

KEYWORD: Mental

DIGEST: Applicant is a longtime sufferer of obsessive-compulsive disorder, which is an anxiety disorder. His condition has gone largely untreated. His partially treated anxiety disorder, which is still symptomatic, is a security concern because it compromises his ability to safeguard classified information. Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the security concern under Guideline I. Eligibility for a security clearance is denied.

CASENO: 05-05430.h1

DATE: 07/19/2007

DATE: July 19, 2007

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| In re: |) | |
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| |) | |
| ----- |) | ISCR Case No. 05-05430 |
| SSN: ----- |) | |
| |) | |
| Applicant for Security Clearance |) | |

**DECISION OF ADMINISTRATIVE JUDGE
MICHAEL H. LEONARD**

APPEARANCES

FOR GOVERNMENT

James F. Duffy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a longtime sufferer of obsessive-compulsive disorder, which is an anxiety disorder. His condition has gone largely untreated. His partially treated anxiety disorder, which is still symptomatic, is a security concern because it compromises his ability to safeguard classified

information. Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the security concern under Guideline I. Eligibility for a security clearance is denied.

STATEMENT OF THE CASE

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on January 23, 2006. The SOR—which is equivalent to an administrative complaint—details the factual basis for the action and alleges a security concern under Guideline I for emotional, mental, and personality disorders due to Applicant's obsessive-compulsive disorder (OCD). In addition, the SOR includes an allegation that Applicant is disqualified, as a matter of law, from having a security clearance granted or renewed by the Defense Department under 10 U.S.C. § 986(c)(3), because he is mentally incompetent as determined by a mental-health professional approved by the Defense Department.

Applicant replied to the SOR on March 12, 2006, and requested a decision without a hearing. Three days later, department counsel exercised their option under the Directive and requested a hearing in this case (R. 14). The following year, the case was assigned to me on March 19, 2007. Thereafter, on April 8, 2007, a notice of hearing was issued scheduling the hearing for May 2, 2007. The hearing took place as scheduled. DOHA received the hearing transcript on May 30, 2007.

At Applicant's request, the record was kept open until May 11, 2007, to allow him to submit additional documentary evidence. He made a timely submission, and those matters were forwarded to me by department counsel who voiced no objections. Applicant's job performance evaluations from 2002–2006 are admitted as Exhibit D.

FINDINGS OF FACT

Applicant admitted the factual allegations set forth in SOR subparagraphs 1.a, 1.b, 1.c, and 1.d. He did not reply to the allegation under 10 U.S.C. § 986(c)(3) in subparagraph 1.e. Based on the record evidence as a whole, I find the following facts:

1. Applicant is a 42-year-old man who is a software engineer for a large aviation company. He holds a bachelor's degree and a master's degree in electrical engineering. He has held a secret-level security clearance since about September 1988 for his employment in the defense industry. He married in 1995. He and his wife have one child, a daughter, born in 1997.
2. Applicant is part of a work group that is responsible for operating and maintaining a sophisticated flight simulation training system for military aircraft. He has a favorable work history,

¹ Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).

as shown by job performance evaluations from 2002–2006 (Exhibit D). Two coworkers testified on his behalf and vouched for his suitability for a security clearance. Applicant’s group leader described him as a diligent and hard-working employee. The witness believes Applicant is extremely conscientious in handling all materials, including classified information. Applicant’s current manager believes Applicant does a good job and is pleased with his work. He has never seen Applicant do anything that would cause him to have concerns about Applicant’s handling of classified information. Both witnesses indicated that they became aware of Applicant’s OCD when they were asked to be witnesses in this proceeding. In addition, Applicant’s former manager vouched for Applicant’s character and integrity (Exhibit B). He has never had any concerns that Applicant was a security risk, he has no reason to question Applicant’s integrity, and he trusts Applicant to do the right thing under every circumstance.

3. To obtain a top-secret security clearance, Applicant submitted a security-clearance application on June 1, 2004 (Exhibit 1). Other than some foreign travel, Applicant disclosed nothing of security significance in the application. By answering “no” to Question 19 about his medical record, he denied consulting with a mental-health professional or another health-care provider about a mental-health related condition in the last seven years.

4. In mid-December 2004, a governmental investigator interviewed Applicant at his place of work as part of the background investigation. The results of that interview are summarized in a written report (Exhibit 4). In broad terms, the interview covered three areas: (1) Applicant’s previous non-disclosure of his OCD and his seeking out pastoral counseling for the OCD a few times annually; (2) rule violations; and (3) mental-health problems. For the first area, Applicant explained that he chose not to disclose his OCD and his pastoral counseling because he was embarrassed by it.²

5. For the second area, Applicant stated that during the last seven years or so, perhaps on a weekly basis, he had mishandled classified information by transporting it from a secured safe in one room to another room without completing the security logs and without double wrapping it. He would simply put the classified information in his pocket. He did this because he was busy and no one knew what was in his pocket. He denied ever misusing or compromising classified information. The special agent who conducted the interview confirmed that Applicant’s actions were technical violations, and that no information was developed showing that classified information was compromised (R. 43–44).³

6. For the third area, Applicant volunteered that he had OCD and sought out help from his parish priest and from a licensed professional counselor in November and December 2004. He had not returned to the counselor because he felt that the counselor was not telling him anything he did not already know or that he could learn from reading a book. He explained that his OCD would manifest itself by his obsessing on sin and on a fear of accidentally hurting people. For example, while driving to work he would visualize hitting a pedestrian. Once he arrived at work, he would

² The SOR did not allege falsification allegations under Guideline E of the Directive, and I did not decide this case against Applicant based on making false statements or concealing information.

³ The SOR did not allege security violations under Guideline K of the Directive, and I did not decide this case against Applicant based on security violations.

then spend time calling local law enforcement agencies to check if there was a hit-and-run accident that day. At work, he would obsess on a thought for 20 minutes to one hour. Neither coworkers nor his wife was aware of his OCD, and he desired that his condition remain a secret.

7. Based on the investigative interview, the agency requested Applicant undergo a medical evaluation by a Defense Department psychiatric consultant.⁴ Applicant consented in October 2005 (Exhibit 2).

8. Applicant met with a board-certified psychiatrist in December 2005. The results of the evaluation were reported to the Defense Department in writing (Exhibit 3). The psychiatrist diagnosed Applicant with OCD with poor insight.⁵ The essential features of OCD are recurrent obsessions or compulsions that are severe enough to be time consuming or cause marked distress or significant impairment, and that at some point of the disorder the person has recognized that the obsessions or compulsions are excessive or unreasonable (Exhibit 5).

9. The psychiatrist reported that Applicant has, since childhood, experienced intrusive, senseless thoughts that preoccupy his time excessively, caused marked distress, and interfere with his ability to fully engage in his relationships and his work (Exhibit 3). The nature of his obsessive thoughts involve scrupulosity, fears of inadvertently harming others, and, most recently, fears of blurting out classified information. His compulsive behaviors included repetitive checking behaviors. She opined that Applicant's OCD was a longstanding, untreated, chronic mental disorder with a fluctuating but persistent course. She also opined that Applicant dramatically minimized his symptoms during the evaluation. In concluding her report, the psychiatrist expressed the following concerns about Applicant's OCD:

Untreated, his persistent repetitive thoughts may impair his judgment or reliability because they interrupt the normal train of thinking. Furthermore, his inability to achieve a sense of certainty between incoming sensory information and internal beliefs—a hallmark of obsessive thinking—may impair his judgment or reliability. Doubts about his performance or actions which he is unable to resolve place him in a vulnerable position to be influenced by others (Exhibit 3 at 2).

10. After the evaluation in December 2005, Applicant sought treatment from a behavioral medicine institute (Exhibits A and C). He was seen at the institute by a clinical psychologist and the director of the anxiety disorders center. They concurred with Applicant's diagnosis of OCD, and they assessed him as having good insight. Applicant was first evaluated at the institute in February 2006, and was then seen for six additional visits between March and June 2006. He was discharged from treatment due to his report that the OCD symptoms had improved significantly and were no longer interfering in his life. They had no reason to believe that Applicant was a security risk, and that his OCD should not be seen as a career impediment.

⁴ This interim action is allowed under the Directive, Enclosure 3, ¶ E3.1.2.

⁵ The diagnosis was made under section 300.3 of the DSM-IV-TR, of which I took administrative notice (Exhibit 5).

11. Applicant does not dispute the OCD diagnosis. Since completing treatment at the institute in June 2006, he estimates having obsessive thoughts and checking behaviors on a daily basis (R. 142–43). The nature of his OCD includes obsessive thoughts about hurting others and blurting out classified information, and checking behaviors such as checking the stove and the locks (R. 145). He agrees that scrupulosity is the root of his OCD (R. 145). Several of his coworkers now know about his OCD as does his wife (R. 153–54). He considers himself a former sufferer of OCD, and he thinks he can control it on his own (R. 154–55).

12. The psychiatrist, an active duty Air Force lieutenant colonel, testified at the hearing. Her qualifications in psychiatry include being licensed to practice medicine in two states. She is board certified in adult psychiatry since 2000, and board certified in forensic psychiatry since 2001. Before her current assignment, she served as a faculty member for four years at a large military medical center. The witness was qualified as an expert in the field of psychiatry with an emphasis in adult psychiatry (R. 51–52).⁶

13. In her testimony, the psychiatrist reaffirmed her conclusions and opinions stated in her December 2005 report.⁷ She explained that Applicant’s OCD caused him to have obsessions centered around doubt (R. 58–59). Applicant’s prognosis was poor largely due to his inability to accept treatment coupled with a longstanding history of symptoms that had been disturbing to him (R. 66). She noted that while his OCD is controllable, willpower alone would be insufficient for Applicant to control his OCD (R. 70). Also, she opined that Applicant’s OCD impairs his judgment and reliability because the symptoms (the doubts about his performance or actions) could place him in a vulnerable position to be influenced or taken advantage of by others (R. 71).

14. On the issue of mental competence, she opined that Applicant is not so impaired by the OCD that he is incapable of safeguarding classified information (R. 72–75, 90). But she also expressed the opinion that, due to the OCD, his ability to safeguard classified information is compromised (R. 72, 90).

15. Having had a chance to review Exhibits A and C and listen to Applicant’s hearing testimony, the psychiatrist added the following:

- Applicant’s course of treatment at the institute in 2006 was inadequate for the long-term management of his chronic OCD (R. 162–63).
- She upgraded her prognosis from poor to guarded because Applicant initiated treatment and participated in a brief course of treatment in 2006 (R. 163).
- If she were seeing Applicant as a patient, she would recommend a course of treatment with a therapist and a reevaluation with a psychiatrist for a 6 to 12-month period and then assess his response to treatment (R. 163–64).

⁶ Under Fed.R.Evid. 702, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

⁷ Although the psychiatrist testified about her opinions, I formed my own independent evaluation of Applicant’s OCD and how it affects his suitability for access to classified information. *See* ISCR Case No. 03-22167 (App. Bd. Dec. 6, 2006).

In addition, she remained concerned because Applicant's OCD will be relapsing and fluctuating, he continues to have symptoms, and he reported symptoms as recently as a couple of weeks ago. These are the types of symptoms that can be managed with medication and ongoing therapy that incorporate the principles of exposure-and-response prevention that Applicant learned at the institute (R. 164).

16. The psychiatrist also explained that she is not concerned that Applicant would blurt out classified information (R. 167). Instead, her concern is that due to the OCD, Applicant will be preoccupied with such thoughts and will be distressed by it. Her assessment of Applicant's OCD, if he was in a military environment, was that: (1) she would not deploy him because his OCD has not been properly treated and his symptoms are not well controlled; (2) she would not recommend that he remain on flight status; and (3) she would not recommend him for the personnel reliability program (R. 170-72). The basis for her conclusions is that Applicant has a partially treated mental illness that is still symptomatic (R. 172).

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.⁸ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁹ There is no presumption in favor of granting or continuing access to classified information.¹⁰ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹¹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or

⁸ Executive Order 10865, § 7.

⁹ ISCR Case No. 96-0277 (App. Bd. Jul. 11, 1997).

¹⁰ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹¹ Directive, Enclosure 3, ¶ E3.1.14.

mitigate facts that have been admitted or proven.¹² In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹³

No one has a right to a security clearance.¹⁴ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁵ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. Applicability of 10 U.S.C. § 986

In addition to the typical security concern under Guideline I, the SOR alleges in subparagraph 1.e that Applicant is statutorily ineligible for a security clearance because he is mentally incompetent as determined by a mental-health professional approved by the Defense Department. The federal statute at issue is 10 U.S.C. § 986, the so-called Smith Amendment.¹⁶

In 2000, a federal law was enacted that prohibited the Defense Department from granting or continuing a security clearance for any applicant if that person fell into any of four categories. The category at issue here is § 986(c)(3) dealing with a person who is mentally incompetent as determined by a mental-health professional approved by the Defense Department. In enacting the statute, Congress did not define the term mentally incompetent.

The Defense Department has provided some guidance in this area. In June 2001, the Deputy Secretary of Defense issued a memorandum that provided policy guidance for implementing 10 U.S.C. § 986. Attachment 1 to the memorandum was general guidance for implementing the new law within the Defense Department. The attachment stated that the new law did not change the substance of Guideline I. Also, it stated that “[a]nyone who is found to be mentally incompetent (incapable of safeguarding classified information) by a credentialed mental health professional approved by the DoD is not considered eligible for a security clearance.” Based on this guidance, the term mentally incompetent means that a person is incapable, lacks the capacity, or is wholly unable to safeguard classified information due to an emotional, mental, or personality disorder or illness.

¹² Directive, Enclosure 3, ¶ E3.1.15.

¹³ Directive, Enclosure 3, ¶ E3.1.15.

¹⁴ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (“It is likewise plain that there is no ‘right’ to a security clearance, so that full-scale due process standards do not apply to cases such as Duane’s.”).

¹⁵ *Egan*, 484 U.S. at 531.

¹⁶ For background information on the origin of this statutory prohibition, see Attorney Sheldon I. Cohen’s publication *Loss of a Security Clearance Because of a Felony Conviction: The Effect of 10 U.S.C. § 986, the “Smith Amendment,”* which can be found at www.sheldoncohen.com/publications.

Congress amended parts of the statute in 2004, but § 986(c)(3) was unchanged. The statute also authorizes a waiver in a meritorious case if there are mitigating factors.¹⁷ A waiver of the prohibition is permitted for two of the four types of cases covered by the Smith Amendment. A waiver is not authorized in mental incompetence cases under § 986(c)(3).¹⁸

Here, the government seeks to disqualify Applicant asserting that he is mentally incompetent under § 986(c)(3). This allegation is unproven. Neither the psychiatrist's report nor her testimony support the allegation that Applicant is incapable of or lacks the capacity to safeguard classified information due to his OCD. Accordingly, I conclude that 10 U.S.C. § 986(c)(3) does not apply here.

2. *The Guideline I Security Concern*

Under Guideline I, the concern is that emotional, mental, and personality disorders can cause a significant deficit in a person's psychological, social, and occupational functioning. These disorders are of security concern because they may indicate a defect in judgment, reliability, or stability.

Here, based on the record evidence as a whole, a security concern is raised due to Applicant's chronic OCD. Applicant has had OCD since childhood, and it has gone largely untreated except for brief periods in 2004 and 2006. The psychiatrist is of the opinion that Applicant's OCD is serious enough that it may indicate a defect in judgment, reliability, or stability. Also, she opined that Applicant's partially treated OCD compromises his ability to safeguard classified information. Given these facts, DC 1¹⁹ applies against Applicant. In addition, his OCD is not a temporary condition. Applicant is still symptomatic as evidenced by his nearly daily obsessive thoughts and checking behavior since June 2006. Given these facts, DC 4²⁰ applies against Applicant.

I reviewed the mitigating conditions (MC) under Guideline I and conclude none apply. Applicant has not presented sufficient evidence to justify applying any MC. Although he presented information (Exhibits A and C) from the people who evaluated and treated him at the institute in 2006, that information is inadequate. Because these people did not testify at the hearing, their assertions and opinions were not subjected to testing and scrutiny via cross-examination. Given these circumstances, I gave the information less weight. In addition, their assertions and opinions are not persuasive when compared with the report and testimony from the board-certified psychiatrist.

Applicant may believe that his OCD is largely resolved, but it is difficult to accept that proposition in light of his almost daily symptoms since June 2006. His stated beliefs—that he considers himself a former sufferer of OCD, and he thinks he can control it on his own—appear to

¹⁷ 10 U.S.C. § 986(d) (2004).

¹⁸ On September 12, 2006, the Director, DOHA, issued revised Operating Instruction No. 64, which implements the waiver authority. It also addresses an administrative judge's responsibilities in handling a case under the statute.

¹⁹ Directive, Enclosure 2, ¶ E2.A9.1.2.1. An opinion by a credential mental health professional that the individual has a condition or treatment that may indicate a defect in judgment, reliability, or stability.

²⁰ Directive, Enclosure 2, ¶ E2.A9.1.2.4. Information that suggests that the individual's current behavior indicates a defect in his or her judgment or reliability.

be wishful thinking. And, until recently, Applicant has kept his OCD a secret from his wife and others. This indicates that Applicant has been reluctant to come to terms with and address his OCD in a serious, comprehensive fashion.

Although he may be able to function adequately in his day-to-day affairs, Applicant is seeking to retain access to classified information. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. And the government cannot rely solely on Applicant's good faith and willpower to address his OCD. What is missing here is a long-term track record of treatment and management of his OCD along with a favorable prognosis that his OCD is under control and will remain under control for the foreseeable future. Applicant's partially treated OCD, which is still symptomatic, militates against a favorable clearance decision because it compromises his ability to safeguard classified information.

Viewing the record evidence as a whole, I conclude Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the security concern under Guideline I. And Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, I also considered Applicant's case under the whole-person concept and my whole-person analysis does not support a favorable outcome for Applicant.

FORMAL FINDINGS

_____ Here are my conclusions for each allegation in the SOR:

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| _____ SOR ¶ 1–Guideline I: | Against Applicant |
| Subparagraphs a–d: | Against Applicant |
| Subparagraph e: | For Applicant |

DECISION

_____ In light of all the circumstances, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Eligibility for a security clearance is denied.

Michael H. Leonard
Administrative Judge