



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



In the matter of:	)	
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-----	)	ISCR Case No. 08-11422
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Alison O’Connell, Esquire, Department Counsel  
For Applicant: *Pro se*

July 2, 2010

**Decision**

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LYNCH, Noreen A., Administrative Judge:

On February 4, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline J (Criminal Conduct) for Applicant. 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant requested a hearing before an Administrative Judge. I received the case assignment on March 12, 2010. DOHA issued a notice of hearing on March 18, 2010, and I convened the hearing as scheduled on April 5, 2010. The Government offered Exhibits (GE 1-5), which were received into the record without objection. Applicant testified on her own behalf and presented the testimony of one witness. She submitted Exhibits (AE A-H), at the hearing which were admitted into the record without objection. DOHA received the transcript on April 13, 2010. Based upon a review of the

case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

### **Findings of Fact**

In her Answer to the SOR, dated February 22, 2010, Applicant admitted in part and denied in part the factual allegation in ¶ 1.a. of the SOR.

Applicant is a 50-year-old employee of a defense contractor. She graduated from high school in 1978 and college in 1985. Applicant is divorced and has two children. She has been with her current employer since March 2005. (Tr. 53) She has held a security clearance since January 2006. (Tr. 53)

In November 2007, Applicant visited her dentist who referred her to an endodontist. After a November 12, 2007 root canal, she received a prescription for Percocet. (AE A) Due to the continuing pain, she received another prescription on November 16, 2007. (Tr. 18) She photocopied the prescription and had it filled on December 4, 2007. (Tr. 21; 70) She admits that she made several photocopies of the prescription. (Tr. 43)

In November, Applicant also learned that her husband was having an affair and spending all her money on another woman. (GE 2) He was also addicted to internet pornography. (AE F) She was facing the loss of her nine-year relationship. Applicant describes this as a “very dark time in her life.” She stated she was overwhelmed with grief and uncertainty, and she made some bad errors in judgment. (GE 2) She reported that she was “an emotional wreck.” (Answer to SOR)

On December 11, 2007, Applicant’s husband dropped off her prescription for Percocet (12 tablets). The prescription was also a photocopy of a November 16, 2007 prescription prescribed by her dentist. After calling the dentist and learning that Applicant was no longer under his care, the pharmacy alerted the local police due to the possible fraud. (GE 3)

The fraud unit conducted an investigation. Applicant admitted to the police detective, after first denying the forgery allegation, that she had photocopied the prescription, dated November 16, 2007. She blamed her relationship problems and financial upheaval for her bad judgment. She also stated that her husband had “flushed” her medications. Ultimately, she accepted responsibility for the alteration of the prescription. (GE 3)

Applicant disclosed to the police that she used other prescription medications for chronic back pain, and other health problems. She denied that she had ever “forged” any of those prescriptions. (GE 3) In a follow-up police interview on December 12, 2007, Applicant revealed that she thought she had filled the November 16, 2007 prescription during the week of December 4, 2007. The police confiscated the prescription from another pharmacy. (GE 3) After the conclusion of the investigation, a report, dated

December 17, 2007, was completed. The evidence invoice, attached to the report, noted two photocopied November 16, 2007 prescriptions. One filled on December 4, 2007 and the other attempted to be filled on December 11, 2007. (GE 3)

On March 19, 2008, Applicant was served a Felony Summons for the charge of Controlled-Substance-Obtain Fraud/Deceit (Felony 6) based on the police investigation. Applicant pled guilty. She received a deferred sentence for a term of two years. Applicant was ordered to complete 48 hours of useful public service as a condition of her probation. Applicant completed her community service in a timely manner. She completed her community service in a women's shelter. She wanted to help other women who had made poor choices in their life. Applicant learned that most of the women were in the shelter as a result of a court order. She learned about rehabilitation and what it means to move forward with her life. She observed the counseling and other programs. She listened to the stories of other women. She learned about humility, and she believes she is now a better person because of her community service experiences.

Applicant complied fully with all conditions imposed by the court. Her probation officer confirmed Applicant's assertion in a letter submitted for the record. (AE B) During her probation, Applicant completed court-appointed counseling. She also paid her fines and court fees.

Due to Applicant's success while on the deferred sentence, Applicant's probation was ended after more than one year in July 2009. The case was then dismissed by court order on July 21, 2009. (AE C)

When Applicant completed her July 15, 2008, security clearance application she answered Section 23 concerning her police record. She disclosed that she had been charged with a felony offense in December 2007. She provided details concerning the attempt to obtain the Percocet (a controlled substance) by a photocopy of a prescription.<sup>1</sup> (GE 1)

At the hearing, Applicant expressed great remorse and shame for the offense. She blamed her behavior on many reasons relating to a common law marriage that was in crisis at the time. She claims she was depressed about the emotional upheaval in her life. She was also in great pain from the dental work. She also said that she did not have money to return to get the tooth repaired completely. She acknowledged that she clearly was using poor judgment at the time. However, she admitted that is not an excuse to break the law.

She also acknowledged that she has taken prescribed Percocet and Vicodin on and off for approximately nine years for her chronic back pain. (Tr. 75) Applicant

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Applicant received one charge (felony summons) in March 2008. She discussed the 2007 drug charge in her OPM interview. Although there was no specific reference to the December 4, 2007 prescription refill, she was not charged with that offense. This was one period of time in 2007. Applicant admitted to a "one time error of judgment." She was charged based on the December 11, 2007 offense.

explained that she has never used illegal drugs. She has no prior criminal record. She divorced her common law husband in 2008. She is calm and not in turmoil. She is not required to attend any other drug counseling because she uses prescription medications on a daily basis. Her dentist and another doctor spoke to police about Applicant and both believed that Applicant was “not a drug seeker.” (AE A)

Applicant was candid at the hearing that she believed the reason that she photocopied the November 16, 2007 prescription was fear of not having sufficient money to return to the dentist. She wanted to have medication for the pain. She admits that there was no logic to this plan. (Tr. 102) Despite the many reasons that Applicant believed she had for photocopying the prescription, she pled guilty and completed the conditions for her deferred sentence in one year rather than two years.<sup>2</sup>

Applicant’s employer describes her as a superior employee who has consistently achieved solid results during her five years with the company. Applicant was promoted due to her dedication, customer service, attitude and overall professionalism. (AE B)

Applicant’s performance appraisals from 2005 to 2009 confirm that her good performance is better than most of the individuals in her position level. Her work rarely requires corrections or review. Her work is consistently complete and error-free. Applicant is a team leader who has high standards. Applicant is always available for an assignment. She also volunteers for projects. (AE D)

Applicant has many letters of appreciation and certificates of recognition from 2007 through 2010. (AE E). Her performance and initiative are consistently noted. She was nominated for a company award for her superior accomplishments. (AE E)

Applicant’s company Deputy Director believes she is “awesome.” He noted her professionalism and technical support during Planning and Operations Training in February 2010. Applicant constantly demonstrated professionalism, proficiency, and commitment to service. (AE E)

Applicant’s Chief, Training and Education Center, acknowledged another “professional job done award” on February 16, 2010. (AE E). Applicant had supported training for high level clients.

Applicant’s Company Supervisor, who is a retired Air Force Officer, is aware of “her personal troubles.” He submitted a letter to recommend Applicant for retention of her security clearance. He states she follows procedures and handles classified information on a daily basis without any discrepancies. He trusts Applicant, and has never had any concern with her work product in that arena. (AE E)

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Applicant was credible in her testimony that she focused on the March 2008 charge in her answers prior to the hearing. She did not remember that she had filled a prescription on December 4, 2007. The police report considered that information and charged Applicant based on the December 11, 2007 incident. The SOR alleged conduct under Guideline J and not under Guideline E.

Applicant's sister testified at the hearing that she is very close to Applicant. She knew that something was bothering her sister in 2007, but Applicant would not confide in her. (Tr. 135) Applicant's sister described her as a fine mother and a good provider for her two children. She has never known her sister to have any problems with illegal or legal prescription drugs. (Tr. 137) She regards Applicant as responsible and trustworthy.

## **Policies**

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2, the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to 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.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline J, Criminal Conduct**

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying, “(a) a single serious crime or multiple lesser offenses,” and “(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

Applicant admitted that she photocopied a November 16, 2007 prescription for Percocet, a controlled substance. She filled the prescription on December 4, 2007 and attempted to fill it again on December 11, 2007. Applicant received a felony summons in March 2008. She was charged with Controlled Substance-Obtain Fraud/Deceit-Att. After pleading guilty, she received a deferred sentence of two years supervised probation, community service, and a fine. AG ¶ 31(a) and (c) apply.

AG ¶ 32 provides conditions that could mitigate security concerns:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's criminal conduct occurred in December 2007. In March 2008, Applicant received a felony summons. She pled guilty to the charge and received a deferred sentence and was initially ordered to be on probation for two years. She successfully completed her probation in July 2009. Thirty months have elapsed since the incident. Applicant has served her probation and successfully complied with court orders. It has been almost one year since the probation ended. Applicant does not have any other criminal charges or arrests on her record. The case has been dismissed.

Applicant has an excellent employment record. Her supervisor and others recommend her for retention of her security clearance. In her five years of employment, she has not had any issues with handling classified information. She has received numerous awards and letters of appreciation from her employer. She understands the importance of a security clearance. She has complied with the rules and regulations in her work environment.

Applicant is ashamed and remorseful about her behavior in 2007. She had several reasons for resorting to her criminal behavior in 2007, but she acknowledged that she did not have any excuse for breaking the law. She ultimately pled guilty and served her reduced probation. She is on her own and supporting her family. She had been a law-abiding citizen her entire life until December 2007.

Applicant does not use illegal drugs. Her treating physician and dentist do not believe that Applicant is a “drug seeker.” She has used prescribed medications for more than nine years. She has never had any prior difficulties. She believes she has learned a lesson. She understands that the December 2007 incident was a life-changing one for her. Thus, AG ¶ 32(a) and (d) apply in this case

### **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.”

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a well-educated, highly respected employee. She has held a security clearance since 2006. She has no security violations. She has an excellent employment record. Many reference letters recommended Applicant for retention of her security clearance. She has many letters of appreciation for her work. Her performance evaluations from 2005 until the present time rate her as a “superior employee.”

Applicant had no record of criminal conduct until the December 2007 incident. She has been on pain medication for many years for a chronic back problem. There had never been an issue prior to the November-December 2007 time frame with her prescriptions. Her physicians do not believe she is a "drug seeker." She admits that she was not in an emotionally or physically healthy place when she photocopied the November 16, 2007 prescription. She is now living on her own with her children.

Applicant was charged in March 2008. She pled guilty and completed her probation. She was successful in completing her program in July 2009 rather than in March 2010 when it was scheduled to end. The case was dismissed. It is now almost three years since the offense date.

Applicant was overwhelmed with her personal situation in November 2007. She was trying to cope with her emotional and physical pain. She admitted that during this period she made errors in judgment. She divorced her husband in 2008. She is no longer vulnerable to the stress that occurred during that time.

Applicant has provided solid service to her employer since 2005. She has been recognized time and again. There is every indication that she is an honorable person. She has had no substantiated allegations of security violations.

Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from her criminal conduct concerns.

### **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: FOR APPLICANT

Subparagraph 1.a: For Applicant

### **Conclusion**

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

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NOREEN A. LYNCH  
Administrative Judge



