



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 06-21536
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: John W. Bonney, Esq.

July 3, 2008

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on June 2, 2005. On February 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline E that provide the basis for its decision to deny Applicant access to classified information. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on February 22, 2008. He answered the SOR in writing on March 5, 2008, and requested a decision without a hearing. On April 7, 2008, the government submitted a File of Relevant Material (FORM) consisting of eight exhibits (Items 1-8). DOHA forwarded a copy of the FORM to Applicant and

instructed him to respond within 30 days of receipt. On May 23, 2008, Applicant submitted his rebuttal to the FORM consisting of an affidavit from his spouse (Ex. A), to which the government did not object. On June 9, 2008, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Based on a review of the government's FORM and Applicant's response, eligibility for access to classified information is granted.

Findings of Fact

DOHA submits under Guideline E, personal conduct, that Applicant deliberately falsified his June 2, 2005, e-QIP by failing to disclose in response to question 21 that he had consulted with two health care providers in spring 2005 about a mental health related issue (SOR ¶ 1.a) and that he had falsified material facts to an investigator in January 2006 when he indicated that in August 2005 he had been evaluated by a counselor after his spouse complained to police that he wanted to hurt himself, but had not sought out any mental health counseling. Applicant denied the allegations. After consideration of the evidence of record, I make the following findings of fact.

Applicant is a 49-year-old electronics field engineer, who has worked for his current employer, a defense contractor, since September 1998 (Item 5). He has been married to his spouse since March 1990, and they have one adopted daughter who was born in March 2001 (Item 5, Item 7).

Applicant served on active duty in the United States Navy from April 1978 to April 1998 (Item 6). He held various levels of security clearance up to top secret (Item 8). In December 1984, he was awarded non-judicial punishment for possession of marijuana (Item 4, Item 5, Item 8) while he held a confidential-level security clearance (Item 8). He had a history of marijuana use that intensified when he was in the service but he ceased his drug use after the non-judicial punishment (Item 8). In about 1987, he was briefly hospitalized after becoming despondent on the breakup of a relationship (Item 7). On a DoD Personnel Security Questionnaire (DD Form 398) completed on October 26, 1987, Applicant checked off "Yes" to question 20d ["Have you ever been a patient (whether or not formally committed) in any institution primarily devoted to the treatment of marital, emotional, psychological, or personality disorders?"] but provided no detail. He listed his non-judicial punishment for marijuana possession in response to questions 21a (any arrests or charges) and 21b (any convictions) (Item 4).

Applicant's performance ratings suffered in the short term following his non-judicial punishment, but he restored his good standing in the military (Item 8) and was awarded several medals and commendations for his active duty service, including two Navy and Marine Corps Achievement Medals, three meritorious unit commendations, three good conduct medals, Navy and Armed Forces Expeditionary Medals, NATO and National Defense Service Medals, and a Southwest Asia Service Medal. In April 1998, he was granted an honorable discharge from active duty at the rank of petty officer first class after 20 years (Item 6). After he retired from active duty, Applicant worked as an

electronics technician installer for a local federal contractor from May 1998 until he started with his present employer in September 1998 (Item 5).

Sometime in spring 2005, Applicant and his spouse began experiencing marital problems around child-rearing issues. His spouse began to see a marriage counselor within a psychotherapy practice in April or May 2005 (Ex. A). Believing it would help their marriage, she told Applicant that she would leave him if he did not attend also. Applicant went to two sessions with the marriage counselor sometime that spring. At the therapist's referral, Applicant also consulted with a mental health professional on two occasions.¹ (Item 7, Item 8, Ex. A). Applicant took a prescribed antidepressant for only two days as he did not like its effect on him (Item 8).

On June 2, 2005, Applicant completed an e-QIP on which he responded negatively to question 21, "In the last 7 years, have you consulted with a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health related condition?"² Applicant disclosed on his e-QIP that he used marijuana in the service from 1982 to 1984 while he held a security clearance, and that he had been awarded non-judicial punishment in December 1984 (Item 5).

In July or August 2005, Applicant argued with his spouse. After he told her that she would like it better if he was not around, his spouse called the police and reported Applicant had expressed the desire to harm himself. The police called in a counselor from the community services board who determined he was fine. Nothing further came of it. Applicant was not required to make any follow-up appointments with the counselor, and was not prescribed any medications (Item 8).

On January 4, 2006, Applicant was interviewed by a government investigator to verify the information on his e-QIP. Applicant volunteered that he had been evaluated at his home by a community services' counselor in July or August 2005 after his spouse expressed concern to the police that he might harm himself. Applicant related he had not sought mental health related treatment on other occasions (Item 8).

On April 21, 2006, Applicant was contacted to obtain information about his previously undisclosed sessions with the marital counselor. Applicant explained that his spouse began going to a psychotherapy practice on the advice of her primary care

¹The credentials of this mental health professional are not documented in the record other than he is referred to as "Dr. [name omitted]." It is not clear whether he is a duly qualified psychiatrist, although he is a medical professional since he prescribed an antidepressant for Applicant (see Item 8).

²Applicant told a government investigator that his sessions with the mental health professional were in the spring 2005 (Item 8). Yet, his spouse indicated that she began seeing the marriage counselor in April or May 2005 (Ex. A). Applicant's sessions with the physician were at the referral of the marriage counselor, so they likely would have been in late spring at the earliest. Neither the government nor the Applicant presented any proof as to the specific dates of his two sessions. Conceivably, they could have occurred after he completed his e-QIP although Applicant never raised it as a defense to the government's allegation of falsification.

physician, and that at some point she told him she would leave him if he did not go also. Marital issues centered around the rearing of their daughter. Applicant indicated that in spring 2005, he had two sessions with the marital counselor and two consults with a doctor on the referral of the marriage therapist. Applicant added he was prescribed an antidepressant that he took for only two days. When asked why he had not disclosed these sessions on his e-QIP or during his previous subject interview, Applicant responded he had forgotten about them (Item 8).

On July 30, 2007, Applicant underwent a mental health evaluation by a DoD approved psychiatrist at DOHA's request. Applicant told the psychiatric consultant that he had been hospitalized briefly in 1987 after becoming despondent over the breakup of a relationship, and had "brief contact" with a mental health professional "as a result of marital issues, long since resolved." The psychiatric consultant opined that Applicant's judgment and reliability are good and likely to remain so (Item 7).

In response to the SOR allegations that he had deliberately concealed his mental health counseling, Applicant indicated in March 2008 his sessions were for marital counseling only and not considered consultation for a mental health condition (Item 2). On May 22, 2008, Applicant's spouse signed an affidavit to the effect that Applicant visited with the marriage counselor at her request and their benefit, and that he had no other interaction with counselors or psychiatrists except for the two occasions with the doctor on the referral of the marriage counselor (Ex. A).

Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline E, Personal Conduct

The security concern for personal conduct is set out in 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.

Applicant checked “No” in response to question 21 on his e-QIP concerning whether he had consulted with a mental health professional or another health care provider about a mental health related condition. He also denied to a government investigator in January 2006 that he had sought mental health counseling when the evidence shows in late spring 2005 he had two sessions each with a marriage counselor and with a doctor who prescribed an antidepressant for him. Applicant has consistently denied that he intended to conceal that information, placing the burden on the government to establish the willful intent required under disqualifying condition 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,” and AG ¶ 16(b), “deliberately providing false or misleading information concerning relevant facts to any employer, investigator, security official, competent medical authority, or other official government representative.”

In April 2006, Applicant told a government investigator that he had not disclosed the counseling sessions on his e-QIP or during his interview of January 2006 because he had forgotten about them. The logical inference therefrom is that Applicant would have listed the counseling sessions had he recalled them. Yet, in response to the falsification allegations two years later, Applicant indicated the sessions were for marital counseling and not sought out by him, inferring that disclosure was not required. A conclusion of deliberate falsification could warrant based on the inconsistency in his explanations, but they must be evaluated in context and in light of the record as a whole.³ Based on the record before me, I am not convinced of the government’s position that Applicant’s failure to disclose the consultations “was deliberate and motivated by a desire to steer the security investigation away from his psychological condition” (see FORM, p. 5).

The DoD’s psychiatric evaluation indicates that Applicant is “free of psychiatric labels,” so the alleged motive is not established. There is no proof of an underlying psychological condition that Applicant would have wanted to conceal. While he apparently had been hospitalized in the past and diagnosed with a “Character Disorder, NOS” (Item 7), Applicant did not conceal that hospitalization when he completed his DD Form 398 in October 1987. He responded affirmatively at that time to question 20d. “Have you ever been a patient (whether or not formally committed) in any institution primarily devoted to the treatment of marital, emotional, psychological, or personality disorders?” (Item 4). More recently, during his interview with the government investigator in January 2006, Applicant “volunteered” that he had been evaluated by a community services’ counselor at the request of the police following an argument between him and his spouse in July or August 2005. Applicant is not likely to have volunteered that information if he wanted to steer the investigation away from mental health issues.

The evidence fails to substantiate that Applicant considered his counseling in 2005 to be other than marital-related. The DoD psychiatric consultant indicated in his report of July 30, 2007, that Applicant had “[a] brief contact with a mental health professional . . . as a result of marital issues, long since resolved” (Item 7). The government submits that even if Applicant regarded his counseling as marriage therapy, Applicant was still required to respond “Yes” to question 21 on the e-QIP because the marriage therapist and physician are mental health professionals. Yet, the instructions on the form specifically exclude from the reporting requirement treatment information that involved only marital, family, or grief counseling, not related to violence by him. Given those instructions, Applicant could reasonably conclude that his counseling did

³Included in Item 8 is an “investigator’s note” indicating that Applicant had been contacted on April 21, 2006, to obtain information regarding the unlisted counseling with the marriage counselor. It is not clear that this was an in-person contact or that Applicant had any time to reflect on his responses.

not fall within the scope of question 21. Even the two sessions with the physician were at the referral of the marriage therapist and Applicant could reasonably have considered them part of his marriage therapy since he had no ongoing relationship with the physician. I am not convinced that Applicant appreciated the distinction between his marriage counseling sessions and those with the physician who prescribed an antidepressant for him.

To prove Applicant's alleged lack of candor during his January 2006 interview, the government offered an investigator's report of Applicant's unsworn declaration of that date. Applicant affirmed in November 2007 that the report of investigator was inaccurate only to the extent it mis-stated the first name of his deceased father-in-law so he does not dispute that he told the agent he had not sought out any mental health treatment ("SUBJECT HAS NOT SOUGHT MENTAL HEALTH RELATED TREATMENT ON ANY OTHER OCCASIONS." Item 8). The statement was not shown to be false, since Applicant did not seek out the counseling in spring 2005 for a perceived mental health issue. He complied with his spouse's request in order to save his marriage. Applicant exhibited no reluctance to discuss his counseling when contacted in April 2006. The record as a whole does not warrant a finding of willful omission or concealment, so neither AG ¶ 16(a) or AG ¶ 16(b) apply.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has a history of candid disclosure, including of previous drug use, a drug-related non-judicial punishment, and even hospitalization for a mental health issue. His failure to disclose four therapy sessions (two with a marriage therapist and two with a medical professional) was not with intent to conceal or deceive. His subsequent disclosures to a government

investigator of the details of this counseling as well as of a July/August 2005 mental status evaluation show his representations can be relied on, and a recent evaluation by a DoD psychiatric consultant confirms he does not suffer from any psychological condition that could impact his judgment, reliability, or trustworthiness.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant

Conclusion

In light of all of the circumstances, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

ELIZABETH M. MATCHINSKI
Administrative Judge