



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



In the matter of:)	
)	
)	ISCR Case No. 09-02176
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Pamela Benson, Esq., Department Counsel
For Applicant: *Pro Se*

December 23, 2009

Decision

LAZZARO, Henry, Administrative Judge

Applicant failed to mitigate the security concerns that arise from her history of drug abuse and criminal conduct, and the false answers she deliberately provided in a security clearance application she submitted in September 2008. Clearance is denied.

On June 10, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.¹ The SOR alleges security concerns under Guidelines H (drug involvement), J (criminal conduct), and E (personal conduct). Applicant submitted a response to the SOR that was received by DOHA on August 17, 2009. She admitted all SOR allegations and requested a hearing.

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive), and revised adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

The case was assigned to me on October 6, 2009. A notice of hearing was issued on October 7, 2009, scheduling the hearing for October 22, 2009. The hearing was conducted as scheduled. The government submitted five documentary exhibits that were marked as Government Exhibits (GE) 1-5 and admitted into the record without objection. Applicant testified but did not submit any other evidence. The transcript was received on November 3, 2009.

Procedural Issues

At the hearing, Department Counsel moved to amend the SOR by striking the letter "B" in the last line of subparagraph 3.a, and substituting the letter "C" in its place; and by striking the letter "C" in the last line of subparagraph 3.b, and substituting the letter "D" in its place. (Tr. p. 14) Those amendments were made on the face of the SOR without objection.

The notice of hearing was issued exactly 15 days before the hearing date. Applicant acknowledged receipt of the notice via a facsimile transmission on the date the notice was issued. She also stated she was prepared to proceed on the hearing date and waived any further 15-day notice requirement she was entitled to under the terms of the Directive. (Tr. p. 19)

Findings of Fact

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is a 31-year-old woman with a history of severe drug abuse and minor criminal conduct. She has been involved with a man who has physically and mentally abused her for the past few years. She fled from him on several occasions and took up residence in shelters. She obtained a court protective order against him in 2007. She shot him after he broke into her residence in the middle of the night in May 2008. She married him in May 2009. She fled from him again in August 2009, and, at the time of the hearing, she was living and working in a church.

Applicant applied for a contractor position as an administrative specialist with the Department of Defense (DoD) in September 2008. She submitted an Electronic Questionnaires for Investigations Processing (e-QIP) on September 25, 2008, as part of the hiring process. She has never actually worked for the DoD and her application for employment has been awaiting the outcome of her security clearance application. She previously held a confidential level security clearance from December 1997 until June 2007, while she was in the Army.

Applicant graduated from high school in 1996. She enlisted in the Army National Guard in June 1997, and she also worked as a full-time Guard employee. She transferred to the active duty Army in September 1998, and served on active duty until February 2001, when she was discharged due to pregnancy. She was unemployed from the time of her discharge until October 2003. She worked as a care giver at a nursing home from October

2003, until she was fired in December 2003, because she failed a drug test. She was unemployed from December 2003, until April 2004, when she began working in a sandwich shop.

Applicant returned to active duty in the Army in July 2004, and served until she was honorably discharged in August 2007. She twice received non-judicial punishment (NJP) during this period of service. The first NJP offense occurred in June 2006, when Applicant was involved in an altercation with another Soldier after they had consumed alcohol. She was found to have committed a disorderly conduct and was sentenced to 14 days extra duty and a suspended reduction in rank. The second NJP offense occurred in November 2006, when Applicant drove a government vehicle after consuming alcohol (although below the legal limit for driving under the influence). She was reduced in rank, restricted for 14 days, ordered to perform extra duty for 14 days, and lost her military driver's license.

Applicant worked as an assembler at an automotive plant from August 2007 until October 2007. She had to leave that job because she was pregnant and unable to perform the manual labor it required. She was unemployed from October 2007 until February 2008. She worked as a custodian at a nursing home from February 2008 until March 2008, and as a customer service representative at an automotive supply store from March 2008 until September 2008.

Applicant was married in February 2001. Her husband obtained a divorce from her in June 2008, on grounds of adultery and abandonment. She has one child from this marriage, a daughter who was born in May 2001. Applicant's husband was awarded custody of the child and Applicant has been ordered to pay child support. She is unable to have visitation with the child unless she remains current with her support payments.

Applicant first experimented with marijuana when she was in high school. She told an investigator in December 2008 that she smoked marijuana with her husband during her first Army enlistment on an almost daily basis between 1998 and December 1999. She testified the investigator's report is incorrect and she now denies ever smoking marijuana while on active duty in the Army. Considering the detail contained in the investigator's report, Applicant's testimony and denial of using marijuana while in the Army is not credible.

Applicant admits she heavily used marijuana, frequently on a daily basis, from about June 2001 until July 2004. She conservatively estimates she smoked marijuana about 250 times during that time period. She attributes her use of marijuana during this time frame to loneliness and depression caused by the fact that her husband was working long hours and thus unable to help her care for their child.

Applicant began an adulterous relationship with a man in about August 2002. He and his friends introduced her to cocaine during their relationship. She used cocaine on a weekly basis during the relationship which lasted until about September 2002. She did not use cocaine again until she was reunited with the friends of her former paramour in about January 2004. She thereafter used cocaine two to three times a week until July 2004. She denies that she continued to use cocaine after she reenlisted in the Army.

Although Applicant denies using any controlled substances while she served on active duty, she was sent by the Army to a 28-day inpatient drug program in March 2005, while she was stationed overseas. She explained that her attendance at the drug treatment program was at her request because she was experiencing severe drug withdrawal symptoms. Applicant was also required to attend an alcohol treatment program following her 2nd NJP.

Applicant began an extra-marital affair with her current husband while she was stationed overseas. He was a staff sergeant (paygrade E-6) in the Army and she was specialist (paygrade E-4). She testified that although he was senior to her and they were in the same command, their relationship was not prohibited under Army regulations because she did not report to him. He was discharged due to mental problems that arose following his service in a combat area about the same time that she was discharged. They continued their relationship in the United States following their discharges.

Applicant had a son from this relationship who was born in December 2007. Her husband wanted her to get an abortion but she insisted on delivering the child. The child was surrendered for adoption 72 hours after he was born.

Applicant testified her husband is very volatile and he has abused her, physically and mentally, on a number of occasions. In May 2008, following an argument, Applicant attempted to drive away from a bowling alley with her husband clinging to the hood of her car. Police intervened, removed him from the scene, and allowed her to go on her way. They then released him without filing any charges. Along with his brother, Applicant's husband went to where Applicant was living and broke into the apartment while his brother remained outside. She fired two shots from a handgun her step-father had provided her to use to protect herself from her husband, one of which struck her husband in the abdomen. The police were called, he was taken to a hospital, and no charges were filed against Applicant.

Applicant continues in the abusive relationship with her husband because she needs the money he can supply to make child support payments. As she testified at the hearing:

. . . I married him, plain and simple, for the child support. I would do anything - - that I could to be able to see my daughter. Plain and simple. . . I didn't benefit from any of this. I did it, plain and simple, \$469.20 a month. And why I say this exact amount is because that's how much it cost me a month to be able to see my daughter. (Tr. p. 81)

However, she denies she would sell classified information to raise money for child support because that would hurt someone other than just her.

Applicant failed to disclose the full extent of her history of abusing marijuana or any use of cocaine in the e-QIP she submitted in September 2008. She also failed to disclose that she had been terminated from a job in December 2003 due to her failing a drug test, and that she had received NJP punishment for disorderly conduct in June 2006. She admits that she deliberately provided false answers to the respective questions about those matters in the e-QIP. When she was interviewed in December 2008, she attributed the

deliberate falsifications to the fact that her husband worked with her to fill out the e-QIP and he demanded she provide the false information so that she would get a security clearance. At the hearing, Applicant testified she had lied to the investigator and that actually she willingly provided the false answers because she wanted to conceal the truth from her husband who was with her when she filled out the e-QIP.

Policies

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying conditions and mitigating conditions for each applicable guideline. Each clearance decision must be a fair and impartial decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Guidelines H (drug involvement), J (criminal conduct), and E (personal conduct) with their disqualifying and mitigating conditions, are most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.² The government has the burden of proving controverted facts.³ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁴ although the government is required to present substantial evidence to meet its burden of proof.⁵ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁶ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against her.⁷ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁸

No one has a right to a security clearance⁹ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of

² ISCR Case No. 96-0277 (July 11, 1997) at 2.

³ ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, Item E3.1.14.

⁴ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁵ ISCR Case No. 01-20700 (December 19, 2002) at 3 (citations omitted).

⁶ ISCR Case No. 98-0761 (December 27, 1999) at 2.

⁷ ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, Item E3.1.15.

⁸ ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, Item E3.1.15.

⁹ *Egan*, 484 U.S. at 528, 531.

denials.”¹⁰ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹¹

Analysis

Guideline H, 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. (Adjudicative Guideline [AG] 24)

Applicant used marijuana and cocaine until at least July 2004. Her use of marijuana began while she was in high school, continued during her first enlistment in the Army while she possessed a security clearance, and reached a daily level usage shortly after the birth of her daughter. She was fired from a job in December 2003, because she failed a drug test. Her use of cocaine began during an adulterous relationship and continued with friends she had met through that relationship. While she denies using any controlled substance during her second Army enlistment, she had to seek inpatient drug treatment in March 2005, due to severe withdrawal problems she was experiencing. Disqualifying Conditions (DC) 25(a): *any drug abuse*; DC 25(b): *testing positive for illegal drug use*; and DC 25(g): *any illegal drug use after being granted a security clearance* all apply.

It has been almost five and one-half years since Applicant last abused a controlled substance and over four and one-half years since she completed inpatient drug treatment. Accordingly, the following Mitigating Conditions (MC) are all potentially applicable: MC 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*; MC 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 MC 26(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*.

However, Applicant had two minor alcohol-related incidents while she was in the Army that resulted in the imposition of NJP punishments. Both of those incidents occurred after she last used drugs and completed inpatient treatment. She continues in an abusive relationship that, according to her own testimony, is nothing more than prostituting herself to obtain money to pay child support so she can maintain visitation rights with her daughter. She frankly admits that she will do anything, except sell classified information,

¹⁰ *Id.* at 531.

¹¹ *Egan*, Executive Order 10865, and the Directive.

to obtain the money to be able to see her daughter. As of the date of the hearing, she had once again fled from the abusive man she had just recently married and she was living and working in a church.

Applicant deliberately provided false information in her September 2008 e-QIP. She provided different explanations for those falsifications at the hearing and to the investigator who interviewed her in December 2008, one of which had to be a lie. She provided false testimony at the hearing when she denied using marijuana during her first enlistment. She presented nothing to indicate that she will be able to live a secure and normal existence in the foreseeable future. As a result of her continuing troubling lifestyle, I conclude that none of the potentially mitigating conditions under Guideline H apply.

Guideline J, 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 30)

Applicant committed two very minor offenses while in the Army in 2006. Both of those offenses resulted in her receiving NJP punishments. DC 31(a): *a single serious crime or multiple lesser offenses* applies.

Over three years has passed since Applicant's last criminal offense. Accordingly, the following mitigating conditions must be considered: MC 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 MC 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*.

Applicant certified the information she provided in her September 2008 e-QIP was "true, complete, and correct to the best of my knowledge. . . ." She provided that certification after she was informed that "a knowing and willful false statement" could be punished by fine or imprisonment under 18 U.S.C. § 1001. She then proceeded to make a number of knowingly and willfully false statements in the e-QIP. At the hearing, held on October 22, 2009, Applicant was advised that her testimony was subject to the criminal penalties that could be imposed under 18 U.S.C. § 1001. She then proceeded to lie about her use of marijuana while in the Army. Her recent display of a total disregard for the criminal penalties that could be imposed for lying to the Government prohibits application of any criminal conduct mitigating condition.

Guideline E, Personal Conduct

Conduct involving questionable judgment, lack of candor, dishonesty, or willingness 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 15)

Applicant deliberately provided a number of false answers in the e-QIP she submitted in September 2008. DC 16(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* applies.

Applicant admits she deliberately provided false information in the e-QIP. She first attempted to explain the falsification by stating her abusive husband worked with her in preparing the e-QIP and he insisted that she submit the false information. At the hearing, she changed her explanation to a claim that she was trying to conceal the derogatory information from her abusive husband. Neither explanation entitles her to the application of any mitigating condition. Further, she continued to provide false information at the hearing when she denied using marijuana while on active duty with the Army.

The SOR also alleges the incident where Applicant shot her abusive husband as a personal conduct security concern. The available evidence on this issue establishes she shot him in self-defense after he broke into her apartment and threatened her. This incident does not create any additional personal conduct security concern.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant failed to mitigate the drug involvement, criminal conduct, and personal conduct security concerns. She has not overcome the case against her nor satisfied her ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance. Guidelines H, J, and E are decided against Applicant.

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 H:	Against APPLICANT
Subparagraphs 1.a–e:	Against Applicant
Paragraph 2, Guideline J:	Against APPLICANT
Subparagraphs 2.a & b:	Against Applicant
Paragraph 3, Guideline E:	Against APPLICANT
Subparagraphs 3.a–c:	Against Applicant
Subparagraph 3.d:	For 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 a security clearance for Applicant. Clearance is denied.

Henry Lazzaro
Administrative Judge

