



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



In the matter of:)
)
) ISCR Case No. 10-02982
)
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: Patrick Hill, Esquire

September 19, 2011

Decision

CREAN, THOMAS M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Statement of the Case

Applicant initially received a security clearance in 2004. On December 21, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to retain a security clearance as part of his employment with a defense contractor. On November 18, 2009, Applicant's employer properly notified the appropriate Government office that Applicant had been arrested on November 6, 2009, for possession of an illegal drug. After an investigation conducted by the Office of Personnel Management (OPM), the Defense Office of Hearings and Appeals (DOHA) issued interrogatories to Applicant to clarify or augment potentially disqualifying information in his background. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOHA could not make the preliminary affirmative findings required to issue a security clearance. On February 10, 2011, DOHA issued Applicant a Statement of Reasons (SOR) detailing security concerns for drug involvement (Guideline H) and personal conduct (Guideline 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 in the Department of Defense on September 1, 2006. Applicant acknowledged receipt of the SOR on February 15, 2011

Applicant answered the SOR in an undated response. He admitted all allegations under both Guideline H and Guideline E. The SOR alleges security concerns under Guideline H because Applicant used oxycontin five to seven times a week from approximately February 2008 until February 2010 (SOR 1.a), because he was arrested on November 16, 2009, for possession of oxycontin without a prescription (SOR 1.b), and because he illegally used oxycontin after being granted a security clearance (SOR 1.c). The SOR alleges security concerns under Guideline E because Applicant answered “no” on his security clearance application to a question concerning his use of illegal drugs in the last seven years (SOR 2.a); answered “no” to a question concerning use of illegal drugs while holding a security clearance (SOR 2.b); and provided false information to a security investigator by stating that the illegal drugs did not belong to him and that he never used illegal drugs (SOR 2.c).

Department Counsel was prepared to proceed on April 6, 2011, and the case was assigned to me on May 19, 2011. DOHA issued a Notice of Hearing on June 9, 2011, scheduling a hearing for June 21, 2011. I convened the hearing as scheduled. The Government offered five exhibits, which I marked and admitted into the record without objection as Government Exhibits (Gov. Ex.) 1 through 5. Applicant and two witnesses testified. Applicant introduced five documents, which I marked and admitted into the record without objection as Applicant Exhibits (App. Ex.) A through E. DOHA received the transcript of the hearing (Tr.) on June 28, 2011.

Procedural Issues

Department Counsel moved that SOR 1.e be amended to show the date of the alleged arrest as November 6, 2011, rather than November 16, 2011. Applicant did not object to the amendment. The motion was granted and SOR 1.e was amended to read November 6, 2011. (Tr. 14-17)

Findings of Fact

Applicant admitted factual allegations under both Guideline H and Guideline E. Applicant’s admissions are included in my findings of fact. After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is a 33-year-old single college graduate. He has a bachelor’s degree in electrical engineering with a minor in mathematics. He has worked as a systems and test engineer on the same government program for two different defense contractors since 2004. He recently was promoted to be the lead test engineer on the project. He has held a security clearance since 2004. (Tr. 23-25)

Applicant started using oxycontin in the summer of 2008 which he received illegally from a friend because of peer pressure. Oxycontin was never prescribed by a physician for him. Oxycontin is a narcotic pain reliever similar to morphine. It also may be habit forming and should be used only when prescribed by a physician. It must be taken exactly as prescribed. It must not be taken in larger amounts, used for longer than recommended by the physician, and should never be given to another person, especially someone who has a history of drug abuse or addiction. It can cause side effects that may impair thinking or reactions. Applicant would purchase the drug a few times a week from the friend. He usually used two pills a day and estimates that he was spending approximately \$2,500 monthly to purchase the illegal drugs.

In August 2009, Applicant was prescribed Loricet, another narcotic pain reliever, by a physician for injuries received while playing sports. Loricet consists of hydrocodone and tylenol. Hydrocodone is in a group of drugs called narcotic pain relievers. Acetaminophen is a less potent pain reliever that increases the effects of hydrocodone. Hydrocodone may be habit-forming and should be used only by the person for whom it was prescribed. He took Loricet for about four to six weeks until his prescription ran out. He still had some pain but never returned to his physician for a refill of Loricet. He again sought Oxycontin from his friend and continued illegally using the drug. He never used the drug at work. (Tr. 23-30, 34-38, 44-47; See Physician's Desk Reference, Medical Economics)

On November 6, 2009, Applicant was entering a local military installation for work when he was stopped at the gate for a traffic violation. A legal search of his car in conjunction with the stop revealed oxycontin tablets. Applicant was apprehended for possession of illegal drugs. His company notified security officials of the arrest. After his arrest, he started weaning himself from the oxycontin. He did not consult a physician to assist him to stop using the drug. In February 2010, Applicant entered a pre-trial drug intervention program. As part of the pre-trial program, he attended a rehabilitation and counseling program. The program consisted of 37 two-to-three-hour class sessions about three days a week. He started the program in March 2010 and completed it in July 2010. He missed some classes that conflicted with his work schedule. He started an after-care program as part of the program but he was not required to complete after-care since his pretrial diversion program was completed in November 2010. He was taught life-skills and how to cope without the use of illegal drugs. He was never tested for illegal drugs prior to his arrest. While in the rehabilitation program, he was tested for illegal drugs but the tests were negative. (Tr. 25-27, 40-43, 47-48; Gov. Ex. 2, Letter of Notification, dated November 18, 2009; Gov. Ex. 3 and 4, Answers to Interrogatories, dated September 30, 2010; and Gov. Ex. 5, Answers to Interrogatories dated January 30, 2011)

Applicant has not used oxycontin for over 15 months since he weaned himself from the drug in February 2010. His arrest prompted him to start the process of abstaining from using the drug. He knew he needed to change his life because he could tell he was making horrible life decisions. He knew he had a security clearance and knew he was not to abuse drugs while holding a security clearance. He accepts full responsibility for what he has done and has worked hard to correct his mistakes. The

rehabilitation and counseling taught him that he must take responsibility and accountability for his actions. He learned life lessons and the triggers for drug abuse. He made amends with his family. His work has improved and he has been promoted and had his best performance reviews. He no longer associates with his former peer group that condoned and encouraged his use of illegal drugs. He has seen the effect his use of illegal drugs has on his work and family and wants to avoid that in the future. He looks at his arrest as being a rescue that allowed him to make changes and become a better person. (Tr. 27-33, 45-49, 51-52)

Applicant was required to complete a security clearance application in December 2009. On the e-QIP, Applicant noted his November 2009 arrest for possession of dangerous narcotics. He further noted that his court date had not been scheduled. In response to questions concerning illegal use of drugs, he answered "no" to all questions and did not list his use of oxycontin since 2008. He was scared at the time and embarrassed about his life. He knew he had an issue but he was not honest and truthful about his drug use. In March 2010, Applicant was interviewed by a security investigator about his arrest for possession of illegal drugs. Applicant told the investigator that the drugs were not his. He said that he was disposing of the drugs which belonged to his grandmother and forgot the pills were in the car. He admitted lying to the investigator. He told family and friends about his inaccurate answers but not to anyone at work or involved in the security clearance process. When provided Interrogatories by DOHA in September 2010, he acknowledged his drug use and his false answers to questions on the security clearance application and his false responses to the security investigator. He had completed the rehabilitation program in July 2010 and understands from his rehabilitation program that he must be accountable for his actions, honest about his drug use, and honest with his responses to questions. The person he is today is not the person who made mistakes by responding with misleading information to questions in the security clearance process. He realizes what he did was wrong and wants an opportunity to show he is trustworthy. (Tr. 26-28, 38-40, 49-50)

Applicant's friend who worked with him when he was a teenager testified he has known Applicant since 1985. During this time, he saw him occasionally and had an opportunity to get to know him. He finds Applicant to be very upstanding, reliable, and trustworthy. He knew Applicant had problems with pain pills but did not know until the hearing that he abused a narcotic drug and lied about it to security investigators. He did not know how this information affected his opinion of Applicant. Applicant has never given him a reason to distrust him and so he still finds him a person to trust. (Tr. 53-59)

Applicant's uncle testified he has known Applicant all of his life. He sees Applicant regularly and knows he had drug abuse trouble. He knows Applicant has overcome the problem. In the last 15 to 18 months, he saw improvements in Applicant's conduct. Before he would question Applicant's trustworthiness, but he now has faith that Applicant is honest and trustworthy. Applicant apologized to him and his wife for his conduct and asked for forgiveness. He proved himself to them and he knows that Applicant has not used illegal drugs since then. (Tr. 59-68)

Applicant presented letters of recommendation from supervisors. The program manager who is Applicant's immediate supervisor wrote that he has known Applicant for over three years and has seen Applicant take on more responsibility in the program. He appreciates Applicant's efforts and abilities. He has no doubts about Applicant, and he has complete confidence in Applicant's reliability and trustworthiness. (App. Ex. A, Letter, dated June 17, 2011) The performance rating he provided Applicant for the period from April 2010 until May 2011 shows outstanding and exceeds expectation performance. (App. Ex. E, Rating, dated May 19, 2011)

The Government program lead on Applicant's program wrote that he has known Applicant for over two years. He considers Applicant to be an exemplary employee who displays professionalism in all aspects of his work. He has the utmost confidence in Applicant's ability and trustworthiness. Applicant can accomplish the mission and represent the office and command. He demonstrates integrity in all he does. (App. Ex. B, Letter, undated)

Applicant's senior manager wrote that he has known Applicant for over three years and has daily contact with him. Applicant is a capable and industrious employee who he considers to be a decent and ethical person. Applicant has shown nothing to question his security worthiness. (App. Ex. C, Letter, dated June 17, 2011)

Applicant's probation officer wrote that Applicant successfully completed probation requirements. He found Applicant him to be dependable, reliable, and conscientious with a strong work ethic. He assumed responsibility for his actions and pursued efforts to rectify his problems. He is a quality person with great potential. (App. Ex. D, Letter, dated May 31, 2011)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised Administrative Guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 common sense 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 burden of persuasion to 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 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.

Analysis

Guideline H, Drug Involvement

The use of an illegal drug can raise questions about an individual’s reliability and trustworthiness, because it may impair judgment and raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Drugs are mood and behavior-altering substances, and include those listed in the Controlled Substances Act of 1970. Oxycontin is an illegal drug when not prescribed by a physician or used in a manner that deviates from approved medical direction (AG ¶ 24). Applicant admits the illegal use of oxycontin from the summer of 2008 until February 2010, purchasing the drug from a friend, and being arrested for possession of oxycontin in November 2009. Applicant’s oxycontin use and possession raises Drug Involvement Disqualifying Conditions AG ¶ 25(a) (any drug use); and AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia).

The Government produced sufficient evidence to establish the disqualifying conditions in AG ¶¶ 25(a) and 25(c). The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns under drug involvement. An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden to prove or disprove it never shifts to the Government. Applicant raised conditions that may mitigate the security concern.

I considered Drug Involvement Mitigating Conditions AG ¶ 26(a) (the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s

current reliability, trustworthiness, or good judgment); and AG ¶ 26(b) (a demonstrated intent not to abuse drugs in the future, such as; (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation). While there is no "bright line" rule for determining when conduct is recent or sufficient time has passed since the incidents, a determination whether past conduct affects an individual's present reliability and trustworthiness must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without evidence of drug involvement, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation.

The mitigating condition at AG ¶ 26(a) does not apply. Applicant was legally prescribed a pain killing drug by his physician. When the prescription ran out in a few weeks, he did not ask for a refill but instead sought oxycontin on the illegal market. There were no unusual circumstances or pressures leading to the drug use. He was a young person who admits he used the illegal drugs based on peer pressure. Applicant sought the illegal drug rather than medical assistance. This was not an unusual circumstance and could recur again. His purchase and use of oxycontin in the past casts doubt on his current reliability, trustworthiness, and good judgment.

The mitigating condition at AG ¶ 26(b) applies. Applicant presented information to show he has changed his lifestyle and has moved away from illegal drug use. Applicant's good intentions must be set against his willing and voluntary use and purchase of oxycontin for less than two years. He purchased and used oxycontin from August 2008 until February 2010 when he stopped using the drug as a result of his November 2009 arrest. He purchased over \$2,500 of the drug a month during this time. He completed his probation requirements of counseling and rehabilitation to include an aftercare program. Applicant now has a good job that he likes, which gives him a good future. His performance is excellent. He has not used an illegal drug for about 15 months. He stated his intent not to use illegal drugs in the future or be with people that use drugs. This is evidence of intent not to use drugs in the future, and a changed circumstance indicating reform or rehabilitation. Applicant is older, wiser, more mature, and has established a change in his life circumstances. Accordingly, Applicant has met his burden to show changed circumstance or conduct that indicates he has reformed and will no longer use illegal drugs.

Personal Conduct

A security concern is raised for personal conduct based on Applicant's responses to drug use questions on a security clearance application. Personal conduct is a security concern 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 whether the person's past conduct justifies confidence the person can be trusted 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 United States government.

Applicant completed a security clearance application on December 21, 2009. He answered "no" to all drug use questions, but noted his November 2009 arrest for possession of a dangerous drug. He also told a security investigator in March 2010 that the drugs found in his car in November 2009 did not belong to him. Applicant's inaccurate and incomplete answers to drug use questions raise a security concern under Personal Conduct Disqualifying Condition AG ¶ 16(a) (the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history, or similar form used to conduct investigations, to determine security eligibility or trustworthiness); and AG 16(b) (deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other government representative).

I have considered Personal Conduct Mitigating condition AG ¶ 17(a) (the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; AG ¶ 17(b) (the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice 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); and AG ¶ 17(c) (the offense 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 admitted that he intentionally failed to include his oxycontin use from 2008 until 2010 in response to the drug use questions. He admitted that he intentionally lied to the security investigator. While there is a security concern for an 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. Applicant admitted that he knowingly and willfully omitted the drug use information on his security clearance application and lied to the investigator. He finally admitted his drug use when he answered the interrogatories in September 2010. He did not admit the correct facts until he was confronted by the need to respond to the interrogatories. Applicant stated that it was the first time he had an opportunity to provide accurate information. However, he could have contacted the investigator or told his security manager. Applicant's action in providing false information in the security clearance process was recent and a major issue. His actions were deliberate with intent to

deceive. He acted on his own without advice from anyone to provide false or misleading information. He did not provide correct information until confronted by the need to again provide information in response to the interrogatories. He may have been prompted to correct his answers by his rehabilitation efforts. But by then, he had already provided false information twice. Applicant has not mitigated the security concern about his inaccurate answers concerning drug use on the December 2009 e-QIP and his answers to the security investigator in March 2010.

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 considered that Applicant is an excellent worker and is highly thought of by his supervisors and coworkers. I considered his intention not to use drugs in the future and the completion of his rehabilitation and counseling program.

Applicant was open and candid at the hearing about his less than two years of oxycontin use from 2008 to 2010. It is obvious that he is now working hard to change his life and become a good worker and productive citizen. He is good at his job and well liked by his supervisors. He is commended for working to improve his life. For security clearance purposes, it has been 15 months since his last use of oxycontin. He completed his drug rehabilitation and counseling program including aftercare. Applicant presented sufficient information to establish there are changed circumstances to his life style indicating he will not use illegal drugs in the future. His intentions are excellent. Applicant has met his burden to show that his drug use from 2008 to 2010 no longer reflects adversely on his reliability, honesty, trustworthiness, and good judgment, and shows that he may properly safeguard classified information. For all these reasons, I conclude Applicant has mitigated the security concerns from illegal drug use.

However, Applicant has acknowledged that he provided false and misleading information concerning his drug use on his security clearance application and in response to a security investigator's questions. His false answers are a strong indication of his questionable judgment, lack of candor, dishonesty, and unwillingness to comply with rules and regulations. It shows that he is unreliable, untrustworthy and not candid. A person with these traits cannot be trusted to safeguard classified information. For all of these reasons, I conclude that Applicant has not mitigated the security concern for personal conduct.

Overall, the record evidence leaves me with questions and doubts as to Applicant's judgment, reliability, and trustworthiness. He should not be granted access to classified information.

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.c:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a – 2.c:	Against Applicant

Conclusion

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

THOMAS M. CREAN
Administrative Judge