



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 12-04903
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esquire, Department Counsel

For Applicant: *Pro se*

June 17, 2013

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigation Processing (e-QIP) on May 13, 2011. (Item 5.) On September 14, 2012, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H (Drug Involvement), J (Criminal Conduct), and G (Alcohol Consumption) concerning Applicant. The action was taken under Executive Order (EO) 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on October 3, 2012. (Item 3.) He subsequently submitted an undated Answer to the SOR, and requested a decision be made without a hearing. (Item 4.) Department Counsel submitted a File of Relevant Material (FORM) to Applicant on December 6, 2012. Applicant received the FORM on December 20, 2012, and was given 30 days to submit any additional information. Applicant elected not to submit any additional information. The case was assigned to

me on February 19, 2013. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Findings of Fact

Applicant is 41, and married. He is employed by a defense contractor and seeks to obtain a security clearance in connection with his employment. Applicant admitted all of the allegations in the SOR, with the exception of allegations 1.b, and 3.e. Those admissions are findings of fact. Applicant's admissions are incorporated into the following findings of fact.¹

Paragraph 1 (Guideline H, Drug Involvement)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he used illegal drugs.

1.a. Applicant admits he purchased and used heroin in 2010 as well as earlier. He further states in his Answer, "Admit used until I could get on suboxone [prescription] and less like opiate and less habit forming than methadone." In Section 23 of his e-QIP (Item 5) he admits using illegal drugs and goes on to state that he was prescribed suboxone in January 2011.²

1.b. Applicant denied that he had purchased and used prescription painkillers in 2010. In his Answer he stated, "Disagree never purchased may have been [prescribed] or given." There is no evidence that Applicant misused prescription painkillers. I find this allegation to be unproved due to lack of evidence and it is found for Applicant.

1.c. Applicant admits that he was on a methadone program from 2002 to December 2009. He further states in his Answer, "Admit what is wrong with getting help." In Section 23 of his e-QIP (Item 5) he admits to a methadone prescription in January 2010 in connection with the hospitalization discussed in allegation 3.a.³

¹Item 6 of the FORM is a Report of Investigation (ROI) from the Office of Personnel Management consisting of a Personal Subject Interview of Applicant. Section 5 of EO 10865, and paragraph E3.1.20, Additional Procedural Guidance of the Directive, state that an ROI requires authentication before it can be considered. Authentication can consist of Applicant affirmatively adopting the ROI in writing. Such authentication or adoption is not present in this case. Accordingly, I have not considered Item 6 in making this Decision.

²"SUBOXONE Film is a narcotic medication indicated for the maintenance treatment of opioid dependence, available only by prescription, and must be taken under a doctor's care as prescribed." (Reckitt Benckiser Pharmaceuticals, Home <http://www.suboxone.com/> (accessed June 13, 2013).) (Emphasis in original.)

³"**Methadone** . . . is a synthetic opioid. It is used medically as an analgesic and a maintenance anti-addictive and reductive preparation for use by patients with opioid dependency." (Wikipedia, *Methadone* <http://en.wikipedia.org/wiki/Methadone> (accessed June 13, 2013).) (Emphasis in original.)

1.d. Applicant admits that he received drug treatment counseling from January to July 2011 where he was diagnosed with drug abuse. In his Answer he stated, "Admit again what is wrong with getting help and I think this was before 2011."

Paragraph 2 (Guideline J - Criminal Conduct)

Government alleges under this paragraph that Applicant has engaged in criminal conduct.

2.a. Applicant admits that he was arrested in 1990 and charged with armed robbery, assault to commit armed robbery, and conspiracy. He plead Nolo Contendere and received a ten year suspended sentence with five years probation. In his Answer Applicant circled the word "conspiracy." He went on to say, "I admit but no [weapons] were used and I was not involved with the robbery I was just in the car when they were caught."

2.b. Applicant admits that he was arrested for illegally discharging a firearm in May 1996. In his Answer Applicant states, "I admit I was shootin[g] tin cans in the woods."

Paragraph 3 (Guideline G, Alcohol Consumption)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he uses intoxicants to excess.

3.a. Applicant admits that he was involuntarily admitted in December 2009 to a state hospital correctional facility, pursuant to state law, for drug and alcohol treatment. He was diagnosed with chronic and habitual substance abuse.

3.b. Applicant admits that he received treatment for depression and alcohol abuse from a licensed mental health counselor for four months in 2010. He further admits that his prognosis for recover was termed as "Fair."

3.c. Applicant admits that he was arrested and charged with Driving Under the Influence of Alcohol in June 1996. In his e-QIP at Section 22 he states that the charge was "Dismissed."

3.d. Applicant admits that he was arrested and charged with Driving Under the Influence of Alcohol in June 1991. He plead guilty, was fined and lost his drivers license. In his Answer he further states, "I admit but someone else was driving my car and left I [thought] that was [dismissed] but I did [lose] my license."

3.e. Applicant denied using alcohol from age 12 to the present, sometimes to the point of intoxication. He states in his Answer, "Disagree not to point of intoxication deny some ones opinion."

As a concluding statement in his Answer, Applicant says:

Clearance or no [clearance] I no longer use illegal drugs and my alcohol use is at an all time low and in no way interferes with my work performance or [attendance]. I have a child on the way I just want to work pay my taxes and support my family I enjoy working for [his employer] and I hope to retire here. I am a hard worker and give my 100% every day.

Applicant provided no additional evidence concerning the quality of his professional performance, the level of responsibility his duties entail, or his track record with respect to handling sensitive information and observation of security procedures. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

Policies

Security clearance decisions are not made in a vacuum. When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used as appropriate 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 AG ¶ 2(a) describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order adverse to an applicant shall be a determination 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

Paragraph 1 (Guideline H - Drug Involvement)

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Drugs are defined as mood and behavior altering substances, and include: (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under AG ¶ 25 and especially considered the following:

(a) any drug abuse; and

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant admits using heroin for some period of time ending in 2010. I accept as true his statement that he is not currently using illegal drugs. He states that he is currently on a suboxone regimen with a doctor. Before that he took methadone for many years. However, as stated in allegation 3.a, he had to be involuntarily committed to a state hospital for drug and alcohol treatment in 2009. He also states that he underwent drug counseling in 2011. He submitted no evidence that he is currently in a drug treatment program, other than taking the suboxone.

I have studied all of the mitigating conditions under AG ¶ 26 and especially considered the following:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation; and
- (d) satisfactory completion of prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant offered insufficient evidence that would support mitigation under AG ¶¶ 26 (a), (b), or (d). Applicant elected not to submit any written information concerning his treatment, including a favorable prognosis by a duly qualified medical professional. Without such evidence it is not possible to find that he has a demonstrated intent not to use drugs, or that he has satisfactorily completed his drug treatment. Enough time has not passed for me to say with any degree of confidence that he will not use heroin or other illegal substances in the future. Paragraph 1 is found against Applicant.

Paragraph 2 (Guideline J - Criminal Conduct)

The security concern relating to the guideline for Criminal Conduct is set out in 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.

I have considered the disqualifying conditions under AG ¶ 31 and especially considered the following:

- (a) a single serious crime or multiple lesser offenses; and

(b) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

As stated above, Applicant was arrested for criminal offenses in 1990 and 1996. The 1990 arrest was for a very serious offense. Both of the disqualifying conditions apply to his conduct.

I have examined the mitigating conditions and there is one that applies under AG ¶ 32:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

His last arrest was over sixteen years ago, and there is no indication of a current problem with law enforcement authorities. He was 18 years old when the robbery-related incident took place. Under the particular circumstances of this case, he has mitigated the security significance of his criminal conduct. Paragraph 2 is found for Applicant.

Paragraph 3 (Guideline G - Alcohol Consumption)

The security concern relating to the guideline for Alcohol Consumption is set out in AG ¶ 21:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

Applicant admitted that he used alcohol from the age of 12 to the present, though he denied using it to intoxication. That denial is undercut by the fact of his two alcohol-related arrests for DUI in 1991 and 1996. He also had alcohol and drug treatment in 2009 and 2010.

The following disqualifying condition apply to this case under AG ¶ 22:

(a) alcohol-related incidents away from work, such as driving while under the influence, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.

I have examined the potential mitigating conditions under this paragraph and find none of them apply. AG ¶ 23(a) states that it can be mitigating when, "so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness or good judgment." In addition, AG ¶ 23(b) states that

it is mitigating where, “the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser).” Finally, AG ¶ 23(c) states that it can be mitigating where, “the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress.”

In this case Applicant has used alcohol to excess for many years. While his alcohol related arrests are in the far past, over sixteen years ago, he continues to use alcohol. In addition, he had involuntary alcohol and drug treatment in 2009, as well as alcohol treatment in 2010. It is Applicant’s burden to show that his long-standing and serious alcohol abuse was a thing of the past. He did not do so. Paragraph 3 is found against Applicant.

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 applicant’s conduct and all the circumstances. 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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a drug user, and abuser of alcohol. These situations may be under control, but Applicant did not present sufficient evidence to show that. Under AG ¶ 2(a)(3), Applicant’s conduct is recent. Based on the state of the record, I cannot find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I find that there is the potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)), and that there is a high likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me with questions and doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his drug use, and alcohol consumption at this time.

On balance, it is concluded that Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding against Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1, and 3 of the Government's Statement of Reasons. As stated above, Paragraph 2 is found for Applicant.

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 H:	AGAINST APPLICANT
Subparagraph 1.a.:	Against Applicant
Subparagraph 1.b.:	For Applicant
Subparagraph 1.c.:	Against Applicant
Subparagraph 1.d.:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant
Subparagraph 2.b.:	For Applicant
Paragraph 3, Guideline G:	AGAINST APPLICANT
Subparagraph 3.a.:	Against Applicant
Subparagraph 3.b.:	Against Applicant
Subparagraph 3.c.:	Against Applicant
Subparagraph 3.d.:	Against Applicant
Subparagraph 3.e.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge