



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



In the matter of:	)	
	)	
	)	ISCR Case No. 09-02557
SSN:	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Melvin A. Howry, Esquire, Department Counsel  
For Applicant: Barry M. Sax, Esquire

October 7, 2010

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**Decision**

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CEFOLA, Richard A., Administrative Judge:

The Applicant submitted a Security Clearance Application (SCA) in September of 2006, and Electronic Questionnaires for Investigations Processing (e-QIPs) in March of 2008, and most recently in November of 2009. On May 6, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines E, H and J for the 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) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

The Applicant acknowledged receipt of the SOR on May 11, 2010. He answered the SOR (Answer) in writing through counsel on May 25, 2010, and requested a hearing before an Administrative Judge. DOHA received the request on July 14, 2010, and I received the case assignment on July 19, 2010. A notice of hearing was originally

issued on July 19, 2010, setting the hearing for August 9, 2010. However, I granted the Applicant's Counsel request for a delay of the hearing until August 19, 2010, in order for said counsel to be available. I convened the hearing as re-scheduled on August 19, 2010. The Government offered Exhibits (GXs) 1 through 5, which were received without objection. The Applicant testified on his own behalf, as did his drug counselor, and submitted Exhibits (AppXs) A through H, which were received without objection. DOHA received the transcript of the hearing (TR) on August 31, 2010. The record closed on August 19, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

## **Procedural and Evidentiary Rulings**

### **Motion to Amend SOR**

Department Counsel moved to amend Subparagraph 2.c. of the SOR by excepting "as set forth in Subparagraph 1.f., above," and substituting therefore "as set forth in Subparagraph 1.b., above." (Emphasis supplied.) The motion was granted.

## **Findings of Fact**

In his Answer to the SOR, the Applicant admitted the factual allegations in all the Subparagraphs with explanations, except for the unamended Subparagraph 2.c. He now admits the amended Subparagraph. He also provided additional information to support his request for eligibility for a security clearance.

### **Paragraph 1 - Drug Involvement**

1.a.~1.g. From about 1992 until about 1996, the Applicant's drug of choice was marijuana. (TR at page 87 line 3 to page 90 line 10.) He used the drug on an occasional basis at social settings in high school and in college. (*Id.*) He also purchased marijuana "a couple of times at a party or something like that." (TR at page 88 lines 15~20.) In addition to marijuana, the Applicant experimented with psychedelic mushrooms in about 1995. (TR at page 87 line 25 to page 88 line 3.)

In about May of 2003, the Applicant suffered "a back injury;" and as a result, "was prescribed Vicodin." (TR at page 59 line 23 to page 60 line 20.) However, after "about six months," the Applicant started to illegally use more pills than he was prescribed. (TR at page 118 line 11 to page 122 line 23.) He eventually went online, submitted his medical records; and as a result, "a doctor in Florida" started prescribing Vicodin to the Applicant. (*Id.*, and at page 70 line 12 to page 76 line 23.) His usage also illegally exceeded this prescription. (*Id.*) In 2005, long after his back had healed, the Applicant continued to go online and get additional pain killers prescribed. (TR at page 128 line 25 to page 130 line 23.) Since October of 2001, the Applicant has been working for his current employer, and was granted a security clearance in October of 2005. (GX 2 at pages 11~12, and at pages 25~27.) As such, the Applicant had illegally used pain

killers while holding a security clearance, until October of 2006, when he went into inpatient treatment.

The Applicant received inpatient treatment, from October of 2006 to November of 2006, for a condition diagnosed as Opiate Dependency. (TR at page 44 lines 14~19.) Since his inpatient treatment, the Applicant has been seeing an “employee assistance counselor.” (TR at page 35 line 21 to page 55 line 12.) Most recently, that counselor averred, in part, the following:

[The Applicant’s] . . . progress has been excellent. He has a very solid AA program. He attends three or four AA meetings per week. He has a sponsor and is working the Steps.

[The Applicant’s] . . . prognosis is excellent. He is doing everything that is recommended to him to stay sober. (AppX A.)

In September of 2008, the Applicant was denied access to classified information due to his Drug Involvement and related Personal Conduct. (GX 3.) In his May 25, 2010 Answer to the SOR, the Applicant has also pledged the following: “It is my intent to stay clean and sober for the rest of my life. If I ever use illegal drugs or abuse alcohol from this day forward, any clearance I hold should be immediately revoked.” (Answer the last page.)

## **Paragraph 2 - Personal Conduct & Paragraph 3 - Criminal Conduct**

2.a.~2.e., and 3.a. The Applicant executed an SCA in September of 2006. (GX 1.) The Applicant answered “NO” to Sections 27 and 28. (GX 1 at page 7.) Section 27 asks if the Applicant has “illegally used any controlled substance . . . or prescribed drugs” in the last seven years. (*Id.*) The Applicant’s answer was a wilful falsification, as he illegally used Vicodin and other prescribed pain killers, as noted above under Drug Involvement. (TR at page 136 line 1 to page 138 line 2.) This wilful falsification is a violation of 18 U.S.C. Section 1001.

Section 28 asks if the Applicant has “EVER illegally used a controlled substance . . . while possessing a security clearance . . . .” The Applicant’s answer was again a wilful falsification, as he illegally used Vicodin and other prescribed pain killers after having been granted a security clearance in October of 2005, as noted above under Drug Involvement. (TR at page 136 line 1 to page 138 line 2.) This wilful falsification is a violation of 18 U.S.C. Section 1001.

The Applicant executed an e-QIP in March of 2008. (GX 2.) The Applicant answered “NO” to Sections 24a and 24b. (GX 2 at page 25.) Section 24a asks if the Applicant has “illegally used any controlled substance . . . or prescribed drugs” in the last seven years. (*Id.*) The Applicant’s answer was a wilful falsification, as he illegally used Vicodin and other prescribed pain killers, as noted above under Drug Involvement.

(TR at page 111 line 4 to page 114 line 15.) This wilful falsification is a violation of 18 U.S.C. Section 1001.

Section 24b asks if the Applicant has “EVER illegally used a controlled substance . . . while possessing a security clearance . . . .” The Applicant’s answer was a wilful falsification, as he illegally used Vicodin and other prescribed pain killers after having been granted a security clearance in October of 2005, as noted above under Drug Involvement. (TR at page 111 line 4 to page 114 line 15.) This wilful falsification is a violation of 18 U.S.C. Section 1001.

## **Policies**

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching 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, 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

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 H - Drug Involvement**

The security concern relating to the guideline for Drug Involvement is set out in Paragraph 24:

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.

The guideline also notes several conditions that could raise security concerns. Under Subparagraph 25(a), “*any drug abuse*” may be disqualifying. In addition, “*diagnosis by a duly qualified medical professional . . . of drug abuse or drug dependence*” under Subparagraph 25(d) may be disqualifying. Here, the Applicant illegally used Vicodin and other pain killers from about May of 2003 until he entered inpatient treatment in October of 2006. His usage was to the point of Opiate Dependency. Subparagraph 25(g) is also applicable, as it prescribes against “*any illegal drug after being granted a security clearance.*” These are countered, however, by the mitigating conditions found in Subparagraphs 26(b)(3) and 26(b)(4). The Applicant has shown “*a demonstrated intent not to abuse any drugs in the future, such as: (3) an appropriate period of abstinence;*” and “*(4) a signed statement of intent with automatic revocation of clearance for any violation.*” The Applicant was last involved with Opiates in October of 2006, about four years ago. He has also signed a letter of intent not to abuse any drugs in the future. I find his statement of intent to be credible and sincere.

### **Guideline E - Personal Conduct**

The security concern relating to the guideline for Personal Conduct is set out in Paragraph 15:

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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 16(a), "*deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . or similar form . . .*" Here, the Applicant falsified his answers to Sections 27 and 28 on his September 2006 SCA, and he also falsified his answers to Sections 24a and 24b on his March 2008 e-QIP. He illegally used prescribed pain killers from about May of 2003 until October of 2006. He also used them after having been granted a security clearance in October of 2005. I can find no countervailing Mitigating Condition that is applicable under these circumstances.

### **Guideline J - Criminal Conduct**

Paragraph 30 of the new adjudicative guidelines 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 adjudicative guidelines set out certain conditions that could raise security concerns. Paragraph 31(c) provides that an "*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,*" may raise security concerns. The Applicant's falsification of his September 2006 SCA and his March 2008 e-QIP are violations of 18 U.S.C. 1001. Again, I find no countervailing Mitigating Conditions that are applicable.

### **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. Under AG Subparagraph 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.

The Administrative Judge should also consider the nine adjudicative process factors listed at AG Subparagraph 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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. The Applicant has the unqualified support of his father, and of those who know him in the work place. (AppX B.) However, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. He was clearly less than candid with the Government as to his past drug abuse. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his Personal Conduct and related Criminal 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 H:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	Against Applicant

Paragraph 3, Guideline J:

AGAINST APPLICANT

Subparagraph 3.a:

Against Applicant

**Conclusion**

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

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Richard A. Cefola  
Administrative Judge