



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



In the matter of:)
)
) ISCR Case No. 08-10008
)
)
Applicant for Security Clearance)

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: Kathleen L. Voelker, Esquire

September 25, 2009

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s use of methamphetamine from May 2005 to January 2007 is not mitigated by his two-year abstinence while under probation. At this time, the passage of time is not sufficient to show reliability, judgment, and willingness to comply with rules and regulations. Eligibility for access to classified information is denied.

Statement of the Case

On July 15, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On March 12, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive),

dated January 2, 1992, as modified and revised.¹ The SOR alleges security concerns under Guideline J (Criminal Conduct) and Guideline H (Drug Involvement). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, denied or revoked.

On April 7, 2009, Applicant responded to the SOR allegations, and requested a hearing before an administrative judge. The case was assigned to me on April 30, 2009. DOHA issued a notice of hearing on May 28, 2009. The hearing was convened as scheduled on June 23, 2009. The government offered Government Exhibits (GE) 1 through 4, which were admitted without objection (Tr. 13). Applicant testified on his own behalf, presented two witnesses, and submitted Applicant Exhibit (AE) 1 (with Tabs A through N), which were admitted without objection (Tr. 23). DOHA received the transcript of the hearing (Tr.) on July 6, 2009.

Findings of Fact

Applicant admitted the SOR's factual allegations, except for SOR ¶ 2.a, which he denied. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 35-year-old project manager working for a defense contractor. He graduated from college in 1999. He then joined the U.S. Navy Officer Candidate School program and became a naval aviator. He displayed flight and academic excellence and received two training commendations in recognition of his outstanding performance. He served in the Navy from March 2000 to March 2005, and achieved the rank of Lieutenant (O-3). He was awarded a Navy and Marine Corps Achievement Medal for superior performance. In November 2003, he lost his flying qualifications due to a number of flying incidents. He was involuntarily discharged from the Navy in March 2005. His service was characterized as honorable.

Applicant started law school in August 2005, and received his law degree in May 2008. He received an award for being the most outstanding third-year law student in the school's clinic program. He has not taken his bar exam. Applicant presented numerous impressive character letters from fellow Navy officers and law school students, as well as a law school professor. All of his references consider Applicant to be honest, trustworthy, and of high moral character. He was commended for his judgment,

¹ On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006.

maturity, outstanding work ethic, and overall performance. All of his references recommended he receive access to classified information without reservations.

He married his first wife in October 2001. They separated in 2004, because of her mental problems, alcohol abuse, and infidelity, and they were divorced in August 2005. Applicant met his current wife through the Internet around May 2005. Applicant married his wife in December 2007. He has no children.

Applicant illegally used methamphetamine ten times from approximately May 2005 to January 1, 2007. He used methamphetamine twice a day on five different occasions. Methamphetamine is a highly addictive, illegal drug. He used methamphetamine twice in May 2005, while visiting his twin brother living in another state (Tr. 94). Applicant's brother is the supplier of all the methamphetamine Applicant consumed. He visited his brother to acquire and use the methamphetamine. Applicant used the methamphetamine to avoid feeling tired and to be able to consume more alcohol while partying with his brother. His use of methamphetamine was knowing, deliberate, and premeditated. Applicant claimed he did not use illegal drugs while in college or in the Navy because he knew the use of drugs was illegal and he did not want to lose his career (Tr. 163).

In May 2005, Applicant brought methamphetamine back with him on his return flight home. He consumed the methamphetamine in December 2005, to avoid feeling tired and to be able to consume more alcohol (Tr. 95). He used methamphetamine twice the same day. While attending law school, Applicant visited his twin brother during the 2006 spring break and in November 2006 (Tr. 97). On both occasions, he used methamphetamine with his brother under similar circumstances as those during May 2005 and December 2005. Applicant brought methamphetamine back with him on his return flight home in November 2006. He consumed the methamphetamine around late December 2006 to early January 2007 at a holiday party (Tr. 101).

Applicant told his wife (then girlfriend) about his use of methamphetamine in May 2005. He also told her about the other four times he used methamphetamine. She has never used illegal drugs, and she discouraged him and advised Applicant against using illegal drugs. Applicant disregarded his wife's advice because he believed he did not have a drug problem, would not get addicted to methamphetamine, and would not get caught by law enforcement.

In February 2007, Applicant sent \$200 to his twin brother living in another state and asked him to mail Applicant some methamphetamine (Tr. 137). His brother mailed him 1.9 grams of methamphetamine. The shipment of the illegal drug was discovered by law enforcement personnel. In May 2007, Applicant was charged with unlawful methamphetamine conspiracy, a felony. In September 2007, pursuant to a plea agreement, Applicant pled guilty to an amended charge of illegal possession of methamphetamine in exchange for a sentence of 24 months probation with deferred judgment (in part).

Applicant decided he would never use drugs again when he saw the police officers coming into his home in February 2007 (Tr. 147). As a result of this incident, Applicant realized he had not exercised good judgment. He believes this is not the type of future he envisioned for himself and his wife. Between July 2007 and December 2007, at the suggestion of his wife, Applicant underwent grief counseling to identify the root of his bad decisions. Applicant believes his use of methamphetamine was a way of him coping with the devastating losses he suffered in a relatively short period, i.e., in 2003, he lost his flight status; he had marital problems in 2004, and divorced his first wife in August 2006; he was involuntarily discharged from the Navy in 2005; his twin brother was diagnosed with AIDS in 2004; he was very close to his grandmother and she died in February 2005; and his older brother died in June 2006 of AIDS. Applicant had problems coping with all these setbacks and was not able to talk to others about his personal problems.

In September 2007, the court required Applicant to undergo a drug assessment. The state counselor concluded Applicant was not drug dependent and recommended no further drug counseling (Tr. 120). She recommended, however, that Applicant continue his grief counseling. During the course of his probation, Applicant took three drug tests, all of which came back negative for illegal drugs. Applicant successfully completed his 24-month probation with all of its requirements.

Since February 2007, Applicant has had limited interaction with his brother. He has not been back to his brother's home since December 2006. He had contact with his brother in July 2007 (Tr. 140) and December 2008, at his parent's home, and his brother visited Applicant's home in July and November 2008 (Tr. 124). Applicant tries to control the environment and circumstances under which he meets with his brother to prevent exposing himself to illegal drugs. To his knowledge, his brother continues to abuse illegal drugs.

Applicant started working for his current employer, a government contractor, in June 2008. His direct supervisor is the Chief Executive Officer (CEO) and part-owner of the company. The CEO and Applicant have weekly phone contact and monthly personal contact (Tr. 24-34). In his opinion, Applicant is doing an outstanding job. Applicant is performing beyond all expectations and a promotion is pending. The customer (a government agency) is well pleased with Applicant's performance and recommended his promotion. Applicant received a monetary award and a letter of commendation for his outstanding job performance.

The CEO is aware of all the SOR allegations against Applicant. He believes Applicant made some bad decisions and exercised poor judgment. Applicant disclosed his drug use and criminal charges in detail in his security clearance application and discussed his problems with the CEO. The CEO considers Applicant to be honest, truthful, and reliable. He recommended Applicant receive access to classified information without reservations. Applicant has been handling a \$25 million dollar contract for the company with great success and is well liked by the client.

Applicant expressed remorse for all of his illegal behavior. He was candid and forthcoming explaining the circumstances surrounding his and his brother's use of drugs, the stress he underwent during the criminal proceedings against him, and the shame and embarrassment he felt. He believes that many of his law school fellow students became aware of his legal situation. He understands that for him to achieve his goals in life there is no room in his future for drugs or any illegal activity. Applicant signed a statement of intent in which he promised never to use illegal drugs again (Tr. 128; AE 1, Tab N).

Applicant believes he has learned his lesson and is rehabilitated. Since his criminal activity, he moved to a different state, married his wife, graduated from law school, and has been successfully working for a government contractor. Applicant intends to continue his contacts with his brother, but under circumstances where Applicant can control the circumstances and situation of their meetings.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 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 "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned." See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision,

in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. 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 or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[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 J, Criminal Conduct

Under Guideline J, the security concern is that criminal activity "creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations." AG ¶ 30.

Between May 2005 and January 2007, Applicant knowingly and deliberately used methamphetamine approximately 10 times. He used methamphetamine twice a day on five different occasions. Applicant traveled by airplane to visit his brother in another state and to acquire and use the methamphetamine. On three occasions, Applicant brought back methamphetamine in the airplane to use at home at a later time. Furthermore, Applicant purchased 1.9 grams of methamphetamine from his brother and had it mailed to him across interstate lines. He was charged with unlawful methamphetamine conspiracy. He pled guilty to an amended charge of illegal possession of methamphetamine. Applicant's drug-related behavior violated state and federal criminal laws.

Applicant's behavior raises security concerns under AG ¶ 31(a) "a single serious crime or multiple lesser offenses," and AG ¶ 31(c) "allegation or admission of criminal

conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

AG ¶ 32 lists four conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

After considering all the mitigating conditions, I find that AG ¶¶ 32 (a) and (d) partially apply. Applicant’s last use of methamphetamine was in January 2007; his last criminal behavior occurred in February 2007; and he pled guilty to unlawful possession of methamphetamine in September 2007. As such his criminal behavior may be considered somewhat remote.

Applicant averred his criminal behavior was caused by unusual circumstances and that it is unlikely to recur. He claimed he used methamphetamine to cope with the devastating losses he suffered in a relatively short period, i.e., losing his flight status in 2003; the 2004 diagnosis of his twin brother with AIDS; the marital problems in 2004 that led to his divorce from his first wife in 2006; his involuntary discharge from the Navy in 2005; the death of his grandmother in 2005; and the death of his older brother to AIDS in 2006.

Since July 2007, Applicant successfully underwent grief counseling, participated in a state-sponsored drug assessment that indicated he is not drug dependent, successfully completed his 24-month probation, purchased a home, married his current wife, graduated from law school, and has been highly successful working for a government contractor. There is no evidence that Applicant has been involved in any additional drug-related incidents or any other misconduct after February 2007. He was candid in his responses to the security clearance application questions, to his supervisor’s questions, and at his hearing when discussing the circumstances surrounding his drug-related offenses. I find this evidence weighs towards a finding of successful rehabilitation, but does not fully mitigate the Guideline J security concerns.

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern about drug involvement:

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 ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Two drug involvement disqualifying conditions raise a security concern and are disqualifying in this particular case: AG ¶ 25(a): "any drug abuse;"² and AG ¶ 25(c): "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia."

Between May 2005 and January 2007, Appellant illegally used and possessed methamphetamine approximately 10 times. He used methamphetamine twice a day in five different occasions. Applicant traveled by airplane to visit his brother in another state and to use and acquire the methamphetamine. On three occasions, Applicant brought back methamphetamine in the airplane to his home state to use it at a later time. Furthermore, Applicant purchased 1.9 grams of methamphetamine from his brother and had it mailed to him across interstate lines. His behavior triggers the applicability of AG ¶¶ 25(a) and 25(c).³ The other disqualifying conditions listed in AG ¶ 25 are not applicable.

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

² AG ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

³ AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

(1) 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), and (2) inhalants and other similar substances.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Cocaine and methamphetamine are Schedule II Controlled Substances. See 21 U.S.C. § 812(c)II(a)(4) (cocaine), and II(c) (methamphetamine); *United States v. McCourty*, 562 F.3d 458 (2nd Cir. 2008) (cocaine); *United States v. Wheeler*, 535 F.3d 446 (6th Cir. 2008) (methamphetamine).

(a) 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;

(b) 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.

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

AG ¶¶ 26 (a) and (b) are partially established by the record evidence. Applicant's illegal use of methamphetamine is somewhat remote. His last possession and use of methamphetamine was in January 2007, and his last drug-related misconduct was in February 2007. Because Applicant used methamphetamine ten times (twice in five different occasions) between May 2005 and January 2007, I do not find his use was infrequent.

Applicant averred his use of methamphetamine occurred under unusual circumstances and it is unlikely to recur. He believes his use of methamphetamine was a way to cope with the devastating losses he suffered in a relatively short period, i.e., in 2003, he lost his flight status and his naval career in 2005; he had marital problems in 2004, and divorced his first wife in August 2006; his twin brother was diagnosed with AIDS in 2004; he was very close to his grandmother and she died in February 2005; and his older brother died in June 2006. Applicant had problems coping with all these setbacks and talking to people about his personal problems.

I disagree with the conclusion that Applicant's use of methamphetamine occurred under unusual circumstances and it is unlikely to recur. Applicant did not use illegal drugs while in college or in the Navy because he was concerned its use would adversely affect his career. In May 2005, when he used methamphetamine for the first time, he was 32 years old. He had just been discharged from the Navy after serving approximately five years as an officer and naval aviator. He was about to start law

school. Applicant knew the use of methamphetamine was illegal and dangerous to his health.

AG ¶ 26(b)(1)-26(b)(4) are partially established by the evidence. Applicant intends to continue having contact with his twin brother, who was the source of all of Applicant's methamphetamine and who used the illegal drug with Applicant. To Applicant's knowledge, his brother is still using illegal drugs. Applicant claimed he has somewhat disassociated from his brother by controlling the circumstances under which they meet. He has not visited his brother at his home and has not been in parties with him to avoid the environment in which the methamphetamine was used.

Applicant receives credit for his two-year period of abstinence while on probation, his successful grief counseling, and for his positive drug assessment. He also receives full credit for his signed statement of intent not to use illegal drugs with automatic revocation of clearance for any violation.

Applicant told his girlfriend (now his wife) about his use of methamphetamine every time he used it. She was opposed to his use of methamphetamine and advised him against using it. Notwithstanding, Applicant deliberately sought out the use of methamphetamine. He visited his brother in another state where he acquired and used methamphetamine. Additionally, he brought methamphetamine with him in the plane for later use. Moreover, Applicant purchased methamphetamine from his brother and had it mailed to his home.

Considering all the facts and the timelines of Applicant's use of methamphetamine and the losses he suffered, I do not find his use of methamphetamine occurred under such unusual circumstances as to make it unlikely that he would use methamphetamine again. I find the drug involvement concerns are not mitigated. In reaching my conclusion, I also considered Applicant's statement of intent not to use illegal drugs again, his limited association with his brother, and Applicant's period of abstinence.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation

for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature and well-educated man. He served honorably for five years in the Navy as an officer and naval aviator. He has been very successful working for a defense contractor. He has established a reputation as a valuable, dedicated and reliable employee. There is no evidence he has ever compromised classified information or committed any security violations. Applicant expressed remorse for his questionable behavior and seems resolute in remaining abstinent. He successfully completed his grief counseling, and his drug assessment determined he is not drug dependent. Additionally, Applicant is married and in a stable relationship. He has been drug abstinent since January 2007, and promised never to use illegal drugs again. These factors show responsibility, good judgment, and mitigation.

On the other hand, Applicant acted deliberately and with premeditation in his use of methamphetamine notwithstanding his knowledge of the illegality of his actions and the risks associated with it. He continued his use of methamphetamine even though his wife asked him not to use illegal drugs. Applicant's bold disregard for the law escalated to the point of him ordering methamphetamine to be delivered to him through the mail. He compromised himself and his brother. It is questionable whether Applicant would have discontinued his methamphetamine use but for his being discovered and prosecuted.

On balance, I conclude that, at this time, Applicant's favorable evidence is insufficient to mitigate the security concerns arising from his criminal conduct and drug involvement. Considering the totality of the circumstances in this case, Applicant's two-year abstinence while under probation is not sufficient to show reliability, judgment, and willingness to comply with rules and regulations. Overall, the record evidence fails to convince me of Applicant's eligibility and suitability for a security clearance.

Formal Findings

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

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant

Paragraph 2, Guideline H:

AGAINST APPLICANT

Subparagraphs 1.a and 1.b:

Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Eligibility for a security clearance is denied.

JUAN J. RIVERA
Administrative Judge