



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



In the matter of:)
)
) ISCR Case No. 14-01751
)
)
Applicant for Security Clearance)

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: Michael B. Ware, Esq.

01/29/2015

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied. Applicant did not present sufficient information to mitigate security concerns for personal conduct under Guideline E.

Statement of the Case

On June 9, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for a position with a defense contractor. Applicant was granted access to classified information. On October 28, 2011, Applicant's employer filed an incident report in the Joint Personnel Adjudication system (JPAS) citing Applicant's statement to an investigator that he had used illegal drugs in the past. On December 1, 2011, Applicant submitted another e-QIP to retain his security clearance. After an investigation conducted by the Office of Personnel Management (OPM) on January 23, 2012, the Department of Defense (DOD) issued Applicant interrogatories on October 21, 2013, to clarify or augment potentially disqualifying information. Applicant responded to the interrogatories on November 12, 2013. After reviewing the results of the background investigation and Applicant's

response to the interrogatories, DOD could not make the preliminary affirmative findings required to issue a security clearance. On July 14, 2014, DOD issued a Statement of Reasons (SOR) to Applicant detailing security concerns for personal conduct under Guideline E. These actions were 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 adjudicative guidelines (AG). Applicant acknowledged receipt of the SOR on April 7, 2014.

Applicant answered the SOR on August 3, 2014. He denied the seven allegations of falsification under Guideline E. He provided detailed explanations for his answers. He did not request a hearing before an administrative judge. Department Counsel timely requested a hearing pursuant to paragraph E3.1.7 of the Directive, and was prepared to proceed on September 23, 2014. The case was assigned to me on September 26, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on October 21, 2014, for a hearing on November 17, 2014. I convened the hearing as scheduled. The Government offered seven exhibits that I marked and admitted into the record as Government exhibits (GX) 1 through 7. Applicant and two witnesses testified. DOHA received the transcript of the hearing (Tr.) on November 25, 2014.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is 29 years old. He received his general education diploma in 2002. He has been employed as a sheet metal worker in a shipyard since November 2005. He has never been married and has no children. He attended a community college for a year. (GX 1, e-QIP, dated December 1, 2011; GX 2, e-QIP, dated December 1, 2011; GX 3, Response to Interrogatories, Personal Subject Interview, dated January 23, 2012, at 1)

Applicant completed a security clearance application on June 9, 2009. In response to a question asking if he illegally used drugs in the last seven years, he responded that he had twice used opiates and cocaine in June 2006. He responded "no" to a question asking whether in the last seven years he received counseling or treatment or been ordered, advised, or asked to seek counseling or treatment for drug use. (GX 1, e-QIP, dated June 9, 2009, at 34) He was granted access to classified information.

Applicant's employer was conducting an investigation on another shipyard worker when the worker revealed the names of employees at the shipyard who were using illegal drugs. Applicant was one of the workers he named. At the time, Applicant was on temporary duty for the shipyard working on a job a significant distance from the shipyard. The employer recalled Applicant from his temporary duties to continue their

investigation. Applicant was at work early in the morning when he was advised by his supervisor that he had to immediately return to the shipyard. A flight was arranged for him to return later that afternoon. Applicant flew overnight and arrived home early the following morning. He had little if any sleep on his flight. He did not understand why he was being ordered to return to the company, and he was apprehensive. He took valium and consumed a few alcoholic beverages to relax. His mother picked him up at the airport. He received a call from the shipyard to immediately report for an interview by a company investigator. He arrived at the company early in the morning after the overnight flight. He had been awake about 36 to 48 hours. (Tr. 39-42)

Applicant told the investigator when they met that morning that he did not think he was in a good condition to talk. The investigators told him about the other shipyard worker and what he revealed to them about drug use. Applicant told the investigators that he did not know much about the other shipyard worker and had not seen him for many months. The investigators told Applicant that they knew he was a drug user who needed help and to go to rehabilitation treatment. At the end of the interrogation, Applicant volunteered to take a drug test. He took the drug test and went home. He returned to work three days later and was told he passed the drug test. He was asked to take a more detailed drug test which he did and again passed. (Tr.42-44)

The investigator reported to the company a summary of Applicant's statement to him. (GX 5, e-mail, dated October 28, 2011) Applicant's employer filed a JPAS Incident report. (GX 4, JPAS Incident report, dated October 28, 2011) The incident report and the email basically state:

- Applicant admitted being addicted to heroin when he was in his early twenties.
- He used heroin on a daily basis for at least a year, and that he spent most of his money during this time on his heroin addiction.
- He stated that he went through treatment and then became addicted to methadone during the heroin recovery.
- During his addiction he was caught breaking into houses and had other problems with the law.
- He admitted that while he was addicted to heroin he smoked crack cocaine as well.
- He smoked marijuana a long time ago.
- He stated it was possible that he used cocaine while intoxicated.
- He has been seeing a woman that regularly uses heroin and it has been in his car and residence.
- While in [the temporary duty location] Applicant admitted that he has met and drank at bars with women who later smoked marijuana in his presence.

Applicant was requested to complete a new application for a security clearance a few weeks later. He completed the e-QIP on December 1, 2011. He received assistance from his mother and father in completing this e-QIP. He responded "yes" to a similar

drug use question asking if in the last seven years he used illegal drugs. He noted that he used illegal drugs approximately seven or eight times in 2006, and had no desire to again use illegal drugs. The question concerning treatment for use of drugs is different on this e-QIP than the one completed in 2009. The treatment question in 2011 had two parts. Applicant responded “no” to the part of the question asking if he ever had been ordered, advised, or asked to seek counseling or treatment for drug use. He responded “yes” to the second part of the question asking if he ever voluntarily sought counseling or treatment for use of illegal drugs. He provided information on treatment he received from June 2006 until December 2006. (GX 2, e-QIP, dated December 1, 2011, at 26-27)

Applicant was interviewed by an OPM security investigator in January 2012. He told the investigator that he experimentally used Vicodin and cocaine together in either 2005 or 2006 approximately twice at parties. He had an adverse reaction after the first use. He tried it again in a smaller dose to see if the reaction was the same. He had another adverse reaction. He did not like the reaction from the drugs so he stopped using them after the second experimental use. He has not used drugs since and is not drug dependent. He told the investigator that he had no future intent to use illegal drugs. Applicant denied participating in any treatment for alcohol or drugs in 2006. (AX 3, Interrogatories, Personal Subject Interview, at 4)

Applicant was sent interrogatories by DOD in November 2013. In response to drug use questions, Applicant stated that he experimented with Vicodin and cocaine a couple of times in 2005. He stated that he did not enjoy the effect of the drugs so he did not continue using drugs. He never had a problem with drugs and never followed a drug use lifestyle. He only experimented with drug use a limit number of times. (GX 3, Response to Interrogatories, dated November 12, 2013)

The SOR alleges that Applicant provided false and misleading information during the security clearance process. The SOR alleges that Applicant falsified his response to an illegal drug use question on his June 9, 2009 e-QIP when he responded that he used opiates and cocaine only two times and did not disclose that he used heroin on a daily basis for at least a year in 2005-2006 (SOR 1.a). The SOR also alleges that he falsified his response to a question on the same e-QIP concerning counseling or treatment for use of drugs. He did not disclose that he received treatment for heroin addiction in 2006 (SOR 1.b). The SOR further alleges that on his December 1, 2011 e-QIP, Applicant only admitted to using illegal drugs seven or eight times in 2006 and not that he used heroin on a daily basis for at least a year in 2005-2006 (SOR 1.c). The SOR alleges that he falsified information to a security investigator in January 2012 when he disclosed that he used opiates or cocaine only on two occasion in 2005 or 2006, and did not disclose he used heroin on a daily basis for at least a year in approximately 2005-2006 (SOR 1.d). He did not disclose his treatment for heroin addiction in 2006 (SOR 1.e). The SOR alleges that in response to questions on the November 12, 2013 interrogatories concerning the use of any illegal drug, Applicant disclosed only that he used Vicodin and cocaine on two occasions in 2005 and did not disclose his use of heroin or marijuana (SOR 1.f). In response to a question on the same interrogatory, the SOR alleges Applicant falsified his response by not disclosing that he was in a counseling

and rehabilitation program in 2006 for heroin addiction (SOR 1.g). The Government's allegations concerning the extent of Applicant's drug use is based on the JPAS incident report.

At the hearing, Applicant stated that he did not specifically remember what he told the company investigator. The interrogation went on over six hours with the investigators asking different questions in different ways. The investigators were pressing him and telling him he was a drug abuser and needed to be in rehab. Applicant was also upset that the investigators ordered him home from his temporary duty assignment without explanation. Finally, he was telling them whatever he could think of to get out of the interrogation. A lot of what he told them probably stretched the truth. He had an attitude problem with the investigators. He could not remember the details of what he told the company investigators but he was flippant with them and stretched the truth to terminate the interrogation.

Applicant did not deny making any statements but he also did not agree that he had made them. He specifically denied making the statement that he sought treatment at the behest of his parents because he was addicted to heroin. He did not recall telling the investigators that he was addicted to methadone. He never received methadone during the treatment and he was never addicted to that drug. He stated that when he was offered methadone during his treatment, he did not take it and left the program with his parents' approval after a month rather than take methadone. He did not tell the investigator that he spent most of his money on heroin in 2005-2006. He admitted being charged with breaking into a house and taking property, but not for the purpose of funding addiction to any drug.¹ He admitted telling the investigators he used drugs in 2006, but he could not remember the specific number of times he stated he used drugs. He could not remember back over five years the specific number of times he used drugs. He stated he never had a drug addiction problem. He said that he was honest and truthful during the entire security clearance process. He admitted he used Vicodin and cocaine, but he could not be specific on the number of times he used illegal drugs. (Tr. 42-43, 56-69)

In responding to the counseling and rehabilitation treatment questions on the June 9, 2009 e-QIP, to the security investigator in January 2012, and the November 2013 interrogatory, Applicant answered "no" because he thought the questions referred to counseling or treatment ordered by the court or to change his lifestyle as a result of drug use. In response to the SOR, Applicant stated that he was not thinking about the treatment he participated in for his parents. He admitted that he had used heroin one time and his parents found heroin and drug paraphernalia in his room. His parents made him seek treatment although he was not an addict. He was glad his parents found the drugs because it started him in counseling and treatment. He entered the counseling and treatment program in 2006 to satisfy his parents and clear up everything with his family. He was not using or addicted to drugs. He blocked this treatment from his mind because he was embarrassed about it. He did not think about the treatment

¹ Applicant listed this conviction for petty larceny on his two e-QIPs and in response to questions from the security investigator and questions on the Interrogatory.

when he was completing the paperwork or responding to the investigator because the counseling and treatment was not court ordered. In completing the 2011 e-QIP he had help from his parents and they reminded him to include the counseling and treatment on the e-QIP. In the January 2012 interview, he just did not think of this treatment. (Tr. 44-56)

Applicant's father testified that he is one of the senior sheet metal supervisors in the shipyard. He has been with the shipyard for over 30 years and has held a security clearance for almost that entire time. Applicant has worked at the shipyard for six or seven years and works in one of the father's departments, but the father does not supervise his son. In 2011, a warehouse employee was caught with a cell camera phone in a restricted area. His toolbox was searched and drugs were found. The employee was questioned about drug use and then terminated. The employee made claims against Applicant about drug use. Per company policy, there was a follow-up investigation. Applicant was ordered back from the temporary duty assignment. As soon as Applicant got off the plane, he was told to go straight to the company. He was interrogated for over six hours. He volunteered to take a drug test, and passed a normal urinalysis drug test and a hair sample test. Since he passed the drug tests, he was not prohibited from working, and he has been on temporary duty to other areas for the company. Applicant's father was told that his son was cleared. (Tr. 29-35)

Applicant's father testified that in 2006 his son was living at home when he was in his late teens or early 20s. He never had an occasion to think his son was using illegal drugs. However, his wife discovered drugs or drug paraphernalia in their son's room that could indicate heroin use. As a family, they did not report the drugs to the police but thought the best action was to send their son to counseling and treatment for drug use. Applicant was never diagnosed during the treatment or after as being addicted to any type of drugs. (Tr. 35-39)

Applicant's supervisor for the last six months testified that he has been a supervisor at the shipyard for over two years and has a security clearance. While Applicant has only worked for him for six months, he has known Applicant on the job for over six years. During this time, Applicant has not shown any indication of illegal drug use. He has been on temporary duty with Applicant, and Applicant was always straight and functional on the job. He has never suspected Applicant of any problem with drugs or alcohol. Knowing the allegation against Applicant does not change his mind about Applicant's trustworthiness. (Tr. 18-28)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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. 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 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 the Applicant may deliberately or inadvertently fail to protect or protect classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Analysis

Personal Conduct

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, 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 ¶ 15) Personal conduct is always a security concern because it asks the central question does the person's past conduct justify confidence the person can be entrusted to properly safeguard classified information. The security clearance system depends on the individual providing correct and accurate information.

If a person conceals or provides false information, the security clearance process cannot function properly to ensure that granting access to classified information is in the best interest of the U. S. Government.

Applicant disclosed in a security clearance application he submitted on June 9, 2009, that he used illegal drugs but he did not disclose the full extent of his drug use or that he received drug abuse counseling or rehabilitation treatment. He also did not disclose the full extent of his illegal drug use and counseling and rehabilitation treatment in response to questions from an OPM security investigator or in response to questions on a Government security interrogatory. He disclosed a greater use of illegal drugs and counseling and rehabilitation treatment on his December 1, 2011 security clearance application. Applicant provided false and misleading information on the security clearance application, to the security investigator, and to interrogatory questions that raised the following security concerns under Personal Conduct Disqualifying Conditions AG ¶ 16:

- (a) the 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 eligibility or trustworthiness, or award fiduciary responsibilities; and
- (b) deliberately providing false and misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

The basic premise of the Government security clearance concern is that Applicant was not completely truthful and candid during the entire security clearance process about his use of illegal drugs and his counseling and rehabilitation treatment for drug abuse. While there is a security concern for a deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance, not every omission, concealment, or inaccurate statement is a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully with intent to deceive.

I considered the following mitigating conditions under AG ¶ 17:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advise of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under 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 cause the 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;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, untrustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant denied intentional falsification of his responses during the security clearance process. The true extent of Applicant drug use was revealed in the statement Applicant provided to his employer's investigator when he was recalled from temporary assignment in October 2011. The investigator provided a detailed outline of what Applicant revealed to them contemporaneously with the completion of the interview. (GX 5) Applicant's employer provided the information in the JPAS incident report. (GX 4) I find that none of the mitigating conditions apply. Applicant has yet to acknowledge his inaccurate responses and provide good-faith accurate answers concerning his use of illegal drugs. He repeatedly concealed his drug counseling and rehabilitation treatment. He did not receive incorrect counseling about how to respond to security questions. His deliberate inaccurate responses continue to be a security concern. The information he provided the company investigator on his use of drugs and his continued association with drug users is reliable.

Applicant did not deny providing the information reported by the investigator. Applicant revealed to the investigator a more extensive use of heroin in 2005-2006 and counseling and rehabilitation treatment for illegal drug use. He also stated that he still associates with people that use illegal drugs. Applicant said that he did not completely remember what he told the investigator. He admitted that he may have embellished his statements so the investigator would cease questioning him and terminate the interview. Applicant would not have made such a statement against his interest unless it was truthful. Even though he may not have slept for some time and he was being pressured by the investigator, he was not being tortured or pressured to such an extent that he would reveal such personally damaging information. Applicant was well aware of the

possible negative consequences for his shipyard employment for his past drug abuse. I find that Applicant provided the true extent of his past abuse of illegal drugs to his employer's investigator and the investigator candidly reported the information to the company which provided the information in the security system.

When Applicant completed a security clearance application in 2009, he knew that drug use was a serious impediment to being granted a security clearance. He knew he needed to be eligible for access to classified information to have meaningful employment with his company. When he completed the security clearance application, it had only been three years since he received counseling and rehabilitation treatment for his use of illegal drugs. He participated in the counseling and rehabilitation at the request of his parents who were exercising their role as good parents. This was a significant event in Applicant's and his family's life that it is not soon forgotten. When he completed the security clearance application in 2009, I find that Applicant knew the extent of his drug use and the counseling and rehabilitation treatment. He wanted to minimize his drug use so he deliberately downplayed the amount of his use of illegal drugs and did not report that he received drug counseling and rehabilitation treatment. I find against Applicant as to SOR 1.a and 1.b.

Applicant completed his second security clearance application in 2011 after revealing the full extent of his use of illegal drugs to his employer's investigator. His parents assisted him in completing the application. Since he had their assistance, he reported the drug counseling and rehabilitation treatment, and increased the amount of his illegal drug use. Except for the information provided to his employer's investigator, this is the most accurate and complete rendition of his illegal drug use provided by Applicant during the security clearance process. I find Applicant was candid and truthful in the 2011 security clearance application and his responses was sufficient to put the Government on notice of the extent of his drug use and treatment. I find for Applicant as to SOR 1.c.

After completing the 2011 security clearance application, Applicant was interviewed in January 2012 by an OPM investigator. Applicant reverted back to the information he provided in 2009 and downplayed his use of illegal drugs and did not admit to illegal drug use counseling and rehabilitation treatment. I find against Applicant as to SOR 1.d and 1.e.

When Application responded to the Government interrogatories in November 2013, he continued to downplay his drug use and did not report mention the counseling and rehabilitation treatment. I find against Applicant as to SOR 1.f and 1.g.

Whole Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all relevant circumstances. An 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 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. I considered the favorable information concerning Applicant and his work performance as provided by his current supervisor. I also considered that Applicant now does not abuse illegal drugs. He received counseling and rehabilitation treatment at the insistence of his parents in 2006. His work in the shipyard was excellent with no signs that he was abusing illegal drugs. He was thoroughly tested for drug use in 2011 when he was recalled from temporary duty. He passed two extensive drug tests which confirmed he was not abusing illegal drugs. I also considered the negative factor that he informed his employer's investigator that he still associates with people that use illegal drugs.

Applicant's failure to provide accurate and correct information during the security clearance process shows questionable judgment, untrustworthiness, and unreliability. The totality of his behavior indicates he may not be concerned or act responsibly in regard to classified information. Overall, the record evidence leaves me with questions and doubts as to Applicant's judgment, reliability, trustworthiness, and eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant has not mitigated security concerns arising under personal conduct guideline. Eligibility for access to classified information is denied.

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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraphs 1.d – 1.g:	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.

THOMAS M. CREAN
Administrative Judge