



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-03587

Appearances

For Government: Alison O'Connell, Esquire, Department Counsel

For Applicant: *Pro se*

01/03/2017

Decision

GALES, Robert Robinson, Administrative Judge:

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

Statement of the Case

On July 19, 2013, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.¹ On December 3, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, pursuant to 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 Guideline H (Drug Involvement), and detailed

¹ Item 5 (e-QIP, dated July 19, 2013).

reasons why the DOD CAF was 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 December 21, 2015. In a sworn statement, dated January 8, 2016, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing.² A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by the Defense Office of Hearings and Appeals (DOHA) on March 25, 2016, 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. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Guidelines applicable to his case. Applicant received the FORM on April 5, 2016. Applicant's response was due on May 5, 2016, but to date, no response has been received. The case was assigned to me on December 27, 2016.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the factual allegations pertaining to drug involvement in the SOR (§§ 1.a. through 1.d.). 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 35-year-old employee of a defense contractor. He has been serving as an operations supervisor with his current employer since April 2007.³ He attended high school for several years but dropped out in June 1997 without graduating. He received his General Educational Development (GED) in December 2004.⁴ He has never served in the U.S. military.⁵ Applicant was granted a secret security clearance in December 2005.⁶ He was married in October 2007.⁷ Applicant has two children, ages 11 and 7.⁸

² Item 4 (Applicant's Answer to the SOR, dated January 8, 2016).

³ Item 5, *supra* note 1, at 9.

⁴ Item 5, *supra* note 1, at 8-9; Item 7 (Personal Subject Interview, dated October 15, 2013), at 1.

⁵ Item 5, *supra* note 1, at 15.

⁶ Item 6 (Joint Personnel Adjudication System (JPAS), Joint Adjudication Management System (JAMS), Person Summary.

⁷ Item 5, *supra* note 1, at 17.

⁸ Item 4, *supra* note 2, at 2.

Drug Involvement

Applicant is a substance abuser whose choice of substances was identified by Applicant as marijuana and various opiates, including Vicodin, Percocet, and heroin. He experimented with marijuana as a teenager by taking six or seven “hits” from a marijuana cigarette on one occasion in September 1995. He was arrested and charged with possession of marijuana. In Juvenile Court, he was placed on probation for nine months. After that incident, Applicant never resumed any relationship with marijuana, and he expressed no intent to do so.⁹

Applicant’s subsequent involvement with illegal substances is somewhat confusing, for he has offered two separate scenarios of such use. One depicts an individual who used opiates recreationally, and the other describes an individual who resorted to opiates for pain management following an automobile accident.

The first scenario is as follows: Commencing in February 2009, three years after he had been granted a security clearance, and continuing until May 2013, Applicant purchased opiates on a regular basis to sustain his daily recreational use of them. It reached a point where he needed the opiates to function, and he became sick if he did not use them.¹⁰

The second scenario is as follows: In 2008, or 2011, Applicant was involved in an automobile accident in which he sustained various injuries. His physician prescribed Percocet or Vicodin for the pain. Applicant became addicted to the medication, and its effectiveness began to wane. When he ran out of his prescription, he resorted to purchasing the opiates from unknown individuals, or friends and colleagues who had leftover prescriptions for their own use. When the Percocet or Vicodin were unavailable, Applicant turned to heroin which he also purchased from unidentified individuals. He initially snorted it, but eventually started injecting the heroin. Using the various substances made Applicant feel tired, and when he was not on them, he would go through withdrawals.¹¹

Applicant eventually came to the realization that he had a substance abuse problem. In January 2012, he was admitted into an eight-day inpatient detoxification program to wean him off heroin. Because his insurance provider refused to authorize the full program, Applicant was forced to involuntarily leave the program after only four days. He relapsed. A few weeks later, he again was admitted to the same program, with the same results. He again relapsed. During the spring of 2012, Applicant participated in a counseling program a few nights per week, but that program was determined not to be

⁹ Item 7, *supra* note 4, at 2-3; Item 5, *supra* note 1, at 27-28.

¹⁰ Item 5, *supra* note 1, at 29-30.

¹¹ Item 7, *supra* note 4, at 2; Item 4, *supra* note 2, at 3. During his OPM interview, Applicant indicated the accident occurred in 2008, and that he was prescribed Percocet. In his Answer to the SOR, he said that the accident occurred in 2011, and that he was prescribed Vicodin.

sufficient for his needs.¹² In April 2013, Applicant approached a local methadone clinic for assistance. He was evaluated and entered into their Methadone Treatment Program to wean him off heroin. He received substance abuse counseling and methadone from April 4, 2013 until December 14, 2014, during which time his methadone was reduced from 85mgs to 33mgs. He underwent routine weekly drug screens, and while most of them reflected negative results, he also had “a couple of positives.”¹³ There is no particular substance identified as being found in the positive tests. Applicant admitted that he was diagnosed as opiate dependent.¹⁴ His substance abuse counselor in the Methadone Treatment Program, a Licensed Chemical Dependency Professional (LCDP), noted that Applicant’s progress was good when he left the program in December 2014.¹⁵ Although Applicant contends that he was successfully weaned off methadone while in the program, that contention is not supported by the counselor’s statement that when Applicant left the program, he was down to 33mgs of methadone.

Character References

Applicant’s lead general foreman, general foreman, the operations supervisor (and formerly Applicant’s immediate supervisor), coworkers, his union representative, and a neighbor/friend, are all effusive in praising Applicant. He has been characterized as reliable, hardworking, dependable, honest, loyal, a team player, an exceptional leader, exceptionally mature, and trustworthy.¹⁶

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.”¹⁷ 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.”¹⁸

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations

¹² Item 5, *supra* note 1, at 24-25, 32; Item 4, *supra* note 2, at 4; Item 7, *supra* note 4, at 2.

¹³ Letter, dated January 7, 2016, attached to Item 4.

¹⁴ Item 4, *supra* note 2, at 5.

¹⁵ Letter, *supra* note 13.

¹⁶ Character References, various dates, attached to Item 4.

¹⁷ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹⁸ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

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.

In the decision-making process, facts must be established by "substantial evidence."¹⁹ 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.²⁰

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."²¹

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."²² 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

¹⁹ "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).

²⁰ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

²¹ *Egan*, 484 U.S. at 531.

²² See Exec. Or. 10865 § 7.

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.

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. In addition, AG ¶ 25(e) may apply where there is 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." AG ¶ 25(g) may apply where there is "any illegal drug use after being granted a security clearance."

Applicant's characterization and description of his significant opiate abuse was initially as follows: In February 2009, three years after he had been granted a security clearance, and continuing until May 2013, Applicant purchased opiates on a regular basis to sustain his daily recreational use of them. It reached a point where he needed the opiates to function and he became sick if he did not use them. When Percocet or Vicodin were unavailable, Applicant turned to heroin which he also purchased from unidentified individuals. He initially snorted it, but eventually started injecting the heroin. He eventually entered various treatment programs, relapsed, and finally entered a Methadone

Treatment Program where his methadone was reduced when he was discharged from the program. During his treatment, he tested positive for unidentified substances on a couple of occasions. Applicant was diagnosed as opiate dependent. After he consulted with an attorney, the scenario changed somewhat. Instead of characterizing his opiate use as recreational, Applicant chose to characterize it as an addiction following an automobile accident. The essential facts remain unchanged. Applicant abused opiates after he was granted a security clearance, eventually becoming addicted to opiates. AG ¶¶ 25(a), 25(c), 25(e), and 25(g) have been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement. None of them apply. The Government put its trust in Applicant when it granted him a secret security clearance in 2005, and he broke that trust when he involved himself in his repeated use of opiates after that date. He went from Percocet, to Vicodin, to heroin. Furthermore, while Applicant has repeatedly stated a current intention not to use any drugs in the future, he has never submitted a signed statement of intent with automatic revocation of clearance for any future violation.

Applicant's purported abstinence is viewed favorably, and he should be encouraged to continue it. However, after becoming addicted to opiates, including Heroin, the period of Applicant's purported abstinence, whether it started in May 2013 or sometime thereafter when he tested positive for unidentified substances, is still too brief to conclude that Applicant will not relapse. Applicant has not furnished a reasonable basis for ignoring his fiduciary responsibilities of holding a security clearance and resorting to opiate use. He initially claimed it was for recreational reasons, and then changed his explanation that it was for pain management and ultimately an addiction. There is no clear evidence that Applicant's use of methadone is completed. Instead, there is evidence that his prescription for methadone had merely been reduced. Because of the uncertainty established by his various versions of causation, there is continuing doubt as to Applicant's reliability, trustworthiness, and good judgment.

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. I have incorporated my comments under Guideline H in my analysis below.

There is some mitigating evidence under the whole-person concept. Applicant has a sterling reputation in the workplace and in his neighborhood. His opiate abuse purportedly ceased in May 2013. Applicant's abstinence is viewed favorably, and he should be encouraged to continue it. He supposedly no longer associates with other substance abusers.

There is also more substantial evidence supporting the security concerns. Applicant used opiates over a multi-year period while possessing a security clearance. He knew he was violating both federal law and his fiduciary responsibilities when he resorted to purchasing, possessing, and using the opiates, including the heroin, but it apparently did not matter for he did so on numerous occasions. There are several troubling aspects of this case, including Applicant's inconsistent versions of the reasons for his opiate abuse; the use of non-prescribed Percocet and Vicodin, as well as heroin, remains a federal criminal violation; and his continued recreational or pain self-management use of those opiates after being granted a security clearance. While Applicant now intends to refrain from such use in the future, based on his track record, it is difficult to give that vow much weight.

I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.²³ Overall, the record evidence leaves me with some questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has failed to mitigate the drug involvement security concerns. (See AG ¶¶ 2(a)(1) - 2(a)(9).)

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, and my interpretation of my responsibilities under the Guidelines. Applicant has failed to mitigate or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

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

²³ 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).

Subparagraphs 1.a. – 1.d.:

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