



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



In the matter of:

Applicant for Security Clearance

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ISCR No. 17-04192

Appearances

For Government: Brian Olmos, Esq., Department Counsel
For Applicant: *Pro se.*

8/27/2018

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated drug involvement. Security concerns covering personal conduct allegations of past employment termination and falsification of his security clearance applications are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On January 29, 2018, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons under the drug involvement and personal conduct guidelines why DoD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 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

Security Executive Agent, by Directive 4, *National Security Adjudicative Guidelines* (SEAD 4), dated December 10, 2016, covered by DoD 5200.02, *Procedures for the Personnel Security Program* (PSP)

Applicant responded to the SOR on February 10, 2018, and requested a hearing. The case was assigned to another judge on March 23, 2018, reassigned to me on April 9, 2018, and scheduled for hearing on May 9, 2018. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance.

At the hearing, the Government's case consisted of seven exhibits (GEs 1-7). Applicant relied on one witness (himself) and no exhibits. The Government's exhibits were admitted without objection. The transcript was received on May 17, 2018.

Summary of Pleadings

Under Guideline H, Applicant is alleged to have (a) misused opiates in August 2017; (b) misused Oxycontin; and (c) misused the prescription medication Lortab, from approximately January 2008 to January 2012, before and after being granted access to classified information.

Under Guideline E, Applicant allegedly (a) was terminated from his employment for using his company email account to send pornographic photos; (b) falsified material facts in propounded interrogatories when he understated his use prescription pain pills other than as prescribed (limited his admissions to January 2012); and (c) falsified his electronic questionnaires for investigations processing (e-QIP) of November 2010 by omitting his prior misuse of prescription drugs.

In his response to the SOR, Applicant admitted most of the allegations covering his prescription drug misuse, termination for cause, and falsification of DOHA interrogatories and e-QIP omissions. He denied using his company-issued cellphone to send pornographic photos. He claimed that the dates of his misuse of prescription drugs he provided in his 2010 e-QIP were approximate.

Findings of Fact

Applicant is a 55-year-old quality assurance manager for a defense contractor. He seeks a security clearance. (GE 2; Tr. 102) The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in March 1981 and divorced in June 1983. (GEs 1-3) He has three adult children from this marriage. He earned a high-school diploma in May 1980 and claimed no post-high school education credits. (GEs 2-3) Applicant reported no military service.

Since June 2015, Applicant has worked for his current employer. (GEs 1-3; Tr. 103) Previously, he worked for another defense contractor for over 30 years between March 1981 and September 2014. (GEs 2-3; Tr. 24)

Applicant's drug history

Over a period of years spanning January 2008 through January 2012, and between April 2015 and August 2017, Applicant misused various pain medications that were not prescribed to him. (GEs 3-7; Tr. 32-34) Applicant acknowledged being addicted to pain pills and using them more than he needed between January 2008 and January 2012, and at hearing acknowledged under questioning and review of his medical records that he misused pain killers (opiates and Oxycontin) beyond January 2012. (GEs 3 and 7; Tr. 55-74) He attributed his misuse of pain killers (opiates, Oxycontin, and Lortab) to medical issues associated with past back and shoulder injuries. (GE 7; Tr. 24-27)

Concerned about his addiction problems with pain killers, Applicant voluntarily sought treatment to address them. (GE 7; Tr. 24-27) Even as he continued to misuse pain killers, he pursued treatment, beginning in 2012 and continuing to this day. (GEs 3 and 7) He assured that he did not use opiates past August 2017, Oxycontin past April 2015, and Lortab past January 2012. (Tr. 35-38, 45-48)

Investigation and medical records corroborate Applicant's claims. (GEs 3 and 7) All of these addictive prescriptive pain killers he used without prescriptions when his prescription orders expired. (GEs 3 and 7)

While employed by his previous employer, Applicant was subject to his employer's substance abuse and drug screening policy. (GE 6) Screening was authorized both on a random and periodic basis. Prescription drug use was covered by his employer's substance abuse and drug screening policy. (GE 6) Automatic suspension becomes mandatory for any screened employee that tests positive for illegal drugs or prescription drugs not properly prescribed. (AE 6) In Applicant's case, while there is no evidence of his submitting to a positive drug screen, the evidence is strong that he availed himself of non-prescribed pain killers while employed by his previous employer.

Employment termination

Records confirm that Applicant was terminated from his employment with a defense contractor in September 2014 on the stated grounds that he used his company email account to send pornographic materials. (GEs 4-5; Tr. 103) His terminations and reasons are summarized in a Joint Personnel Adjudication System (JPAS) report of July 2014 as follows: Applicant was found "to have sent sexually explicit emails from his employer's email account to an outside provider and was suspended and later terminated from the company." (GE 5)

Applicant's disciplinary action notice of September 2014 from his previous employer confirmed his termination for cited falsifying pertinent employment information,

dishonesty, work-related behavior, misuse of company internet connections, and specifically described misconduct (i.e., misusing his company issued cellphone to send pornographic photos). Applicant provided no explanation of the recited incidents and conduct covered in the JPAS findings. (GE 4)

Applicant denied using his company issued cell phone to transmit pornographic photos. And, he expressed surprise at the disclosure when confronted by his employer's security personnel in September 2014. (GE 3; Tr. 86) He admitted he lost his cell phone on several previous occasions without reporting the losses to his supervisor. (GE 3) While he did not want to think that any of his children would transmit pornographic messages on his cellphone at home, he could not rule out the possibility after confronting them with the information supplied by his employer's security officials. (GE 3; Tr. 87) *Compare* his answers given to the OPM investigator who interviewed him in September 2017 with his revised hearing acknowledgments of discussing the cellphone issue with his children. (GE 3; Tr. 86-87)

Applicant also offered the possibilities of others at work having access to his company cellphone, but could provide no specific evidence. (Tr. 85-87) Asked about the email transmission of the photos on his company cell phone to an identified email address in his September 2014 interview with company investigators, Applicant denied any familiarity with the email address and provided no explanations of how the photos could have been located on his company cellphone. (GE 4) Applicant repeated these denials in his September 2017 OPM interview before acknowledging at hearing that the identified email address that received the transmitted photos belonged to his girlfriend. (Tr. 89)

After receiving warnings from company investigators who interviewed him in September 2014 that his failing to provide complete, accurate, and honest answers could place his security clearance at risk, Applicant continued to provide no explanations of the evidence. At this point, he was suspended without pay by the company investigator and ultimately terminated for cause after the company could find no persuasive explanations from Applicant to warrant reconsideration of his suspension. (GEs 4-5)

Having made the decision to move to another company, Applicant took no further action to contest his termination. (Tr. 82) Without more evidence from Applicant to counter the findings of his previous employer that led to his suspension and termination, his former employer's findings are entitled to acceptance as proven findings of company cellphone misuse based on the facts developed by the company's investigators.

Interrogatory misstatements

Asked by DOHA to complete interrogatories in January 2018, Applicant understated the duration of his use of prescription pain killers (limiting his misuse to the period of January 2008 to January 2012) without accompanying explanations of how he misinterpreted the questions. His explanations of mistakenly answering the questions lack the credible time-line disclosures necessary to avert inferences of material lapses in candor in completing his e-QIPS. (GEs 1-2)

Based on Applicant's developed medical history regarding his misuse of several pain killer medications initially prescribed to him but later misused and his own explanations provided in his OPM interview, the questions posed in both his OPM interview and DOHA interrogatories regarding misuse of prescribed pain pills cover opiates, Oxycontin, and Lortab. His understating of his misuse of these medications is difficult to reconcile with his claims of inadvertent date mixups in the repeated occasions he was asked about his inclusive dates of misuse.

On four separate occasions he was asked about misuse of prescription drugs, he provided the following dates of misuse: (a) in his 2010 e-QIP; in his 2015 e-QIP (limited his misuse to January 2008 to January 2012); (c) in his September 2017 OPM interview (limited his misuse to the period of January 2008 to January 2012); and (d) in interrogatories posed to him in January 2018. (limited his misuse to January 2008 to January 2012). (GEs 1-3) And, on each occasion, he either denied any misuse at all (i.e., in his 2010 e-QIP) or materially understated the extent of his misuse of pain killers.

Considered together in the context of his longtime holding of a security clearance with Applicant's current and previous employer, his imputed knowledge of DoD's historical proscriptions of the misuse of prescription drugs for clearance holders, and his exhibited pattern of misstatements throughout the clearance investigation process, Applicant's misstatements in responding to propounded interrogatories from the Government cannot be considered inadvertent.

On the strength of the evidence developed in the record, inferences are warranted that his omissions and understatements of his misuse of prescription drugs when responding to DOHA interrogatories were intentional. Inferences are warranted of a lack of candor in disclosing the extent of his misuse of prescription drugs to Government investigators.

E-QIP omissions

In answering his e-QIP in November 2010, Applicant answered "**no**" to questions posed in section 23a of the e-QIP about his prior use of illegal drugs and misuse of prescription drugs. (GE 1; Tr. 51) In so doing, he omitted his misuse of prescription drugs between 2008 and 2010.

In a follow-up e-QIP completed in December 2015, Applicant understated his misuse of prescription pain pills sans a valid prescription. (GE 2) In this e-QIP, he limited his misuse of prescription pain pills to the period of January 2008 through January 2012. (GE 2) In so limiting his pain pill misuse to this period, he omitted his more expansive use between April 2015 and August 2017. (GE 2 Tr. 69-71)

Applicant's understatements of his use of prescription pain killers in the e-QIPs he completed in November 2010 and December 2015, respectively, are material to a complete and accurate assessment of Applicant's clearance suitability and reflect material lapses in candor. Applicant stayed with this limited accounting of his past

misuse of pain killers until he was confronted by the Government with the more extensive dates of misuse at hearing. (Tr. 69-76)

Pressed by Department Counsel at hearing, Applicant could not plausibly explain why he did not provide the more expansive dates of his misuse of pain killers. Under these covered circumstances above, his corrected dates of use of non-prescribed pain killers were neither timely nor voluntary.

Endorsements

Applicant did not provide any personal endorsements from his supervisors and coworkers. Nor did he provide any performance evaluations, character references, nor evidence of community contributions.

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and many of the conditions that could mitigate security concerns. These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

Drug Involvement

The Concern: 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. AG ¶ 24.

Personal Conduct

The 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 or sensitive 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 ¶ 15.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant’s security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant’s eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). Because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Analysis

Applicant presents as a quality assurance manager for a defense contractor who seeks a security clearance. Principal security issues in this case center on Applicant's misuse of prescription drugs (pain killers), termination for cause resulting from his sending pornographic photos on a company-issued email account, and material omissions of his misuse of prescription drugs, and extent of his misuse, in his answers to drug involvement questions in his 2010 2015, OPM interview summaries, and DOHA interrogatories.

Drug concerns

Over a number of years spanning 2008 and 2017, Applicant misused prescribed medications (pain killers) while granted access to classified and sensitive information.

Applicant's admissions to misusing prescribed medications raise security concerns over risks of recurrence as well as judgment issues. On the strength of the evidence presented, three disqualifying conditions of the AGs for drug involvement and substance abuse are applicable: DC ¶ 25(a), “any substance misuse,” and DC ¶ 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” and 25(f), “any illegal drug use while granted access to classified information or holding a sensitive position.”

Applicant's significant recurrent misuse of prescription drugs over an extended number of years (January 2008 to August 2017) raises questions over the strength of his abstinence commitments. Because of the extended time and amounts of non-

prescribed pain killers availed of by Applicant, his recurrent involvement with the controlled prescription medications creates continuing security concerns.

While Applicant's recurrent misuse of prescription drugs between 2008 and 2017 has never been resumed since August 2017 in any proven way, his misuse of prescription drugs over an extended period of time spanning January 2008 and August 2017 makes the likelihood of recurrent use too great to facilitate safe predictions of continued abstinence.

Applicant, to his credit, has made some noticeable gains in his efforts to mitigate his past misuse of pain killers with the assistance of his medical counselors. Still, his extensive use of non-prescribed pain killers over such an extended period of time is still relatively recent, and has not been accompanied by enough evidence of demonstrated intent to avoid any recurrence in the future. Considering the frequency and length of time of his misuse of pain killers, none of the mitigating conditions for misuse of prescription drugs are available to Applicant at this time.

Considering the record as a whole, at this time there is insufficient probative evidence of sustainable mitigation to make predictable judgments about his ability to avoid non-prescribed pain medications in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant's lengthy period of misuse of prescription drugs over an 11-year period, he does not mitigate security concerns with respect to the allegations covered by subparagraphs 1.a-1.c of the SOR.

Personal conduct concerns

Security concerns are raised as well over Applicant's judgment, reliability, and trustworthiness under Guideline E as the result of his termination for cause resulting from his use of a company email account to send pornographic photos to his girlfriend's email address, falsification of his 2010 e-QIP by omitting his misuse of prescribed medications during the period of 2008-2010 and understating his misuse of prescription medications in his the 2015 e-QIP he completed and in his OPM interview and DOHA responses he provided in December 2017 and January 2018, respectively. Questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, are each core policy concerns of the personal conduct guideline (AG ¶ 15)

Judgment and trustworthiness concerns are tied to Applicant's omissions and understatements he furnished in his e-QIP, OPM interview, and DOHA interrogatory responses. Because his omissions of the extent of his past misuse drug activities raise separate trustworthiness and judgment, they may be considered independently under Guideline E. See ISCR Case No. 06-20964, at 6 (April 10, 2008).

Applicant's termination for cause stemming from his misuse of his employer's email account to send pornographic photos to his girlfriend and his material omissions and understatements of his ongoing misuse of prescription drugs between 2008 and 2017 in the e-QIPs he completed in 2010 and 2015, respectively, invite application of

DC ¶¶ 16(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 national security eligibility or trustworthiness, or award fiduciary responsibilities,” 16(b), “deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, or competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative,” and 16(d)(3), “a pattern of dishonesty or rule violations.” Each of these disqualifying conditions fully applies to Applicant’s situation.

While Applicant never admitted sending pornographic photos to his girlfriend’s email address, he acknowledged enough details about his girlfriend’s email address, while providing no probative explanations for other possibilities when afforded opportunities by investigators of his employer and OPM to do so, to warrant acceptance of his previous employer’s findings of termination for cause. His proven intentional omissions and understatements of the extent of his misuse of prescribed medications and ensuing failures to make prompt, good-faith corrections when afforded opportunities to do so preclude the application of any of the mitigating conditions potentially available to him under Guideline E.

In evaluating all of the circumstances surrounding Applicant’s termination for cause resulting from his use of a company email account to send pornographic photos and his collective omissions and understatements of the extent of his misuse of prescription drugs over an extended period of time, considerations of the evidence covering the Government’s Guideline E allegations to do not warrant conclusions of either refutation or mitigation of personal conduct concerns.

Whole-person assessment

From a whole-person perspective, Applicant has established insufficient probative evidence of his overall honesty, trustworthiness, and understanding of DoD policy constraints on the use of illegal substances (inclusive of misuse of prescription drugs). His contributions to the defense industry over a 30-plus year career is worthy of respect and appreciation and are taken into account in making an overall evaluation of his clearance eligibility.

At this time, though, Applicant is at continued risk of recurrence. Evaluating all of the facts and circumstances developed in the record, Applicant fails to mitigate security concerns associated with the allegations covered by Guideline E.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE H (DRUG INVOLVEMENT): AGAINST APPLICANT

Subparas. 1.a through 1.c: Against Applicant

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Subparas. 2.a through 2.c: Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge