



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



In the matter of:)
)
) ISCR Case No. 09-01520
)
)
Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: Alan V. Edmunds, Esquire

October 27, 2010

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline J, Criminal Conduct, and Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

On May 19, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on June 11, 2010, and requested a hearing before an administrative judge. The case was assigned to me on August 8, 2010. DOHA issued a Notice of Hearing on August 12, 2010, and I convened the hearing as scheduled on September 8, 2010. The Government offered Exhibits (GE) 1

through 8. Applicant did not object and they were admitted. Applicant offered Exhibits (AE) A through V, which were admitted without objections. Applicant and a witness testified. During the hearing, the Government moved to amend the SOR to add an allegation.¹ The motion was granted and the hearing was postponed until October 18, 2010, to afford Applicant proper notice. The hearing resumed as scheduled. Applicant provided AE W, which was admitted without objection. DOHA received the original hearing transcript (Tr.) on September 15, 2010 and the final hearing transcript on October 20, 2010.

Findings of Fact

Applicant admitted all of the allegations in SOR except ¶¶ 1.b, 2.d, and 2.e. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 49-year-old college graduate. He has worked for the same federal contractor since 1997 and has held a security clearance since 1998. His security clearance was upgraded to Top Secret in 2003. He married in 2002 and has two stepchildren ages 24 and 19.²

Applicant was arrested in 1979 and charged with petit larceny and possession of burglary tools. He and some friends siphoned gasoline from a truck. The owner of the truck dropped the charges. He was about 17 years old at the time. Applicant believed his record was expunged, although he did not take any affirmative action to verify if that actually happened.³

In 1987, Applicant's parents came to live with him. His father had medical problems and could no longer work. His mother also had medical problems. Applicant cared for his father until he passed away in 1992. He cared for his mother until she moved into a nursing home in 2001. Applicant did not have any assistance in caring for his ailing parents. From 1992 to 2001, he was responsible for giving his mother her medicine. In 1996, Applicant had a heart attack. He was prescribed and took Oxycodone. He took off from work for several weeks, but continued to care for his mother. His prescription expired. In 1998, his mother's condition worsened. At this time, Applicant began taking his mother's prescription pain killer, Percocet. He did not remember exactly how many times he took her pain killers, but estimated that it was about 20 times from 1998 to 2001. He used it on the weekends. He explained he was under a great deal of stress at the time and he used the drug to "take the edge off." He knew that he was not authorized or prescribed to take the medication and that his

¹ Hearing Exhibit (HE) I is the amended SOR. HE II is the answer to the amended SOR.

² Tr. 10-11, 32, 54.

³ Tr. 33, 57-62.

actions were illegal. He held a security clearance when he illegally used his mother's drug. After his mother moved into a nursing home he no longer took her medicine.⁴

In February 2004, Applicant stole a blank prescription form from his doctor's desk. He made copies of the blank prescription. On approximately 21 different occasions he forged his doctor's name and prescribed himself 100 Oxycodone pills. He did this on a monthly basis for approximately 21 months. Each month he presented the fraudulent prescription to the pharmacist who filled it for him. He then used the 100 Oxycodone pills over the month and then he would repeat the action. Applicant held a Top Secret security clearance at the time and had access to classified information. In December 2005, he attempted to present the forged prescription for Oxycodone to the pharmacist and instead of writing it for 100 pills, as he had done in the past, he wrote it for 200 pills. The pharmacist refused to fill the prescription. Applicant believes the pharmacist contacted the police and the doctor.⁵

Applicant illegally used Oxycodone from February 2004 to January 2006. He explained he took several pills a day after work to "wind down." He used them because of stress. He did not take them before or during work. He tried stopping, but it was easier to get more pills and continue to use them. He knew he was taking a controlled substance without a prescription while he held a security clearance. He thought of his actions as a victimless crime. When he stopped taking the drug, he believed he went through withdrawal. He was never diagnosed as being physically dependent on the drug. He never missed work due to his use or from withdrawal.⁶

In 2006, Applicant was arrested and charged in Federal Court with one count of obtaining Oxycodone by fraud. He pleaded guilty and was placed on probation for three years. He was required to attend drug counseling and see a psychiatrist as part of the terms of his probation. He complied with the terms of the probation and it terminated early in December 2008. Due to his felony conviction, Applicant is restricted from purchasing a weapon and his voting rights were terminated.⁷

Applicant was asked by Department Counsel the following question.

Q: When you were using your mother's Percocet you knew that you were doing that illegally. Correct?

A: Yes.

⁴ Tr. 35-48, 63-79; I will not consider Applicant's illegal use of his mother's prescription drug for disqualifying purposes, but will consider it when analyzing the "whole-person."

⁵ Tr. 79-91.

⁶ Tr. 50, 85, 87-89.

⁷ Tr. 34, 62, 91-95.

Applicant completed a security clearance application (SCA) on November 14, 2002. Question 27 asked since the age of 16 or in the last 7 years, whichever is shorter, had Applicant illegally used any controlled substance or prescription drug. Applicant answered “no” even though he illegally used his mother’s Percocet from 1998 to 2001. At his initial hearing, Applicant agreed that his answer to Question 27 was incorrect. He stated that he did not recall answering this question on the SCA. He further stated: “I don’t know if I deliberately did it. But at that time, like I said, I didn’t realize, I didn’t realize I was doing something illegal.”⁸ This contradicts his earlier testimony in the hearing acknowledging he knew taking his mother’s Percocet was illegal.⁹

Department Counsel asked another question and Applicant responded as follows:

Q: The question was, knowing that you took your mother’s Percocet, from 1998 to 2001 that would have been about approximately a year before you completed that Security Clearance Application that’s in front of you, when you answered “no” to that question, you deliberately falsified that question?

A: Yes.

Department Counsel amended the SOR during the hearing to add an allegation of falsification regarding Applicant’s failure to disclose he had been illegally using his mother’s prescription for Percocet approximately 20 times over a three year period. Applicant subsequently denied the allegation in his answer to the amended SOR. He stated in his answer to the amended SOR the following:

I deny this allegation as written. I did not deliberately fail to disclose my use of a prescription drug. It is my belief that eight years ago when I originally answered question number 27, I had answered it based on not reading the entire question thoroughly. I saw a list of illegal drugs and immediately knew that I had not used any of the illegal drugs listed and answered the question based on what I had read. As such, this was an unintentional mistake that occurred under unique circumstances and should not cast doubt upon my reliability, trustworthiness or good judgment.¹⁰

At his October 18, 2010, hearing, Applicant affirmed that his failure to disclose his prior illegal use of a prescription drug was not deliberate. He stated he did not know what he was thinking when he answered the question eight years ago. He stated he

⁸ Tr. 100.

⁹ Tr. 96-102.

¹⁰ Answer to Amended SOR.

“might have just heard the question say marijuana or cocaine.”¹¹ He explained that he overlooked the last line that asked him about illegal use of prescription drugs. He also explained he is a diabetic and he had a late breakfast and was confused. He stated he was unaware that he would be required to answer questions about his 2002 SCA and thought he would only have to respond to the 2008 SCA issues. He denied he deliberately lied on his 2002 SCA.¹² After considering all of the evidence, including Applicant’s inconsistent answers, I find Applicant’s testimony was not credible and that Applicant deliberately and intentionally falsified his 2002 SCA.

Applicant completed another SCA on March 26, 2008. In response to Question 23.a, he disclosed his felony conviction. In response to Question 23.d, he disclosed that the conviction was related to drugs. In the explanation section, he disclosed the specifics of the charge and sentence. He also provided under the comments section additional information. In response to Question 24.a, he disclosed his illegal use of a controlled substance, Percocet, and provided the dates he used it. He did not disclose in response to Question 24.b that he used the controlled substance while possessing a security clearance. Question 26 asked if he had ever been granted a security clearance and he answered “yes” and provided the date of his prior investigation and that he had been granted a Top Secret security clearance.¹³ There is sufficient information provided by Applicant to put the Government on notice that he held a security clearance during the time he used a controlled substance in the past seven years. After considering all of the evidence, I find Applicant did not intentionally and deliberately fail to disclose on his 2008 SCA that he illegally used a controlled substance while holding a security clearance.

Applicant was prescribed Percocet in 2007 by his doctor when he broke his wrist. He notified his probation officer. He took the pills as prescribed.¹⁴

A witness testified on behalf of Applicant. The witness holds a security clearance. He and Applicant have done volunteer work together. He has not worked with Applicant. He had frequent contact with him from January 2009 to June 2009. He is aware of Applicant’s felony conviction and believes he is successfully rehabilitated. He does not have any reservations about Applicant holding a security clearance.¹⁵

I have considered all of the letters of recommendation, letter of appreciation, credit reports, certificates of completion, documents from Applicant’s probation,

¹¹ Tr. II page 7.

¹² Tr. II page 7-8.

¹³ Tr. 102-106; GE 1.

¹⁴ Tr. 48.

¹⁵ Tr. 18-30.

negative drugs screen results, performance evaluations, and statement of intent to never use drugs in the future subject to automatic revocation of security clearance.¹⁶

Applicant is considered a loyal, hardworking, and honest employee. He is helpful and resourceful. He is professional and courteous. He is held in high regard by his colleagues and supervisors. He earned ratings of “exceeds expectations” on his performance appraisals.¹⁷

Applicant stated he realized he made a mistake. He has gone through treatment and is now aware of other options to relieve stress. He explained that he can be trusted because he is now 48 years old and has a family and responsibilities. He has not told his stepchildren about his offense.¹⁸

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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(c), 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, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or

¹⁶ AE A-W.

¹⁷ *Id.*

¹⁸ Tr. 51-52.

mitigate facts admitted by an applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable clearance 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 of 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

Criminal Conduct

AG ¶ 30 sets out the security concern relating 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.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 30 and especially considered:

- (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 was convicted of one count of obtaining Oxycodone by fraud, a felony. He pleaded guilty and was placed on probation. Applicant stole a blank prescription form from his doctor. He then copied the prescription form and forged his doctor’s signature on at least 21 occasions. He presented the forged document to the pharmacist and fraudulently obtained the controlled substance at least 21 times. He illegally used the controlled substance from 2004 to 2005. I find both of the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and especially considered the following:

(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.

In 1979 Applicant was arrested and charged with petit larceny and possession of burglary tools. He was 17 years old at the time and he and his friends attempted to siphon gas from car gas tanks. The charges were later dropped. Applicant's age and maturity, at the time, are a mitigating factor. I find sufficient time has elapsed to conclude that this type of offense is unlikely to recur and AG ¶ 32(a) applies.

In 2004, Applicant stole a blank prescription form from his doctor, forged her name, and fraudulently presented the prescription to the pharmacist. He did this at least 21 times over about a two year period. He did not stop until he got caught. When questioned why he used the drug, he said it was to "take the edge off." He was not taking them for pain. He was using them recreationally.

Applicant was convicted of a felony. He has demonstrated a pattern of misconduct by forging his doctor's signature and fraudulently presenting a prescription to the pharmacist on at least 21 separate occasions. He served about two years of probation and completed its terms. It has been less than two years since Applicant was released from probation. The offense he committed is serious and the surrounding circumstances cast doubt on his current trustworthiness and good judgment. I find not enough time has elapsed since the termination of the probation and this serious offense did not happen under unusual circumstances. His actions were repeated over a significant period of time. His actions cast doubt on his trustworthiness and good judgment. I find AG ¶ 32(a) does not apply to these facts.

Applicant provided supportive character letters. His employment record appears to be very good. He believes he has learned from his mistakes and now knows there are other ways to relieve stress. He completed his probation. Applicant has a long and established pattern of misconduct beginning in 1998 through 2006 when he was arrested. His offenses involved acts of moral turpitude that specifically relate to his trustworthiness. He first testified that he knew it was illegal to use his mother's drugs. However, in his second hearing he testified that he did not know his actions were illegal when he completed his 2002 SCA. Applicant's inconsistent testimony lacks credibility. Applicant attempted to minimize his criminal involvement when taking his mother's drugs. I find there is insufficient evidence of successful rehabilitation and AG ¶ 32(d) does not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I have specifically considered the following:

(a) 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;

(c) credible 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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

In 2004, Applicant used a controlled substance that was not prescribed to him. He stole his doctor's blank prescription form and repeatedly forged her name, and repeatedly and fraudulently obtained controlled substances. His conduct spanned at least 21 months. He was illegally using about 100 pills a month of the controlled substance. His actions were discovered when he attempted to write a prescription for 200 pills. These are crimes of opportunity involving acts of moral turpitude. Applicant held a security clearance when he was involved in this misconduct. Applicant intentionally and deliberately falsified his 2002 SCA when he failed to disclose he was illegally using his mother's prescribed drug. Applicant's stepchildren are unaware of his criminal conduct. Concealment of his personal conduct creates a vulnerability that may affect his personal, professional, and community standing. I find all of the above disqualifying conditions apply.

The guideline notes several conditions that could mitigate security concerns. I have considered all of them under AG ¶ 17 and especially considered the following:

- (a) the individual made a prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (c) 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;
- (d) 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; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant was convicted of only one offense. However, his pattern of misconduct is significant. It began when he started taking his mother's prescribed drug in 1998 and did not stop until 2006 when he was caught after forging his doctor's signature and fraudulently obtaining a prescribed drug. Each time Applicant forged his doctor's signature, took it to the pharmacist, obtained the prescription drug and then used it, he made a knowing and conscious decision to commit a criminal act. He did this on at least 21 different occasions over a two-year period. He was illegally consuming approximately 100 pills a month. He stated he believed his conduct was a victimless crime. Applicant's actions are not minor or infrequent, and they cast serious doubts on his reliability, trustworthiness, and good judgment.

Applicant falsified his 2002 SCA when he failed to disclose his illegal use of a prescription drug. Applicant first testified that he knew when he took his mother's pills and used them it was illegal. He then changed his testimony and said he did not know his actions were illegal. Applicant's inconsistent testimony was not credible. I conclude that his failure to disclose this information was intentional and deliberate.

I find none of the mitigating conditions apply. Applicant did not correct his 2002 SCA before being confronted with the facts. AG ¶ 17(a) does not apply. His long-term pattern of misconduct of fraudulently obtaining controlled substances and illegally using them over an extended period of time is not minor and continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 17(c) does not apply. It has only been two years since Applicant was released from probation for a serious felony conviction. His indication that he used the drugs due to stress is a cause of concern. His explanation that he used the drugs to relax after work is also a cause of concern. Although he may have found other outlets for stress relief, I am not convinced his conduct is unlikely to recur. I find AG ¶ 17(d) does not apply. Applicant acknowledged

he made mistakes. However, his lack of candor and credibility when testifying raise doubts whether he has taken positive steps to reduce or eliminate his vulnerability to exploitation, manipulation, or duress. I find AG ¶ 17(e) does not apply.

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 commonsense 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. I have incorporated my comments under Guidelines J 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 was a mature man when he decided to steal his doctor's prescription form and forge her signature. His action of repeatedly and fraudulently obtaining a controlled substance continues to raise doubts about his trustworthiness and good judgment. During two separate periods of his life, he inappropriately obtained controlled substances and used them repeatedly, once when he took his mother's medication and used them from 1998 to 2001, and three years later when he fraudulently obtained them over a 21-month period. He stopped taking his mother's pills because they were no longer readily available when she moved into a nursing home. Applicant was entrusted to take care of his mother and provide her medication. He abused the trust by taking some of her pills. This conduct is not alleged, but it shows Applicant's continuing pattern of misconduct. He then abused his doctor's trust by taking her prescription form. His testimony regarding his failure to disclose his illegal use of his mother's prescription drug was inconsistent and not believable. Applicant has failed to meet his burden of persuasion. Overall, the record evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the guidelines for Criminal Conduct and Personal Conduct.

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:	For Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	Against Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge