



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 XXXXXX, Xxxxx Xxx) ISCR Case No. 10-09576
)
 Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esquire, Department Counsel
For Applicant: *Pro se*

04/02/2012

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,¹ Applicant's clearance is granted.

On 27 September 2011 the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, Drug Involvement and Guideline E, Personal Conduct.² Applicant timely answered, requesting a hearing. DOHA assigned the case to me 8 December 2011, and I convened a hearing 12 January 2012. DOHA received the transcript (Tr.) 22 January 2012.

¹Consisting of the transcript (Tr.), Government exhibits 1-10, and Applicant exhibits A-B.

²DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on 1 September 2006.

Findings of Fact

Applicant admitted the SOR allegations, except for SOR 1.e.³ She is a 40-year-old systems integrator employed by a defense contractor since January 2011. She seeks to retain the clearance she was issued in May 2002. Applicant is the divorced mother of two daughters, who by her own account married too young because she was pregnant with their first child, grew apart from her spouse over time, and divorced him after 10 years of marriage in August 1999. However, they both remain very involved in raising their daughters, the oldest of whom is now in college. Applicant received an associate's degree in information technology, and is working on her baccalaureate degree.

After Applicant and her spouse divorced in August 1999, he filed for Chapter 7 bankruptcy protection to escape his share of the liability for their joint debt. Applicant was unable to pay the debts on her own, and on the advice of counsel, filed for Chapter 7 bankruptcy protection herself in October 2000. She was discharged of about \$15,000 in debt in January 2001 (SOR 2.h). Applicant's finances were fine until December 2008, when she filed a second Chapter 7 bankruptcy petition. This was the culmination of a number of events beginning in 2006. Her debts were discharged in March 2009 (SOR 2.g).

In 2006, Applicant bought a house some distance from her work to try to provide her daughters with a better quality of life than she thought they had living in a townhouse closer to work. She moved far enough away from work so she could afford a suitable house with a suitable yard. She did not really think about the commuting costs, either in expense or commuting time. Indeed, in October 2006, she was fined \$125 for a misdemeanor reckless driving arrest in August 2006 (SOR 2.f), for speeding between home and work. In addition, she had the automobile accident described below. Eventually, Applicant and her daughters moved back to a townhouse closer to work. Applicant rented her house for a while, and then tried to sell it, but was unable to do so with the housing market collapse. The house was foreclosed upon. Applicant was worried that the lender might pursue any deficiency after the foreclosure sale. By December 2008, Applicant was well into what would be more than a year's unemployment after resigning her job in March 2008, and had unpaid medical bills, as well as the remaining balance on a leased automobile that she could no longer afford.

Applicant completed the required financial counseling before her December 2008 filing. Since her January 2009 discharge, Applicant has nearly \$3,000 positive monthly cash flow (AE B; Tr. 55). She has one credit card with a \$1,000 limit, a car payment, and payments on her student loans and her daughter's student loans. To reduce expenses so that she and her ex-spouse can pay for their daughter's college costs, Applicant and her daughter moved into her ex-spouse's three-storey house—not without some friction. Applicant and her daughters live upstairs, her ex-spouse lives in the basement, and they share the main-floor living areas.

³Which is, for all practical purposes, a duplicate of SOR 1.h.

In November 2010, Applicant and her ex-spouse got into a verbal argument and she threw a baseball bat at him. Although he was not hurt, their youngest daughter had been frightened and called 911. The ex-spouse did not want to press charges, but the police did so anyway. Applicant received probation before judgment in January 2011, conditioned on a favorable psychiatric examination and completion of an anger management course, both since accomplished. Applicant was released early from active probation, but has a year of inactive probation before she can have her record expunged (SOR 2. b).

In December 2006, Applicant mistakenly sent a classified document via unclassified email (SOR 2.d). The error occurred because Applicant forgot to switch the computer from unclassified email to classified email. She had never before worked on a classified email system before. Applicant and the recipient immediately discovered the mistake and reported it to her facility security officer. In January 2007, Applicant received a written reprimand from her supervisor, and the entire division received additional training from the agency on the importance of ensuring the computer was in proper mode when sending classified documents.

In August 2006, Applicant was seriously injured in an automobile accident when she was rear-ended by a car traveling 60 miles per hour while she was stopped in a traffic tie-up on an interstate highway. Her recovery was extremely painful, and she was prescribed vicodin and percocet until spring 2007. In spring 2007, Applicant obtained a prescription painkiller from one of her coworkers, who had extra medication left over from some recent dental work. Applicant's physical condition was aggravated in September 2007, when she fell and hurt her back and pelvis.

From spring 2007 to June 2008, Applicant used vicodin (SOR 1.a) and percocet (SOR 1.b) without a prescription, and acquired both drugs without a prescription (SOR 1.c)—all while she held a security clearance (SOR 1.d).⁴ From spring 2007 to late fall or early winter 2007, Applicant used vicodin and percocet about twice per month, 10-20 mg each time. From about November to December 2007, Applicant used the drugs two-to-three times per week, 60-80 mg per use. From December 2007 to March 2008, Applicant used the drugs daily, 60-80 mg per use. Initially, Applicant's coworker just gave her the pills. But over the last four months of her regular use, Applicant bought the coworker lunch or gas in exchange for the pills.

When Applicant's prescription abuse increased to daily use, and she was coming to work late or calling in sick, she realized that she had become dependent. In early 2008, Applicant emailed her supervisor that she intended to resign her job because of her prescription drug abuse. She felt that she had to leave the environment and the source of her drugs to be able to stop using. Her supervisor gave the coworker 30 days notice of termination, but told Applicant just to take a few days off and not resign.

⁴This allegation was cross-alleged as disqualifying conduct under Guideline E (SOR 2.a), but has no additional security significance under that guideline, because the conduct alleged is fully cognizable under Guideline H, where it properly belongs.

However, Applicant was unable to stop abusing prescription drugs in that environment, and resigned from her job in March 2008.

Also in March 2008, Applicant sought medical help for her addiction. Initially, she intended only to complain about her ongoing back pain to obtain more painkillers, but once she got to the emergency room she decided to disclose her addiction and obtain a referral for outpatient treatment. In the emergency room, her condition was variously diagnosed as narcotics addiction (SOR 1.e) or opiate addiction (SOR 1.h).⁵ She was treated in the emergency room, referred to addiction services to develop a treatment plan, and prescribed a drug to help her detoxify—to be used as needed for untoward withdrawal symptoms (GE 3). Two days later, Applicant had a followup appointment with her doctor to address her opiate dependence.⁶ Her doctor prescribed a different drug to help Applicant detoxify. After about two weeks, she was switched to a third drug because the second drug made her nauseous. This drug made her feel worse than the withdrawal symptoms, so she discarded the unused pills. Applicant looked into rehabilitation programs for her substance abuse, but she was unable to find a suitable outpatient program, and she was unable to afford the inpatient programs because she was unemployed. She resolved to quit abusing prescription painkillers on her own.

Applicant suffered a couple of relapses between March 2008 and June 2008. The relapses consisted of using four pills in a day, abstaining for about a month, then using another four pills in a day. In June 2008, Applicant was returning home after obtaining these prescription drugs. She had taken these painkillers before leaving for home, but they took effect much quicker than she expected, and she began to feel tired. She pulled to the side of the road to stop driving, and fell asleep. She was awakened by a police officer knocking on her window, and eventually arrested for misdemeanor public intoxication (SOR 1.f).⁷ She did not contest the citation, but pre-paid an \$80 fine, because she could not afford a lawyer. This was the last time she used prescription painkillers without a prescription.

Since June 2008, Applicant has obtained vicodin four times by prescription for pain management. Each time, the number of pills dispensed was enough to last a day at the maximum dosage; two days at the minimum dose, with no refills. In June 2009, she got 12 pills for hip pain (along with a prescription muscle relaxant). In October 2010, she got another 12 pills for hip pain. In February 2010, she had a hip sprain and got 15 pills. About six weeks later, in March 2010, she got another 12 pills for severe menstrual

⁵The two terms appear to be used interchangeably, albeit by two different medical staffers. Colloquially, narcotic appears more a legal term; opiate a medical one. Nevertheless, allegations 1.e and 1.h are essentially duplicate diagnoses made on the same day.

⁶Although the doctor records Applicant's self-description of drug dependence/opiate addiction, the doctor's diagnosis is substance abuse.

⁷This allegation was cross-alleged as disqualifying conduct under Guideline E (SOR 2.c), but has no additional security significance under that guideline, because the conduct alleged is fully cognizable under Guideline H, where it properly belongs.

cramps.⁸ This was the last time she had any prescriptions for painkillers (Tr. 71). Applicant is willing to sign a statement of intent concerning future drug use as contemplated by the Directive (Tr. 75).

Applicant has extremely favorable references from her supervisor, the agency program managers for two programs Applicant works on, and a co-worker. All recommend her for her clearance. None have seen any indication of substance abuse problems or financial issues (AE A).

Policies

The adjudicative guidelines (AG) list factors to be considered in evaluating an applicant's suitability for access to classified information. Administrative judges must assess both disqualifying and mitigating conditions under each issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial commonsense consideration of the factors listed in AG ¶ 2(a). The presence or absence of a disqualifying or mitigating condition is not determinative for or against an applicant. However, specific adjudicative guidelines should be followed where a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guidelines are Guideline H (Drug Involvement) and Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does, it establishes a baseline case against granting a clearance. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, an applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁹

⁸This allegation was cross-alleged as disqualifying conduct under Guideline E (SOR 2.e), but has no additional security significance under that guideline, because the conduct alleged is fully cognizable under Guideline H, where it properly belongs. Further, the allegation lacks security significance under Guideline E because the record clearly reveals that Applicant obtained the painkillers by prescription on only a few occasions, for legitimate medical reasons, and in amounts consistent with those medical reasons.

⁹See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

Analysis

The Government established a case for disqualification under Guideline H, by demonstrating Applicant's extensive prescription drug abuse between spring 2007 and June 2008, during which time she obtained them without prescription and used them while holding a clearance.¹⁰ However, Applicant mitigated the security concerns. Without minimizing the security significance of prescription drug abuse, the important fact is that Applicant was properly prescribed these painkillers to manage her pain after a very serious car accident in August 2006, and only later segued into abuse and dependence.

Drug involvement mitigating conditions give substantial support to Applicant. Her prescription drug abuse was frequent, but was confined to a fairly narrow time period that ended in June 2008, over 3½ years ago. Department Counsel correctly observes that Applicant is likely to continue to have residual pain from her automobile accident and other mishaps, but she demonstrated her willingness to obtain medical intervention as needed to avoid dependence.¹¹ Further, she demonstrated intent to not abuse drugs in the future by avoiding abuse for more than three years and abstaining altogether for more than two years, quitting her job to disassociate herself from her drug provider, and limiting any additional use to medical necessity, by both frequency and quantity.¹² She has also stated a willingness to sign the statement of intent contemplated by the Directive. While not as strong an indication of intent as actually signing such a letter, it nevertheless indicates Applicant's understanding of the practical consequences should she return to prescription drug abuse. Finally, her prescription drug abuse followed a severe injury and prolonged recovery that may not have been fully resolved when Applicant started using the drugs without a prescription, and the abuse has since ended.¹³ I conclude Applicant is unlikely to abuse prescription drugs in the future. Accordingly, I resolve Guideline H for Applicant.

The Government established a case for disqualification under Guideline E. However, Applicant mitigated the security concerns. First, SOR 2.a, 2.c, and 2.e, which simply cross-reference drug allegations under SOR 1, raise no independent security

¹⁰¶ 25 (a) any drug abuse ; (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; (d) diagnosis by a duly qualified medical professional . . . of drug abuse or drug dependence; (g) any illegal drug abuse after being granted a security clearance;

¹¹¶ 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 [Emphasis supplied];

¹²¶ 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;

¹³¶ 26 (c) abuse of prescription drugs was after a severe **or** prolonged illness during which these drugs were prescribed, and abuse has since ended [Emphasis supplied];

concerns under Guideline E because they are fully addressed under Guideline H. Applicant's two chapter 7 bankruptcy discharges (SOR 1.g and 1.h), ordinarily cognizable under Guideline F, raise no issues of questionable judgment or unreliability. Instead, choosing bankruptcy in these two instances demonstrates her good judgment.

Applicant's January 2001 bankruptcy discharge was directly related to her divorce and her ex-spouse's decision to escape his share of the responsibility for their joint debt. It would have been nearly impossible, if not irresponsible to her family obligations, to have shouldered that indebtedness alone. Her March 2009 bankruptcy discharge was directly related to what she thought was a sensible decision to improve her daughters' living circumstances by buying a house in a market she could afford, but which turned out not to be a sensible commuting distance to Applicant's job. By the time she realized that fact, she found herself unable to sell her house because of the collapse in the housing market and was unable to rent the house for enough to cover her mortgage while renting closer to her work. Further, she received financial counseling as part of her second bankruptcy, took significant action to reduce her living expenses, and now has significant positive monthly cash flow. Her August 2006 citation for reckless driving (speeding), for which she paid a fine, raises a minor question of judgment, and indeed largely highlights the problems with buying a home so far from her work. Her December 2006, security violation for sending a classified document out over an unclassified email network, was a routine violation that she self-reported and was reprimanded for, and which resulted in her company providing additional retraining to all its employees about the need to ensure the email was correctly switched to the secure network when sending classified documents. Her December 2010 domestic violence arrest, for which she received probation before judgment, was indirectly related to her financial situation because she was renting space in her ex-spouse's house for herself and her daughters. Applicant paid her fines, completed her required anger-management training, and was released from active probation. While this arrest and the 2006 incidents raise security concerns under Guideline E, none of this conduct seems likely to recur, and does not rise to a level requiring revocation of the clearance Applicant has otherwise held without incident since May 2002. Accordingly, I resolve Guideline E for Applicant. Nothing in the whole-person factors of AG ¶2(a) requires a different result. Indeed, Applicant's favorable work and character references substantiate this result.

Formal Findings

Paragraph 1. Guideline H:	FOR APPLICANT
Subparagraph a-h:	For Applicant
Paragraph 2. Guideline E:	FOR APPLICANT
Subparagraph a-h:	For Applicant

Conclusion

Under the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance granted.

JOHN GRATTAN METZ, JR
Administrative Judge