



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



In the matter of:)
)
-----) ISCR Case No. 09-01543
)
Applicant for Security Clearance)

Appearances

For Government: Stephanie Hess, Esq., Department Counsel
For Applicant: *Pro se*

May 26, 2011

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny her eligibility for a security clearance to work in the defense industry. The evidence shows she has a well-documented and lengthy history of drug abuse and related criminal conduct, which ceased in 2000. She presented sufficient evidence of reform and rehabilitation to mitigate the drug involvement and criminal conduct security concerns. She did not give deliberately false answers to three questions about her police record when completing a security clearance application in 2008. Accordingly, as explained below, this case is decided for Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on August 3, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) explaining that it was not clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it endeavored to set forth Applicant's history of drug abuse under Guideline H; her related criminal conduct under Guideline J; and three allegations that she gave false answers in response to questions on a August 2008 security clearance application under Guideline E.

Applicant timely answered the SOR and requested a hearing. The case was assigned to me January 26, 2011. The hearing took place February 24, 2011. The hearing transcript (Tr.) was received March 3, 2011.

At the close of evidence, I kept the record open until March 16, 2011, to allow Applicant to present documentary evidence in addition to Exhibits A–E. Her timely post-hearing document, a letter from the drug treatment program, is marked and admitted as Exhibit F without objections.

Procedural and Evidentiary Matters

At hearing, Department Counsel moved to amend the allegation in SOR ¶ 3.c to correct a drafting error as follows: the phrase “as set forth in 1.h, 1.i, and 1.j, above” was amended to “as set forth in 2.h, 2.i, and 2.j, above.”² The motion was granted without objections.

Also at hearing, Department Counsel withdrew SOR ¶ 2.e, an allegation of motor vehicle theft in 1988, because Applicant was the victim not the perpetrator in that case.³ In addition, Department Counsel withdrew SOR ¶¶ 2.i and 2.j, allegations of transporting illegal aliens and making a fictitious or fraudulent statement in 2004, because those charges involved another individual with a similar name.⁴ Accordingly, those matters are not addressed further.

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines contained in Enclosure 2 to the Directive.

² Tr. 115–116.

³ Tr. 18–19.

⁴ Tr. 105–109.

Concerning documentary exhibits, the following Government Exhibits were not admitted for the reasons stated during the hearing: Exhibit 10, Exhibit 12, Exhibit 14, Exhibit 15, and Exhibit 16. In addition, Exhibit 18 was admitted for a limited purpose as stated during the hearing.

Findings of Fact

Applicant's answers to the SOR allegations were mixed with admissions and denials as well as explanations. Her admissions are accepted as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 49-year-old employee of a federal contractor. She is seeking to obtain a security clearance for the first time. She has worked as a senior media production associate in the print services department of the company since May 2008. Her employment history includes working in the print industry since 2001, although she had a five-month period of unemployment due a job layoff in 2003. She has had full-time employment since September 2003. Her job-performance reports from 2008–2010 are indicative of a good employment record for her current job.⁵ Her initial report was average, and she has received an overall rating of “exceeds requirements” for the last two years.

Applicant's personal references are consistent with her recent job-performance reports. A current coworker describes her “a caring and open person” as well as an “organized, efficient, and extremely competent” employee.⁶ A former coworker who has known her for eight years describes her as a hard worker who understands the importance of confidentiality.⁷ A second former coworker describes her as hardworking, loyal, and dependable.⁸ A third former coworker describes her as a highly dedicated employee.⁹

Applicant has a well-documented and lengthy history of drug abuse and related criminal conduct.¹⁰ Her drug of choice was heroin, which she used intravenously. She was introduced to heroin at age 12 by her uncle who was a drug dealer. Over the years, she also used a mixture of cocaine and heroin, a practice known as “speedballing.” She had her first child at age 15, and she was able to stop using illegal drugs during and after her pregnancy. At age 17, she married her child's father. She had two more

⁵ Exhibit E.

⁶ Exhibit A.

⁷ Exhibit B.

⁸ Exhibit C.

⁹ Exhibit D.

¹⁰ See Exhibits 1–9, 11, 13, 17, 18, and F.

children during the marriage, which ended by divorce in 1993. Other than a little periodic marijuana use, she used no other illegal drugs until about 1986 or 1987, when she and her husband separated some years before the final divorce. One of the people with whom she used drugs with, and engaged in related criminal activity with, is the father of her youngest child. In about 1988, that person was prosecuted, convicted, and incarcerated. Applicant was drug-free during the five years of his imprisonment. She attended drug treatment during this time. She reconnected with this person at some point after his release from prison. That led to further drug abuse, which continued until 2000, although she had some periods during 1993–2000 when she did not use.

The seminal event that led Applicant to her ongoing recovery occurred in February 2000, when she was in a house raided by a police SWAT unit as a probable location of heroin dealing and use.¹¹ She was detained and questioned by the police, but not arrested or prosecuted. The event was a wake-up call for Applicant, as she decided that she was “sick and tired of being out on the street, using and abusing and people abusing [her] and not knowing where [she] was going to wake up the next day and, you know, going to jail.”¹² At about this time, she met a drug-free gentleman and began a romantic relationship with him that lasted until about 2007. This gentleman was, apparently, a key factor in Applicant’s recovery. Initially, he paid for her to participate in a private program before she was accepted into the current program.

From about July 2000 to the present, Applicant has participated in a nonprofit substance abuse program. The extensive medical records, provided by Applicant in response to interrogatories, show that she has been assessed or diagnosed with opioid dependence.¹³ She now participates in a prescribed methadone¹⁴ treatment program. She is engaged in a self-paced process of gradually decreasing the dosage, with the goal of eliminating methadone use. She reported that her daily dosage has decreased from about 75 mg to 16 mg.¹⁵ She reported that has earned the privilege of taking home a 13-day dosage, as opposed to reporting daily for medication. Her testimony was consistent with the medical records, which reflect, as of January 2010, she was stable with a methadone dose of 22 mg and 13-day take-home privileges.¹⁶ Her current status is summarized in a March 2011 letter from the treatment program as follows:

¹¹ Exhibit 9.

¹² Tr. 130.

¹³ Exhibit 3.

¹⁴ Methadone is a synthetic opioid, used in medicine as an analgesic and a maintenance anti-addictive for use in patients with opioid dependency. Although chemically unlike morphine or heroin, methadone acts on the same opioid receptors as these drugs, and thus has many of the same effects.

¹⁵ Tr. 78.

¹⁶ Exhibit 3 at 7.

[Applicant] is currently participating in the methadone maintenance treatment program since June 2003, and has demonstrated continued progress towards her recovery by maintaining counselor-client contact, abiding by all federal and clinic rules, providing negative toxicology reports, and following her treatment plan. Her prognosis for continued stability, and maintenance of a drug free lifestyle is rated as favorable, and is assessed at being in the maintenance stage of change with a healthy history of long term commitment to recovery.¹⁷

Applicant no longer associates with anyone involved in illegal drugs, and has not done so in years. After her relationship with the gentleman ended in about 2007, she lived with her adult children on a temporary basis. She has lived alone, albeit in her son's house, since late 2009. She rents the house from her son, who is away serving in the U.S. armed forces.

Applicant's criminal conduct is related to drug abuse. Unable to hold a steady job, she committed crimes to support her habit.¹⁸ She stole things she could sell and used the money to buy drugs. During 1987–1999, she had arrests, charges, or convictions for offenses such as possession of drug paraphernalia, shoplifting, theft, burglary, probation violation, etc. The most serious appears to be an arrest in 1988 for multiple felony theft and burglary offenses. She pleaded guilty to three counts of burglary and was sentenced to, among other things, five years of probation. Since the raid by the SWAT unit in 2000, she was involved in a single incident of criminal conduct, but it was not related to her past drug abuse. In 2002, Applicant pushed the former girlfriend of the gentleman with whom she was then involved. She acknowledged at hearing she did so out of jealousy. She was charged with the offense of assault-recklessly cause injury, but it was dismissed without prejudice in February 2003.¹⁹ In total, she estimates serving about eight to nine months in jail for her various crimes.²⁰

Applicant began her current employment in May 2008, after going through the company's hiring process, which included passing a drug test (she disclosed her methadone use). Thereafter, in August 2008, she completed a security clearance application in which she answered various questions about her background.²¹ She fully disclosed her methadone use on a prescription basis in response to the relevant question.

¹⁷ Exhibit F.

¹⁸ Tr. 89–90.

¹⁹ Exhibit 6 at 3–4.

²⁰ Tr. 127.

²¹ Exhibit 1.

Concerning her police record, in response to Question 23a, which asked about ever having been charged with or convicted of a felony offense, she answered “Yes” and disclosed the felony-level burglary offenses that ended in five years of probation and drug treatment. She did not report the 1995 arrest and charge for third-degree burglary, which was dismissed.²² She did not report the more recent burglary (SOR ¶ 2.g) because she did not remember it, in part, because it was dismissed.²³ In response to Question 23d, which asked about ever having been charged with or convicted of any alcohol- or drug-related offenses, she answered in the negative. She did not report charges of possession of drug paraphernalia (SOR ¶¶ 1.d, 1.g, and 1.h) because she did not understand the scope of the question went beyond the actual drugs to include drug paraphernalia.²⁴ She understood the question included things such as possession of cocaine, but did not include drug paraphernalia. And in response to Question 23f, which asked about arrests, charges, or convictions within the last seven years not otherwise reported, she answered in the negative. She did not report the 2002 assault offense (SOR ¶ 2.h) because she did not remember it, in part, because it was dismissed.²⁵

At hearing, Applicant’s sister testified about her involvement with Applicant.²⁶ The sister is a recently retired employee of the same company that employs Applicant. The sister has been involved with Applicant over the years and has participated in her treatment. The sister has seen “tremendous change”²⁷ in Applicant since 2000 to include the following: (1) a vastly improved physical appearance; (2) improved health; (3) full-time employment for many years; (4) financial stability, to include buying two vehicles, the most recent of which was a new vehicle; (5) reestablishing relationships with her children; (6) responsible behavior on a day-to-day basis; (7) active participation and involvement in a church; (8) immaculate housekeeping; and (9) improved self-esteem. At one point, Applicant lived with and cared for her sister while her sister recovered from the effects of a stroke. As a former employee who held a security clearance, the sister candidly acknowledged that she would not have trusted Applicant in the past, but she is now of the opinion that Applicant can be trusted.

Law and Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide

²² Exhibit 8.

²³ Tr. 111–112.

²⁴ Tr. 112–114.

²⁵ Tr. 114–118.

²⁶ Tr. 49–67.

²⁷ Tr. 60.

if an applicant is suitable for access to classified information. The Department of Defense takes the handling and safeguarding of classified information seriously because it affects our national security, the lives of our servicemembers, and our operations abroad.

It is well-established law that no one has a right to a security clearance.²⁸ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²⁹ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.³⁰ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.³¹

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.³² The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.³³ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.³⁴ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.³⁵ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.³⁶ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.³⁷

²⁸ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

²⁹ 484 U.S. at 531.

³⁰ Directive, ¶ 3.2.

³¹ Directive, ¶ 3.2.

³² ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

³³ Directive, Enclosure 3, ¶ E3.1.14.

³⁴ Directive, Enclosure 3, ¶ E3.1.15.

³⁵ Directive, Enclosure 3, ¶ E3.1.15.

³⁶ *Egan*, 484 U.S. at 531.

³⁷ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant facts and circumstances, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.³⁸ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

1. *Drug Involvement and Criminal Conduct*

These matters are discussed together because the evidence shows they are factually interrelated. Under Guideline H,³⁹ the concern is the use of an illegal drug, or misuse of a prescription drug, raises questions about a person's judgment, reliability, and trustworthiness. In this context, the term drug abuse means "the illegal use of a drug or use of a legal drug in a manner that deviates from the approved medical direction."⁴⁰ Under Guideline J,⁴¹ the concern is that criminal activity can raise questions about a person's judgment, reliability, and trustworthiness. Both guidelines share a concern about a person's ability or willingness to follow laws, rules, and regulations.

Here, the evidence is more than sufficient to establish concerns based on Applicant's well-documented and lengthy history of drug abuse and related criminal conduct. The evidence shows Applicant was a drug abuser whose drug of choice was heroin, which she sometimes mixed with cocaine. Introduced to drug abuse at an early age, she engaged in it until 2000. She also engaged in criminal conduct to pay for her drugs, and she has several arrests, charges, and convictions to show for it. The last drug-related arrest took place in 1995, although she was questioned as a suspect during the SWAT raid in 2000. She had a relatively minor incident of criminal conduct (the assault charge) in 2002, but it ended in dismissal not a conviction. This incident appears to be aberrational conduct by Applicant, and it no longer raises a concern.

Based on the evidence as a whole, the following disqualifying conditions under Guideline H are raised:

³⁸ Executive Order 10865, § 7.

³⁹ AG ¶¶ 24–26 (setting forth the security concern and the disqualifying and mitigating conditions).

⁴⁰ AG ¶ 24(b).

⁴¹ AG 30–32 ¶¶ (setting forth the security concern and the disqualifying and mitigating conditions).

AG ¶ 25(a) any drug abuse;

AG ¶ 25(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

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(e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized treatment program.

And under Guideline J, the following disqualifying conditions are raised:

AG ¶ 31(a) a single serious crime or multiple lesser offenses;

AG ¶ 31(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and

AG ¶ 31(e) violation of parole or probation, or failure to complete a court-mandated program.

There are several mitigating conditions to consider under each guideline. The following mitigating conditions under Guideline H are most pertinent:

AG ¶ 26(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; and

AG ¶ 26(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;
- (4) a signed statement of intent with automatic revocation of clearance for any violation.

And under Guideline J, the following mitigating conditions are most pertinent:

AG ¶ 32(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

AG ¶ 32(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 the relevant disqualifying and mitigating conditions, the central issue is whether Applicant presented sufficient evidence of reform and rehabilitation to mitigate and overcome the obvious security concerns under both guidelines. I conclude that she has done so. Her drug abuse and related criminal conduct ceased more than ten years ago in 2000. She has accomplished much since, such as: (1) a long-term relationship with a drug-free gentleman; (2) full-time employment in the print industry for many years; (3) a good employment record; (4) disassociation from her drug-using associates along with reestablishing relationships with family members; (5) regular participation in her church and church-related activities; (6) satisfactory participation in a recognized drug treatment program for many years, which is ongoing; and (7) a favorable prognosis from the drug treatment program. Viewing these circumstances as points on a graph or scale, the overall trend is both positive and upward. The evidence as a whole supports a conclusion of a long-term record of reform and rehabilitation beginning in 2000 and continuing to present.

2. Personal Conduct

Under Guideline E for personal conduct,⁴² the suitability of an applicant may be questioned or put into doubt due to false statements and credible adverse information that may not be enough to support action under any other guideline. The overall concern under Guideline E is:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] 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.⁴³

⁴² AG ¶¶ 15–17 (setting forth the security concern and the disqualifying and mitigating conditions).

⁴³ AG ¶ 15.

A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

The issue here is whether Applicant made deliberately false statements when answering three questions about her police record on her 2008 security clearance application. Based on the evidence, to include her hearing testimony, which I found credible, I am not persuaded she made deliberately false statements. In response to Question 23a, she did not report the 1995 burglary charge, which was dismissed, because she did not recall it. In response to Question 23d, she did not report the possession of drug paraphernalia charges because she misunderstood the question. And in response to Question 23f, she did not report the 2002 assault charge, which was dismissed, because she did not remember it. Moreover, by answering in the affirmative to other questions on the application, she put the Government on notice of her past drug abuse and related criminal conduct. I am not persuaded that Applicant was attempting to mislead or conceal information in order to put her security clearance application in a more favorable light.

3. *Whole-Person Concept*

I have considered this case in light of the evidence as a whole and the nine-factor whole-person concept.⁴⁴ In particular, I considered the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age when she was introduced to drug abuse and her age at the time of the conduct; the presence of rehabilitation and other positive changes; and the likelihood of recurrence of the drug abuse and related criminal conduct.

With those factors in mind, a thoughtful balancing of the evidence requires that we view Applicant in the totality of her acts, both negative and positive, past and present, and look below the surface of the case, which is not attractive, to make a thorough assessment and evaluation of Applicant's current security suitability. For many years now, she has engaged in a controlled, monitored, and lawful program to abstain from drug abuse, she is succeeding in this regard, and she has a favorable prognosis. During this period, she has not engaged in drug abuse or related criminal conduct. This lengthy period amounts to substantial evidence of reform and rehabilitation, and it is persuasive evidence. I base this conclusion, in part, on my opportunity to observe her demeanor and listen to her testimony during the course of a three-hour hearing. Her full, frank, and candid testimony, coupled with her simple dignity throughout the hearing, persuades me that her drug abuse and related criminal conduct are safely in the past and unlikely to recur.

⁴⁴ AG ¶ 2(a)(1)–(9).

To conclude, Applicant presented sufficient evidence to overcome the security concerns, and I am persuaded that she will exercise the required good judgment, reliability, and trustworthiness. Accordingly, I conclude that Applicant met her ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided for Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline H:	For Applicant
Subparagraphs 1.a–1.j:	For Applicant
Paragraph 2, Guideline J:	For Applicant
Subparagraphs 2.a–2.d:	For Applicant
Subparagraph 2.e:	Withdrawn
Subparagraphs 2.f–2.f:	For Applicant
Subparagraph 2.i:	Withdrawn
Subparagraph 2.j:	Withdrawn
Subparagraph 2.k:	For Applicant ⁴⁵
Paragraph 3, Guideline E:	For Applicant
Subparagraphs 3.a–3.c:	For Applicant

Conclusion

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

Michael H. Leonard
Administrative Judge

⁴⁵ Decided for Applicant because it merely alleges a minor traffic violation in 2006 (failure to obey traffic control device), which was dismissed; it was not a criminal offense. See Exhibit 6 at 1–2.