



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



In the matter of:

ISCR Case No. 15-04462

Applicant for Security Clearance

**Appearances**

For Government: Jeff Nagel, Esq., Department Counsel

For Applicant: *Pro se*

June 2, 2017

**Decision**

MOGUL, Martin H., Administrative Judge:

**Statement of the Case**

On July 13, 2016, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H for Applicant. The action was taken under 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); and the adjudicative guidelines (AG), effective within the Department of Defense for SORs issued after September 1, 2006.

On August 13, 2016, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge (AJ). The case was assigned to this AJ on October 4, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 18, 2016, and the hearing was convened as scheduled on November 2, 2016.

At the hearing, the Government offered Exhibits 1 through 4, which were received without objection. Applicant testified on his own behalf and submitted no

exhibits. The record was kept open until November 18, 2016, to allow Applicant to submit additional evidence. Two additional documents were identified as Exhibits A and B, and were received into evidence without objection. DOHA received the transcript of the hearing (Tr) on November 9, 2016. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

### **Findings of Fact**

After a complete and thorough review of the evidence in the record, as reviewed above, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 56 years old. He has been first married from 1984 to 1996, and he has been married to his current wife from 1999 to the present. He has one daughter and one adopted daughter. Applicant attended college, but has not earned a degree. Applicant has been employed by a Government contractor since 2002, and he is currently a Quality Engineer. Applicant seeks a DoD security clearance in connection with his employment in the defense sector.

### **Guideline H - Drug Involvement**

The SOR lists eight allegations (1.a. through 1.h.) under Adjudicative Guideline H. They will be reviewed in the same order as they were listed on the SOR:

1.a. The SOR alleges, and Applicant admitted in his RSOR, that he misused his daughter's prescription of Vicodin in October 2011, while possessing a security clearance.

At the hearing, Applicant testified that he has held a security clearance continually since 2005. He further testified that he took five of the pills in total from his daughter. This was because of severe pain in his neck and back, which ultimately forced him to have neck surgery in 2012. He explained that while he could have gone to a doctor to have medicine prescribed to relieve the pain, he was very busy at work, and he did not want to take off the time to see a doctor. (Tr at 21-23.)

1.b. The SOR alleges, and Applicant admitted in his RSOR, that he misused his co-worker's prescriptions of Motrin and Vicodin from approximately October 2006 to December 2006, while possessing a security clearance.

Applicant testified that he was suffering from severe back and neck problems, causing him a great deal of pain during this period. He again reiterated that he was just taking the pills to help him cope with the pain and to continue to work at his job. He estimated that he bought 20 Motrin and five Vicodin from his co-worker on two occasions, spending \$10 each time for a total of \$20. He took Motrin when his pain was less severe and the Vicodin for more severe pain. He stated that at the time he was using these drugs he was not considering the fact that he possessed a security

clearance, because his only real concern was just to help him cope with his pain and continue working. (Tr at 23-26.)

1.c. The SOR alleges, and Applicant admitted in his RSOR, that he “illicitly obtained” Motrin and Vicodin from his co-worker’s prescriptions from approximately October 2006 to December 2006. Applicant confirmed this allegation, as reviewed in 1.b., above. (Tr at 23-26.)

1.d. The SOR alleges, and Applicant admitted in his RSOR, that he used cocaine in June 2005, while possessing a security clearance.

Applicant testified that he used cocaine on one occasion while holding a security clearance. He used it at a friend’s house, as he stated, “just to taste it.” (Tr at 26-27.)

1.e. The SOR alleges, and Applicant admitted in his RSOR, that he used cocaine from 1989 to 1993, and in June 2005.

Applicant did not know the exact amount of times he used cocaine from 1989 to 1993, but estimated that it was approximately 75 times. He reiterated that during this period he did not have a security clearance. He used the cocaine with people he knew. (Tr at 26-28.)

1.f. The SOR alleges, and Applicant admitted in his RSOR, that he purchased cocaine from 1989 to 1993. Applicant estimated that he spent about \$800 in the purchase of cocaine, spending about \$25 each time. (Tr at 28-29.)

1.g. The SOR alleges, and Applicant admitted in his RSOR, that he used marijuana from approximately 1974 to 1993.

Applicant testified that he used marijuana from when he was in high school until he was 33. He used it because he liked the effect of marijuana more than from consuming alcohol. Applicant confirmed that he has not used marijuana since 1993. (Tr at 29-33.)

1.h. The SOR alleges, and Applicant admitted in his RSOR, that he purchased marijuana from approximately 1974 to 1993.

Applicant testified that he purchased the marijuana he used in either nickel or dime bags on less than 25 occasions. He estimated he spent from \$100 to \$200 in total. (Tr at 33-34.)

Applicant testified that he last used any drug in an illegal manner in 2011, but at the time he used them, he had not considered using the drug of someone else to help him cope with pain as a violation of the security clearance rules. He has since become aware that this is a violation, and he strongly and credibly averred that he would never again use illegal drugs or use the prescription drugs of anyone else. In response to a question about why Applicant would never illegally or improperly use drugs in the future,

he stated, "My job is very important to me and our nation. And I would die for our nation. And I love what I do." He also explained that he has been in the defense industry for 30 years and it is very dear to his heart. Finally, he explained that he is a devoted family man, and now through his daughter, he is a grandfather. (Tr at 35-37.)

## **Mitigation**

Applicant submitted three Performance Evaluations for years 2013 through 2015. (Exhibit B.) He received a rating of "Achieves Expectations" for each year. Additionally, in a post-hearing letter, Applicant explained that in August 2012, he underwent neck surgery with a fusion of his C5 through C7, and he has been under his doctor's care since his surgery. He once again reiterated that his last usage of a drug that was not prescribed to him was in 2011, and it was because he was working many hours, and feeling severe pain in his neck, back and down his legs. Finally in the letter he wrote, "I promise you, that I will never put my DOD Security Clearance at risk or jeopardy ever again." (Exhibit A.)

## **Policies**

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 to be 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, administrative judges apply the 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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion 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 EO 10865 provides that adverse 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**

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 judgement and because it raises questions about a person’s ability or willingness to comply with laws, rules and regulations.

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, especially the use of prescription drugs that were prescribed to another person and the use of cocaine, all while he was holding a security clearance, is of great concern, especially in light of his continued desire to have access to the nation's secrets. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement ¶ 25(a) “any drug abuse” and (c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.” ¶ 25(g) is also applicable because of Applicant’s “illegal drug use after being granted a security clearance.”

I also considered a number of factors in mitigation. First I considered the recency of use. Applicant last used the Vicodin of his daughter to help him deal with his pain in 2011, almost 6 years ago. At that time he used about five of her pills. Before that he used the prescription drugs of his co-worker, again the Vicodin, in particular, in 2006, more than 10 years ago. Finally, he used the cocaine one time when he held a security clearance, and that was in June 2005, more than 11 years ago. His other uses of cocaine and his marijuana usage were more than 20 years ago. Therefore, a significant amount of time has elapsed since his use of any illegal substance. While Applicant's use of the prescription drugs is illegal and a violation of his company's rules and the rules regarding security clearances, I do take into consideration that this usage was only to help him cope with actual pain, and not to get high or to alter his consciousness. His

cocaine use is more of a concern because it clearly was done for him to get high, not to ease pain. However, is cocaine usage while holding a security clearance was only one time, and again, it was more than 11 years ago. Finally, I found Applicant's testimony that he would never use any illegal drug or the prescription drug of anyone else to be credible and sincere. At this time I believe that Applicant will not use any illegal drugs in the future. Therefore, I conclude that the following mitigating conditions under Drug Involvement AG ¶ 26 are applicable:

- (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: (3) an appropriate period of abstinence.

In this case, the Government has met its initial burden of proving that Applicant has used illegal drugs under Guideline H, especially while holding a security clearance. Applicant, on the other hand, has introduced persuasive evidence in rebuttal, explanation, or mitigation, which is sufficient to overcome the Government's case against him. Guideline H of the SOR is concluded for Applicant.

### **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. I have incorporated my comments under Guideline H in my whole-person analysis.

Overall, the record evidence leaves me with no significant questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the Drug Involvement security concerns under the whole-person concept.

### **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.h.: For Applicant

### **Conclusion**

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

Martin H. Mogul  
Administrative Judge