



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-08163

Appearances

For Government: Adrienne Driskill, Esquire, Department Counsel

For Applicant: Skyler Samp, Esquire
Claery & Green, LLP

July 19, 2017

Decision

ROSS, Wilford H., Administrative Judge:

Applicant had one arrest and conviction for prescription-drug-related reckless driving more than four years ago. He had work problems, most of which were directly related to a chronic medical condition. Applicant did not intentionally falsify his security clearance questionnaire. Security concerns were mitigated. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted his most recent Electronic Questionnaire for Investigations Processing (e-QIP) on June 5, 2015. (Government Exhibit 1.) On June 10, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines E (Personal Conduct) and J (Criminal Conduct). 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 for Determining Eligibility for Access to Classified Information*, effective within the Department of Defense after September 1, 2006.¹

Applicant answered the SOR in writing (Answer) on July 7, 2016, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on September 1, 2016. The case was assigned to me on September 8, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on September 13, 2016. I convened the hearing as scheduled on October 25, 2016. The Government offered Government Exhibits 1 through 7, which were admitted without objection. Applicant offered Applicant Exhibits A through I, which were admitted without objection, and testified on his own behalf. I granted Applicant's request to leave the record open until November 10, 2016, to permit him to submit additional evidence. DOHA received the transcript of the hearing (Tr.) on November 1, 2016. Applicant elected not to submit any additional information and the record closed as scheduled.

Findings of Fact

Applicant is 36 years old and employed by a defense contractor as a Senior IT Systems Analyst. He is also involved in IT security, and has certifications in that discipline. (Applicant Exhibits H and I.) He has a bachelor's degree. Applicant has a fiancée. He is seeking to retain a security clearance previously granted in connection with his employment. He has held a security clearance at various times during his career.

Paragraph 1 (Guideline E – Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct that shows poor judgment, untrustworthiness or unreliability. Applicant admitted subparagraphs 1.b, and 1.h. Those admissions are findings of fact. He denied the remaining allegations. Applicant submitted additional information supporting his request for a finding of eligibility for access to classified information.

The record contains medical information of note. Applicant has suffered for many years from Crohn's Disease. As a result of his disease he has had multiple bowel resections and intraabdominal abscesses, which have resulted in multiple hospitalizations. Fatigue and persistent diarrhea are symptoms of this disease. Applicant has both of these symptoms, which have a major impact on his life and work habits. His last major hospitalization was in August 2015, when he was in the hospital for two weeks.

¹ I considered the previous Adjudicative Guidelines, effective September 1, 2006, as well as the new Adjudicative Guidelines, effective June 8, 2017. My decision would be the same if the case was considered under the previous Adjudicative Guidelines.

Applicant takes properly prescribed pain killers on a regular basis. Because of his illness, and the medications he takes, Applicant does not drink alcohol at all. (Applicant Exhibits B and G; Tr. 26-30, 74-78, 84.)

In November 2014 Applicant was examined by a psychiatrist. This psychiatrist found that Applicant was also suffering from Asperger Syndrome, a pervasive developmental disorder. (Applicant Exhibit F; Tr. 86-87.)

1.a. Applicant denied that he was terminated from his employment at a casino in about July 2008 for cashing a fraudulent traveler's check for \$500 without following the casino's procedures. (Government Exhibit 1 at 22.)

Applicant admitted that he cashed the check, but denied that he did not follow the casino's procedures. (Answer; Government Exhibit 2; Tr. 17-21.) However, in Government Exhibit 3, Applicant told an investigator from the Office of Personnel Management that he was counseled by his manager for alleged procedural errors on this and one other occasion. Based on the available evidence, the incident appears to have been an honest mistake. This incident has no current security significance and is found for Applicant.

1.b. Applicant admitted that he received a red light camera violation in June 2012. He attempted to fight the ticket but was unsuccessful. In order to resolve the citation Applicant attended traffic school, but no points were assessed on his record. (Government Exhibit 3 at 2, Exhibit 4 at 6; Tr. 21-23.) This incident has no current security significance and is found for Applicant.

1.c. Applicant was employed by Law Office C from October 2011 to February 2013. He denied that he was formally reprimanded or disciplined by this employer two or three times for sleeping at work. Applicant did admit that his supervisors did talk to him about sleeping on the job. He believes these sleeping incidents to be related to his Crohn's disease. Applicant resigned from this position because he had obtained other employment, not because of the incidents of falling asleep. (Government Exhibit 4 at 4; Tr. 24-26, 30-31.)

1.d. Applicant was arrested on May 16, 2013, for Possession of Narcotic/Controlled Substance Without a Prescription, and Being Under the Influence of a Controlled Substance.² Applicant had not been drinking alcohol, but had been taking his prescribed pain killers. On February 2, 2015, he plead guilty to an additional charge, the lesser included offense of Reckless Driving. He was sentenced to summary probation for three years, a fine, to attend a first offender's alcohol program, and attend a MADD impact panel. A hospitalization originally prevented Applicant from attending the impact panel, but he has since completed it. Applicant is still on probation until January 2018, but

² The SOR alleges that Applicant was arrested for three charges, including Driving Under the Influence of a Controlled Substance, and Driving Under the Influence of Alcohol or Drugs. That is incorrect. See Applicant Exhibit D.

has completed the remainder of the sentence. Applicant has changed his driving habits as a result of this incident. (Government Exhibit 4 at 3-4, Exhibit 5, and Exhibit 6; Applicant Exhibits D and E; Tr. 31-44, 72-73, 78-80.)

This allegation was cross-alleged under Guideline J, Criminal Conduct, as subparagraph 2.a. Applicant denied that allegation.

1.e. Applicant was employed by a defense contractor (Company E) at the time of the incident described in 1.d, above. Applicant stated in his e-QIP that he received a warning concerning the offense from his employer. The company submitted a JPAS report about the incident in 1.d. Applicant resigned from this employment in September 2013. He stated that his resignation was not in connection with the 1.d incident, but rather because he thought he had obtained better employment. When the other employment opportunity did not pan out he attempted to rescind his resignation, but was unsuccessful. (Government Exhibit 1 at 16-17, Exhibit 7; Tr. 44-47.)

1.f. Applicant was detained by police for possibly driving under the influence of alcohol or drugs after a minor accident on August 18, 2013. After a blood alcohol test showed he had not been drinking at all Applicant was released. No charges were filed, and the records confirm this was "Detention Only." Based on the available evidence, I find that Applicant was not arrested or charged on this occasion. (Government Exhibit 4 at 6, Exhibit 5, and Exhibit 6; Tr. 47-54.)

1.g. Applicant was employed at Law Office G from January to March 2014 as a Technical Lead System Administrator. Applicant admits he was terminated from this position due to his monitoring of other employee emails. However, Applicant denied that what he did was inappropriate. He testified that he believed monitoring the database and email servers was part of his job. However, he was terminated because other people in the corporation thought his conduct was not appropriate. (Government Exhibit 1 at 15; Applicant Exhibit C; Tr. 54-58.)

1.h. Applicant was employed with a defense contractor (Company H) from November 2014 through January 2015. Applicant had severe medical issues during his entire time with this company, including a week-long hospitalization in November 2014. He also passed out unexpectedly on the job several times due to his illness, which his employer viewed as "sleeping on the job." He left this job by mutual agreement. (Government Exhibit 1 at 12-14; Tr. 58-62.)

1.i. Applicant filled out a security clearance application on June 5, 2015. (Government Exhibit 1.) Question 21 of that application asked Applicant whether he had consulted a mental health professional regarding an emotional or mental health condition. Applicant answered the question, "No." In fact Applicant had consulted a counselor in 2013 on about five occasions due to work-related stress, and saw a psychiatrist from June 2014 to January 2015 for depression and anxiety. In his Answer and at the hearing Applicant denied that his answer to this question was false because the question says,

“Answer ‘No’ if the counseling was for . . . grief not related to violence by you.” Applicant stated that to him grief included, “Losing job, losing potential freedom.” He went on to testify, “I define ‘grief’ as a loss of anything, anything significant, such as freedom, death of a spouse. Any sort of job or situation can put a person into grief.” (Tr. 63-68.)

1.j Section 22 of the same questionnaire asked Applicant about his arrest history. Applicant did disclose in detail the facts of the May 2013 arrest set forth in subparagraphs 1.b and 1.d. In addition, that section asked whether Applicant had been arrested any other time during the previous seven years. Applicant stated, “No,” and did not admit the alleged driving under the influence incident that occurred on August 18, 2013 (subparagraph 1.f). Applicant did not admit this alleged incident because he felt it was an improper arrest, as described elsewhere. (Government Exhibits 5 and 6; Tr. 69-72.)

The same section asked whether Applicant had ever been charged with an offense involving alcohol. Applicant stated, “No,” to this section because he was never charged with a drug or alcohol offense regarding the August 18, 2013 incident because the blood alcohol test came back negative and because this incident is defined in the records as, “Released/Detention Only.” (Government Exhibits 5 and 6; Tr. 69-71.)

Applicant was interviewed under oath by an investigator from the Office of Personnel Management on August 24, 2015, two months after filling out the e-QIP. During that interview Applicant freely and frankly discussed all of his employment issues, his illness, and the counseling he received. With regard to the August 18, 2013 incident, the Report of Investigation states that Applicant “volunteered” information on that topic. Applicant testified that he wanted to be “transparent” during the interview. (Government Exhibit 4; Tr. 71-72.)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant’s national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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, “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 national security eligibility. 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 or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. Two are potentially applicable in this case:

(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 national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(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 individual may not properly safeguard classified or sensitive information.

The guideline also notes several conditions that could mitigate security concerns under AG ¶ 17. Two are potentially applicable in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(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.

The record shows that Applicant suffers from a serious and chronic medical condition. Two symptoms of this condition are extreme fatigue, and chronic pain. SOR allegations 1.c and 1.h are directly related to his condition, and are unique circumstances. Those allegations are found for Applicant.

Applicant's discharge from the Law Office G in 2014 appears to have been a matter of policy confusion or conflict inside the company as to Applicant's proper role

(subparagraph 1.g). His conduct was not, on its face, wrongful. Based on all of the available evidence, which is provided solely by Applicant, I find this allegation for Applicant.

The available records support Applicant's contention that he was not arrested or charged for driving under the influence in August 2013. The records state that this incident was a "Detention Only." Under the circumstances, subparagraph 1.f is found for Applicant.

Applicant has one drug-related arrest and conviction on his record. The incident happened in 2013, four years ago (subparagraph 1.d). There has been no recurrence of that conduct. Mitigating Condition 17(c) applies to this allegation, as well as the related allegation in subparagraph 1.e, which are both found for Applicant.

Applicant had a good-faith belief that he was receiving grief counseling from a counselor and a psychiatrist. His definition of grief as including the emotional concerns for which he sought treatment is not inherently unreasonable given his personal history. Accordingly, I do not find that he had the requisite intent to falsify Section 21 of his e-QIP on this topic.

Applicant, with good reason, did not believe he had been arrested or charged in August 2013. This was because he was released without charge after a blood test. Once again, I find that he did not have the requisite intent to falsify Section 22 of his e-QIP on this topic.

In addition, Mitigating Condition 17(a) applies to both allegations relating to Applicant's e-QIP responses. Two months later, when interviewed, Applicant made a prompt, good-faith effort to disclose the information, and thereby correct possible omissions, before being confronted with the facts.

Applicant has successfully mitigated all of the allegations under Guideline E. Paragraph 1 is found for Applicant.

Paragraph 2 (Guideline J: Criminal Conduct)

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

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.

The guideline at AG ¶ 31 contains five disqualifying conditions that could raise a security concern and may be disqualifying. Two conditions might apply, as discussed below:

- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and
- (c) individual is currently on parole or probation.

The guideline in AG ¶ 32 contains four conditions that could mitigate criminal conduct security concerns. Two of these are established by the evidence:

- (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, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant has a single prescription-drug-related arrest and conviction. Due to the timing of the court hearings, sentencing was almost two years after the incident and, because of that, Applicant remains on informal probation. He has fulfilled all the other sentencing requirements, and the conduct is unlikely to recur. Both of the mitigating conditions apply. Paragraph 2 is found for Applicant.

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(d):

- (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 pertinent facts and circumstances surrounding this case. Applicant has mitigated his single prescription-drug-related arrest, and the alleged falsifications. The other conduct was also mitigated due to his health conditions and other circumstances. Overall, the record evidence does not create substantial doubt as to Applicant's present eligibility and suitability for national security eligibility, and a security clearance.

Formal Findings

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

Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraphs 1.a through 1.j:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.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 or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge