



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



In the matter of:)
)
) ISCR Case No. 11-07602
)
)
Applicant for Security Clearance)

Appearances

For Government: Kathryn MacKinnon, Esq., Deputy Chief Department Counsel
For Applicant: *Pro se*

09/06/2013

Decision

CREAN, THOMAS M., Administrative Judge:

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

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on December 20, 2010, to obtain a security clearance required for his employment with a defense contractor. After an investigation conducted by the Office of Personnel Management (OPM), the Department of Defense (DOD) 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, DOD could not make the preliminary affirmative findings required to issue a security clearance. On April 10, 2013, DOD 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 April 23, 2013.

Applicant answered the SOR on May 8, 2013. He admitted three allegations of misconduct under Guideline E (SOR 1.a, 1.b, and 1.c), but denied four allegations of falsification (SOR 1.d, 1.e., 1.f, and 1.k).¹ He admitted the four allegations of drug use under Guideline H. Department Counsel was prepared to proceed on June 7, 2013, and the case was assigned to me on July 15, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on July 30, 2013, scheduling a hearing for August 20, 2013. I convened the hearing as scheduled. The Government offered two exhibits, which I marked and admitted into the record without objection as Government Exhibits (Gov. Ex.) 1 and 2. Applicant testified. I kept the record open for Applicant to submit documents. Applicant timely submitted one document I marked and admitted into the record without objection as Applicant Exhibit (App. Ex.) A. DOHA received the transcript of the hearing (Tr.) on August 28, 2013.

Findings of Fact

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 36 years old. He attended college from 1995 until 1999, receiving a bachelor's degree in computer science in 1999. He started working for the defense contractor employer in April 2000, and has worked for the same employer for over 13 years. He has been granted access to classified information at times for specific projects with his employer. He is married with two small children. (Tr. 73-74; Gov. Ex. 1, e-QIP, dated December 20, 2010)

The SOR alleges, and Applicant admits, that from the mid-1990s until as late as 2008, he illegally downloaded and copied software, videos, and games from the internet (SOR 1.a and 1.b). The SOR alleges, and Applicant admits, that he misused prescription drugs at various times from 2007 to 2012 (SOR 1.d, SOR 2.a to 2.d). The SOR alleges, but Applicant denies, that he falsified information during a security interview with another government agency in October 2007, in an OPM interview in January 2011, and on his e-QIP submitted on December 20, 2010 (SOR 1.d, 1.e, 1.f, and 1.k).

Applicant informed a security investigator when he was interviewed on January 30, 2008, that in May or June 2007 he used approximately six pills each of the prescription drugs Naproxen and Flexeril over two days. The pills were prescribed for and provided by his then live-in girlfriend who is now his wife. He took the medication to relieve pain from a gall bladder attack. Department Counsel acknowledged that Naproxen is also available over the counter as Aleve. Flexeril is a muscle relaxer. He

¹ There are no SOR allegations 1.g, 1.h, 1.i, and 1.j.

used the drugs to relieve pain from the gall bladder surgery and not to “get high.” (Tr. 19-21, 31-32; Gov. Ex. 2, Response to Interrogatories, dated March 20, 2013, at Report, January 30, 2008, paragraph d)

In December 2009, Applicant admitted that he took one pill of Oxycodone prescribed for and offered by his wife to relieve a headache. He had a slight pleasant effect making him more social. He took one pill a few other times that month because he liked the social effect it had on him the first time. Applicant admits that in December 2010, he took a Valium prescribed for and provided by his wife to relieve stress. Applicant’s wife had medical and mental health issues resulting from the birth of a child. At the time, Applicant was managing his wife’s medical issues and caring for their two young children. He was stressed, so his wife offered, and he took, the Valium to assist him in managing and relieving the stress. (Tr. 22-27; Gov. E. 2, Response to Interrogatories, dated March 20, 2013, Testimonies at 1)

Applicant used Percocet prescribed for and provided by his wife on isolated instances in 2011 and 2012 to relieve pain. He is not sure of the number of times he took the drug but believes it is less than five. (Gov. Ex. 2, Response to Interrogatories, dated March 20, 2013)

Applicant states that he misused the prescription drugs because of stupidity. He has not misused prescription drugs since sometime in early 2012. He no longer uses his wife’s prescription drugs to deal with stress. Applicant’s wife’s medical and mental health is better but he is still under stress dealing with her medical issues and caring for their children. He is under the care of his own doctor who has prescribed a low-level anti-depressant, Buspar. He takes less of the drug than his doctor prescribed. He also has a psychological therapist who counsels him on how to deal with his stress. (Tr. 45-53, 75-77)

Applicant’s bachelor’s degree is in computer science. During a security interview in January 2008, Applicant informed the interviewer that from the 1990s, while in college, to 2004, he downloaded and copies software, videos, music, and games from the internet and fellow college students. The overwhelming majority of his downloading material was while he was a college student. It was common practice among college students to download music and videos from each other and from the internet. Computer science students also downloaded software programs that they needed for their course work from the internet and each other because the programs were expensive and they did not have a lot of money. Some of the programs were legal to download and some were not legal for downloading. He downloaded some games after he left college but erased them shortly after downloading. (Tr. 53-58, 74-76)

Applicant has not downloaded or copied programs or music since 2008. He does not have software loaded on his personal computer that enables him to download music or videos. He writes software for a living and knows he must protect the copyrights of other software writers. Also, media is now very affordable and he can purchase what he needs. (Tr. 58-61)

Applicant was interviewed by another government agency in October 2007 to determine eligibility for access to classified information. He stated in that interview that he had never illegally downloaded software. When interviewed again in January 2008, he admitted illegally downloading software from the internet. He also did not tell the security investigator that he had used Naproxen, which had been prescribed for his wife, earlier that year. (Gov. Ex. 2, Response to Interrogatories, dated March 20, 2013, at Report, dated January 20, 2008, at paragraph c)

On his December 20, 2010 e-QIP, Applicant provided positive answers to drug use questions noting that he misused the prescription drugs Valium in December 2010 and Oxycodone in December 2009. He did not list the misuse of Naproxen in 2007 or Percocet in 2012. Applicant was uncomfortable about his misuse of prescription drugs but he did list his most severe misuse. He forgot the misuse of Naproxen because he did not believe he misused the drug since it was available over-the-counter. In the January 2011 security interview, he told the investigator that he was finished misusing prescription drugs. Applicant admits it was a “crazy” thing for him to misuse the Percocet. He had been through so many interviews and questions that he believed he would not be cleared for access to classified information. He did not think about the consequences of taking the Percocet to relieve pain. He readily admits his decision was dumb and he no longer intends to misuse prescription drugs. His misuse of the Percocet in early 2012 was the last misuse of a prescription drug. He was under stress at the time caused by his wife’s medical and mental health issues. (Tr. 35-44)

The president of Applicant’s employer wrote that he has known Applicant since March 2000. Applicant performed exceptionally well for seven years while the firm was working on a critical program for a government law enforcement agency. Applicant was cleared for access to classified information for this project. Applicant was then promoted and assumed a role for the company in product development. For the last six years, he has been the technical architect for a complex computer software program. The company president trusts Applicant’s judgment and professionalism. He has increased Applicant’s areas of responsibilities because of his trust and confidence in Applicant. He strongly believes Applicant is reliable, trustworthy, honest, and responsible. He recommends that Applicant be given eligibility for access to classified information. (App. Ex. A, Letter, dated August 27, 2013)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the 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 or misuse of a prescription 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. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. (AG ¶ 24)

Applicant admits the use of prescription drugs not prescribed for him at various times from 2007 until 2012. Applicant's misuse of prescription drugs raises Drug Involvement Disqualifying Condition AG ¶ 25(a) (any drug use).

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). I have not considered AG ¶ 26(c) (abuse of prescription drugs was after a severe or prolonged illness during which the drugs were prescribed, and abuse has since ended). While Applicant took the drugs to relieve pain, they were not prescribed for him and were not taken after a prolonged illness. It is noted that the abuse of prescription drugs has ended.

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.

These mitigating conditions apply. Applicant occasionally misused drugs prescribed for his wife to relieve pain or stress. He did not use the Valium or Percocet for pleasure or to get a high. His purpose was to overcome pain from an operation or to relieve stress caused by his wife's medical and mental health as well as the need to care for his two young children. He initially used Oxycodone to relieve pain, but he liked the social effect that it had on him, and he used it a few more times. His last misuse of a prescribed drug was in early 2012 when he used his wife's Percocet. Since then, he has seen his own primary care doctor and a psychological therapist to have the medical tools to deal with pain and stress. His doctor prescribed a low-level anti-depressant. He uses less dosage of the drug than proscribed. His misuse was mostly long ago, was infrequent, and happened under circumstances that are now unlikely to recur since he now has a coping mechanism for pain and stress. There has been an appropriate period of abstinence. Applicant mitigated security concerns for drug involvement.

Guideline E, Personal Conduct

A security concern is raised for personal conduct based on Applicant's responses to drug use questions on a security clearance application, on an interrogatory, and to a security investigator. 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 was interviewed by a security investigator from another government agency in October 2007, but did not inform the investigator of his earlier use of the prescription drug, Naproxen, provided by his wife. On the security clearance application he completed on December 20, 2010, Applicant listed his two most severe misuses of prescription drugs but not the misuse of Naproxen. Applicant was interviewed by a security investigator in January 2011 and he did not list his misuse of Naproxen. He did not inform the security investigator that he had downloaded computer software and other materials from the internet or from other college students. Applicant's inaccurate and incomplete answers to questions during the security clearance process raise a security concern under Personal Conduct Disqualifying Conditions 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).

Applicant admitted that from the mid-1990s to 2008, he illegally downloaded software, videos, games, and other material from the internet. His downloading of computer programs and his misuse of prescription drugs raise the following Personal Conduct Disqualifying Conditions: AG ¶ 16(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); AG ¶ 16(d) (credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicting that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (3) a pattern of dishonesty or rule violations); and AG ¶ 16(e) (personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing).

In regard to the falsification personal conduct security concerns, I have considered Personal Conduct Mitigating Conditions AG ¶ 17(a) (the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts); and AG ¶ 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) in regard to the allegations of falsification. 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.

I considered the following Personal Conduct Mitigating Conditions in regard to Applicant's acts of misconduct in downloading computer software and misuse of prescription drugs: AG ¶ 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 is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment); AG ¶17(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); and AG ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress).

As noted above, Applicant illegally downloaded software, videos, games, and other material from the internet. Most of the actions were while a college student and were activities that most of his fellow students also engaged in. The downloading was done long ago, was minor, and was not done for profit or financial reasons. Applicant self-reported his improper actions. I find that the incidents happened under unique circumstances and his downloading of computer programs are unlikely to recur.

Applicant denied intentional falsification with intent to deceive by not listing all of his misuse of prescription drugs. He included his misuse of two prescription drugs on his security application and in response to security investigators. He did not consider the misuse of the other prescription drug as a misuse since the drug was available over-the-counter. His listing of the misuse of the two prescription drugs put the government on notice that he may have misused other prescription drugs. His failure to list all misused prescription drugs was not deliberate with the intent to deceive. In addition, Applicant's misuse of prescription drugs as a personal conduct security concern is mitigated for the same reasons noted above. Applicant mitigated personal conduct security concerns.

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 the president of his company who considers him reliable, honest, and trustworthy. I considered that he has been granted access to classified information in the past.

Applicant misused some of his wife's prescription drugs over time to relieve pain and stress. He did not misuse the drugs to gain a high or pleasure. His misuse was limited and he now has medical and psychological assistance to deal with stress. He has shown that his use of illegal drugs will not happen again and that he is reformed and rehabilitated.

Applicant established he did not deliberately with the intent to deceive provide false information during the security clearance process. As noted above, he mitigated security concerns for downloading computer programs and for misuse of prescription drugs. Accordingly, Applicant mitigated the security concern for personal conduct. He established that he is reliable, trustworthy and candid. For all of these reasons, I conclude that Applicant mitigated the security concerns for drug involvement and personal conduct. Overall, the record evidence leaves me without questions and doubts as to Applicant's judgment, reliability, and trustworthiness. He should 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 E:	FOR APPLICANT
Subparagraphs 1.a - 1.k:	For Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraphs 2.a – 2.d:	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.

THOMAS M. CREAN
Administrative Judge