



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



In the matter of:)	
)	
)	ISCR Case No. 09-06295
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: D. Michael Lyles, Esq., Department Counsel
For Applicant: Mark Zaid, Esq.

July 29, 2011

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is granted.

Statement of the Case

On January 4, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H and E. 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 answered the SOR on March 9, 2011, and requested a hearing before an administrative judge. The case was assigned to me on April 5, 2011. DOHA issued a

Notice of Hearing on April 18, 2011. I convened the hearing as scheduled on May 23, 2011. The Government offered exhibits (GE) 1 through 6. Applicant did not object and they were admitted into evidence. Applicant testified and three witnesses testified on his behalf. He offered exhibits (AE) A through I, which were admitted into evidence without objections. The record was held open to allow Applicant to submit additional documents, which he did and it was marked as AE J, and admitted without objection. DOHA received the hearing transcript (Tr.) on June 2, 2011.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a and 1.b, and denied the remaining allegations. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 33 years old. He graduated from high school in 1996. He needs 18 credits to complete his bachelor's degree. He has never been married and has no children. He has worked for a federal contractor since about 2009.¹

Applicant has been diagnosed with obsessive compulsive disorder, attention deficit disorder, and complex regional pain syndrome (CRPS)² that was caused by nerve damage, associated with an injury and is manifested by chronic pain. He takes four types of prescribed drugs daily that help him with anxiety, pain, and sleeplessness.³

Applicant's mother testified and explained that her son had a difficult road in life. He had learning disabilities throughout school, but was not a behavioral problem. His disabilities involved an inability to comprehend the written word. He is capable of reading, but his comprehension is limited when he reads the material himself. If something is read to him, he is better able to comprehend the information. She explained that he attended classes in high school that helped him deal with his learning disability, but he always felt inferior because of it.⁴

Applicant's mother explained that he was slow to mature. However, since he moved to his present residence and has worked for his current employer, she has seen him grow immensely. She is in contact with him regularly. When he was completing his security clearance application (SCA), he contacted her by telephone and read her the questions being asked. They were both somewhat confused by certain questions, especially those that asked him for information within the last seven years.⁵

¹ Tr. 150-151.

² The condition is also referred to as reflex sympathetic dystrophy.

³ Tr. 102-105.

⁴ Tr. 66-73.

⁵ Tr. 73-78, 92-95.

Applicant experienced physical and sexual abuse by a couple of teachers when he was in grammar school and in middle school. His mother explained that in March 2007, he was in therapy once or twice a week with a psychiatrist. Around the same time, he saw the teachers who had abused him and he became extremely anxious. He was also experiencing severe pain due to his CRPS. The doctors were trying to determine the right type of drugs to administer to him. At that time, he was unable to stay home alone, unable to feed himself, or walk. It took a long time for the doctors to determine a proper pain management plan. She also described his medical issues that involved countless surgeries, epidurals, chemical meningitis, and an infection. He now has a doctor who understands how to manage his medications and regulate his chronic pain. She did not believe he could have purchased heroin in his tumultuous physical and mental state. She stated he crushed his prescribed medications, presumably for digestive purposes, and kept the crushed pills in a little bag. Since that low point in Applicant's life, his mother has observed him develop into a different person. He has matured and is an adult. Applicant's mother described him as an honest person. He loves his job and is proud of his accomplishments.⁶

Applicant admitted he was arrested in 1997 and charged with attempted possession of a controlled substance, marijuana, a misdemeanor. He admitted he attempted to purchase marijuana from a street dealer, who was an undercover policeman. He was arrested and given a ticket to appear in court. He stated he was told by the judge that the charge would be dismissed and expunged at a later date, and nothing would appear on his record, if he did not get in any further trouble. Applicant believed he did not have to disclose the arrest because of what he had been told.⁷

Applicant admitted he was arrested in July 2003 and charged with possession of a controlled substance. He spent the night in jail. He was pulled over by the police when he was driving with his girlfriend who had marijuana in the car. Applicant stated the marijuana did not belong to him. He went to court and the case was dropped due to an illegal search. He was told by the judge and his attorney that the charge was not on his record, and therefore he did not have to disclose it. Applicant no longer associates with this girlfriend or with any known drug abusers.⁸

Applicant admitted he used marijuana in the past, but ceased using it about 2003. He used it infrequently after high school and used it to ameliorate his pain.⁹

Applicant denied he illegally used street heroin in 2007. He was prescribed and told by one of his doctor's that a medication he was given was as powerful as heroin.

⁶ Tr. 81-92.

⁷ Tr. 105-109, 113-119.

⁸ Tr. 119-123.

⁹ Tr. 111-112.

He remembered when he was being sedated that the doctor told him he was being given a pharmaceutical heroin. The name of the actual drug is Dilaudid, which he believed was on the same chemical level as heroin. He was suffering from meningitis at the time. When Applicant was transferring hospitals he took the medication without authorization. He admitted he was distraught and it was a gesture for attention. This is the one time use of heroin that he disclosed to the government investigator. Applicant has not used the drug since 2007. There is no indication that he is addicted to any illegal drugs.¹⁰

Applicant explained that he did not disclose on his SCA his prior arrests for marijuana possession because he was confused and had difficulty completing and understanding the questions and paperwork. He completed the SCA in a hotel room. He has difficulty focusing on things if they are not laid out in an orderly way. He has to follow a pattern to complete tasks. He is compelled, when he receives a task, to complete it as fast as possible. He explained when he received his SCA he wanted to complete it as quickly as possible. Applicant credibly testified that he did not deliberately and intentionally conceal his arrests or illegal drug use from the government.¹¹

Applicant's doctor provided a letter stating Applicant has been his patient since March 20, 2007. He stated:

Applicant does not currently have a condition which will impair his judgment or reliability. He has an attentional deficit disorder, obsessive compulsive traits which frequently accompany an attentional deficit disorder, and a regional pain syndrome sometimes called sympathetic reflex dystrophy.¹²

His doctor described the nature of the condition, its extent and duration of the impairment and treatment as follows:

Attentional deficit disorder, sometimes called "hyperactivity" is characterized by physical hyperactivity, fidgeting, difficulty in concentration or finishing work and tendency to be distracted. It occurs in about 10% of American males. However, I believe [Applicant] has acquired many of the available coping mechanisms. The extent to which [Applicant] may be at risk for error in judgment is best estimated by his work performance. He is currently taking clonidine 2 TTS (patch) to assist him in control of the symptoms. I suspect at this point he could do well even without it because of his enthusiasm and pride in his position and performance. The obsessive compulsive traits do not reach the level of a diagnosis in that there is no functional impairment. It may cause him to take certain routes

¹⁰ Tr. 109-112, 132-136.

¹¹ Tr. 105-109, 133-142-150.

¹² GE 5.

every day or do things in a particular sequence but does not lead to impairment and may even lead to a higher striving to do perfectly in his work. The sympathetic reflex dystrophy is secondary to an injury to his left foot he incurred in the late 1990s. It is characterized by high propensity to pain from relatively minor physical contact only in specific areas, in his case the left foot and part of the left leg. At the current level of severity, it is treated with methadone 10 mg three times per day. The dose was originally 50 mg/day but has been reduced as above without any indication of addictive behavior or drug seeking. The methadone rather than codeine or oxycodone is used for its long half life which leads to smoother, more even pain control.

The prognosis for the attentional deficit disorder is excellent in that those with it develop individual strategies to prevent it from interfering. It does not become worse in time. If [Applicant] were to have difficulty from it in either judgment or reliability, I believe you would have observed those difficulties by now. The obsessive compulsive traits are stable and do not require treatment. The reflex sympathetic dystrophy tends to decline over time but it is not perfectly predictable.¹³

Applicant's coworker testified on his behalf. The coworker has known him since September 2009. Applicant was the witness's liaison with Applicant's employer, and they interacted daily from September 2009 to December 2010. He described Applicant as very methodical and task-oriented. Applicant would sometimes become overwhelmed if he did not understand a task and start to stammer and lose his thought process until he understood the task. He provided outstanding support to senior staff, who would ask for him by name. He would complete a job from start to finish. He excelled in the technical aspects of the job because he was able to break the task down. If he was confused, his performance would be affected. He could be trusted with any project and exhibited a high degree of integrity. When asked his opinion about the falsification allegations, the witness believed if Applicant was confused he would just write something down to complete the task.¹⁴

Applicant's former roommate, an E-9 in the Air Force, with 25 years on active duty, testified on his behalf. She has held a top secret clearance with access to sensitive compartmented information since 1986. She has known Applicant since November 2009. The witness had bought a house and was looking for a roommate. Applicant moved in and they were roommates for six or seven months and also had interactions professionally. She referred to him as a "misfit toy". He is a good person, tries hard to make things work, is an introvert, and a workaholic. He is very focused. She has noticed a change in him since he began working at his present job and described him as "blossoming" and maturing. Based on his personality and "foibles", she does not believe he intentionally falsified his SCA, but rather that he just wanted to

¹³ GE 5.

¹⁴ Tr. 23-41.

get through it and get it done. She explained he has a routine that he follows and when it is disrupted he has issues. He is more successful when he has someone to help him prioritize things. She has never known him to deviate from his routine. She asked him to vacate the house they shared after an incident where he burned a pizza box in the oven. This obviously broke his routine and he was a little agitated until he found a new place to live. He has adapted well in his new apartment. She believes his drug involvement was youthful indiscretion. She recommended he be granted a security clearance.¹⁵

Letters provided by coworkers and others who know him and interacted with him daily, describe Applicant as a highly technically-sound engineer. Many of the customers personally request his services due to his attention to detail, willingness to provide a permanent solution, and his tenacity to go above the call of customer service. If the problem is of a critical nature, the employer always sends Applicant to resolve it. He is a solid team member, who is loyal and understands the customer's mission. He is the person the company relies on when there is difficulty in solving a problem, because he will work until a resolution is found. He is passionate about his job and is excited when he can solve a customer's problem and make the customer happy. There is no hesitation recommending Applicant for a position of trust and a security clearance.¹⁶

Applicant explained that because of his obsessive compulsive disorder he follows certain patterns. If he has a computer problem he can understand it totally and completely. If he has to comprehend paperwork he has difficulties. He stated that if everything is laid out for him he will not have a problem. He explained that when given a task he can prioritize it, but when given something he is not familiar with, he needs time to organize it. He now has an appreciation for the security clearance process and the importance of completing the SCA correctly.¹⁷

Applicant admitted he made some bad choices in his past by using drugs. He believes his former girlfriend was a bad influence. He no longer associates with anyone who uses illegal drugs. He credibly testified that his failure to disclose information on his SCA was not intentional and he was not trying to hide information from the government. Applicant signed a statement agreeing to automatic revocation of a security clearance if he should use illegal drugs again.¹⁸

Policies

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

¹⁵ Tr. 41-66.

¹⁶ AE A, B, C, J.

¹⁷ Tr. 126-128.

¹⁸ Tr. 128-130.

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. 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, 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 and has the ultimate burden of persuasion to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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. 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 conclude the following have been raised:

- (a) any drug abuse; and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant used marijuana in his past and ceased using it around 2003. He was arrested for possession of a controlled substance in July 2003 and attempted possession of marijuana in 1997. Applicant improperly used a substance that was prescribed to him, which he believed was some form of synthetic heroin. I find the above disqualifying conditions apply.

I have considered all of the mitigating conditions under drug involvement AG ¶ 26. The following three are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's 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 are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation; and
- (c) abuse of the prescription drugs was after a severe and prolonged illness during which these drugs were prescribed, and abuse has since ended.

Applicant credibly testified that he stopped using marijuana in 2003. He explained the marijuana that was seized in his car in 2003 belonged to his girlfriend. He

no longer sees this woman and he no longer associates with anyone who uses illegal drugs. Applicant told investigators that he used heroin. Regardless of what the actual substance was, he used it contrary to his physician's direction. He has abstained from all illegal or inappropriate drug use since 2007. He is in a stable and productive environment and appears to be thriving. He signed a statement of intent with automatic revocation of clearance if he uses illegal drugs in the future. I am convinced that illegal drug use is in Applicant's past. I find a sufficient period of time has passed, and future use is unlikely to recur. I find AG ¶¶ 26(a), 26(b), and 26(c) apply.

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 conditions that could raise a security concern and may be disqualifying. I have specifically considered:

(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.

Applicant was arrested and charged in 2003 for possession of a controlled substance. He was also arrested in 1997 and charged with attempted possession of a controlled substance. He was told the charges would be expunged and would not be on his record. He believed he did not have to report them. Applicant was confused when completing the SCA. There was substantial evidence that Applicant has some learning disabilities and had difficulty understanding the questions. He sought help from his mother, but they both were confused. There was also evidence from those who know him that when he receives a task, he is compelled to finish it immediately. I have considered all of the facts and conclude that Applicant did not intentionally or deliberately omit or conceal his past drug offenses. I find none of the personal conduct disqualifying conditions apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's

conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress;
- and (9) the likelihood of continuation or recurrence.

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

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but others warrant additional comment.

Applicant has had many struggles during his life. It appears he has overcome many obstacles through perseverance and support from his family and others. He has found his niche. He receives high praise from his coworkers and excels in his performance at work. Applicant had some past transgressions when he used marijuana and a drug illegally. He has matured in his job and no longer has those negative influences in his life. I find Applicant has met his burden of persuasion. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant successfully mitigated the security concerns arising under the guidelines for Drug Involvement and Personal Conduct.

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
Subparagraphs 1.a-1.d:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 1.a-1.b:	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 a security clearance. Eligibility for access to classified information is granted.

Carol G. Ricciardello
Administrative Judge