



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



In the matter of:)
)
 -----¹) ISCR Case No. 09-02958
 SSN: -----)
)
 Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Esq., Department Counsel
For Applicant: David P. Price, Esq.

July 30, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement, E (Personal Conduct), and I (Psychological Conditions). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on June 21, 2007. He resubmitted it on October 8, 2008, after changing employers. On March 10, 2010, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines H, E, and I. DOHA acted 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

¹ At the hearing, the Statement of Reasons was amended to reflect Applicant's middle name.

adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on March 29, 2010; answered it in an undated document; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 22, 2010, and the case was assigned to me on April 27, 2010. DOHA issued a notice of hearing on April 27, 2010, scheduling the hearing for May 12, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified but presented no witnesses or documentary evidence. DOHA received the transcript (Tr.) on May 20, 2010.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.e and 2.a-2.c. He denied the allegation in SOR ¶ 3.a. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 49-year-old employee of a defense contractor. He has worked for his current employer since February 2008. He received a security clearance in March 2008.

Applicant was a federal civilian employee from May 1985 to May 1989, working as an aircraft electrician. He held jobs in the private sector until July 2006. He was unemployed from July 2006 to April 2007. He worked for a federal contractor from May to November 2007. He was unemployed from November 2007 until February 2008, when he began his current job.

Applicant married in May 2001 and divorced in January 2008. He has no children. (Tr. 23.) He currently resides with his 84-year-old father, who suffers from dementia. (Tr. 31.)

When Applicant submitted his security clearance applications in June 2007 and October 2008, he responded “yes” to question 24a on both applications, asking if, since the age of 16 or in the last seven years, he had illegally used any controlled substance. He stated that he used cocaine once in March 2006. (GX 1 at 29; GX 2 at 27.)

In an interview with a security investigator in January 2009, Applicant stated that he had used cocaine twice in 2006, and he denied using cocaine or any other illegal substances during the last seven years. (GX 3 at 5.) In response to DOHA interrogatories in June 2009, he again stated that he used cocaine twice in 2006. (GX 4 at 6.) In an affidavit executed in September 2009, he admitted that he used cocaine every other day for a couple of weeks in 2006, and he stated that he did not disclose the extent of his cocaine use on his security clearance applications or during his interview with the security investigator because he was embarrassed about it. (GX 5 at 2, 4.)

At the hearing, Applicant testified he began using cocaine while working as a night club bouncer, and he used it about three times a year from 1985 to 2005. In 2005, his mother became seriously ill and he started having marital problems. In addition, his work environment became stressful because he was given difficult tasks without sufficient time to perform them properly, and he believed he was being “set up to fail.” (GX 3 at 3.). He purchased cocaine and used it every day for a couple of months. (Tr. 26-27.) In September 2006, he left his job by mutual agreement because his supervisor considered his work unsatisfactory. (GX 1 at 27.)

On both of his security clearance applications, Applicant answered “no” to question 21, asking if he had consulted with a mental health professional or another health care provider about “mental health related conditions.” (GX 1 at 27; GX 2 at 25.) In 2005, Applicant had voluntarily obtained treatment for substance abuse in 2005, but he did not stop using cocaine. From March to June 2006, he received further treatment for cocaine abuse at a psychiatric center. When he was admitted for treatment, he denied having any suicidal tendencies or thoughts of self-injury, but he stated that he heard voices when he used cocaine and had once fired a gun at a wall. (GX 6 at 3). He was diagnosed by a medical doctor as being cocaine dependent and having an adjustment disorder with depressed mood. Further testing was ordered to rule out underlying psychosis such as major depression with psychotic features or bipolar, schizoaffective disorder. There is no evidence that further testing occurred. (GX 6; GX 7.) In his September 2009 affidavit, he stated that he did not disclose his treatment at the psychiatric center because he had forgotten about it. (GX 5 at 7.)

At the hearing, Applicant admitted thinking about suicide and shooting at a wall. He denied hearing voices while using cocaine, but he admitted that he fabricated that explanation for his behavior because he was embarrassed about his suicidal thoughts. (Tr. 39-40.)

Applicant used cocaine with friends after completing his treatment in 2006. He stopped using illegal drugs in January 2008 and has not used them since that date. (GX 5 at 5; Tr. 25-30.) He now devotes all his time to his job and caring for his father. (Tr. 42-43.) He attended a few Narcotics Anonymous meetings after completing his substance abuse treatment. He no longer attends meetings, but he now talks almost every day with a friend who acts as an informal sponsor. (Tr. 50.)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement

The SOR alleges Applicant used marijuana in 1976 (¶ 1.a), used cocaine with varying frequency from 1985 to 2006 (¶ 1.b), was treated for cocaine abuse in 2005 (¶ 1.c), purchased cocaine in 2006 (¶ 1.d), and was diagnosed with cocaine dependence

by a medical doctor in June 2006 (¶ 1.e). Applicant admitted all these allegations, and his admissions are corroborated by the evidence presented by Department Counsel and Applicant's testimony at the hearing.

The concern under this guideline is as follows: "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." AG ¶ 24. Guideline H encompasses "drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens)." AG ¶ 24(a)(1).

The evidence raises the following disqualifying conditions under this guideline:

AG ¶ 25(a): any drug abuse, defined in AG ¶ 24(b) as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction;

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

AG ¶ 25(d): diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence.

Since the Government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a), (c), (d), and (g), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated if "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." AG ¶ 26(a). The first prong of AG ¶ 26(a) ("happened so long ago") focuses on whether the drug involvement was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the evidence. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant's abstinence from drugs for two and a half years, standing alone, is a "significant period of time." However, it is less significant in the context of 21 years of cocaine use, including frequent use and relapse after treatment in 2005 and 2006. Although Applicant has an informal sponsor, he has no formal support structure, and he has not been evaluated by a medical professional since his diagnosis of cocaine dependence in 2006. After considering the totality of the evidence, I am not satisfied that his abstinence from cocaine since January 2008 is sufficient to demonstrate reform or rehabilitation. Thus, I conclude that the first prong of AG ¶ 26(a) is not established.

Applicant's drug use was frequent and did not occur under circumstances making it unlikely to recur. Although Applicant is no longer married, he still faces job-related stress, loneliness, and concerns about his ailing father. I conclude that AG ¶ 26(a) is not established.

Security concerns also may be mitigated by "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; and (4) a signed statement of intent with automatic revocation of clearance for any violation." AG ¶ 26(b). Applicant no longer socializes with drug users, but instead is focused on his job and his ailing father. He has changed jobs and terminated his troubled marriage. I conclude AG ¶ 26(b)(1) and (2) are established. AG ¶ 26b(3) is not established for the reasons set out above in the discussion of AG 26(a). There is no evidence of the statement of intent required for AG ¶ 26(d)(4).

Security concerns also may be mitigated by "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." AG ¶ 26(d). Applicant completed a drug treatment program, but he has abused drugs since completing the program, and he has not received a favorable prognosis. I conclude AG ¶ 26(d) is not established.

Guideline E, Personal Conduct

The SOR alleges Applicant falsified his security clearance application by failing to disclose the extent of his illegal drug use (¶ 2.a), intentionally failing to disclose his treatment by a mental health professional (¶ 2.b), and falsifying material facts about the extent of his illegal drug use during his interview with a security investigator (¶ 2.c). It also alleges he left a job by mutual agreement in September 2006, after his supervisor claimed that his work was not satisfactory (¶ 2.d). Finally, it cross-alleges his episode of shooting at a wall after using cocaine, alleged under Guideline I. Applicant admitted his falsifications in his response to the SOR and at the hearing, and he disclosed the circumstances of his job loss on his security clearance application.

The concern under this guideline is set out in AG ¶ 15 as follows:

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.

Applicant's admissions and the evidence of record establish two disqualifying conditions related to his lack of candor during the security clearance process: AG ¶ 16(a) (deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire) and AG ¶ 16(b) (deliberately providing false or misleading information concerning relevant facts to an investigator).

Security concerns raised by false or misleading answers on a security clearance application or during a security interview may be mitigated by showing that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." AG ¶ 17(a). This mitigating condition is not established because Applicant made no effort to correct his omissions and misstatements until confronted with the evidence.

The evidence of the circumstances surrounding Applicant's job loss alleged in SOR ¶ 2.d is sparse. The limited evidence in the record strongly suggests that he left his job because his supervisor considered his technical performance substandard. While substandard performance could be related to drug use, it also could be attributable to inadequate training or the other stressors in his life, such as his mother's failing health, his father's dementia, and his marital breakup. Although the quantum of evidence required to raise a security concern is low, I am not satisfied that anything has been established about his job termination that has security significance. Thus, I will resolve SOR ¶ 2.d in Applicant's favor.

The episode alleged in SOR ¶¶ 2.e and 3.a, in which Applicant thought about committing suicide, fired a gun into a wall, and then fabricated a story about hearing voices raises the following disqualifying conditions under this guideline:

AG ¶ 16(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;

AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Security concerns raised by personal conduct may be mitigated if “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”. AG ¶ 17(c). The incident happened four years ago. It occurred under unique circumstances, with a confluence of family illness, job stress, and marital strife. On the other hand, firing a gun is inside an inhabited building is not a “minor” offense, because it could have resulted in injury or death. While there is no evidence that Applicant had subsequent suicidal thoughts, there have been several incidents in which Applicant has intentionally provided false information to avoid embarrassment. Except for his own testimony, there is no evidence from medical professionals, friends, colleagues, or supervisors that he has overcome his cocaine dependence, depression, or suicidal thoughts. The credibility of his testimony is impaired by his record of falsification. The record leaves me with doubts about his current reliability, trustworthiness, and good judgment. Thus, I conclude that AG ¶ 17(c) is not established.

Security concerns raised by personal conduct may be mitigated if “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.” AG ¶ 17(d). Applicant acknowledged his behavior at the hearing, but there is no evidence that the psychological testing prescribed upon Applicant's admission to the psychiatric facility was completed. There is no evidence other than his testimony, which is of limited credibility, that he has alleviated the stressors that caused his behavior. Thus, there is an inadequate evidentiary basis for a reliable prediction about its recurrence. I conclude AG ¶ 17(d) is not established.

Finally, security concerns under this guideline may be mitigated if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). Applicant's vulnerability to exploitation, manipulation, or duress cannot be reliably evaluated without evidence, other than his

testimony, that he has overcome his cocaine dependence and the depression that apparently caused his behavior and his fabricated explanation for it. I conclude AG ¶ 17(e) is not established.

Guideline I, Psychological Conditions

The SOR alleges that Applicant stated, during a “biopsychosocial assessment,” that he fired a gun at a wall or ceiling because he heard voices (¶ 3.a). The security concern under this guideline is set out in AG ¶ 27 as follows:

Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (e.g., clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline.

The relevant disqualifying condition under this guideline is AG ¶ 28(a): “behavior that casts doubt on an individual's judgment, reliability, or trustworthiness that is not covered under any other guideline, including but not limited to emotionally unstable, irresponsible, dysfunctional, violent, paranoid, or bizarre behavior.” The limited evidence establishes cocaine dependence and an adjustment disorder with depressed mood. The record does not reflect any further testing or evaluation. The accuracy of the diagnosis is compromised by Applicant’s testimony that he fabricated some of the facts regarding hearing voices because he was embarrassed by his suicidal thoughts. Notwithstanding the absence of medical evidence, Applicant’s testimony establishes that he thought about suicide and fired a gun into a wall. Such conduct was irresponsible, dysfunctional, violent, and bizarre, and is sufficient to raise AG ¶ 28(a).

The relevant mitigating conditions are AG ¶ 29(d) (“the past emotional instability was a temporary condition (e.g., one caused by death, illness, or marital breakup), the situation has been resolved, and the individual no longer shows indications of emotional instability”) and AG ¶ 29(e) (“there is no indication of a current problem”). Applicant has dealt with the death of his mother, found another job, and adjusted to the breakup of his marriage. However, other than his testimony, there has been no evidence, such as further professional evaluation or testimony of friends, coworkers, and supervisors, to show that he “no longer shows indications of emotional instability” or “a current problem.” I conclude that AG ¶¶ 29(d) and (e) are not established.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all the relevant circumstances. An 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 have incorporated my comments under Guidelines H, E, and I 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 remorseful at the hearing. He appears to be trying hard to leave his troubled past behind him, but the record is devoid of evidence showing the current status of his cocaine dependence and psychological health. His multiple falsifications during the security clearance process raise grave doubts about his current reliability, trustworthiness, and good judgment.

After weighing the disqualifying and mitigating conditions under Guidelines H, E, and I, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on drug involvement, personal conduct, and psychological conditions. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H, Drug Involvement:	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant
Paragraph 2, Guideline E, Personal Conduct:	AGAINST APPLICANT
Subparagraphs 2.a-2.c:	Against Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	Against Applicant
Paragraph 3, Guideline I, Psychological Conditions:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge