



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



In the matter of:)
)
) ISCR Case No. 11-12622
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: Christopher Graham, Esquire

08/22/2013

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of all evidence in the record of this case, and after carefully observing Applicant and assessing his demeanor and credibility in light of the applicable adjudicative guidelines and the whole-person concept, I conclude that Applicant failed to mitigate security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. His eligibility for a security clearance is denied.

Statement of the Case

As the employee of a defense contractor, Applicant completed and signed an Electronic Questionnaire for Investigations Processing (e-QIP) on February 17, 2011. On January 3, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; 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 Department of Defense for SORs issued after September 1, 2006.

On February 19, 2013, Applicant answered the SOR in writing. On February 20, 2013, he provided a notarized statement in which he elected to have a hearing before an administrative judge. The case was assigned to me on May 10, 2013. I convened a hearing on June 19, 2013, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced four exhibits, which were marked as Exhibit (Ex.) 1, Ex. 2; Ex. 3; and Ex. 4 and entered in the record without objection. Applicant testified and called no other witnesses. He offered 10 exhibits, which were marked as Ex. A through Ex. J and entered in the record without objection. At the conclusion of the hearing, I left the record open so that Applicant could provide additional information for the record which might mitigate the conduct alleged in the SOR. Applicant timely filed two additional exhibits, which were marked as Ex. K and Ex. L and entered in the record without objection. DOHA received the transcript (Tr. 1) of the hearing on June 27, 2013, and the record also closed on June 27, 2013.

Findings of Fact

Applicant is 43 years old and employed by a government contractor. He married in 1993 and divorced in 2001. He has no children. In 2010, he earned a bachelor's degree. (Ex. 1; Tr. 33.)

Applicant enlisted in the U.S. military in 1988. He specialized in aircraft maintenance and readiness, and he rose to the rank of technical sergeant. Because of his expertise, he was given high-profile assignments. In 2011, he retired from active military service and received an honorable discharge. He receives a monthly military pension of approximately \$1,300 and monthly military disability pay of approximately \$1,150. He held a security clearance during his military service, and he now seeks a clearance as a civilian. (Ex. 1, Ex. A; Tr. 45-48.)

The SOR alleges at ¶ 1.a. under the guideline for drug involvement that in June 2010 Applicant was found guilty of violating Articles 112A and 134 of the Uniform Code of Military Justice (UCMJ).¹ The charges specified in the SOR allegation are "Distribution of Schedule II Controlled Substance" and "Wrongful Use of

¹ Article 112 a. is titled: "Wrongful Use, Possession, Etc. of Controlled Substances." Article 134 is titled "General Article" and reads: "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

Antidepressants without Prescription.”² Additionally, at ¶ 2.a. the SOR cross alleges that Applicant’s drug involvement behavior raises security concerns under the personal conduct adjudicative guideline. (SOR.)

In his answer to the allegation at SOR ¶ 1.a., Applicant stated the following: “I deny misuse of prescription drugs or use of an illegal drug. I admit I was found guilty at [name of military service] Court Martial proceeding [April] 2010.” In his answer to the allegation at SOR ¶ 2.a., Applicant stated: “I deny any conduct involving questionable judgment, dishonesty, or unwillingness to comply with rules and regulations.” At his hearing, Applicant stated that he did not agree with the findings of the court-martial tribunal, but he did not dispute the court-martial process. (Answer to SOR; Tr. 46.)

In his testimony and in exhibits he asked to have entered in the record, Applicant provided the explanation that follows. In early 2008, during his military service, he injured his back when lifting luggage and loading it into an airplane. He reported his injury and subsequent pain. In January 2008, he was prescribed Percocet³ for back pain. (Tr. 46-49.)

Sometime in 2008 or 2009, Applicant became friends with a subordinate and coworker in his unit. The friend’s wife suffered from post-traumatic stress syndrome and was prescribed Percocet and the antidepressant Wellbutrin for her illness. Applicant frequently visited the individual and his wife, who lived on the military base where he was assigned, and they often invited him to join them for meals at their home. (Ex. A; Tr. 33-34, 49-50.)

Applicant, his friend, and other individuals in his unit were assigned to military aircraft flights. These individuals were thoroughly briefed on the limits of their use of medication when they were in flying status. For example, military regulations required that an individual taking any kind of medication, including over-the-counter medication, had to consult with a flight surgeon to discuss the medication before carrying out flight duties. A service member on flying status who was prescribed and taking Percocet or an antidepressant drug would be assigned to “duty not involving/including flying” (DNIF). (Ex. L, 22-24.)

On February 2009, Applicant again consulted a physician for his back pain, and he was given a prescription for Percocet. He took the medication with him when he went to his friend’s home for dinner. He explained that he took the medication with him

² The transcript of the court-martial, offered as a post-hearing submission, identifies June 29, 2010, as the date of the staff judge advocate’s review of the trial judge’s decision, and his certification that the findings and sentence of the trial court were correct.

³ Percocet, a synthetic narcotic comprised of acetaminophen and oxycodone, is listed as a Schedule II narcotic in 21 USC 812. In a post-hearing submission, Applicant provided information showing he had been prescribed Percocet in February 2007 for a dental issue. He also received prescriptions for Percocet in May 2007 and June 2007 from two other military medical providers. (Ex. K, Ex. L at 24.)

because he was required to take the medication with food. After supper, he did not take the pills with him when he left. He stated that he forgot the pills and left them behind inadvertently when he went home. He further explained:

I did not know it at the time. And when I found out, I contacted them. Unfortunately there was a couple of days in between the time I got my pill bottle back and the time I left it there, because I went on a trip. I continued to [fly], so went on a trip and. . . .⁴

(Ex. A, Ex. K, Tr. 34-35, 89-90.)

Applicant stated that when he received his pill bottle from his friend, the label had been torn off. Applicant stated that his friend told him he and his wife had taken some of his Percocet pills. Applicant did not report his friends' illegal use of his prescription drug to his superiors. (Tr. 34-35.)

In late February or early March 2009, Applicant learned that his friend had either been arrested or was under investigation. Applicant believed that he might also be under investigation. He went to his commanding officer and requested an interview. At his hearing, Applicant stated that he told the commanding officer that his friend had taken some of his Percocet pills, without his permission, and he believed that was why he was being investigated. (Tr. 35-36, 61.)

Applicant stated that his commander advised him of his right to remain silent, brought in another officer as a witness, and then told Applicant he did not need to say anything else. Applicant, his commander, and the other officer then went to the military investigations unit, and he made a statement. (Ex. 3; Tr. 36-37, 53-55.)

Applicant stated that he told the investigators that he crushed one of his Percocet pills and snorted it in the company of his friend and his wife. He denied ever receiving the antidepressant Wellbutrin from his friend or his friend's wife, and he denied ever using Wellbutrin. (Tr. 50-53.)

As a result of the investigation, Applicant was charged with three offenses under the UCMJ. Under Article 92 of the UCMJ, he was charged with dereliction of duty on several occasions between December 31, 2008 and February 26, 2009, when he willfully failed to refrain from self-medicating, when on flight status, as it was his duty to do (Count One). Under Article 112a, he was charged with wrongfully distributing, on diverse occasions between December 31, 2008 and February 26, 2009, Percocet, a Schedule II controlled substance (Count Two). Under Article 134 of the UCMJ, he was charged with wrongful use of antidepressants without a prescription, conduct which was

⁴ A military medical doctor reviewed Applicant's medical record and reported: "Based on [Applicant's] records, [he] was on flying status from the end of December 2008 to the end of February 2009. He was DNIF from the 23rd of February 2009 and was returned to flying status on the 26th of February." (Ex. L, 22-24.)

prejudicial to good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces (Count Three). (Ex. 3.)

Applicant pleaded “Not Guilty” to all three charges. He was represented by military and civilian counsel. He was tried by special court-martial in April 2010. He was found not guilty on Count One. He was found guilty on Counts Two and Three, and he was sentenced to reduction in grade to E-5 and confinement for 40 days. Applicant’s access to classified information was suspended in October 2010. (Ex. 1, Ex. 3, Ex. L; Tr. 42-44.)

Applicant’s friend was also tried at a court-martial. He was convicted of wrongful use of drugs while in uniform,⁵ and sentenced to a dishonorable discharge. After his court-martial, he was granted immunity from further prosecution, with the exception of perjury, and he testified as a prosecution witness at Applicant’s court-martial. (Ex. L; Tr. 51-52.)

At Applicant’s request, I admitted, without objection, a certified copy of the court-martial record. My purposes in admitting the court-martial document were to provide Applicant with an opportunity to provide additional information in mitigation and to assess Applicant’s credibility. (Tr. 82-85.)

At Applicant’s court-martial, his friend testified that he had crushed and snorted an antidepressant pill in Applicant’s presence. He then gave Applicant an antidepressant pill and Applicant did the same. The witness testified that he had seen Applicant crush and snort an antidepressant drug two or three times between the end of December 2008 and the end of February 2009. (Ex. L, 16-17.)

The friend’s wife was interviewed by authorized investigators in February 2009. In a signed, sworn statement, she told the investigators that she had been prescribed Wellbutrin for depression and Percocet for pain associated with surgery. She told the investigators that Applicant had provided her and her husband with Percocet on 10 to 15 occasions. She also reported that she, her husband, and Applicant snorted Wellbutrin and Percocet together over a period of about six weeks. When asked at his hearing about the wife’s assertions, Applicant denied them. (Ex. 3; Tr. 58-60.)

Applicant’s commanding officer testified at the court-martial that Applicant told him he had provided his friend with Percocet, which he and the friend then crushed and snorted at the friend’s house. The officer who served as a witness when Applicant was interviewed by his commanding officer also testified as a witness at Applicant’s court-martial. The officer testified that he heard Applicant state that he and his friend crushed and snorted Applicant’s Percocet, which had been prescribed for Applicant. At his court-martial, Applicant testified that his commanding officer and the officer serving as a witness were incorrect in their statements. (Ex. L, 11-13, 28-29, 35.)

⁵ The friend stated he was convicted of taking prescription medication without a prescription on more than one occasion. (Ex. L, at 16.)

At his court-martial, Applicant stated that, in the company of his friend, he crushed and snorted Percocet between December 2008 and the end of February 2009. He also testified that on February 23 and February 25, 2009, he saw his friend snort something, but he did not know what it was. He denied distributing Percocet to his friend. (Ex. L, 35.)

Applicant's friend was called as a rebuttal witness by the prosecution at the court-martial. He testified that Applicant distributed a Percocet pill to him on February 26, 2009. Applicant then crushed the pill and the two men snorted it together. The friend also testified that on three other occasions, Applicant distributed to him a pill which he identified as his back pain medication. On those occasions, Applicant and the friend crushed and snorted the pills, which the friend stated had the same effect as the first Percocet they crushed and snorted together. The friend also testified that he saw Applicant use his wife's antidepressants on two different occasions. At his hearing, Applicant denied sharing his Percocet pills with his friend and using his friend's wife's antidepressant, Wellbutrin. He stated that he crushed only one Percocet pill in the presence of his friends, and he snorted it himself. (Ex. L, 38-39, 50-53.)

Applicant's commanding officer provided a letter of character reference for Applicant, which was entered into evidence at his court martial. The commanding officer praised Applicant's service record of 22 years, his work ethic, and his strong technical skills. He recommended that, if possible, Applicant be retained on active duty. (Ex. G.)

Applicant submitted four letters of character references from officers under whose commands he had served. Three of the letters had been offered in support of Applicant at his court-martial. The letters praised Applicant's work ethic, professional skills, and positive attitude. A fourth letter of support from a former commander recommended that Applicant's security clearance eligibility be reinstated. (Ex. B, Ex. E, Ex. F, and Ex. H.)

Applicant also submitted two letters of character reference from his current civilian managers. Both managers stated that they believed Applicant to be trustworthy and honorable. They also praised his strong professional skills. (Ex. C, Ex. D.)

When he completed his e-QIP in February 2011, Applicant denied any illegal use or distribution of a controlled substance in the previous seven years. He also denied ever using a controlled substance illegally while possessing a security clearance. (Ex. 1.)

Applicant submitted a signed statement, dated June 17, 2013, in which he declared his intent not to abuse drugs illegally in the future. In his statement, pursuant to ¶ 26(b)(4) of Guideline H, he also acknowledged that any future illegal drug use by him would be grounds for automatic revocation of his security clearance. (Ex. J.)

Applicant submitted a toxicology report which showed that on April 15, 2009, his urine tested positive for the opiate oxymorphone. At that time, no positive results for antidepressants were detected. (Ex. K.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, the administrative judge applies these 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record.

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 applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion in seeking 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 protect or 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.

Section 7 of Executive Order 10865 provides that 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 H, Drug Involvement

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. AG ¶ 24(a) defines drugs as “mood and behavior altering substances.” The definition of drugs includes “(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.” AG ¶ 24(b) defines drug abuse as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

At his court-martial and at his security clearance hearing, Applicant denied misuse of prescription drugs or use of an illegal drug. When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. “That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern.” See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

The Government established a *prima facie* case by the evidence in the record. The record evidence establishes that Applicant was found guilty in a special court-martial of distribution of a controlled substance and wrongful use of antidepressants

without a prescription. Evidence in support of the charges against Applicant was provided by the Government in documentary evidence and by the court-martial transcript, offered into evidence by Applicant.

At his court-martial, Applicant was represented by military and civilian counsel. Although Applicant denied illegal use of a controlled substance, his friend's wife provided a signed, sworn statement in which she reported that Applicant had provided her and her husband with Percocet on 10 to 15 occasions. She also reported that she, her husband, and Applicant snorted Wellbutrin and Percocet together over a period of about six weeks. The woman's husband, who was Applicant's friend, testified at Applicant's court martial that he gave Applicant an antidepressant pill, which Applicant then crushed and snorted. The friend testified that he had seen Applicant crush and snort an antidepressant drug two or three times between the end of December 2008 and the end of February 2009. When these events occurred, Applicant held a security clearance.

Two officers in Applicant's military command testified at his court-martial. Applicant's commanding officer testified that Applicant told him he had provided his friend with Percocet, which he and the friend then crushed and snorted at the friend's house. Another officer, a major, who served as a witness when Applicant was interviewed by his commanding officer, also testified at the court-martial that he heard Applicant state that he and his friend crushed and snorted Applicant's Percocet.

In response to the Government's prima facie case, Applicant then had the burden of proof to show mitigating conditions outweighed the disqualifying conditions that the Government argued should apply. Applicant denied the Guideline H allegations in the SOR, which recited the findings of the court-martial, but he provided no evidence to rebut or mitigate the allegations. He failed to provide evidence to corroborate his denials.

Applicant's drug involvement casts doubt on his reliability, trustworthiness, and good judgment. It also raises security concerns about his ability or willingness to comply with laws, rules, and regulations. I conclude that Applicant's illegal drug involvement raises security concerns under AG ¶¶ 25(a) and 25(g). AG ¶ 25(a) reads: "any drug abuse [as defined at AG ¶ 24(b)]." AG ¶ 25(g) reads: "any illegal drug use after being granted a security clearance."

Two Guideline H mitigating conditions might apply to the facts of Applicant's case. If Applicant's drug use happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on his current reliability, trustworthiness, or good judgment, then AG ¶ 26(a) might be applicable in mitigation. If Applicant demonstrated an intent not to abuse any drugs in the future by (1) disassociation from drug-using associates and contacts, (2) changing or avoiding the environment where drugs were used, (3) abstaining from drug use for an appropriate period, or (4) signing a statement of intent with the automatic revocation of his security clearance for any violation, then AG ¶ 26(b) might be applicable.

The record establishes that Applicant's last drug abuse occurred in 2009, more than four years ago. However, at his court-martial and at his hearing, Applicant denied any misuse of prescription drugs or use of illegal drugs. He provided no information to rebut or mitigate the allegations he denied.

Applicant provided a statement of intent not to abuse drugs in the future, and acknowledged that if he did so, his security clearance would be automatically revoked. However, Applicant's statement lacks credibility in the face of his ongoing denial of any past drug misuse or abuse and his failure to provide information to mitigate or rebut the Guideline H allegations.

Applicant's uncorroborated denials in the face of testimony by four credible witnesses are insufficient to establish that he has mitigated the charges of Guideline H drug involvement. I conclude that AG ¶ 26(a) and AG ¶ 26(b) do not apply in mitigation to the facts of Applicant's case.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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.

SOR ¶ 2.b. alleges that Applicant's distribution of a Schedule II controlled substance and his wrongful use of antidepressants without a prescription also raise security concerns under Guideline E. In his answer to the SOR, Applicant denied "any conduct involving questionable judgment, dishonesty or unwillingness to comply with rules and regulations."

Applicant served for 22 years in the military. He now seeks a security clearance as the employee of a government contractor. The record evidence establishes that Applicant misused his prescription drug Percocet by distributing it and snorting it with a friend. Additionally, the record evidence establishes that he also illegally used his friend's wife's Wellbutrin, a prescription antidepressant drug. In April 2010, after a court-martial, at which he was represented by counsel, testified, and was cross-examined, a military judge found against Applicant on two counts: violation of Article 112A of the UCMJ (distribution of a Schedule II controlled substance) and Article 134 (wrongful use of antidepressants without a prescription). Applicant denied the allegations but provided no credible information in mitigation.

Applicant's personal conduct raises security concerns under Guideline E disqualifying conditions AG ¶¶ 16(c), 16(e)(1), and 16(g). AG ¶ 16(c) reads: "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)(1) reads: “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.” AG ¶ 16(g) reads: “association with persons involved in criminal activity.”

Several Guideline E mitigating conditions might apply to the facts of this case. Applicant’s disqualifying personal conduct might be mitigated under AG ¶ 17(c) 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(d) might apply if “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.”

Additionally, AG ¶¶ 17(e), 17(f), and 17(g) might apply in this case. AG ¶ 17(e) reads: “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(f) reads: “the information was unsubstantiated or from a source of questionable reliability.” AG ¶ 17(g) reads: “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.”

During his military service and as a federal contractor, Applicant was entrusted with classified and sensitive information. In 2008 and 2009, he chose to become involved in the illegal use of prescription drugs with a military coworker and his wife. Their conduct involved criminal activity, impacted their professional and community standing, and exposed them to the possibility of exploitation, manipulation, and duress. After a military investigation, Applicant was charged with distribution of a Schedule II controlled substance and wrongful use of antidepressants without prescription.

He was tried on these charges in a military court-martial. At trial, Applicant was represented by military and civilian counsel. He denied the charges. Four witnesses, including the two individuals with whom he used drugs illegally and two officers in his command, corroborated the charges. He was found guilty by a military judge. His security clearance was suspended.

The SOR in this case alleges the charges for which Applicant was tried at court-martial and found guilty. At his hearing, Applicant denied the allegations but provided no credible information in mitigation.

Applicant's personal conduct, which involved illegal use of prescription drugs and failure to follow rules and regulations, was not minor, so remote in time, or so infrequent, nor did it occur under such unique circumstances, that it was unlikely to recur and therefore did not cast doubt on his reliability, trustworthiness, or good judgment. (AG 17(c).)

The investigative record contained a signed sworn statement from one of the individuals with whom Applicant used prescription drugs illegally. That individual identified Applicant as the person who supplied her and her husband with Percocet, a Schedule II controlled drug. The woman's husband, a co-worker of Applicant's, testified that Applicant gave him Percocet and illegally used his wife's antidepressant, a prescription drug. Applicant's commanding officer, and another officer in his command, testified that Applicant stated in their presence that he crushed and snorted Percocet with his co-worker. The military trial court found these four witnesses to be credible and reliable. Applicant, who was represented by a military counsel and a civilian counsel, offered no credible evidence in rebuttal or mitigation.

While he apparently no longer associates with the coworker and his wife, Applicant has never acknowledged his illegal drug use and criminal activity, and he failed to demonstrate that he had taken positive steps to reduce or eliminate the vulnerability to exploitation, manipulation, or duress caused by his personal conduct behavior. It is not clear that his behavior will not recur. I conclude, therefore, that AG ¶¶ 17(c), 17(d), 17(e), 17(f) and 17(g) do not apply in mitigation to the facts of Applicant's case.

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. Applicant has a respected military record, and he is considered to be a valued employee by his current and former colleagues. However, Applicant failed to mitigate security concerns arising from his illegal drug use and personal conduct. At his security clearance hearing, Applicant denied responsibility for illegal use of prescription drugs.

The military branch in which Applicant served made serious allegations against him. Those charges were adjudicated in an investigation which resulted in a military court-martial trial. Applicant was represented by counsel; he testified and was cross-examined. The presiding judge returned a verdict convicting Applicant of two of the three charges alleged. After reviewing the judge's verdict, a senior military officer entered a final judgment and sentence. Applicant was sentenced to a demotion in rank and 40 days of confinement. While Applicant denied any wrongdoing, he failed to rebut or mitigate the allegations, which raised security concerns about his drug involvement, reliability, trustworthiness, and ability to follow rules.

After a thorough review of the evidence in the record of this case, and after carefully observing Applicant and assessing his demeanor and credibility, I conclude that Applicant failed to mitigate the security concerns arising under the drug involvement and personal conduct adjudicative guidelines.

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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	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.

Joan Caton Anthony
Administrative Judge