISCR Case No. 96-0525 (June 17, 1997); DOHA Appeal Board Decision, ISCR Case 99-0116 (May 1, 2000); DOHA Appeal Board Decision, ISCR Case No. 04-05712 (October 31, 2006).

are not enough to mitigate the security concerns raised by the Government's information.

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.

More specifically, this record supports 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;

(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.

AG ¶ 20(a) does not apply because most of the total debt at issue is still unresolved. AG ¶ 20(b) only applies to SOR 3.a, the second mortgage on his home in

State A. This debt arose after he lost work and was eventually unable to make his monthly payments. However, to be fully applicable, Applicant was required to show that he acted responsibly in trying to resolve the debt. It may be that the short sale of the first mortgage absolved him of his obligation to pay off the second. However, he did not present documentation that supports this claim. None of the other debts arose from unforeseen circumstances. I include the delinquent land investment debt at SOR 3.e here, because Applicant decided to retain the land secured by that mortgage at the same time he liquidated the rest of his land holdings through short sale. It was completely within his control to take that risk. He did not present information showing he has paid or otherwise resolved that debt.

As to the debts at SOR 3.b - 3.d, he has resolved those debts. AG 20(d) applies. None of the remaining mitigating conditions apply. Applicant did not support his claims that any of the debts are not valid and he did not establish that he has received financial counseling or other professional help in resolving his debts. He also did not establish that his finances are under control. To the contrary, he is repaying a business loan he obtained to fund his legal defense, and available information does not show that he has resolved or is repaying the debts at SOR 3.a and 3.e. On balance, available information is not sufficient to mitigate the security concerns raised by the Government's information about Applicant's finances.

Personal Conduct

The same information that raised security concerns about criminal conduct reasonably cast doubt on Applicant's personal conduct, as well. The security concern in this regard is stated 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.

I have considered the following AG ¶ 16 disqualifying conditions as potentially applicable to these facts and circumstances:

(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;

(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;

(3) a pattern of dishonesty or rule violations;

(4) evidence of significant misuse of Government or other employer's time or resources; and

(e) personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

AG ¶ 16(d) does not apply, because the adverse information presented by the Government is squarely addressed by the criminal conduct (AG ¶ 30) guideline. AG ¶ 16(e) does not apply because there is no indication that Applicant has tried to conceal his arrest or his financial problems. To the contrary, he disclosed his arrest (and his alcohol problem) to his FSO at or near the time he turned himself in to the police in January 2004. He disclosed his arrest and his delinquent debts in his 2013 EQIP. He has a good reputation among his personal and professional associates, all of whom know, at a minimum, that he was arrested and that he is an alcoholic.

Application of AG ¶ 16(c) is limited by my conclusions that the security concerns established by the Government's information about Applicant's criminal conduct and financial problems have not been mitigated. One or both of those security concerns are sufficient to disqualify Applicant from holding a security clearance.

Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraphs 3.a and 3.e:	Against Applicant
Subparagraphs 3.b - 3.d:	For 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