



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



In the matter of:)
)
) ISCR Case No. 17-01950
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

04/19/2018

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the financial considerations security concerns and the drug involvement and substance misuse security concerns, but he did not mitigate the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On July 17, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct), F (financial considerations), and H (drug involvement and substance misuse). Applicant responded to the SOR on August 14, 2017, and requested a hearing before an administrative judge.

The case was assigned to me on November 9 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 18, 2017, scheduling the hearing for January 31, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 11 were admitted in evidence without objection. Applicant testified and called two witnesses, but he did not submit any documentary

evidence. The record was held open for Applicant to submit additional information. He submitted documents that I have marked Applicant's Exhibits (AE) A through C and admitted without objection. DOHA received the hearing transcript (Tr.) on February 8, 2018.

Findings of Fact

Applicant is a 37-year-old employee of a defense contractor. He has worked for his current employer since June 2016. He served on active duty in the U.S. military from 2000 until he was discharged with a general under honorable conditions discharge in 2010. He attended college for a period without earning a degree. He married in 2000 and divorced in 2004. He married again in 2007 and separated in about 2013. He has three children and a stepchild.¹

Applicant smoked marijuana before and after he enlisted in the military. In about 2001, he smoked marijuana on several occasions, and he used cocaine on one occasion. On about five or six occasions in 2009, he smoked what he believed was a legal alternative to marijuana known as "spice." He smoked it with other members of the military. He took Percocet² on two occasions without a prescription. Another service member provided the Percocet. Applicant swallowed it the first time. The other service member cut up the Percocet the second time, and Applicant snorted it. Applicant held a security clearance at the time.³

Applicant was questioned about his illegal drug use by a military investigator in 2009. He waived his right to remain silent and admitted to the illegal drug use while in the military as described above. In January 2010, Applicant received nonjudicial punishment for his marijuana and cocaine use in 2001 and his use of Percocet in 2009. He was reduced one pay grade, ordered to serve 45 days extra duty, and reprimanded. He received a general under honorable conditions discharge because of his illegal drug use.⁴

The financial allegations in the SOR include \$15,574 owed for a charged-off auto loan; an unpaid judgment for \$1,281; two delinquent medical debts totaling \$1,356; and three miscellaneous delinquent debts totaling \$734. All of the debts are listed on at least one credit report. Applicant and his wife were sued by the creditor for the \$15,574

¹ Tr. at 30-33, 43, 54; GE 1.

² Percocet is the trade name for a painkiller that contains oxycodone and acetaminophen. Oxycodone is a Schedule II controlled substance. See https://www.deadiversion.usdoj.gov/drug_chem_info/oxycodone/oxycodone.pdf#search=percocet.

³ Tr. at 13, 49-53, 55-56; GE 4, 5. The SOR did not allege illegal drug use before 2009. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be considered when assessing Applicant's credibility, in the application of mitigating conditions, and during the whole-person analysis.

⁴ Tr. at 33, 47-53; GE 5.

charged-off auto loan. He established the debt was resolved through garnishment in April 2016. He also established that the \$1,281 judgment was settled and paid.⁵

Applicant stated that he was devastated by the loss of his military career. He had no direction; he was working meaningless jobs; and his wife left him. He stated that his current job helped turn his life around. It enabled him to take control of his life and his finances. He stated that he learned from his mistakes. He no longer associates with the individuals who were involved in his drug use. He planned to resolve his remaining delinquent debts. He called two witnesses who attested to his excellent job performance, trustworthiness, and integrity.⁶

Applicant submitted a Questionnaire for National Security Positions (SF 86) in June 2016. He wrote that his enlistment ended with a general under honorable conditions discharge. He gave the reason as: "I had admitted to taking one pill at one time that was not prescribed to me for pain." He reported a 2014 arrest and 2015 conviction for reckless driving. He did not report any issues under the financial questions. He denied intentionally falsifying the financial questions on the SF 86. He stated that he was unaware of the extent of his financial problems.⁷

Applicant was interviewed for his background investigation in January 2017. A signed statement was not taken, but the interview was summarized in a report of investigation (ROI). He told the investigator that his wife was prescribed Percocet. He had back pain and took one of his wife's Percocet pills to relieve the pain. He stated that he took one and only one Percocet pill. When confronted with the other drug use reported in the military investigation, Applicant stated that he had never smoked spice and had never snorted Percocet. He admitted to using cocaine on one occasion in 2001. He admitted smoking marijuana before he joined the military, but he denied smoking marijuana after that time. He stated that his only illegal drug use in the military was his one-time cocaine use in 2001 and his one-time Percocet use that he received from his wife for his back pain.⁸

Applicant certified to the accuracy of the ROI in June 2017. He wrote in his response to the SOR: "I was in the wrong for the horrible decision I made in taking the one Percocet not prescribed to me." He eventually admitted at his hearing that he did not tell the OPM investigator the complete truth.⁹

⁵ Tr. at 34-42; GE 8-11; Applicant's response to SOR; AE A-C.

⁶ Tr. at 13-14, 18-28, 30, 39; Applicant's response to SOR.

⁷ Tr. at 30, 36, 45-47; Applicant's response to SOR; GE 1.

⁸ GE 2.

⁹ Tr. at 49-53; GE 2.

Policies

This case is adjudicated under Executive Order (EO) 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), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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 national security eligibility will be resolved in favor of the national security."

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

- (a) inability to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant has a history of financial problems including an unpaid judgment and delinquent debts. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances; and
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant provided documentation that the \$15,574 charged-off auto loan and the \$1,281 judgment were resolved. The remaining medical debts and miscellaneous debts

total less than \$2,100. He stated that he planned to resolve his remaining financial problems. Security concerns about Applicant's finances are mitigated.

Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Controlled substance means any "controlled substance" as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following is potentially applicable in this case:

- (a) any substance misuse (see above definition); and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant used Percocet without a prescription and while holding a security clearance in 2009. Percocet is the trade name for a painkiller that contains oxycodone, a Schedule II controlled substance. He also used "spice." Applicant received nonjudicial punishment for his use of Percocet, marijuana, and cocaine, but not for his use of spice. There is insufficient evidence to conclude that Applicant's spice use was illegal at the time he used it. However, it is a substance that causes physical or mental impairment. It falls within the above definition of substance misuse. The above disqualifying conditions are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially 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;
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used;
and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

There is no evidence that Applicant has used illegal substances since 2009. That is sufficient to mitigate concerns about his drug and substance misuse.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and
- (b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

Applicant intentionally provided misleading information on his June 2016 SF 86 when he wrote that the reason his enlistment ended with a general under honorable conditions discharge was: "I had admitted to taking one pill at one time that was not prescribed to me for pain." However, that was not alleged in the SOR. There is insufficient evidence for a determination that Applicant intentionally falsified the SF 86 when he did not report any issues under the financial questions. AG ¶ 16(a) has not been established. SOR ¶ 2.b is concluded for Applicant.

Applicant intentionally provided false information during his background interview in January 2017. He falsely stated that he took one and only one of his wife's Percocet pills to relieve back pain. He falsely stated that he had never smoked spice and had never snorted Percocet. AG ¶ 16(b) is applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) 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;
- (d) 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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant perpetuated the lie when he certified to the accuracy of the ROI in June 2017, and when he wrote in his response to the SOR: "I was in the wrong for the horrible decision I made in taking the one Percocet not prescribed to me." His conduct continues to cast doubt on his current reliability, trustworthiness, and good judgment. There are no applicable mitigating conditions.

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(d):

(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 Guidelines E, F, and H in my whole-person analysis. I also considered Applicant's favorable character evidence.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the financial considerations security concerns and the drug involvement and substance misuse security concerns, but he did not mitigate the personal conduct security concerns.

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 F:	For Applicant
Subparagraphs 1.a-1.h:	For Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3, Guideline F:	For Applicant
Subparagraph 3.a:	For Applicant

Conclusion

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.

Edward W. Loughran
Administrative Judge