

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant has a lifelong history of drug abuse. He completed several short-term drug treatment programs, but after each his drug abuse recurred. He voluntarily entered treatment in April 2003, and he has abstained from illegal drugs since then, but he is dependent on methadone to control his addiction. He disclosed his illegal use of prescription drugs on his security clearance application but neglected to disclose use of marijuana, cocaine, and heroin. He refuted the allegation of falsifying his security clearance application, but he has not mitigated the security concern based on his drug involvement. Clearance is denied.

CASENO: 06-22290.h1

DATE: 04/06/2007

DATE: April 6, 2007

In re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 06-22290

**DECISION OF ADMINISTRATIVE JUDGE  
LEROY F. FOREMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Stephanie C. Hess, Esq., Department Counsel

**FOR APPLICANT**

*Pro se*

**SYNOPSIS**

Applicant has a lifelong history of drug abuse. He completed several short-term drug treatment programs, but after each his drug abuse recurred. He voluntarily entered treatment in April 2003, and he has abstained from illegal drugs since then, but he is dependent on methadone to control his addiction. He disclosed his illegal use of prescription drugs on his security clearance application but neglected to disclose use of marijuana, cocaine, and heroin. He refuted the allegation of falsifying his security clearance application, but he has not mitigated the security concern based on his drug involvement. Clearance is denied.

## **STATEMENT OF THE CASE**

On November 27, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive), and the revised adjudicative guidelines approved by the President on December 29, 2005, and implemented by the Department of Defense on August 30, 2006 (Guidelines). The SOR alleged security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct).

Applicant answered the SOR in writing on January 2, 2007, and elected to have a hearing before an administrative judge. The case was assigned to me on February 21, 2007, and heard on March 13, 2007, as scheduled. DOHA received the hearing transcript (Tr.) on March 23, 2007.

## **FINDINGS OF FACT**

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 49-year-old plant service worker for a defense contractor. He has worked for his current employer since March 1981. He was married in March 1989 and has two children, ages 16 and 13. He has never held a clearance.

In 1972, when Applicant was in high school, he started smoking marijuana, and he continued using marijuana until about 2001. Some time in the 1970s, he became acquainted with a Vietnam veteran who had lost both legs and had a prescription for Lorcet and Dilaudin. Applicant started obtaining prescription drugs from his friend until the friend died. Applicant then found other persons with prescriptions and obtained the drugs from them.

In February 1976, Applicant was arrested for sexual assault and public indecency. In July 1976, he was arrested for driving under the influence (DUI). In both cases, he was held in jail but the record does not reflect a conviction or sentence. In December 1978, he was arrested for DUI, and was sentenced to probation for 12 months and fined \$400. In February 1984, he was arrested for DUI and fined \$650. In June 1984, he was arrested for attempting to elude a police officer, obstructing police, attempting to commit a misdemeanor, simple battery, criminal trespass, and a dangerous drug offense. He was sentenced to probation for 12 months and a \$400 fine. In January 1986, he was arrested for DUI and fined \$730. Also in January 1986, he was arrested for reckless conduct, pointing a weapon at another, discharging a firearm near a public highway, and discharging a firearm on the property of another. He was fined \$53, but it was suspended for six months. These arrests and convictions are not alleged in the SOR but are reflected on the criminal history submitted by Applicant at the hearing (Applicant's Exhibit A at 2).

In July 1986, Applicant was arrested for driving under the influence, violating the state controlled substance laws, striking a fixed object, and driving without insurance (Government Exhibit 2 at 3). The record does not reflect a conviction or sentence. This arrest is alleged in SOR ¶ 1.g.

In August 1986, Applicant was arrested for public intoxication and disorderly conduct. He was sentenced to confinement for six months, with 90 days suspended, and five years of probation (GX 2 at 3). This offense was not alleged in the SOR.

Some time in 1986, Applicant entered a rehabilitation program. He stayed away from drugs for about eight years. He was put on methadone maintenance for a brief period some time between 1994 and 1997 (Tr. 64).

In July 1995, Applicant was arrested for possession of a marijuana and driving with no proof of insurance (GX 2 at 3; Tr. 35). This offense is alleged in SOR ¶ 1.f.

In November 1998, Applicant was arrested for DUI and sentenced to confinement for 90 days, probation for 12 months, a fine of \$1,225, and placed in a work release program. This offense is not alleged in the SOR, but it is reflected in the criminal history submitted by Applicant (AX A at 3).

In about 2001, Applicant started using marijuana, cocaine, and heroin in addition to Lorcet and Dilaudin. He entered a rehabilitation program for about five days in 2001 (Tr. 36). He resumed using various drugs until April 2003, when he voluntarily entered an outpatient drug abuse treatment facility, at the suggestion of his now-deceased sister, with whom he had used drugs (Tr. 24). He was diagnosed with polysubstance abuse and opiate dependence. He was given methadone to keep him from craving drugs. He started out taking 30-milligram doses of methadone, and it was later increased to 60-milligram doses (Tr. 38, 60). His dosage eventually was reduced to 40 milligrams, but it was increased to 45 milligrams about a year ago (Tr. 40, 48). About twice a month, he attends meetings for methadone users, similar to Alcoholics Anonymous (Tr. 43-44). He was recently diagnosed as diabetic (Tr. 38). He meets about twice a year with a counselor and a doctor (Tr. 51). He has not yet completed the drug rehabilitation program.

Applicant is required to submit to random drug screening as part of his current rehabilitation program. He admitted he failed the first drug test, and probably failed two or three tests before his methadone dosage was adjusted (Tr. 40).

In November 2003, Applicant filed a grievance because he was passed over for promotion. His grievance was denied because he was not eligible for the promotion without a clearance (AX B).

In November 2005, Applicant applied for a security clearance. On his Questionnaire for National Security Positions (SF 86), he responded to question 24(a), asking if he had illegally used any controlled substance or prescription drugs by disclosing his illegal use of two prescription drugs (Lorcet and Dilaudin), but he did not disclose his illegal use of marijuana, cocaine, and heroin. He testified he did not know why he listed only Lorcet and Dilaudin, that he must have misunderstood the question, and that he did not intentionally fail to disclose information (Tr. 28).

Applicant's wife is aware of his drug addiction and treatment, but his children are not (Tr. 45). His drug and alcohol counselor at work is aware of his circumstances, but he has not told his supervisor about his addiction or treatment (Tr. 45-46).

At the hearing, Applicant acknowledged that he will battle with drug addiction for the rest of his life. He is not proud of his methadone use, but it is the only way he can resist using illegal drugs and the only way he can continue to work and stay with his family (Tr. 64-65).

## **POLICIES**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the Guidelines. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, the disqualifying conditions and mitigating conditions under each specific guideline, and the factors listed in the Guidelines ¶¶ 2(a)(1)-(9).

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 persons with access to classified information. However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The Guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Guidelines ¶ 2(b).

## **CONCLUSIONS**

### **Guideline H (Drug Involvement)**

The concern under this guideline is as follows: “Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.” Guidelines ¶ 24.

Any drug abuse may be disqualifying under this guideline. Guidelines ¶ 25(a). Drug abuse is defined as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” Guidelines ¶ 24(b). A disqualifying condition also may arise from a positive test for illegal drug use or “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.” Guidelines ¶ 25(b) and (c). The evidence, including Applicant’s admissions, establishes all three of these disqualifying conditions.

A disqualifying condition also may arise from a “diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence” or an “evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program.” Guidelines ¶¶ 25(d) and (e). Applicant readily admitted his drug dependence, but there is no evidence of the credentials of the person who diagnosed him. He made general references to a “counselor” and referred to a “doctor,” but no evidence of their credentials was introduced. I conclude these two disqualifying conditions are not fully established by substantial evidence.

Finally, a disqualifying condition may arise from “failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional.” Guidelines ¶ 25(f). Applicant successfully completed several short-term drug treatment programs. There is no evidence that any of the earlier programs were “prescribed by a duly qualified medical professional.” He has not completed his current program, in which he was self-referred. This disqualifying condition is not established.

Since the government produced substantial evidence to raise the disqualifying conditions in Guidelines ¶¶ 25(a), (b), and (c), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

A security concern based on drug involvement may be mitigated by evidence that “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.” Guidelines ¶ 26(a). It may also be mitigated by “a demonstrated intent not to abuse any drugs in the future, such as . . . an appropriate period of abstinence” Guidelines ¶ 26(b)(3).

Applicant’s drug abuse between 1976 and 2003 certainly was not infrequent. His last use of illegal drugs was around April 2003. Determining whether it occurred “so long ago” that it is “unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment,” requires a careful evaluation of the record. If the evidence shows “a significant period of

time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *See* ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant produced evidence of multiple arrests, convictions, and other misconduct not alleged in the SOR. He stated at the hearing that he presented the evidence because he wanted to make sure I had all the available evidence (Tr. 21). The Appeal Board has held that conduct not alleged in the SOR may be considered: “(a) to assess an applicant’s credibility; (b) to evaluate an applicant’s evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.” ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). I have considered his evidence for the limited purpose of evaluating the extent, duration, and severity of his substance abuse, and to determine whether he is rehabilitated.

The period of almost four years since Applicant’s last drug abuse is “a significant period of time.” However, in the context of his lifelong pattern of drug and alcohol abuse, his previous attempts at rehabilitation, and previous significant periods of abstinence (up to eight years) followed by recurring drug abuse, and his current need for constant monitoring and increased methadone dosages, I am not satisfied that his most recent period of abstinence is sufficient to show reform or rehabilitation. I conclude the mitigating conditions in Guidelines ¶¶ 26(a) and (b)(3) are not established.

A security concern based on drug involvement also may be mitigated by evidence of “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.” Guidelines ¶ 26(d). Before enrolling in his current treatment program in 2003, Applicant completed several short-term programs, but each time his drug abuse recurred. He has not completed his current program, nor does he have a favorable prognosis by a duly qualified medical professional. I conclude this mitigating condition is not established.

### **Guideline E (Personal Conduct)**

The concern under this guideline is as follows: “Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.” Guidelines ¶ 15. The relevant disqualifying condition in this case is “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.” Guidelines ¶ 16(a).

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission on a security clearance application, standing alone, does not prove an

applicant's 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 concerning an applicant's state of mind at the time of the omission. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant admitted his answer to question 24(a) was incomplete. He could offer no explanation for the omission other than the possibility that he misunderstood the question. There was no plausible reason for him to intentionally omit some of the drugs he abused, because his disclosure of abusing prescription drugs was sufficient to trigger an inquiry. He was very candid at the hearing, presenting evidence from state court records, obtained at his own expense, that revealed arrests, convictions, and misconduct beyond what was alleged in the SOR and proved by Department Counsel. He offered the evidence because he simply wanted to make sure that I had all the available evidence (Tr. 21). At times during the hearing he was confused and unfocused. I am satisfied that his incomplete answer to question 24(a) was the product of that same confusion, and was not intended to deceive. I conclude that no disqualifying conditions under this guideline were established, and I resolve SOR ¶ 2 in Applicant's favor.

### **Whole Person Analysis**

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered: (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 applicant'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. Guidelines ¶¶ 2(a)(1)-(9). Many of these factors were addressed above, but some merit additional comment.

Applicant is paying the price for a lifetime of substance abuse. He sincerely wants to be free of his addiction. He has not disclosed it to his children or his supervisor, making him vulnerable to pressure, coercion, exploitation, or duress. His lifelong pattern of treatment, abstinence, and recurrence of drug abuse, coupled with his present dependence on methadone and the recent increase in his methadone dosage make continuation or recurrence of drug abuse likely. This is a sad case of an honest and sincere man who is a prisoner of his drug addiction. While he deserves compassion, suitability for a security clearance cannot be based on compassion.

Applicant has refuted the allegation of intentional falsification under Guideline E. However, after weighing the disqualifying and mitigating conditions under Guideline H and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on his drug involvement. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him a security clearance.



### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline H (Drug Involvement):      AGAINST APPLICANT

Subparagraphs 1.a-1.h:      Against Applicant

Paragraph 2. Guideline E (Personal Conduct):      FOR APPLICANT

Subparagraph 2.a:      For Applicant

### **DECISION**

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman  
Administrative Judge