



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



In the matter of:)
)
) ISCR Case No. 12-00663
)
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Bart Colombo, Esq.

06/26/2013

Decision

MASON, Paul J., Administrative Judge:

Applicant exercised poor judgment in February 2011 when she gave away her prescription for Vicodan and then obtained different drugs not prescribed to her. In June 2011, she received but did not use a small amount of marijuana not prescribed to her. Having weighed and balanced the entire record, specifically Applicant's commendable character evidence, the drug involvement and personal conduct guidelines are found in her favor. Eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and signed an Electronic Questionnaire for Investigations Processing (e-QIP), Government's Exhibit (GE) 1, on October 26, 2011. She was interviewed by an investigator from the Office of Personnel Management (OPM) on

November 21, 2011. The interview summary appears in Applicant's interrogatory responses, signed and notarized by Applicant on July 27, 2012. (GE 2) Under question #2 of the exhibit, Applicant agreed with the contents of the interview summary. Under questions #3 and #4, Applicant made no modifications to the summary. Under question #5 of the exhibit, Applicant acknowledged the accuracy of the summary and that it could be admitted in evidence to determine her security suitability. (GE 2)

On September 27, 2012, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under drug involvement (Guideline H), and personal conduct (Guideline E). The action was taken pursuant to Executive Order 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 Department of Defense on September 1, 2006.

Applicant's notarized, undated answer to the SOR was received by the Defense Office of Hearings and Appeals (DOHA) on November 2, 2012. DOHA issued a notice of hearing on February 15, 2013, for a hearing on March 15, 2013. The hearing was held as scheduled. The Government's five exhibits (GE 1-GE 5) and Applicant's two exhibits (AE A-AE B) were admitted into evidence without objection. The transcript was received on March 20, 2013. The record closed on March 20, 2013.

Findings of Fact

Applicant admitted the two allegations under the drug involvement guideline. Concerning the two allegations under the personal conduct guideline, she admitted SOR 2.a and denied SOR 2.b. Based on a review of the entire record, I make the following factual findings:

Applicant is 46 years old. She has been married since November 1993. She has three children, 17, 14, and 11 years of age. She was awarded a bachelor's of science degree in 1988. She began her professional career with an employment recruiting company in the late 1980s or early 1990s. Then she worked as a salesperson selling software for approximately a year. In 1992, she launched her first recruiting company placing candidates in pharmaceutical and biotechnological positions. Ten years later, she sold the company and founded her current recruiting company in 2003. In 2008, she modified the company's recruiting objectives by placing candidates in government contracts. This is Applicant's first application for an individual security clearance. Another contractor sponsored her company for a facility security clearance in 2009. (GE 1 at 35; Tr. 19-24)

In 1996, Applicant was diagnosed with an incurable physical condition related to her immune system. The condition triggers pain at varying intensities. The most recent episode

of pain was at least a year ago. She has treated the condition periodically with prescribed medications such as Vicodin and Percocet, or a placebo like ice packs. Applicant was prescribed Vicodin many times. Her last prescription for the drug was in 2010 when she received a 30-day prescription with no refill. Her last prescription for Percocet was in 2007 or 2008. She did not believe she had ever been prescribed Oxycontin.¹ She has never had a prescribed supply of medication in her possession that she could take as needed. Because of the side effects, Applicant has consistently tried to take prescribed medication as infrequently as possible. Currently, she is handling the pain through diet and exercise. (Tr. 42-52, 58, 64)

In February 2011, Applicant was in her office when she gave the remainder of her 2010 Vicodin prescription to a coworker who was injured when a desk dropped on his back. Though she knows now, she did not know then that giving the prescribed medication to someone else was illegal. If she had another opportunity to think through the transfer of her prescribed medication to someone else, she would recognize the transfer was illegal. (GE 2 at 84; Tr. 52-55)

Two weeks later in February 2011, Applicant was experiencing pain in her office. A female coworker overheard Applicant indicate she no longer had her pain medication. Rather than having her doctor prescribe medication, she accepted a bottle of the coworker's prescribed Oxycodone medication because "I really didn't think about it." (SOR 1.b)² Despite the pain, Applicant did not take the medication until two days later when the pain reached an extreme level. After taking the Oxycodone, she almost passed out. Applicant had never taken Oxycodone before, but ingested the drug because she believed it was the same classification of medication that she had been prescribed. She knew when she took the controlled substance without a prescription that it was wrong, but was in extreme pain. She may have used a smaller dose of the drug again had she experienced another emergency episode of pain. (GE 2 at 89; Tr. 29, 55-59, 65-66)

In June 2011, Applicant was on vacation in the United States when a friend of her nephew offered her some of his medically prescribed marijuana for her pain. The amount was less than the size of a quarter. She accepted the marijuana thinking she could use it in an emergency. (SOR 1.a) She did not use the drug, but had intended to based on a suggestion from her doctor. Applicant had the bottle of Oxycodone in her possession when she accepted the marijuana. (GE 2 at 89; Tr. 68-74)

¹ In the interview summary, the drug is spelled "oxycotin." (GE 2 at 88) At the hearing, the drug is identified as "Oxycontin" and "Oxycodone." (Tr. 28, 45, 57, 59, 60, 61, 91, 96)

² As noted below, Applicant did not find out the precise contents of the bottle until after she was arrested in July 2011. (Tr. 63)

In July 2011, Applicant was returning to the United States from a vacation. Her purse and luggage were checked as she passed through customs. A search revealed a prescription bottle containing about 25 pills of Vicodin, Percocet, and Oxycodone. Applicant did not know what was in the prescription bottle that she received from the female coworker in February 2011. In addition to the three controlled drugs, a small amount of marijuana, which she had received from her nephew's friend, was found in a prescription bottle of Prozac. Applicant was charged with two misdemeanors, illegal possession of marijuana and illegal possession of drugs without a prescription. She retained an attorney and took no part in the court proceedings or any other proceeding related to the disposition of the case. (GE 2 at 89, GE 5; Tr. 61-63, 93-94)

The criminal charges were dismissed after Applicant performed 25 hours of community service, passed two drug tests, and obtained letters from her physicians indicating she had experienced pain in the past from her physical condition. (GE 1 at 32, AE A; Tr. 31)

On October 26, 2011, Applicant submitted an electronic questionnaire for investigations processing (e-QIP). In response to section 21 - psychological and emotional health, asking whether in the last seven years she had consulted with a health care professional regarding an emotional or mental health condition or were hospitalized for such a condition?, Applicant answered "no." (SOR 2.a) The evidence indicates Applicant has been treated for a mental condition by two health professionals since 2003. The records also indicate Applicant has been treated for a physical condition that affects her immune system. (GE 3, GE 4 at 19)

Applicant admitted her "no" answer to section 21 was wrong, but she denied that she intentionally falsified her response to the question. She misinterpreted the question as meaning that the disclosure of treatment was required only if there was hospitalization. She had been through the e-QIP three times, but was not reading it thoroughly or carefully. She made a mistake, but did not intentionally answer the question incorrectly. (GE 2 at 88; Tr. 24-25, 86-90)

On the same October 2011 e-QIP, Applicant was asked to respond to section 22 - police record. The next question in the section is "Have any of the following happened? An applicant is presented with four questions that identify various procedural phases of a criminal charge and asked whether she has been involved in one of those stages in the last seven years. The applicant is then asked whether she is currently on trial or awaiting trial, to which Applicant responded "yes." In the optional comment section, she responded that she had been charged with a crime. She provided details of how she obtained the drugs not prescribed to her and marijuana not prescribed to her. She indicated she had been carrying the drugs through U.S. airports for at least 6 months. She noted that she would not have carried the drugs in her pocketbook had she known the drugs were illegal. She

explained her painful physical condition as the reason for being in possession of the drug. However, the case was not dismissed until March 2012. Applicant understood how her e-QIP response could be misinterpreted by her use of the word “medicinal” in the e-QIP. In November 2011, she told the OPM investigator how she obtained the marijuana. (GE 1 at 31, GE 2 at 85, 88, AE A; Tr. 35)

Applicant has never smoked marijuana and does not intend to use illegal drugs in the future. She has no future intentions of using prescription drugs not prescribed to her. (GE 2 at 89-90; Tr. 27, 30, 92)

Character Evidence

Witness A has worked with Applicant for 16 years and has been vice president of sales since 2005. She also wrote a character reference for Applicant. Based on her daily contact with Applicant, witness A considers Applicant to be trustworthy with clients, candidates, and employees that work with her. She is very honest. Her reliability is exemplified by the hard work she regularly puts into her company. She is an inspiration to her staff. In witness A’s view, Applicant’s good judgement was demonstrated in the decisions she made to keep the company afloat during poor economic times in 2008. Her compliant attitude is substantiated by her willingness to abide by the paperwork requirements of contracts with the Government, subcontractors, and primary contractors. Witness A has never seen Applicant use illegal drugs or abuse prescription medication. Witness A knows that Applicant serves on the board of directors of two international charitable organizations. (AE B; Tr. 98-106)

Witness B met Applicant in 2004 or 2005 when he was a senior consultant with another company. In the last seven years, witness B has contacted Applicant weekly and sometimes daily to refer job candidates to her. Applicant has consistently demonstrated her honesty to witness B. She is excellent in complying with contractual obligations as well as laws and regulations. Witness B has not known Applicant to use illegal drugs or abuse prescription medication. (Tr. 108-115)

Applicant submitted four character references. The president of a court reporting company, who is also a lawyer, met Applicant 16 years ago when they were young mothers trying to manage their professional careers and their parental obligations. In the president’s opinion, Applicant’s good judgment is demonstrated by her leadership qualities. The president knows that Applicant is actively involved in two charitable organizations and has raised money to fund research for the cure of a serious illness. (AE B)

Applicant’s friend of 22 years, an interior designer, has found Applicant to be very trustworthy. This opinion is based on her commitment to her children and her staff. The friend has not known Applicant to do anything dishonest or illegal. A chief financial officer

has known Applicant for ten years. The officer considers Applicant to be honest and trustworthy. About a year ago, Applicant provided moral support in the officer's time of need. The remaining reference was written by witness A. (AE B)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. Each guideline lists potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

The disqualifying and mitigating conditions should also be evaluated in the context of nine general factors of the whole-person concept so that all available information, past and present, favorable and unfavorable, is a part of the decision for or against an applicant's security clearance application. Such decisions entail a certain degree of legally permissible extrapolation as to the potential, rather than actual, risk of compromise of classified information.

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 of establishing that it is clearly consistent with the national interest to grant him a security clearance.

Analysis

Drug involvement

Paragraph 24 of the AG sets forth the security concern for drug involvement:

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 to comply with laws, rules and regulations;

The pertinent disqualifying conditions under AG ¶ 25 that may be disqualifying are:

(a) any drug use;³ and

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

In February 2011, Applicant foolishly gave a coworker her Vicodin prescription that she had filled in 2010. Though her giving the prescription to the employee is not alleged in the SOR, the conduct occurred under similar circumstances to the conduct described in SOR 1.a. Her transfer of prescribed medication is also relevant under the whole-person concept. When Applicant experienced pain two weeks later in February 2011, an employee offered and Applicant thoughtlessly accepted the employee's prescribed medication.

During a vacation in June 2011, Applicant was in a state that permits the use of prescribed marijuana for medical reasons. Without thinking, she accepted a small amount of the drug, but did not use it, although her doctor suggested she try the drug.

In July 2011, Applicant was returning to the United States from vacation. After discovering the drugs in her luggage, she was arrested and charged with two misdemeanors of illegal possession of marijuana and illegal possession of drugs without a prescription. AE ¶¶ 25(a) and 25(c) apply.

The two potentially mitigating conditions under AG ¶ 26 of the drug involvement guideline are:

(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); and

(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 are used, (3) an appropriate period of abstinence, and a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's February 2011 conduct of giving her prescribed medication away and obtaining medication prescribed for someone else demonstrates poor judgment by a person who otherwise has a reputation for following the rules. Her conduct is exacerbated by another display of poor judgment in June 2011, when she accepted the medical

³ Drug use is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. (Directive at 34)

marijuana that was prescribed for her nephew's friend. Applicant illegally obtained the prescription drugs in February 2011, and she received the marijuana in June 2011. The case was not dismissed until March 2012. AG ¶ 26(a) does not apply because of the recency of the conduct. Applicant was not a young adult, but 44 years old. She should have known that exchanging her prescribed drug and other drugs not prescribed to her was illegal.

Even though the record contains no signed statement of intent to forego use of illegal drugs or use of drugs not prescribed to her with automatic revocation for any violation, there is sufficient evidence that Applicant is not a drug user, either of illegal drugs or drugs prescribed to other persons. Neither witness A or B have observed evidence of illegal drug use by Applicant. This observation is confirmed by the two of the character references. There is no evidence Applicant has ever used any illegal drugs, though she stated in November 2011 that she had intended to use marijuana based on a suggestion from her doctor. There is no other evidence suggesting that she used medication not prescribed to her. Applicant has provided affirmative evidence under AG ¶ 26(b).

Personal Conduct

The security concern for personal conduct is set forth 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.

AG ¶ 16 contains two disqualifying conditions that are potentially pertinent:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personnel security statement, or similar form to conduct investigations, determine employment qualifications, award benefits and status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(c) credible adverse information in several adjudicative 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 he may not properly safeguard classified information.

An applicant must be forthright and completely candid during every stage of a security investigation. An important stage is the filling out the e-QIP. While omissions of material information from a security clearance application or interview summary evoke security concerns under AG ¶ 16(a), not every omission or incorrect response is disqualifying under the condition. An omission or falsification must be driven by a deliberate intent to conceal material information. Applicant admitted her “no” answer to Section 21 was incorrect, but she claimed she misunderstood the question. The record shows she has been treated for a mental health condition for a significant period of time. She was 45 years old when she completed the e-QIP. On the other hand, the record reflects that this was Applicant’s first security clearance application. In addition, the detailed information she provided in other locations of her e-QIP, specifically her explanation of events leading to her arrest for illegal drugs prescribed for other persons, lends support to my ultimate finding that she did not intend to falsify her answer. Based on her explanations in the e-QIP, the interview, and her credible testimony, I conclude she did not deliberately falsify Section 21 of the application form. SOR 2.a is resolved in Applicant’s favor.

I reach the same conclusion for SOR 2.b. In response to section 22 - police record of her e-QIP, Applicant checked “yes” that she was currently on trial or awaiting a trial on criminal charges. In the optional comment section, she responded that she had been charged with a crime. She provided details of how she obtained the small amount of marijuana and drugs not prescribed to her. She explained that she would not have had the drugs in her possession had she known they were illegal. She explained her painful physical condition as the reason for being in possession of the drugs. While the criminal charges had not been dismissed as she claimed, I do not find the misrepresentation sufficient to disregard an otherwise forthright picture of how she got the illegal drugs. I also conclude that Applicant’s use of the word “medicinal” in her explanation was not an attempt to intentionally mislead for the same reasons. I find SOR 2.b in Applicant’s favor.

When Applicant gave her prescribed medication to someone else and received drugs prescribed for other persons in 2011, she exhibited extremely poor judgment with the scope of AG ¶ 16(c).

There are three mitigating conditions under AG ¶ 17 that are potentially pertinent to the circumstances in this case. Those conditions are:

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

- (c) the offense was 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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur.

I have found for Applicant under SOR 2.a and 2.b because she did not deliberately falsify or provide misleading information on her e-QIP. Since AG ¶ 17(a) is only relevant when there is a deliberate non-inadvertent attempt to falsify the e-QIP, the mitigating condition does not apply. AG ¶ 17(c) does not apply for the same reasons that have been addressed in AG ¶ 26(a).

Even though she still suffers from the painful physical condition, Applicant recognizes that she must find other ways to cope with her condition. She has never used illegal drugs and she only used Oxycontin on one occasion in February 2011, Applicant is entitled to mitigation under AG ¶ 17(d).

Whole-Person Concept

I have examined the evidence under the disqualifying and mitigating conditions of drug involvement and personal conduct. I have also weighed the circumstances within the context of nine factors of the whole-person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors set forth in 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 the participation was 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 a commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

In February 2011, Applicant demonstrated poor judgment when, at 44 years old, she decided to give away the remainder of her Vicodin prescription and then receive different drugs that were not prescribed to her. The primary reason certain drugs can only be

obtained legally by a medical prescription is to control the administration of potentially harmful and addictive drugs. The second reason, which flows from the first, is to prevent the type of outcome that occurred to Applicant after she ingested the Oxycontin pill in February 2011. Applicant is fortunate that the drug did not produce more serious consequences. Compounding her poor judgment was her acceptance in June 2011 of a small amount of marijuana that was not prescribed to her. Though she did not use the marijuana, she was inclined to use it based on a suggestion from her doctor. Applicant was arrested with the drugs in July 2011, and the case was not disposed of until March 2012.

Balanced against the negative evidence is positive evidence that supports Applicant's security clearance application. She is 46 years old and has been married for 20 years. She is raising three children. She has been in the recruiting field about 21 years. Coworkers, employees, and professional persons in other professions extol her leadership and inspirational qualities. She is active in two international charities and has raised money for research for the cure of a very serious medical illness. Having weighed the disqualifying evidence with the mitigating evidence, and in the context of the whole-person concept, Applicant has successfully met her ultimate burden of persuasion under the drug involvement and personal conduct 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):	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2 (Guideline E):	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Paul J. Mason
Administrative Judge