



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-00530
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel

For Applicant: *Pro se*

June 24, 2011

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on August 13, 2008. (Item 4.) On August 6, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, which detailed security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). 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 adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant submitted an Answer to the SOR on August 31, 2010, and requested a decision without a hearing. Department Counsel submitted a File of Relevant Material (FORM) to Applicant on December 16, 2010. Applicant received the FORM on December 27, 2010, and was given 30 days to submit any additional information. Applicant submitted additional information on January 15, 2011, which was not objected to by Department Counsel and is entered into evidence as Applicant Exhibit A. The

case was assigned to me on February 3, 2011. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is granted.

Findings of Fact

Applicant is 32, recently married with a child, and has also recently received a bachelor's degree. (Applicant Exhibit A.) He is employed by a defense contractor and seeks to obtain a security clearance in connection with his employment.

Paragraph 1 (Guideline H - Drug Involvement)

The Government alleges under Guideline H that Applicant is ineligible for clearance because he has used illegal drugs. He admitted all the allegations in the SOR. (1.a. through 1.l.) Those admissions are deemed findings of fact. His admissions and responses to DOHA interrogatories are incorporated into the findings. (Items 5, 6.)

Applicant admits that he used illegal drugs from about 1996 until May 2006. His primary drug of choice was the prescription drug Oxycontin, which he used from 2001 to May 2006. (1.b.) During that same period he also illegally purchased and used methamphetamines and methadone. (1.c. and 1.d.) From 1996 through 1998 Applicant used marijuana on multiple occasions. (1.a.) Applicant stopped all drug use in May 2006 and has not used any illegal drugs since that time. Applicant states that he does not currently use drugs and has no desire or intent to use drugs in the future. (Applicant Exhibit A.)

Applicant was arrested for drug-related offenses in 1998 and 2001. The 1998 arrest was for Possession of a Controlled Substance, Less than 20 grams of Marijuana and Possession of a Controlled Substance. He pled nolo contendere to the charges, was sentenced to probation for one year and fined. (1.l.) (Items 8 and 9.)

The December 2001 arrest was for Possession of a Controlled Instrument and Criminal Intent to Commit a Controlled Substance Crime. In that case, Applicant attempted to buy Oxycontin using a forged prescription. He pled guilty to Obtaining Drugs by Fraud and was sentenced to five years in prison, suspended pending completion of a Diversion Program. (1.k.) (Items 10, 11 and 12.)

Applicant attended the Diversion Program from June to August 2002. (1.j.) While worthwhile, Applicant was unable to shake his addiction at that time. (Items 13 and 14.)

In 2003, he again attended a drug treatment facility. (1.i.) This treatment was of short duration, and was also unsuccessful as Applicant was not ready to face his addiction. (Item 15.)

Finally, in 2006, Applicant was ready to take the major steps necessary to combat his addiction. From May to November 2006 he successively received intensive inpatient treatment, intensive outpatient treatment and finally he lived for three months

in a halfway house. (1.f., 1.g. and 1.h.) At the conclusion of his intensive outpatient treatment Applicant was given a good prognosis. (Items 16, 17 and 18.)

Paragraph 2 (Guideline E - Personal Conduct)

Government alleges in this paragraph that Applicant is ineligible for clearance because he has made false statements during the clearance screening process. Regarding both allegations under this paragraph Applicant stated in his Answer, "ADMIT -the answers were false, but not done intentionally." (Emphasis in original.)

Question 23.d. of Applicant's e-QIP asks whether he had ever been charged with or convicted of any offense related to alcohol or drugs. Applicant answered, "No." This was a false answer to a relevant question about his prior drug history. Applicant stated in Applicant Exhibit A that this was a mistake on his part, and not done with intent to deceive. He was not a veteran, had never worked for the Federal Government or a government contractor before, and was very confused when filling out the form. He could not find a supervisor to talk to, and mistakenly listened to a co-worker who said that he only had to go back seven years on the form. "I should have asked more questions because I wasn't familiar with security clearances." Applicant also informed the government investigator of the 1998 arrest during his interview two months later. The investigator did not know about that arrest. Applicant further stated:

I also was under the belief that my records were expunged or sealed. My attorneys were paid a lot of money to have this done in the past and they always told me I could answer NO to application questions regarding criminal history. I know now that all of this is irrelevant and I was supposed to disclose everything, but all these things made me feel justified in my response on the SF86. (Applicant Exhibit A at 4.)

Question 24.a. asks Applicant about his drug use history in the seven years prior to filling out the form. He said, "Yes." In addition, he specified his use was from "01/2004 (estimated)" to "06/2006 (estimated);" that he used drugs 25 times. He also stated that the drug was "Prescription Pain Medicine. I had a prescription for some, but these I did not have a prescription for. I sought and completed substance abuse treatment." The Government alleges this statement was false because Applicant did not specifically set forth that he used Oxycontin, methamphetamines, methadone, Lorcett, Vicodin and other prescription medications.

Mitigation

Applicant submitted documentary evidence showing that he is a highly respected person and employee. Applicant's Exhibit A contains letters from government employees Applicant works for. All are extremely laudatory of the Applicant.

The Chief Business Management Branch, who has known him two and half years, states that Applicant "is very [conscientious] and takes pride in the performance of his duties." She further states that Applicant was appointed as the Physical Security

Officer and Information Assurance Security Officer “based on his outstanding character and attention to details.” (Applicant’s Exhibit A at 6.)

The Chief, IA Compliance Branch, who has known Applicant four years, states that Applicant “demonstrates integrity by keeping his promises, doing what he says and treating everyone in a fair and equitable manner.” (Applicant Exhibit A at 7.)

An IT Specialist, who has worked with Applicant three years, says that Applicant is an “extremely reliable, and honest young man.” (Applicant Exhibit A at 8.)

Finally, the Logistics Manager at the center where Applicant works, who has known him ten months, says, “I know [Applicant] to be honest, dependable and courteous.” (Applicant Exhibit A at 9.)

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 (AG). 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 the adjudicative process. The administrative judge’s over-arching 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 “[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. Security clearance decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to 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. It is also true that DOHA proceedings are not designed to punish Applicants. Rather, they are designed to assess whether an Applicant can be trusted at the present time and in the future to properly safeguard classified information.

Finally, as emphasized by the President in Section 7 of Executive Order 10865, "Any determination under this order . . . 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 Drug Involvement 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.

The Applicant used prescription drugs, primarily Oxycontin, on a regular basis ending in May 2006. He also used marijuana from 1996 to 1998. I find that both of the above disqualifying conditions apply.

I have considered all of the mitigating conditions under Drug Involvement 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 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 are 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 a 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's abuse of prescription drugs, primarily Oxycontin, occurred five years ago. He engaged in a long-term process involving three different treatment regimens in 2006 to resolve his addiction. He was successful, as is shown by the "good" prognosis he received and his five years of sobriety. The documentary evidence in the record shows Applicant has matured, that he has a credible and sustainable long-term commitment not to use drugs in the future and he is now eligible for a security clearance. Paragraph 1 is found for Applicant.

Paragraph 2 (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 in any failure to provide

truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The following Disqualifying Condition is arguably applicable:

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.

With regards to his questionnaire, the evidence shows that Applicant did not intentionally falsify this document. Turning first to question 23.d., it appears that Applicant's failure to respond to this question was a combination of poor advice from co-workers, poor advice from his attorneys and his own naivete with regards to filling out government questionnaires. He was fully forthcoming during his interview with a government investigator, which occurred in October 2008, two months after he filled out the questionnaire in August.

Question 24.a. concerns Applicant's use of drugs. He admitted using prescription drugs without a prescription in 2004. Oxycontin, his drug of choice, is a prescription drug. In reality, all of the other drugs Applicant used in this time frame are also prescription drugs. While his answer could have described his drug use in greater detail, he put the Government on notice that he had used drugs and that he had undergone drug abuse treatment.

Based on all the available evidence, the following Mitigating Condition applies:

17.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.

Applicant's government co-workers, who have known him for several years, find him to be a trustworthy and believable person. Based on the totality of the evidence, I find that Applicant did not deliberately falsify his answers on the Government questionnaire. Paragraph 2 is found for the 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 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. My Guidelines H and E discussion applies here as well. Applicant engaged in drug use that ended about five years ago, after he engaged in an extensive bout of treatment. He is respected at his place of employment, credibly states he shall not use drugs in the future, and has shown that he did not deliberately falsify his questionnaire. The record shows that he has matured, understands the nature of his conduct, and credibly shows that such conduct will not happen in the future.

Applicant's conduct was serious, but there is considerable evidence of rehabilitation. Based on the state of the record, I find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I find that there is no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is no likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me without questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his Drug Involvement and Personal Conduct. On balance, I conclude that Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance.

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:

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| Paragraph 1, Guideline H: | FOR THE APPLICANT |
| Subparagraphs 1.a. through 1.l.: | For the Applicant |
| Paragraph 2, Guideline E: | FOR THE APPLICANT |
| Subparagraphs 2.a. and 2.b.: | For the 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 access to classified information is granted.

WILFORD H. ROSS
Administrative Judge