



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



In the matter of:)	
)	
)	ISCR Case No. 12-09936
)	
Applicant for Security Clearance)	

Appearances

For Government: Bryan Olmos, Esquire, Department Counsel
For Applicant: *Pro se*

12/10/2015

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on April 12, 2012. The Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) on August 1, 2015, detailing security concerns under Guideline H, drug involvement, and guideline E. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR on August 6, 2015, and he answered it on August 24, 2015. Applicant requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on October 7, 2015, and I received the case assignment on October 13, 2015. DOHA issued a Notice of Hearing on October 14, 2015, and I convened the hearing as scheduled on October 21, 2015. The Government offered exhibits (GE) marked as GE 1 through GE 3, which were received and admitted into evidence without objection. Applicant testified. He submitted exhibits (AE) marked as AE A through AE H, which were received and admitted into evidence without objection. The record closed on October 21, 2015. DOHA received the hearing transcript (Tr.) on November 4, 2015.

Procedural Ruling

Notice

Applicant received the notice of the date, time and place of the hearing less than 15 days before the hearing. I advised Applicant of his right under ¶ E3.1.8. of the Directive to receive the notice at least 15 days before the hearing. Applicant affirmatively waived this right under the Directive. (Tr. 9-10)

Findings of Fact

In his Answer to the SOR, Applicant admitted all the factual allegations in ¶¶ 1.a, 1b, and 2.a of the SOR. His admissions are incorporated herein as findings of fact. He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 48 years old, works as a senior scientist for a DOD contractor. He began his current employment in November 2006. He receives excellent performance reviews and is well-respected for his technical skills and interpersonal abilities.¹

Applicant received a Bachelor of Science degree in electrical engineering in 1992 and a Master of Science degree in electrical engineering in 2000. He anticipates receiving a Master of Science degree in management of information systems in December 2015. He began a doctoral program in late 2011. He has completed 24 hours of course work. He recently received a doctoral student scholarship award as a result of his work in this program. He also works as a teaching assistant at the university.²

Applicant and his wife married in May 1993. They separated in April 2010, and their divorce became final in 2012. They have three children, two daughters, ages 21

¹GE 1; AE B; AE D; Tr. 23.

²GE 1; AE D; AE G; Tr. 24, 28.

and 19, and a son, age 13. His daughters are not financially dependent upon him, and he and his wife share custody of their son. He will soon be a grandfather. Both his daughters experienced serious medical issues around the time of his divorce. His oldest daughter was diagnosed with anorexia and bulimia in 2009, and the divorce aggravated her problems. After Applicant and his wife separated, his younger daughter was diagnosed with depression. His daughters' medical issues created additional financial burdens and emotional stress. His son seemed less impacted by the divorce.³

For six months after his separation, Applicant did not go out and socialize with others. In the fall of 2010, he began dating for the first time in 20 years. After finishing a marathon race in February 2011, he met an attractive, younger woman who presented herself as successful and ambitious. They shared similar interests, and began to date. In early March 2011, she told him that she had been in rehabilitation for heroin use. He did not think much about her statement and did not consider that she may have a current issue with heroin. She had not used drugs in his presence or discussed using illegal drugs. About a week later, she had a business event. She suggested they meet for dinner after her event and stay overnight at a nearby hotel. Applicant agreed.⁴

On March 19, 2011, he registered at the hotel, then walked to the hotel restaurant to meet the young woman. While he waited for her to arrive, he consumed a bottle of wine. At dinner, they consumed another bottle of wine between them. Applicant was intoxicated when he left the restaurant. Once in the hotel room, the young woman suggested they get "high". Initially, he responded that he did not do drugs. He cannot remember their entire conversation, but she eventually persuaded him to get "high" because he would experience the "best sex ever". She was sitting next to him and injected him with heroin from a needle she had. He assumes the heroin was in her purse, but he does not know. He did not purchase the heroin nor did he observe her purchase it. Within seconds, he reacted badly to the heroin. He does not know what happened after she injected him, but he remembers waking up to a beep and looking at paramedics. He was taken to the hospital and released hours later.⁵

The police interviewed Applicant and the young woman at the hospital. The police charged him with possession of a narcotic drug, a class four felony, and possession of drug paraphernalia, a class six felony.⁶ In July 2011, Applicant pled guilty to amended count three of unlawful possession or use of drug paraphernalia, a class

³GE 1; Tr. 23, 25-27, 45.

⁴GE 3; Tr. 29-31, 42.

⁵GE 3; Tr. 31-35.

⁶The police also charged the young woman, but the charges and results of her court case are unknown. GE 3; Tr. 35.

one misdemeanor. The court fined him \$100, which he paid. This is Applicant's only arrest or interaction with the criminal justice system.⁷

Applicant reported his arrest to his facility security officer (FSO), his executive vice president, and his deputy director. His employer took no disciplinary action against him. His FSO filed an incident report with the DOD CAF.⁸

Applicant denies that he uses any illegal drugs, and the record lacks any evidence of illegal drug involvement beyond the incident that led to his arrest. He consumes beer or wine, but usually not to excess. He describes his use of alcohol as two or three beers a couple of times a week. After he and his wife separated in 2010, he sought counseling during that summer, but he was not diagnosed as having any mental health issues. Applicant has a long-time lady friend, who does not use drugs or consume alcohol. None of his friends are drug users. In August 2015, Applicant voluntarily submitted to an independent drug test. The test results are negative for any illegal drugs. Applicant signed a letter of intent not use illegal drugs in the future under the penalty of immediate revocation of his security clearance.⁹

Applicant attributes the events of March 19, 2011 to "horribly poor judgment" and his irresponsible action. He realizes that he nearly died from his poor decision that night. He intends not to use drugs in the future. Since this incident, he has focused on preparing for and participating in triathlons and bike races as well as completing his master's and doctoral programs.¹⁰

Applicant's friend of more than 20 years wrote a letter of recommendation for Applicant. He describes Applicant as hardworking, honest, trustworthy, and reliable. He is aware of the incident in question and was surprised that it occurred because use of illegal drugs is out of character for Applicant. He does not believe such an incident will occur again. Applicant's current lady friend also wrote a letter of recommendation. She is aware of his one-time use of heroin and the surrounding circumstances. She has never seen him intoxicated and has absolutely no concerns that he will use illegal drugs in the future.¹¹

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief

⁷GE 2; AE H; Tr. 35-38.

⁸GE 2.

⁹Response to SOR; AE A; Tr. 40-442, 46, 48, 50-52.

¹⁰Response to SOR; Tr. 11-13.

¹¹AE E; AE F.

introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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 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.

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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for 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 an 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 H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

(a) 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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(a) any drug abuse (see above definition);

(g) any illegal drug use after being granted a security clearance.

While on a date in March 2011, Applicant agreed to get "high", and his female companion injected him with heroin. He possessed a security clearance at the time. The Government has established a security concern under AG ¶¶ 25(a) and 25(g).

The drug involvement guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 26(a) through ¶ 26(d), and the following are potentially applicable:

(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; and

(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; and,

(4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's use of heroin was a one-time event, which occurred almost five years ago. He nearly died as a result of this poor decision. He does not associate with the young woman who injected him with heroin and he has not placed himself in a position to be vulnerable to a similar incident. His friends, including his long-time lady friend, do not use illegal drugs. His recent drug test was negative for any illegal drug use as of the date of the test. He signed a statement of intent not to use drugs in the future, and he understands that if he does, he will lose his security clearance. The serious results from his decision have impacted Applicant in a positive way. He refocused his life towards physical exercise and furthering his education. He has developed a relationship with a woman who does not use drugs and does not consume alcohol. In reviewing all the evidence and in assessing Applicant's attitude and behavior, I am confident that he will not use illegal drugs again. He did this conduct while holding a security clearance, which is a breach of the Government's trust in him. He did so while intoxicated, which does not excuse his behavior, but was also uncharacteristic of him. He has learned a valuable lesson from his wrong decision. He has mitigated any security concerns about his future use of drugs under AG ¶ 26(a) and 26(b)(1)-(4).

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(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; 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.

Applicant exercised poor judgment when he agreed to get “high” in March 2011. He decision was impacted by his intoxication and by the prospect of “great sex”. The Government has established a security concern about his judgment in March 2011 under AG ¶¶ 16(c) and 16(e).

The personal conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶¶ 17(a) through ¶ 17(g), and the following are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

Applicant's one-time use of heroin occurred at a time in his life and under circumstances which are not likely to reoccur in his life. He clearly recognizes that he made a bad decision, which almost killed him. He has refocused his life towards positive activities, such as his exercising and biking. He returned to school to obtain his doctorate degree and to complete a second master's degree. He developed a positive relationship with a lady friend. He has no need or desire to be involved with illegal drugs. He does not have any contact with the young woman who gave him the heroin. His current friends are not illegal drug users. He told his FSO, deputy director, and executive vice president about this incident. Both his lady friend and his longtime friend who attested to his good character are aware of the incident. He cannot be coerced or manipulated because of this incident. Applicant has mitigated the personal conduct security concerns raised about his conduct in March 2011 under Guideline E.

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 an applicant's conduct and all relevant 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

The evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant made a decision almost five years ago that he sincerely regrets. He knows that he exercised poor judgment and engaged in inappropriate behavior. The Government's concern focuses more on the possibility of his exercise of poor judgment in the future than to his future use of illegal drugs. Applicant has persuaded me that he will not use heroin or any other illegal drug in the future. In deciding whether his conduct indicates that he would exercise poor judgment in handling classified material, I looked at what he has done since March 2011. He immediately distanced himself from the young woman. He refocused his energies towards triathlon and cycling training and competitions. He associates with individuals who are not involved with drugs, and he developed a long-term relationship with a caring woman. He enrolled in a doctorate program, and he is successfully moving through this program. He made his immediate management aware of his arrest arising out of his one-time heroin use. Applicant has taken numerous steps to assure that he will not make such a serious error in judgment. He learned from this incident and can be trusted to properly handle classified information and materials.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his drug involvement and personal conduct under Guidelines H and E.

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: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for a security clearance is granted.

MARY E. HENRY
Administrative Judge