



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-15567
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Francisco Mendez, Esq., Department Counsel
For Applicant: [Redacted-Applicant's Father], Personal Representative

November 9, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement) and E (Personal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on July 17, 2007. On May 13, 2009, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines H and E. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on May 19, 2009; answered it on June 18, 2009; and requested a hearing before an administrative judge. DOHA received the request on June 19, 2009.

On July 10, 2009, Department Counsel amended the SOR by withdrawing the two Guideline E allegations of falsifying a security clearance application and substituting one allegation of desertion from the U.S. Army. Applicant responded to the amendments on July 28, 2009.

Department Counsel was ready to proceed on July 24, 2009, and the case was assigned to me on July 27, 2009. DOHA issued a notice of hearing on August 6, 2009, scheduling the hearing for September 2, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 8 were admitted in evidence without objection. Applicant testified and presented the testimony of one witness. The record closed upon adjournment of the hearing. DOHA received the transcript (Tr.) on September 14, 2009.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.d under Guideline H, and he admitted SOR ¶ 2.a, as amended, alleging desertion from the Army. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 29-year-old employee of a federal contractor, working as an electrician in a naval shipyard. He has worked for his current employer since January 2007. He has never held a security clearance (Tr. 18).

In high school, Applicant used marijuana and occasionally used cocaine (Tr. 52). He served on active duty in the U.S. Army from August 1999 to August 2001, but did not use illegal drugs in the Army. After completing basic training and being assigned to a unit, he became depressed by the "negativity" in his unit and the hazing he experienced as a new arrival. His fellow soldiers did not like the unit, the duty station, or the Army (Tr. 45-46, 63-65). He deserted on February 28, 2000, even though his father tried to talk him out of it. His father convinced him to surrender, and he did so on April 11, 2000 (Tr. 35). He was discharged under other than honorable conditions in lieu of court-martial (GX 3 through GX 8).

Applicant was addicted to Oxycontin for about nine months in 2003. He was introduced to Oxycontin when it was prescribed for his girlfriend, who was seriously injured. Applicant took care of his girlfriend and started using Oxycontin and Dilaudid that were prescribed for her (Tr. 36, 52). His parents ejected him from the family home, where he had been living, when they found out about his drug use (Tr. 36). Applicant underwent detoxification twice. After he and his girlfriend broke up, he no longer had her prescription drugs available, and he replaced them with heavy alcohol consumption (GX 2 at 15; Tr. 53). He also continued to use marijuana about once a week and used cocaine once every other month (Tr. 53-55).

After Applicant's older brother died in October 2004, he began using heroin, and used it about three times a day from May to December 2005 (GX 2 at 15). He suspected his brother had died from a drug overdose, but later learned that the cause of death was pneumonia (GX 2 at 23). Applicant purchased his heroin from friends or dealers on the street (GX 2 at 3). He incurred numerous delinquent debts, sold or pawned all his personal property to buy drugs, and cashed in a retirement fund from a public school system where he was employed (Tr. 55).

Applicant's father convinced him to seek treatment (Tr. 39). He underwent drug treatment from December 2005 to April 2006 (GX 2 at 11). He tested positive for cocaine and THC during the first week of treatment (GX 2 at 8). He was diagnosed by a registered nurse and a medical doctor as suffering from opiate dependence, a generalized anxiety disorder, and a depressive disorder not otherwise specified (GX 2 at 17-18). His treatment consisted of three weeks of outpatient treatment, followed by group counseling sessions and individual counseling sessions with staff professionals (GX 2 at 8). He stopped attending the group therapy sessions in March 2006 (GX 2 at 20), because he found the sessions unhelpful and he did not want to be around addicts who were still using drugs (GX 2 at 24; Tr. 48). He last used illegal drugs when he relapsed once in March 2006 (Tr. 59).

Applicant has not participated in Narcotics Anonymous, Alcoholics Anonymous, or any similar activity (Tr. 60). In October 2008, he was evaluated by the same treatment facility he had attended in 2005-2006, and he was diagnosed as opiate dependent in remission (GX 2 at 13). The evaluation did not include a prognosis.

Applicant does not associate with any of the individuals with whom he used illegal drugs (Tr. 62). He was married in May 2007. He and his wife are expecting their first child. He enjoys his job as an electrician. He has paid off his delinquent debts and recently purchased a home (Tr. 49-50). He has been taking prescription medications for depression for about two years, and he sees a psychiatrist on a regular basis, about once every three months (Tr. 66).

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 have 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 revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these

guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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 that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. 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. 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 AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement

The SOR alleges Applicant was addicted to Oxycontin in 2003 after using it for about nine months (SOR ¶ 1.a), used heroin about three times daily from December 2005 to June 2006 (SOR ¶ 1.b), and tested positive for remnants of cocaine and tetrahydrocannabinol (THC) in January 2006 (SOR ¶ 1.c). It also alleges he participated

in a drug treatment program from December 2005 to April 2006; was diagnosed with opiate addiction, generalized anxiety disorder, and depressive disorder; refused to continue with the recommended individual counseling; and reported using heroin and drinking excessively at his last visit before discharge (SOR ¶ 1.d). Applicant admitted these allegations in his answer to the SOR.

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.” AG ¶ 24.

Guideline H encompasses “drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens).” AG ¶ 24(a)(1). Drug abuse is “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” AG ¶ 24(b).

Disqualifying conditions under this guideline include:

AG ¶ 25(a): any drug abuse;

AG ¶ 25(b): testing positive for illegal drug use;

AG ¶ 25(c): illegal drug possession, including purchase; and

AG ¶ 25(d): diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence; and

AG ¶ 25(f): failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional.

Applicant's admissions and the government's evidence raise AG ¶¶ 25(a)-(d). AG ¶ 25(f) is also raised because Applicant did not complete the aftercare requirements of his drug treatment program.

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

Security concerns under this guideline may be mitigated if “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.” AG ¶ 26(a). The first prong of AG ¶ 26(a) (“happened so long ago”) focusing on whether the drug involvement was recent, is a key consideration in this case. There are no “bright line” rules for determining when conduct is “recent.” The determination 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 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.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant’s last drug involvement was in March 2006, more than three and a half years ago. A significant period of time has passed, raising the question whether he is rehabilitated after his long history of intense drug abuse starting in high school. He did not complete his aftercare requirements for the drug treatment program that ended in April 2006, and he does not participate in Narcotics Anonymous or any similar support group. At his hearing, he seemed to be a quiet, sensitive, somewhat fragile person. On the other hand, he has a supportive family, was recently married, and is awaiting the birth of his first child. He has worked at a job that he finds rewarding for almost three years. He no longer associates with drug users. He receives medication for his depression, and he sees a psychiatrist regularly. His opiate dependence has been diagnosed as in remission. He has experienced a drug-free life for a substantial period of time, and he has no desire to relapse to the hopeless state he experienced in December 2005. I conclude AG ¶ 26(a) is established.

Security concerns also may be mitigated by “a demonstrated intent not to abuse any 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; and (4) a signed statement of intent with automatic revocation of clearance for any violation.” AG ¶ 26(b). The evidence establishes AG ¶¶ 26(b)(1), (2), and (3).

Security concerns also may be mitigated by “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.” AG ¶ 26(d). This mitigating condition is only partially established. Applicant completed the outpatient treatment portion of his drug treatment program, but he did not complete the aftercare requirements. The diagnosis as of October 2008 that he was “in remission” falls short of a favorable prognosis.

Guideline E, Personal Conduct

The SOR alleges Applicant deserted from the Army and was absent from his unit from February 20, 2000, to April 11, 2000, and that he was discharged in lieu of trial by court-martial for his conduct (SOR ¶ 2.a, as amended). He has admitted these allegations.

The concern under this guideline is set out in AG ¶ 15 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.” The following are the relevant disqualifying conditions under this guideline.

AG ¶ 16(c) is raised by:

[C]redible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

AG ¶ 16(d) is raised by:

[C]redible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of . . . disruptive, violent, or other inappropriate behavior in the workplace.

AG ¶ 16(e) is raised by:

[P]ersonal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

AG ¶¶ 16(c) and (d) are raised by Applicant’s conduct while in the Army, because he demonstrated unwillingness to comply with rules and regulations, questionable judgment, and unreliability. AG ¶ 16(e) is raised because his desertion from the Army was likely to adversely affect his standing among his neighbors, friends, co-workers, associates, and his community.

Security concerns based on personal conduct also may be mitigated by showing that “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.” AG ¶ 17(c). Applicant’s desertion was not a minor offense, but it happened

almost ten years ago. It did not occur under unique circumstances. Although he is no longer in the military, he could encounter stressors that would prompt him to abandon his current responsibilities. However, he has obtained professional help and surrounded himself with a support structure to help him cope with stress. I conclude AG ¶ 17(c) is established.

Security concerns under this guideline may be mitigated if “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.” AG ¶ 17(d). This mitigating condition is established, because Applicant has acknowledged his behavior, obtained treatment for his depression and anxiety, and changed his lifestyle.

Finally, security concerns arising from personal conduct may be mitigated if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). This mitigating condition is established because Applicant has disclosed his past and obtained treatment for his vulnerable personality traits.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all the relevant circumstances. An 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 have incorporated my comments under Guidelines H and E in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a relatively young man, but he appears to have left his turbulent adolescence and early adulthood behind him. He has obtained and held a responsible job, married, and obtained professional assistance to overcome his drug addiction and

vulnerable personality traits. He was candid, remorseful, and sincere at the hearing. After weighing the disqualifying and mitigating conditions under Guidelines H and E, evaluating all the evidence in the context of the whole person, and mindful of my responsibility to resolve any doubt in favor of national security, I conclude Applicant has mitigated the security concerns based on drug involvement and personal conduct. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 2.a (as amended):	For Applicant

Conclusion

In light of all of the circumstances, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge