



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



In the matter of:

ISCR Case No. 14-05326

Applicant for Security Clearance

Appearances

For Government: Mary M. Foreman, Esq., Department Counsel

For Applicant: *Pro se*

04/05/2017

Decision

CREAN, THOMAS M., Administrative Judge:

Based on a review of the pleadings, Applicant failed to mitigate drug involvement and criminal conduct security concerns, but he mitigated personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on February 27, 2014, to obtain a security clearance required for a position with a defense contractor. (Item 3) After an interview conducted by a security investigator from the Office of Personnel Management (OPM) on April 1, 2014 (PSI), the Department of Defense (DOD) could not make the affirmative findings required to issue a security clearance. (Item 4) On December 16, 2014, DOD issued Applicant a Statement of Reasons (SOR) detailing security concerns for drug involvement (Guideline H), criminal conduct (Guideline J), and personal conduct (Guideline E). (Item 1) 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 answered the SOR on October 20, 2015. He admitted all of the allegations under the three guidelines. However, he also noted that the falsification of the information in his security clearance application was not intentional. Since Applicant stated that he did not intent to provide false or misleading information, I will consider his answer to the Guideline E allegation as a denial. Applicant elected to have the matter decided on the written record. (Item 2)

Department Counsel submitted the Government's written case on April 1, 2016. Applicant received a complete file of relevant material (FORM) on April 4, 2016, and he was provided the opportunity to file objections and to submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant did not provide additional information in response to the FORM. The case was assigned to me on February 13, 2017.

Procedural Issues

Applicant was advised in the FORM that the summary of the PSI (Item 4) was not authenticated and could not be considered over his objection. He was further advised that he could make any corrections, additions, or deletions to the summary to make it clear and accurate, and he could object to the admission of the summary as not authenticated by a Government witness. He was additionally advised that if no objection was raised to the summary, the Administrative Judge could determine that he waived any objection to the admissibility of the summary. Applicant did not respond to the FORM. Since Applicant did not respond to the FORM, he did not raise any objection to consideration of the PSI. I will consider information in the PSI in my decision.

Findings of Fact

After a thorough review of the case file, I make the following findings of fact. Applicant is a 35-year-old high school graduate with some technical college education. He worked as a self-employed home improvement contractor from January 2001 until February 2009. He served in the Army from February 2009 until his honorable discharge in September 2012. He was unemployed from September 2012 until February 2014. During this time, he attended school using the G.I. bill. He started working for the government contractor in a shipyard in March 2014. He married in January 2009 and divorced in October 2012. He has two children. (Item 3, e-QIP, dated February 27, 2014; Item 4, PSI, dated April 1, 2014)

The SOR alleges, and Applicant admits, drug involvement security concerns for using illegal opiates from July 2012 until October 2013 (SOR 1.a), and receiving treatment for drug abuse from January 2013 until April 2014. He was diagnosed as opioid dependent (SOR 1.b). The SOR alleges under criminal conduct, and Applicant admits, that he was arrested for driving on a suspended license in April 2004 (SOR 2.a);

that he was charged with and convicted of disorderly conduct/domestic assault (SOR 2.b); that he was charged with driving on a suspended license in June 2007 (SOR 2.c); that he was arrested and charged with domestic assault in February 2010 (SOR 2.d); that in August 2012 (SOR 2.e) and February 2014 (SOR 2.f), he was arrested and charged with simple assault/domestic and disorderly conduct/domestic. Under personal conduct, the SOR alleges, and Applicant admits, that he failed to reveal all of his criminal offenses on the e-QIP (SOR 3.a). As I noted earlier, Applicant admits this offense but noted that his failure to list all offenses was not deliberate.

Applicant reported in response to e-QIP question 23 concerning illegal drug use that he used prescription opiates three to four times a week from July 2012 until June 2013. He had just been discharged from the Army, injured his knee and been prescribed opiates for pain relieve. He became dependent on the opiates. He also reported that he completed a voluntary treatment program. (Item 3 at 32-33)

Applicant told the security investigator in the PSI that he was taking the opiates for pain and became addicted. He would steal pills from his mother, and received some from a cousin. He no longer has contact with the cousin. Applicant stated that he voluntarily went to the Department of Veteran's Affairs (VA) clinic and received counseling and a medication to resolve the drug abuse. He tested positive for drugs one time at the VA clinic, but he has never been arrested for drug possession or use. He was diagnosed as a drug abuser and is still in the counseling program. His intent is not to use drugs in the future. Applicant did not present any documents to verify his treatment or prognosis. (Item 4 at 6)

Applicant listed an August 2012 arrest for simple assault and disorderly conduct/domestic in response to e-QIP question 22 concerning arrests within the last seven years. He reported the charge was dismissed. (Item 3 at 6) In the PSI, he told the security investigator that he had a verbal argument on the street with his former wife. He stated that all charges were dismissed but he had to complete an anger management course. He did not receive any jail or probation time. Applicant also told the investigator about another domestic violence incident in December 2005 that happened more than seven years before he completing the e-QIP. This incident also involved an argument with his former wife. Applicant pled nolo contendere and received four months of probation and ordered to attend anger management course. (Item 4, at 5-6)

A Federal Bureau of Investigation (FBI) report cites a 2010 arrest for domestic assault. Applicant's was required to complete counseling and a substance abuse program On the FBI report was also a 2014 arrest for domestic assault and disorderly conduct. The report did not note a disposition for this offense. (Item 5)

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

Drug Involvement

The use of an illegal drug can raise questions about an individual's reliability and trustworthiness, because it may impair judgment and raise 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. Drugs are defined as mood and behavior altering substances, including drugs material and other chemical compounds identified and listed in the Controlled Substances Act of 1970. Opiates are included in the controlled substance act schedule of illegal drugs. (AG ¶ 24)

Applicant admits he became addicted to opiates. He stole or acquired opiates and used them without medical direction. Applicant voluntarily attended treatment at a VA facility, and was diagnosed as a drug abuser. These facts raises the following Drug Involvement Disqualifying Conditions under AG ¶ 25:

- (a) any drug use;
- (c) illegal drug possession, including cultivation, processing manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program.

26: I considered the following Drug Involvement Mitigating Conditions under AG ¶

- (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;
- (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;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed , and abuse has since ended; and
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

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.

None of the mitigating conditions apply. Applicant became addicted to opiates after they were prescribed for pain from an injury. He did not provide any documents to verify the extent of his injury and the medical direction to use the drugs. After

Applicant's use of opiates under medical direction ended, Applicant stole opiates or obtained them from another to continue using them. Applicant claims his last use of opiates was in 2013. Since Applicant's use of opiates without medical direction was voluntary and deliberate, Applicant can again become addicted to opioids and use them without medical direction. Applicant admits to receiving counseling and treatment for drug abuse from the VA, and being diagnosed as a drug abuser. Applicant is still undergoing treatment for drug abuse from the VA. There is no evidence of successful completion of the program, any prescribed aftercare, or his prognosis for success.

Applicant did not present sufficient evidence of his intent not to use or abuse illegal drugs in the future. The only evidence of his intent was a statement in response to a question from the security investigator that he did not intend to use illegal drugs in the future. Since Applicant provided no documentation to verify he no longer uses opiates, successful completion of a drug abuse treatment program, or his intent not to use illegal drugs in the future, he has failed to mitigate drug involvement security concerns.

Criminal Conduct

Criminal activity creates doubt about a person'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 ¶ 30). Applicant admitted his criminal activity of driving on a suspended license in 2004 and again in 2007, and arrests for domestic assault and domestic disorderly conduct in 2005, 2010, 2012, and 2014. These criminal acts raise the following Criminal Conduct Disqualifying Conductions under AG ¶ 31:

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

I considered the following Criminal Conduct Mitigating Conditions under AG ¶ 32:

- (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.

None of the mitigating conditions apply. Applicant has been involved in some type of criminal activity almost every two years from 2005 to as late as 2014. These offenses did not happen under unusual circumstances. The offenses of driving on a

suspended license and domestic assault can likely recur. There was no pressure to commit any of the offenses, and they appear to be voluntary. The only evidence of rehabilitation is the passage of about three years without the report of any additional criminal conduct. Applicant has not presented any information of remorse or repentance for his conduct. The evidence of criminal conduct adversely affecting Applicant's judgment, reliability, and trustworthiness and lead to the conclusion that he cannot or will not comply with laws, rules, and regulations. Applicant has not presented sufficient information to mitigate criminal conduct security concerns.

Personal Conduct

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 and sensitive information. Of special interest is any failure to provide truthful and candid answers during the process to determine eligibility for access to classified information or any other failure to cooperate with the 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 or sensitive information. Authorization for a security clearance depends on the individual providing correct and accurate information. If a person conceals relevant information or provides false information, the security clearance process cannot function properly to ensure that granting access to classified or sensitive information is in the best interest of the United States Government.

Applicant responded "yes" to the question if he had any charges, convictions or sentenced for a crime. Applicant had a number of criminal offences that were committed within seven years of completing his e-QIP. He provided information on one offense that happened in 2012. He did not provide information on three other offenses. All of the offenses should have been listed in section 22 in response to questions concerning his police record. The failure to list all criminal offenses on the e-QIP raises the Personal Conduct Disqualifying Condition AG ¶ 16(a) (deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities).

For AG ¶ 16(a) to apply, Applicant's omission must be deliberate. The Government established that Applicant omitted criminal conduct facts from his February 27, 2014 e-QIP when he failed to list all of his criminal offenses. In his response to the SOR, Applicant denied intentional falsifying information on the e-QIP. When the allegation of falsification is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence of an applicant's intent or state of mind at the time of the omission.

Applicant established that he did not deliberately fail to provide correct and accurate information on the security clearance application. He listed one offense but not three others. There were reasons for not listing the other three offenses. One offense was beyond the e-QIP reporting period for arrests, one was being adjudicated as Applicant completed the e-QIP, and he was only referred for counseling for the third offense. By answering “yes” to the police record question, and providing information on part of his arrest record, Applicant showed that he did not intend to deceive the Government concerning his criminal conduct. His failure to list all offenses under the circumstances is reasonable. He did not deliberately fail to list all offenses with the intent to deceive. 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. Applicant admitted using opiates from July 2012 to October 2013, and being diagnosed as opioid dependent. He also admitted criminal offenses of driving on a suspended license in 2004 and 2007; and domestic assault/disorderly conduct in 2005, 2010, 2012, and 2014. His failure to list all of his criminal offenses on the e-QIP was not deliberate with intent to deceive. Overall, these facts leave me with questions and doubts about Applicant’s judgment, reliability, trustworthiness, and eligibility and suitability for access to classified information. For all these reasons, I conclude that Applicant has not mitigated drug involvement and criminal conduct security concerns, but mitigated personal conduct security concerns. Eligibility for access to classified information is denied.

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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a – 2.f:	Against 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 not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

THOMAS M. CREAN
Administrative Judge