



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



In the matter of:)
)
) ISCR Case No. 10-08522
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

April 20, 2012

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant has mitigated the Drug Involvement, Criminal Conduct, and Personal Conduct security concerns that arose out of his illegal drug use and criminal conduct during the period of 2005 through 2006. He has not used any illegal substances, misused prescription drugs, or committed any criminal offense since 2006. Eligibility for access to classified information is granted.

Statement of the Case

On October 31, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, Drug Involvement; Guideline J, Criminal Conduct; and Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 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 after September 1, 2006.

Applicant answered the SOR on December 20, 2011, and requested a hearing before an administrative judge. The case was assigned to me on February 13, 2012. DOHA issued a notice of hearing on February 14, 2012, and the hearing was convened as scheduled on March 1, 2012. The Government offered Exhibits (GE) 1 through 5, which were admitted without objection. The Applicant offered Exhibits (AE) A through R, which were admitted without objection. Applicant testified on his own behalf and called two witnesses. The record was left open until April 5, 2012, for receipt of additional documentation. On March 21, 2012, Applicant submitted additional documents, marked AE S to AE X. Department Counsel had no objections to AE S through AE X, and they were admitted into the record. DOHA received the transcript of the hearing (Tr.) on March 15, 2012.

Findings of Fact

In the SOR, the Government alleged that from November 2005 through April 2006, while serving on active duty with the Navy and while holding a security clearance, Applicant used heroin 3-4 times per week (allegation 1.a); cocaine once per month (allegation 1.b); and marijuana at least twice per month (allegation 1.c). It also alleged that while on active duty and holding a security clearance, Applicant used prescribed oxycodone (allegation 1.d), and Klonopin (allegation 1.e), in amounts above his prescribed dosage. The SOR also alleged that Applicant traveled to Canada, purchased heroin and cocaine, brought these drugs across the border into the United States (allegation 1.f), and distributed the drugs he obtained to his friends (allegation 1.g.), during the period November 2005 through April 2006. It is alleged that by these actions, Applicant violated Article 112(a) of the Uniform Code of Military Justice (UCMJ) (allegation 2.a). He was convicted at a Special Court-Martial of violating Article 112(a) of the UCMJ and sentenced to four months confinement, was reduced in grade to E-1, forfeited \$800 per month for four months, and was discharged from the Navy with a Bad Conduct Discharge (allegation 3.a). The Government further alleged that Applicant was arrested in July 2005 (allegation 1.b) and November 2005 (allegation 1.c) for two separate incidents of driving under the influence of alcohol or drugs. During his testimony, Applicant admitted all of the allegations contained in the SOR. (Tr. 42-44.)

Applicant is a 29-year-old employee of a defense contractor since 2010. His is single and currently resides with his parents. In January 2004, at the age of 21, he enlisted in the Navy. Shortly after he enlisted and completed boot camp, he began to notice his anxiety levels increasing and began to experience panic attacks. He sought medical treatment in December 2004. His treating doctor diagnosed him with panic disorder with agoraphobia, social phobia, and avoidant personality disorder. He also suffered with lumbar disc degeneration. He was prescribed a number of medications to help with his physical and emotional disorders including oxycodone and Klonopin. After several months of treatment, Applicant informed his doctor the treatment was not working. She indicated that she would recommend Applicant be separated from the Navy for medical reasons. Applicant continued to struggle with anxiety, and in July 2005, approximately four months after his doctor recommended a medical discharge, he began to self-medicate with larger doses of his prescribed Klonopin. (GE 1; GE 4; AE H; AE J; AE N; Tr. 44-49, 61-64, 68-80.)

In July 2005, Applicant was cited for driving under the influence of intoxicating drugs. Applicant pled guilty to this charge on February 14, 2006. He was sentenced to jail time of 365 days, with 364 days suspended, required to complete an alcohol assessment and victim panel, fined \$840, and placed on probation for five years. (GE 2; GE 5; Tr. 42-44.)

In November 2005, Applicant was arrested and charged with driving under the influence of alcohol or drugs. He was sentenced to 90 days confinement, of which 60 days were suspended. He was also fined and had his license suspended for two years. He was placed on probation. (GE 3; Tr. 42-44.)

Applicant was living off base with roommates at this time. When his roommates observed Applicant's Klonopin abuse, they offered him heroin and cocaine. As he felt increasingly "hopeless" that he would get a medical discharge, he agreed to try heroin. He was "astonished how [his] problems seemed to disappear as [he] entered a state of chemical-induced euphoria." He quickly became addicted to heroin. He also used cocaine. (GE 4; AE N; Tr. 48-49.)

Applicant used a detoxifying beverage prior to a urinalysis administered during this time by the Navy. Containers of detoxifying beverages were discovered in Applicant's work area by the Naval Criminal Investigative Service (NCIS). (GE 5.)

In early 2006, he learned from his doctor that he had been recommended for administrative separation, but his command had not acted on the recommendation. Shortly after that appointment, he went to Canada with a roommate to look for heroin. He had made five to ten trips into Canada to obtain heroin and cocaine, which he transported into the United States. He would sometimes bring back drugs to distribute to friends as well as for his personal use. On his March 2006 trip into Canada, Applicant and his roommate were stopped by the Border Patrol on suspicion of drugs. No illegal substances were discovered, but the Border Patrol had alerted the NCIS. Applicant's room was searched by NCIS and they found drug paraphernalia. Applicant was arrested and charged with violation of Article 112(a) of the UCMJ. (GE 4; AE N; Tr. 48-52.)

Applicant was found guilty of violating Article 112(a) of the UCMJ at the resulting court-martial. He was sentenced to four months confinement, reduction in pay grade to E-1, forfeiture of \$800 a month for four months, and discharged with a Bad Conduct Discharge. The Bad Conduct Discharge was later upgraded to a General Discharge, Under Other Than Honorable Conditions. (GE 5; AE N; Tr. 50-52.)

In July 2006, Applicant was released from confinement and fully discharged. He then enrolled in a one-year intensive in-patient religion-based rehabilitation program. The program placed Applicant in "many stressful and difficult situations in order to learn how to deal with stress and anxiety by using coping mechanisms like positive affirmation, exercise, and meditation, without the need for any medication or drug." However, the program was not a recognized drug and alcohol rehabilitation program and did not include counseling by any licensed medical staff. While enrolled in this

program Applicant entered college, maintained a 3.7 grade point average, and was accepted into a scholastic honor society. In January 2008, together with another graduate of the rehabilitation program, Applicant moved out of the rehabilitation center and successfully found and held a job, while still attending school. (GE 3; AE F; AE G; AE N; Tr. 78-80.)

In January 2010, Applicant relocated to another state and now lives with his parents. He was hired by a Government contractor in October 2010. He continues to pursue his associate's degree at a community college in the state he resides. He holds a 4.0 grade point average in his current program. He expects to graduate with his associate's degree in summer of 2012. (AE B; AE I; AE V; Tr. 78-80.)

Applicant recognizes the serious mistakes he made in his past. He believes that he has changed significantly and has been sober for the past five years. He abstains "from all intoxicants, including alcohol and tobacco products." He signed a statement of intent indicating that he will "never use illegal drugs again," and consents to automatic revocation of his security clearance if there is a violation with regard to illegal drug use. He introduced a drug screening test, dated February 24, 2012, to show that he tested negative for controlled substances. He no longer associates with drug users. (AE N; AE P; AE Q; Tr. 52-53.)

In preparation for the instant matter, Applicant received a psychological evaluation conducted by a licensed clinical psychologist. That psychologist opined "none of the criteria for dependency or abuse have been met at any time during the period of at least the last 12 months." However, the Psychologist noted the Applicant "continues to experience problems consistent with his avoidant personality disorder." In Applicant's post-hearing submission, Applicant presented documentation that he is continuing treatment for his psychological condition. He has also recently applied to upgrade his discharge to honorable. (AE L; AE M; AE X.)

Applicant is well respected by the commanding officer from the Navy for which Applicant works, who "unconditionally recommend[s]" Applicant because he "continues to perform his duties in an exemplary manner and is consistently and frequently recognized for his performance," with knowledge of Applicant's drug and criminal history. Applicant also has the support of his father and a friend that testified and wrote letters of support on Applicant's behalf. Each highlighted how Applicant has changed in the past five years, since he stopped using drugs. Applicant also introduced letters of support from his lab manager, co-workers, and friends, who all find Applicant to be an honest and trustworthy person. (AE A through AE E; AE S through AE V.)

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 are to be 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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.

I have considered all of the evidence in this case and the disqualifying conditions under Drug Involvement AG ¶ 25 and especially considered the following:

- (a) any drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal use after being granted a security clearance.

The Government presented sufficient information to support all of the factual allegations under Guideline H (SOR 1.a.-1.g.). Applicant began misusing prescription drugs in 2004 and used illegal substances from late 2005 through April 2006, after being granted a security clearance by the Navy. The facts established through the Government's information and through Applicant's admissions raise a security concern under all of the above disqualifying conditions.

I have considered all of the evidence in this case and 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 current reliability, trustworthiness, or good judgment; and
- (b) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant misused prescription drugs and used illegal drugs from 2005 to 2006. He was attempting to self-medicate his uncontrolled anxiety disorders, as his regular medical treatment was not successful. He lacked the tools to deal with the stress he was under. However, Applicant has demonstrated a concrete and substantial change in his life since April 2006. He attended a religious-based rehabilitation program for over a year. In that program, Applicant learned tools in therapy to help him deal with future stressful situations in a healthy manner. He has successfully enrolled in college and is earning high marks. He performs well at work, as attested to by those that know him best. He has not used any type of legal or illegal intoxicant since April 2006.

Applicant has signed a statement clearly indicating that he will not use illegal substances in the future. He has taken actions to support his promise including learning how to deal with future stressful situations in a healthy manner. He no longer associates with drug users. He is sincere in his pledge to not allow drugs to interfere with his job or future. His circumstances appear to have changed enough to support his current stated intentions to abstain from all future drug use. Available information is sufficient to

mitigate the security concerns about Applicant's past drug use while holding a security clearance. AG ¶¶ 26(a) and 26(b) apply.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant has a history of criminal offenses including: his illegal drug use in violation of Article 112(a) of the UCMJ; his July 2005 driving under the influence of alcohol and/or drugs charge and conviction; and his November 2005 driving under the influence of alcohol and/or drugs charge and conviction. The above disqualifying conditions have been established.

Two Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant has a history of criminal behavior. However, his offenses occurred when he was young and less mature. Almost six years have passed since his last offense. During that time, he has committed himself to sober living. He has sought an education and is earning high marks at his college. He is seeking professional treatment for his remaining anxiety. His superiors and co-workers support Applicant's application and speak highly of Applicant. Due to the recent, positive changes in Applicant's life, further Criminal Conduct is unlikely to recur. He has demonstrated that he has

successfully rehabilitated himself. His past criminal behavior does not cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 32(a) and 32(d) apply.

Guideline E, Personal Conduct

The security concern relating to the guideline 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 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. The following disqualifying condition is potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

Applicant's past drug use and criminal behavior, to include using illegal substances after being granted an interim security clearance, demonstrates questionable judgment. His poor judgment led to a conviction at a Special Court-Martial for violating Article 112(a) of the UCMJ for possessing and using a controlled substance while on active duty in the Navy. AG ¶ 16(e) applies.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

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

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

Applicant has been sober for over five years now. His co-workers, supervisors, family, and friends are all aware of his past problems with drugs. Applicant is committed

to sober living, and has demonstrated that his past drug and criminal involvement does not cast doubt on his current reliability, trustworthiness, or good judgment. Further, he has successfully rehabilitated himself and has taken steps to avoid ever using drugs in the future, including avoiding contact with drug users. He is unlikely to return to his criminal past including the use of illegal substances. AG ¶ 17(c) and 17(d) 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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

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

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

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 Guidelines H, J, and E in my whole-person analysis. Independent of my analysis under Guideline H, J, and E, I find that Applicant has mitigated the security concerns under the whole-person concept.

Applicant's life has drastically changed in the past five to six years. He has focused on his education and started building a future for himself. He was young at the time he misused prescription drugs and used illegal substances. He is now more mature and uses the religious training he received through rehabilitation to solve his problems. He has not used any illegal substances since April 2006 and avoids all intoxicating substances. In addition, Applicant is well respected by his colleagues who were aware of his drug use and the circumstances of his discharge from the Navy. His co-workers and clients consider him to be trustworthy, with knowledge of his confessed past indiscretions. There is little potential for pressure, coercion, exploitation, or duress in this instance.

Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the Drug Involvement, Criminal Conduct, and Personal Conduct security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraph 1.a~1.g:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a~2.c:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

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

Jennifer I. Goldstein
Administrative Judge