



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



In the matter of:)
)
-----) ISCR Case No. 11-11654
)
Applicant for Security Clearance)

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: *Pro se*

06/28/2013

Decision

GALES, Robert Robinson, Administrative Judge:

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

Statement of the Case

On May 12, 2011, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).¹ On October 1, 2012, the Department of Defense (DOD) issued him a set of interrogatories. He responded to the interrogatories on October 17, 2012.² On an unspecified date, the DOD issued him another set of interrogatories. He responded to the interrogatories on October 17, 2012.³ On November 9, 2012, the DOD

¹ Item 5 (SF 86), dated May 12, 2011.

² Item 6 (Applicant's Answers to Interrogatories, dated October 17, 2012).

³ Item 7 (Applicant's Answers to Interrogatories, dated October 17, 2012).

issued him another set of interrogatories. He responded to the interrogatories on December 5, 2012.⁴ On January 28, 2013, the DOD issued a Statement of Reasons (SOR) to him, under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD 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 Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct), and detailed reasons why the DOD adjudicators were unable to find 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 received the SOR on February 11, 2013. In a statement notarized February 26, 2012,⁵ Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was provided to Applicant on March 25, 2013, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on April 15, 2013, but as of June 19, 2013, he had not submitted any further documents or other information. The case was assigned to me on June 21, 2013.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with explanations, nearly all of the factual allegations pertaining to drug involvement in the SOR (§§ 1.a., 1.b., and 1.d.), and one of the factual allegations pertaining to personal conduct SOR (§ 2.a.) in the SOR. He denied the remaining allegations. Applicant's admissions and other comments are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 52-year-old employee of a defense contractor. He has been serving in production support with his current employer since November 2007. He was previously employed as an automobile salesman, a motor-man, pressure washer, field service technician, and customer operations leader. He was unemployed from August 2005 until April 2006. Applicant has never served in the U.S. military.⁶ He was married in March 1979 and divorced in March 1999, and has been cohabiting with his girlfriend

⁴ Item 8 (Applicant's Answers to Interrogatories, dated December 5, 2012).

⁵ Item 3 (Applicant's Answer to the SOR, dated February 26, 2013).

⁶ Item 5, *supra* note 1, at 37.

since April 2005.⁷ He has one daughter, born in July 1983, and is the guardian of a child born in January 2002.

Drug Involvement and Personal Conduct

Applicant is a substance abuser whose substance of choice is methamphetamine. Because of inconsistencies in his various versions of his substance abuse history, it remains unclear as to the accurate length and frequency of such abuse. He acknowledged to a healthcare provider that he had used methamphetamine daily from the age of 25 (or 1985) until November 2008;⁸ revised his history so that he used it daily for 25 years (or 1983) until 2008;⁹ stated in his SF 86 and to an investigator of the U.S. Office of Personal Management (OPM) that he had only used it three or four times per day for three months in 2008;¹⁰ and in his Answer to the SOR said he only used it sporadically, not constantly, from 2003 until 2008.¹¹ Applicant's responses to the SF 86 inquiries and to the questions of the OPM investigator were false and concealed the full scope of Applicant's substance abuse and treatment history.

Applicant admitted he was treated for methamphetamine abuse as an inpatient in about 1993.¹² It is unclear as to what generated his treatment, of what it consisted, how long it lasted, what the diagnosis, if any, was, or if there was any prescribed aftercare. For reasons not specified, he visited the emergency room of a local hospital on November 6, 2008. He was hospitalized and underwent a psychiatric evaluation and treatment.¹³ Applicant turned to his employer's employee assistance program (EAP) for help,¹⁴ and he underwent an integrated needs assessment referral and screening assessment, after which he was enrolled in the chemical dependency intensive outpatient program of another local hospital.¹⁵

Applicant acknowledged to the program staff that he had experienced anxiety, depression, headaches, body aches, and runny nose, as well as mood swings, self-isolation, performance problems at work, and excessive absenteeism from work.¹⁶ He

⁷ Item 5, *supra* note 1, at 21-22.

⁸ Item 8 (Hospital Needs Assessment, dated November 6, 2008), at 7.

⁹ Item 8 (Hospital Needs Assessment, dated November 10, 2008), at 1.

¹⁰ Item 5, *supra* note 1, at 31; Item 6 (Personal Subject Interview, dated August 9, 2011), at 1.

¹¹ Item 3, *supra* note 5, at 1.

¹² Item 8 (Applicant's Answers to Interrogatories), *supra* note 4, at 2, 7.

¹³ Item 8 (Hospital General Instructions, dated November 6, 2008).

¹⁴ Item 6 (Applicant's Answers to Interrogatories), *supra* note 2, at 1.

¹⁵ Item 8 (Hospital Integrated Needs Assessment Referral/Screening Assessment, various dates).

¹⁶ Item 8 (Hospital Integrated Needs Assessment Referral/Screening Assessment), *supra* note 15.

told the OPM investigator that methamphetamine had no effect on him other than making him tired.¹⁷

Applicant was treated in the program until he was discharged on December 8, 2008, because he abruptly stopped coming to group therapy after attending only 3 of the required 18 sessions. He made little progress during those three sessions over a three-day period when his active participation was characterized as minimal on two of the three occasions.¹⁸ Applicant's Axis I diagnosis by a physician was 304.40, Amphetamine/Psycho-Stimulant Dependence NOS. His prognosis was poor.¹⁹ Applicant was referred to a psychiatrist for anxiety and fatigue. Applicant was considered non-compliant.²⁰

When questioned by the OPM investigator, Applicant falsely claimed that he had completed all therapy sessions and that no recommendations as to follow-up therapy were made. He also said that he had not been diagnosed with any condition.²¹ Applicant subsequently denied that he was ever made aware of any "exact clinic diagnosis."²² He later acknowledged that he was to have participated in 18 therapy sessions, but that when he learned the EAP would only pay for three sessions, he dropped out of the program because he could not afford the cost of those remaining sessions.²³

Applicant purportedly ceased using illegal substances in November 2008 because he did not want to risk losing his job and because it was bad for his health.²⁴ There is no evidence that Applicant ever considered the illegality of methamphetamine abuse. In October 2012, he indicated that he does not intend to use drugs in the future.²⁵

Despite abusing methamphetamine for such a lengthy period, Applicant denied ever purchasing or contributing to the purchase of the substance, claiming instead that the methamphetamine was always obtained through a friend, whose name he could not recall.²⁶ The record is silent as to Applicant's motivation for using methamphetamine

¹⁷ Item 6 (Personal Subject Interview, dated August 9, 2011), at 1.

¹⁸ Item 8 (Discharge Summary, dated December 30, 2008); Item 8 (Therapeutic Modality Progress Notes, various dates).

¹⁹ Item 8 (Coding Summary Form, dated December 9, 2008); Item 8 (Hospital Integrated Needs Assessment Referral/Screening Assessment, various dates), *supra* note 15.

²⁰ Item 8 (Discharge Summary), *supra* note 18.

²¹ Item 6 (Personal Subject Interview), *supra* note 17, at 1.

²² Item 3, *supra* note 5, at 1.

²³ Item 8 (Applicant's Answers to Interrogatories), *supra* note 4, at 3.

²⁴ Item 7 (Applicant's Answers to Interrogatories), *supra* note 3, at 1.

²⁵ Item 7 (Applicant's Answers to Interrogatories), *supra* note 3, at 3.

²⁶ Item 6 (Personal Subject Interview), *supra* note 17, at 1.

other than for recreational use by himself at home.²⁷ The record is also silent as to whether or not Applicant ever disassociated himself from his methamphetamine co-users or suppliers.

In October 2008, while Applicant and his girlfriend were shopping at a local store, they attempted to steal \$96 worth of merchandise, but were stopped as they were attempting to depart the store. Applicant was arrested and charged with shoplifting and detained overnight. In November 2008, he was given deferred adjudication for one year and ordered to pay a fine of \$1,000.²⁸ It is unclear what actions were taken against Applicant's girlfriend. There is no other evidence to indicate that such conduct by Applicant fell into a pattern of similar conduct, and this incident seems to be an isolated one.

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."²⁹ 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."³⁰

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.

²⁷ Item 6 (Personal Subject Interview), *supra* note 17, at 1.

²⁸ Item 6 (Personal Subject Interview), *supra* note 17, at 1.

²⁹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

³⁰ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

In the decision-making process, facts must be established by “substantial evidence.”³¹ 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, 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.³²

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.”³³

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.”³⁴ 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.

³¹ “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).

³² See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

³³ *Egan*, 484 U.S. at 531

³⁴ See Exec. Or. 10865 § 7.

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:

(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. Also, where there is a *diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence*, AG ¶ 25(d) may apply. In addition, AG ¶ 25(e) may apply if there was an *evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program*. The *failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional* may be disqualifying under AG ¶ 25(f). During the period 1983 until November 2008, Applicant obtained, possessed, and used methamphetamine; was treated on several occasions for methamphetamine abuse and dependence; was diagnosed with methamphetamine dependence; and failed to complete prescribed drug treatment and aftercare programs. AG ¶¶ 25(a), 25(c), 25(d), 25(e), and 25(f), have been established.

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.

In addition, AG ¶ 26(d) may apply where there is a *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(a) and 26(d) do not apply. AG ¶ 26(b) minimally applies. Applicant used methamphetamine with varying frequency for a period of 25 years, and he became dependent on it. He did not explain his motivation for using methamphetamine, especially when it caused him so many health and employment problems. The issue of methamphetamine's status as an illegal drug was apparently not a concern for him. His decision, as it pertains to his continuing abuse of methamphetamine over such a lengthy period, despite treatment 15 years before the November series of events, is troublesome. Applicant has taken certain efforts to demonstrate his intent not to abuse any drugs in the future. He has purportedly abstained since November 2008, and in October 2012, he indicated that he does not intend to use drugs in the future. That comment is the closest he has come to signing a "statement of intent with automatic revocation."

As noted above, the record is also silent as to whether or not Applicant ever disassociated himself from his methamphetamine co-users or suppliers. Applicant's purported abstinence over the past four years is encouraging. Nevertheless, in light of the foregoing, it appears that a more thorough demonstration of intent, supported by a longer period of abstinence, complete and clear disassociation from drug-using associates, and avoidance of the environment where the methamphetamine was used, is appropriate to satisfy continuing concerns that his methamphetamine dependence is unlikely to recur or that it does not cast doubt on Applicant's reliability, trustworthiness, or good judgment.

Guideline E, Personal Conduct

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

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions

about an individual's reliability, trustworthiness and ability to protect classified information. 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.

The guideline notes conditions that could raise security concerns. Under AG ¶ 16(a), security concerns may be raised when there is a:

deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Under AG ¶ 16(b), security concerns may be raised by:

deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

In addition, under AG ¶ 16(c), it is potentially disqualifying when there is:

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(e) may apply where there is:

personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing. . . .

Finally, *association with persons involved in criminal activity*, may raise security concerns under AG ¶ 16(g).

Applicant's responses to the SF 86 inquiries and to the questions of the OPM investigator were false and concealed the full scope of Applicant's substance abuse and treatment history. He was diagnosed and treated for methamphetamine dependence; he unilaterally terminated his substance abuse counseling; he failed to comply with recommended aftercare; he was arrested and charged with shoplifting; and he still resides with his girlfriend, his accomplice in the shoplifting episode. AG ¶¶ 16(a), 16(b), 16(c), 16(e), and 16(g) have been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. AG ¶ 17(a) may apply if *the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts. 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) may apply. Also, AG ¶ 17(g) may apply if *the association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations*. As to Applicant's responses to the SF 86 inquiries and to the questions of the OPM investigator, AG ¶¶ 17(a) and 17(c) do not apply. As to Applicant's 2008 shoplifting offense, there is no other evidence to indicate that such conduct by Applicant fell into a pattern of similar conduct, and this incident seems to be an isolated one. AG 17(c) applies to this incident, but AG ¶ 17(g) does not apply.

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. Moreover, I have evaluated this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.³⁵

There is some evidence in favor of mitigating Applicant's conduct. Applicant's methamphetamine abuse and dependence supposedly ceased in November 2008, and he has been abstinent since that time. He has been with his current employer since November 2007. In October 2012, he indicated that he has no intention of using illegal substances in the future.

³⁵ 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).

The disqualifying evidence under the whole-person concept is much more substantial. For 25 years, ending in November 2008, Applicant obtained, possessed, and used methamphetamine; was treated on several occasions for methamphetamine abuse and dependence; was diagnosed with methamphetamine dependence; and failed to complete a prescribed drug treatment and aftercare programs. Applicant's responses to the SF 86 inquiries and to the questions of the OPM investigator were false and concealed the full scope of Applicant's substance abuse and treatment history. Applicant's actions over such a lengthy period, as well as his changing stories, indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which raise questions about his reliability, trustworthiness and ability to protect classified information. 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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	For Applicant
Subparagraph 2.b.:	Against Applicant
Subparagraph 2.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.

ROBERT ROBINSON GALES
Administrative Judge