



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 09-08240

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel

For Applicant: *Pro se*

May 10, 2011

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding drug involvement. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On May 12, 2008, Applicant applied for a security clearance and submitted an e-QIP version of a Security Clearance Application (SF 86).¹ On January 20, 2010, the Defense Office of Hearings and Appeals (DOHA) issued her a set of interrogatories. She responded to the interrogatories on February 15, 2010.² On May 17, 2010, DOHA issued a Statement of Reasons (SOR) to her, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For*

¹ Government Exhibit 1 (SF 86), dated May 12, 2008.

² Government Exhibit 2 (Applicant's Answers to Interrogatories, dated February 15, 2010).

Access to Classified Information (December 29, 2005) (AG) for all adjudications and other determinations made under the Directive. The SOR alleged security concerns under Guideline H (Drug Involvement), and detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on an unspecified date. In a written statement, notarized June 15, 2010, Applicant responded to the SOR allegations and elected to have her case decided on the written record in lieu of a hearing. On September 2, 2010, she reversed her decision and requested a hearing before an Administrative Judge. Department Counsel indicated the Government was prepared to proceed on September 3, 2010, and the case was assigned to me on October 4, 2010. A Notice of Hearing was issued on November 13, 2010, and I convened the hearing, as scheduled, on November 30, 2010. During the hearing, 3 Government exhibits (GE I, and 1-2) and 19 Applicant exhibits (AE A-S) were received without objection, and Applicant testified. The transcript of the hearing (Tr.) was received on December 7, 2010.

Findings of Fact

In her Answer, Applicant admitted all of the factual allegations in ¶¶ 1.a. through 1.d. of the SOR. Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence, and upon due consideration of same, I make the following additional findings of fact.

Applicant is a 28-year-old employee of a defense contractor, serving as a senior consultant.³ She is seeking to retain a secret security clearance previously granted to her in October 2008.⁴ A 2001 high school graduate, she received her bachelor of arts degree in psychology in 2005.⁵ She has completed a year and one-half of graduate work towards her master's degree.⁶ She joined her current employer in April 2008.⁷ She never served in the military and never married.⁸

³ Tr. at 80.

⁴ Answer to the SOR, dated June 15, 2010.

⁵ *Id.* at 13-15; Tr. at 30.

⁶ Tr. at 8.

⁷ Government Exhibit 1, *supra* note 1, at 15.

⁸ *Id.* at 21, 24.

Drug Involvement

From September 2008 to at least April 2009, Applicant was a substance abuser whose choice of substances was the prescription medication Oxycontin.⁹ She initially encountered, but did not use, Oxycontin through her boyfriend.¹⁰ Applicant's boyfriend had apparently initially obtained the drug legally from the hospital following an operation, and for several years thereafter, he acquired it illegally and used it in front of Applicant.¹¹ In September 2008, because of recurring back pain, and out of curiosity, at the suggestion of her boyfriend, Applicant self-administered an 80 milligram dose of Oxycontin which had not been prescribed for her.¹² On one other occasion, believed by Applicant to have occurred in November 2008, she inhaled Oxycontin, but doing so made her ill.¹³ Applicant continued to use Oxycontin, without a prescription, one to two times per month, and used it about 10 to 12 times during the entire period.¹⁴ She used Oxycontin with her boyfriend at his house in the evenings or during the weekend.¹⁵ She generally obtained the Oxycontin from her boyfriend or his friends.¹⁶

On several occasions, at her boyfriend's behest, Applicant drove him to his dealer to obtain more Oxycontin.¹⁷ Applicant observed her boyfriend paying for the Oxycontin on only one occasion,¹⁸ and she was aware that one of the dealers charged \$60 per tablet.¹⁹ In April 2009, Applicant drove alone to one of the dealers to obtain three Oxycontin pills for her boyfriend.²⁰ She returned to her boyfriend and delivered the Oxycontin to him.²¹ He took one pill and they left the residence. Applicant drove a few blocks and then pulled over to enable her boyfriend to "smoke" one of the Oxycontin pills. At that moment, a marked police unit pulled in front of them and undercover officers approached Applicant's automobile. Applicant and her boyfriend were

⁹ Answer to the SOR, dated Mar. 14, 2008, at 1.

¹⁰ Government Exhibit 2 (Personal Subject Interview, dated September 20, 2009), at 1, attached to Applicant's Answer to Interrogatories, *supra* note 2.

¹¹ *Id.*

¹² *Id.* at 2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Tr. at 40-41.

¹⁶ Government Exhibit 2, *supra* note 10, at 2.

¹⁷ *Id.* at 1.

¹⁸ Tr. at 61-62.

¹⁹ Government Exhibit 2, *supra* note 10, at 2.

²⁰ Government Exhibit 2 (Applicant's Answer to Interrogatories – Corrections to Investigator's Writeup), *supra* note 2, at 6.

²¹ Government Exhibit 2, *supra* note 10, at 1.

arrested.²² A search of her automobile revealed two Oxycontin pills, an unspecified anxiety pill, and several muscle relaxing pills.²³ She was transported to the county women's detention facility, and was released when her parents posted \$5,000 bail.²⁴ The district attorney subsequently decided not to file formal charges against Applicant.²⁵

Applicant attributed her use of the unprescribed Oxycontin to a variety of reasons: she was struggling to obtain enough graduate school tuition; she was stressed over residing with her parents during a period of their domestic strife; she was depressed over being a burden to her parents; she was generally unhappy about her life; and she was curious about her boyfriend's drug use.²⁶ In addition, she said she had always played by the rules and never done anything wrong, but it resulted in unhappiness, so she did a reversal by dating the wrong type of guy and having fun;²⁷ she was involved with a person with a serious addiction problem;²⁸ Oxycontin relieved her back pain or addressed her particularly bad day or bad mood;²⁹ she looked upon the use of the unprescribed Oxycontin as different from the use of an illegal drug; and her boyfriend encouraged her to use it.³⁰ Applicant also contends her use of Oxycontin was "an isolated incident."³¹

Although the arrest was "terrifying" to Applicant,³² she continued seeing the same boyfriend on and off until August 2009.³³ She tried getting him to abstain from further Oxycontin abuse, but he refused, so she attempted to end the relationship. Her efforts failed, and Applicant obtained a restraining order against him.³⁴

Commencing in May 2009, and continuing until July 2009, Applicant went through four sessions of therapy with a marriage and family therapist (MFT), discussing

²² *Id.*

²³ *Id.* at 2.

²⁴ *Id.*

²⁵ Government Exhibit 2, *supra* note 2 (Letter from district attorney, undated), attached to Applicant's Answer to Interrogatories.

²⁶ Answer to the SOR, *supra* note 4, at 3.

²⁷ Tr. at 64.

²⁸ *Id.* at 24.

²⁹ *Id.* at 40-41.

³⁰ Government Exhibit 2, *supra* note 18, at 7.

³¹ Tr. at 25.

³² Government Exhibit 2, *supra* note 18, at 7.

³³ Tr. at 31.

³⁴ *Id.*; Applicant Exhibit G (Restraining Order After Hearing, dated September 15, 2009).

the stressors in Applicant's life and she learned about possible positive coping skills.³⁵ Applicant's diagnosis was an adjustment disorder with some depression and anxiety symptoms.³⁶ The therapist opined that Applicant was not in need of therapy from a chemical dependency specialist.³⁷ In October 2010, more for the purposes of the security clearance review than a perceived need for further therapy,³⁸ Applicant underwent an assessment and evaluation by a licensed clinical social worker (LCSW) and substance abuse professional (SAP).³⁹ Based on the mini-mental status exam, psychosocial interview, and a drug and alcohol screening protocol, it was the opinion of the LCSW/SAP that Applicant did not meet the criteria for a substance use disorder under the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV).⁴⁰ He added: "[Applicant's] behavior appears to be an isolated incident and it is unlikely that a single episode is cause for concern."⁴¹

On November 10, 2010, Applicant pledged not to use Oxycontin or any other controlled substance in the future.⁴² There is no evidence that she has used any illegal substance or unprescribed medication since April 2009.

Character References and Work Performance

Applicant received "exceeds" ratings for all assessment areas for the two rating periods commencing in April 2009 and ending in March 2010.⁴³ She has been cited for her commitment to excellence, leadership, and dedicated efforts.⁴⁴ She was fully consistent with the individual core ratings for respect, fairness, integrity, trust, and professionalism.⁴⁵ Applicant's immediate supervisor, a senior associate, is effusive in his praise of her. "[Applicant] has demonstrated responsibility, maturity and excellent judgment in all her work. . . . [Applicant's] honesty and transparency is consistent with

³⁵ Applicant Exhibit M (Statement from MFT, dated June 3, 2010).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Tr. at 46-47.

³⁹ Applicant Exhibit N (Statement from LCSW/SAP, dated October 6, 2010).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Applicant Exhibit K (Statement, dated November 10, 2010).

⁴³ Applicant Exhibit P (Annual Assessment, dated May 6, 2009); Applicant Exhibit Q (Annual Assessment, dated May 3, 2010).

⁴⁴ Applicant Exhibit E (Certificates of Commendation, undated).

⁴⁵ *Id.*

her work ethic. She has earned my trust and strongest endorsement. . . .”⁴⁶ Applicant was promoted to her current position on October 1, 2010.⁴⁷

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.”⁴⁸ 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”⁴⁹

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”⁵⁰ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation,

⁴⁶ Applicant Exhibit R (Statement from supervisor, dated May 27, 2010).

⁴⁷ Applicant Exhibit S (E-mail from supervisor, dated October 19, 2010).

⁴⁸ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

⁴⁹ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

⁵⁰ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “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).

extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.⁵¹

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials."⁵²

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."⁵³ Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

Analysis

Guideline H, Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 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.

(a) Drugs are defined as mood and behavior altering substances, and include:

⁵¹ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

⁵² *Egan*, 484 U.S. at 531

⁵³ See Exec. Or. 10865 § 7.

(1) 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), and

(2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 25(a), “any drug abuse (see above definition),” is potentially disqualifying. Similarly, under AG ¶ 25(c), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” may raise security concerns. In addition, AG ¶ 25(g) may apply if there was “any illegal drug use after being granted a security clearance.” During the period September 2008 – April 2009, nearly all of which Applicant possessed a security clearance, Applicant used, obtained, and transferred the misused prescription drug Oxycontin. AG ¶¶ 25(a), 25(c), and 25(g), apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement. Under AG ¶ 26(a), the disqualifying condition may be mitigated where “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.” Under AG ¶ 26(b), drug involvement concerns may also be mitigated where there is 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.

Also, “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,” may be mitigating under AG ¶ 26(d).

AG ¶ 25(a) partially applies. Applicant attributed her drug use to a variety of circumstances and reasons: she was struggling to obtain enough graduate school tuition; she was stressed over residing with her parents during a period of their domestic strife; she was depressed over being a burden to her parents; she was generally unhappy about her life; she was curious about her boyfriend's drug use; she said she

had always played by the rules and never done anything wrong, but it resulted in unhappiness, so she did a reversal by dating the wrong type of guy and having fun; she was involved with a person with a serious addiction problem; Oxycontin relieved her back pain or addressed her particularly bad day or bad mood; she looked upon the use of the unprescribed Oxycontin as different from the use of an illegal drug; and her boyfriend encouraged her to use it. While the environment in which Applicant found herself might be construed as somewhat stressful, her poor choices due to her inability to adjust to that environment, especially while holding a security clearance, is troublesome. Applicant did not specify which issues prompted her to use Oxtcontin, she merely offered the entire list of possibilities in an effort to justify her conduct. The fact that the use of the nonprescribed Oxycontin might be against the law was of little concern to her.

Furthermore, while Applicant and her LCSW/SAP may characterize her actions as “a single episode” or “an isolated incident,” her course of conduct, involving her use, possession, and transfer of Oxycontin from September 2008 until her arrest in April 2009, was far from being a single episode or isolated incident. That characterization by Applicant indicates that she has continued to minimize her actions, thereby increasing concerns. Applicant’s abstinence over the past 23 months is encouraging, but in light of the foregoing, the period is still too brief to establish that her substance abuse is unlikely to recur or that it does not cast doubt on Applicant’s reliability, trustworthiness, or good judgment.

AG ¶ 26(b) partially applies. Applicant has taken certain efforts to demonstrate an intent not to abuse any drugs in the future. For several months after the arrest, she kept associating with her boyfriend, but finally (in December 2009) decided to end the relationship; she moved; on November 10, 2010, Applicant pledged not to use Oxycontin or any other controlled substance in the future; and she has completed 23 months of abstinence.

AG ¶ 26(d) partially applies. Applicant’s four therapy sessions with the MFT do not fully qualify as a “drug treatment program.” Likewise, her one session with the LCSW/SAP, during which she underwent a mini-mental status exam, psychosocial interview, and a drug and alcohol screening protocol, was not a drug treatment program, but rather an evaluation of drug abuse or drug dependence by a LCSW who may or may not be a staff member of a recognized drug treatment program. There is no evidence of any such affiliation between the LCSW and any such recognized drug treatment program. Also, given the erroneous impression that Applicant’s “behavior appears to be an isolated incident and it is unlikely that a single episode is cause for concern,” there is a significant concern that his understanding of the facts is incomplete. Applicant’s conduct was ongoing over a several month period, not a single episode. Under these circumstances, the significance of the evidence presented by the LCSW is reduced.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

There is substantial evidence in favor of mitigating Applicant's conduct, for, until her drug abuse commenced, she: said she had always played by the rules and never done anything wrong; was a successful student, working on her master's degree; was a good employee of a defense contractor, in a job she liked, holding a security clearance; was unable to adjust to her stressful environment; abstained for 23 months from Oxycontin use after her arrest; eventually disassociated herself from her addict boyfriend; altered her environment; sought some types of counselling and evaluation; and pledged not to use Oxycontin or any other controlled substance in the future.

The evidence against mitigating Applicant's conduct is simply more substantial. During the period September 2008 – April 2009, nearly all of which Applicant possessed a security clearance, Applicant used, obtained, and transferred the unprescribed prescription drug Oxycontin. Her involvement in the illegal activity was curtailed only by her arrest. Applicant placed her own interests above her fiduciary responsibilities as a holder of a security clearance, and continued to exhibit a pattern of questionable judgment, irresponsibility, and immature behavior by using the substance. In addition, while Applicant and her LCSW/SAP may characterize her actions as "a single episode" or "an isolated incident," her course of conduct, involving her use, possession, and transfer of Oxycontin, was more extensive than a single episode or isolated incident. That characterization by Applicant indicates that she has continued to minimize her actions, thereby increasing concerns. Applicant's abstinence over the past 23 months is encouraging, but in light of the foregoing, the period is still too brief to establish that her substance abuse is unlikely to recur or that it does not cast doubt on Applicant's reliability, trustworthiness, or good judgment.

I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.⁵⁴ Overall, the record evidence leaves me with substantial questions or doubts as to Applicant's eligibility and suitability for a security clearance. While her continued abstinence is to be encouraged, nevertheless, I conclude Applicant has failed to fully mitigate the security concerns arising from her drug involvement. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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
Subparagraph 1.a.:	Against Applicant
Subparagraph 1.b.:	Against Applicant
Subparagraph 1.c.:	Against Applicant
Subparagraph 1.d.:	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.

ROBERT ROBINSON GALES
Administrative Judge

⁵⁴ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).