



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



In the matter of:)
)
) ISCR Case No. 10-04325
)
Applicant for Security Clearance)

Appearances

For Government: John B. Glendon, Esq., Department Counsel
For Applicant: *Pro se*

05/09/2013

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On September 12, 2012, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, personal conduct. The action was taken under Executive Order (EO) 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) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on September 21, 2012, and requested a hearing before an administrative judge. The case was assigned to me on March 18, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 21, 2013, scheduling the hearing for April 16, 2013. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 10 were admitted in evidence without

objection. Applicant testified and submitted Applicant's Exhibit (AE) A, which was admitted without objection. The record was held open for Applicant to submit additional information. He submitted documents that were collectively marked AE B through I and admitted without objection. Correspondence about the additional exhibits is marked Hearing Exhibit (HE) I. DOHA received the hearing transcript (Tr.) on April 22, 2013.

Findings of Fact

Applicant is a 48-year-old employee of a defense contractor. He has worked for his current employer since 2008. He served in the U.S. military from 1986 until he retired in April 2008 in the pay grade E-7. He has an associate's degree, and he is attending college in pursuit of a bachelor's degree. He is married with two adult children.¹

Applicant has numerous physical ailments, and he received an 80% disability rating from the Department of Veterans Affairs (VA). He has chronic pain. His prescribed medication includes daily doses of methadone. Applicant's wife has had substance abuse problems that involve pain medication. In 2008, she was prescribed pain medication for dental problems. She took more of her pain medication than was prescribed. She also took Applicant's methadone without his knowledge or permission.²

Applicant had a security clearance while in the military and through his current employer. He was interviewed in conjunction with a polygraph for another government agency in November 2008. The other government agency reported that Applicant "initially provided no information of adjudicative significance."³ After further questioning, however, he provided the following:"

[Applicant] admitted intentionally puckering his anal sphincter throughout the course of the test at the diagnostic questions in an effort to overshadow the relevant questions and manipulate the polygraph test. [Applicant] manipulated his physiology in this manner to avoid admitting he had taken three pills of his wife's narcotic prescription pain medication (Roxicet) to get high or "not feel anything" in April 2008. [Applicant] was in the U.S. [military] and maintained a TOP SECRET security clearance at the time. He was aware of the drug policies for the military and for maintaining security clearances and chose to use the drug anyway to escape. [Applicant] learned of this countermeasure technique through an unrecalled temporary coworker at his present work site at [employer].⁴

¹ Tr. at 21, 40-42, 53; GE 1.

² Tr. at 21-31, 37-39; GE 8; AE A, B, E.

³ Tr. at 21, 43-44; GE 2.

⁴ GE 2.

The other government agency denied Applicant's access to sensitive compartmented information (SCI). Applicant submitted a letter of appeal to the other government agency in February 2009. Applicant denied using his wife's pain medication, and he denied that he used countermeasures to fool the polygraph. He admitted that he "took" three of his wife's pills in April 2008, but he stated that he did not ingest the pills. He stated that his wife was abusing her pain medication, so he "took the last three [pills] and flushed them down the toilet."⁵ He further stated:

At no time did I state that I took my wife's medication to "get high." I told the tester that I took the medication so that I would not have to think about it if even for just a little while, that at the time I was in so much physical and emotional pain that I didn't want to feel anything if even for a little while. I had previously informed that that my wife had been abusing her medication and had been sneaking mine as well. This finally stopped once I took all of her medication and mine and began locking them up until I got my wife into see her doctor; I also informed that I gave my wife's medication back to her since I could have gotten into trouble with the clinic for keeping her medication from her.⁶

Applicant also denied employing countermeasures to the polygraph. He stated that his numerous physical problems made him uncomfortable and parts of his body started twitching during the examination.⁷ He explained:

At no time did I pucker my sphincter nor did I say I puckered my sphincter during the test. I told the tester that I had squeezed my butt cheek. It was the only way to describe the twitch I had on the right side of my lower body due to the way I was positioned during the test. I never stated that I learn[ed] any countermeasure from any co-worker. When asked if I had ever spoken with anyone about the polygraph, I recalled a conversation that took place sometime prior to my polygraph between myself and a fellow co-worker. This conversation in no-way had any effect on my performance during the test.⁸

Applicant's letter was considered during his first appeal review of the denial of his eligibility for access to SCI. The appeal decision stated that a "management review of the polygraph interview summary tape revealed the report was accurate as written." The other government agency issued a final clearance decision statement in December 2009, denying Applicant's eligibility for access to SCI.⁹

⁵ Tr. at 22-37, 43, 45-48; GE 2; AE E.

⁶ GE 3.

⁷ Tr. at 31-33, 45-52; GE 3.

⁸ GE 3.

⁹ Tr. at 42, 52-53; GE 2-4.

Applicant submitted a Questionnaire for National Security Positions (SF 86) in December 2009. He discussed the actions by the other government agency. He denied ingesting his wife's pain medication, and he denied employing countermeasures to the polygraph. Based upon the determination by the other government agency, Applicant's DOD security clearance was suspended in February 2010.¹⁰

Applicant was interviewed for his background investigation by an Office of Personnel Management (OPM) investigator on May 2010. A signed statement was not taken, but the interview was summarized in a report of investigation (ROI). He again denied ingesting his wife's pain medication, and he denied employing countermeasures to the polygraph. Applicant's testimony was consistent with his statement to the other government agency in 2009, his comments in the 2010 SF 86, and his 2010 OPM interview.¹¹

Applicant submitted numerous letters attesting to his excellent job performance, honesty, truthfulness, generosity, compassion, work ethic, leadership, professionalism, reliability, dependability, trustworthiness, ethics, judgment, and integrity. He is recommended for a security clearance.¹²

After considering all the evidence, I find by substantial evidence¹³ that Applicant ingested his wife's prescription pain medication in April 2008. I also find that he utilized countermeasures in November 2008 in an attempt to alter the results of the polygraph. I further find that he intentionally provided false information about those matters in his statement to the other government agency in 2009, in his 2010 SF 86, during his 2010 OPM interview, and during his testimony.¹⁴

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially

¹⁰ Tr. at 43; GE 1, 5.

¹¹ Tr. at 22-37, 43, 45-52; GE 9; AE E.

¹² AE B-D, F-I.

¹³ 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 *Department of the Navy v. Egan*, 484 U.S. at 518 (1988). "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).

¹⁴ Applicant's false statements to the other government agency in 2009, in his 2010 SF 86, during his 2010 OPM interview, and during his testimony were not alleged in the SOR, and they will not be used for disqualification purposes. They may be considered when assessing Applicant's credibility, in the application of mitigating conditions, and in analyzing the "whole person."

disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching 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."

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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 E, Personal Conduct

The security concern for personal conduct 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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; and

(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.

While holding a security clearance, Applicant ingested his wife's prescription pain medication in April 2008. He utilized countermeasures in November 2008 in an attempt to alter the results of the polygraph. That conduct showed poor judgment and an unwillingness to comply with rules and regulations. It also created a vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(c) and 16(e) are applicable as disqualifying conditions.

SOR ¶ 1.a alleges information that is also alleged in SOR ¶ 1.b. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). SOR ¶ 1.a is concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) 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;

(d) 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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

During his interview in conjunction with a polygraph for another government agency in November 2008, Applicant admitted to taking his wife's prescription pain medication and to utilizing countermeasures in an attempt to alter the results of the polygraph. He has been untruthful about those matters ever since. There are no applicable mitigating conditions.

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 relevant 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I considered Applicant's favorable character evidence and his honorable military service. However, he cannot be trusted to be honest and truthful.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated personal conduct security concerns.

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 E:	Against Applicant
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b-1.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

Edward W. Loughran
Administrative Judge