



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



In the matter of: )  
)  
) ISCR Case No. 19-00576  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Dan O’Reilly, Esq., Department Counsel  
For Applicant: Bradley P. Moss, Esq.

02/19/2020

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**Decision**

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LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the security concerns raised under Guidelines E (personal conduct), H (drug involvement and substance misuse), and J (criminal conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

On May 9, 2019, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E, H, and J. Applicant responded to the SOR on June 6, 2019, and requested a hearing before an administrative judge. The case was assigned to me on November 26, 2019.

The hearing was convened as scheduled on January 29, 2020. Government Exhibits (GE) 1 through 7 were admitted in evidence without objection. Applicant testified, called two witnesses, and submitted Applicant’s Exhibits (AE) 1 through 4, which were admitted without objection.

## Findings of Fact

Applicant is a 28-year-old employee of a defense contractor. He has worked for his current employer since about 2017. He seeks to retain a security clearance, which he has held since about 2014. He earned a bachelor's degree in 2013. He has never married, and he has no children. He lives with his girlfriend. (Transcript (Tr.) at 40, 48-49, 53, 97; GE 1, 4, 6; AE 1, 4)

There is no evidence that Applicant used illegal drugs before or after June 2017. In June 2017, he accepted an offer from a friend to smoke marijuana and use MDMA (3,4-methylenedioxy-methamphetamine), a controlled substance commonly known as ecstasy.<sup>1</sup> Applicant decided that he liked marijuana, and he purchased about three ounces of marijuana from his friend. His friend also gave him another MDMA pill. Applicant stated in his October 2018 affidavit that he paid "approximately \$300" for the marijuana. He testified he paid "about \$500." He stated that the marijuana was for his personal use. He used marijuana on a few more occasions in June 2017. Because of police intervention, Applicant never had the opportunity to take the MDMA pill or the remainder of his marijuana. (Tr. at 52-55, 64, 82-84; Applicant's response to SOR; GE 1; AE 1, 4)

In June 2017, Applicant and his friends were driving to a music festival. They were stopped by the police a few blocks from his apartment. Applicant believes a confidential informant provided the information to the police, because the police knew who they were, where they were going, and that they had drugs in their possession that they intended to use at the festival. The police searched the car and seized about five grams of marijuana that belonged to Applicant and additional marijuana that belonged to the other passengers. The police searched Applicant's apartment and seized the MDMA pill that Applicant received from his friend and about three ounces of marijuana, half of which belonged to Applicant's roommate. (Tr. at 55-60, 84-84; GE 1, 4; AE 1, 4)

Applicant was arrested and charged with possession of marijuana with intent to distribute and possession of a controlled substance. In June 2018, he pleaded guilty to possession of a controlled substance, and the other charge was *nolle prosequi* (dismissed). Imposition of sentence was suspended for one year conditioned upon Applicant's good behavior through 12 months of probation. His probation included drug testing and 100 hours of community service. (Tr. at 59-67, 87; Applicant's response to SOR; GE 1, 4, 5; AE 1, 4)

Applicant's employer had an anti-drug policy that prohibited illegal drug possession and use. His supervisor testified that Applicant had access to sensitive information, but he did not have access to classified information. Applicant asserted that he applied for a security clearance, but he was never informed that he had a security clearance, and he never knew that he had a security clearance. (Tr. at 24-28, 49-52, 78, 90-98; GE 4, 7)

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<sup>1</sup> See <https://www.drugabuse.gov/publications/drugfacts/mdma-ecstasy>.

However, in a May 2015 Questionnaire for National Security Positions (SF 86), Applicant wrote that he was investigated for a secret clearance with the date of action of "04/2014." He added: "Date of Action is when the investigation was initiated, not when the clearance was granted. But I do have an active secret clearance." Additionally, in the resume he submitted to his current employer, he wrote that he had a "Secret Clearance with DOD Suitability."<sup>2</sup> (GE 2, 6)

Applicant completed all the terms of his probation, including counseling. His therapist did "not see him as a risk for future court involvement." The charge was dismissed, and he was released from probation in June 2019. He stated that he is remorseful for his actions, and he has learned a valuable lesson. He asserted that he does not intend to use marijuana or any other illegal drug in the future. He met his girlfriend after his drug involvement. She works for the U.S. Government and is strongly opposed to illegal drug use. He is active in his church and volunteers in his community. He no longer associates with his friends who used drugs. (Tr. at 38, 42-47, 64, 67-75, 81-82; GE 4; AE 1-4)

Applicant called witnesses and submitted documents attesting to his good character and excellent job performance. He is praised for his trustworthiness, reliability, and dependability. (Tr. at 14-47; AE 3)

### **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

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<sup>2</sup> The SOR did not allege that Applicant provided false information about his security clearance. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be considered in assessing Applicant's credibility, in the application of mitigating conditions, and in the whole-person analysis.

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 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 are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant possessed and used marijuana and MDMA while holding a security clearance. AG ¶¶ 25(a), 25(c), and 25(f) 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; and
- (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 used illegal drugs before or after June 2017. He completed all the terms of his probation, which included counseling. He stated that he is remorseful for his actions, and he has learned a valuable lesson. He asserted that he does not intend to use marijuana or any other illegal drug in the future. His girlfriend works for the U.S. Government and is strongly opposed to illegal drug use. He no longer associates with his friends who used drugs.

Nonetheless, I still have significant concerns. Applicant's conduct was serious and would have continued for an unknown period if not for police intervention. His

assertion that he did not know that he held a security clearance is contradicted by the information in his May 2015 SF 86 and the resume he submitted for his current job.

Applicant's conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. The above mitigating factors, individually or collectively, are insufficient to dispel the drug involvement and substance misuse security concerns.

### **Guideline J, Criminal Conduct**

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant's arrest for possession of marijuana with intent to distribute and possession of a controlled substance was cross-alleged under criminal conduct. The above disqualifying condition is applicable.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant has a strong work record and favorable character evidence. He completed all the terms of his probation. He has shown positive steps toward rehabilitation. Notwithstanding, I have unmitigated concerns under the same rationale discussed in the drug involvement and substance misuse analysis.

## 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:

(c) credible adverse information in several adjudicative issue 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 the individual may not properly safeguard classified or sensitive information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant's drug involvement is cross-alleged under Guideline E. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable because Applicant's conduct is sufficient for an adverse determination under the drug involvement and substance misuse guideline. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

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

(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.

The discussion above under drug involvement and substance misuse applies equally here. There is no evidence that Applicant has used illegal drugs since June 2017. His criminal conduct is now well known, which reduces his vulnerability to exploitation, manipulation, and duress. Nevertheless, the conduct continues to cast doubt on his current reliability, trustworthiness, and good judgment. Personal conduct security concerns remain despite the presence of some mitigation.

### **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 have incorporated my comments under Guidelines E, H, and J 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 did not mitigate the security concerns under Guidelines E (personal conduct), H (drug involvement and substance misuse), and J (criminal conduct).



## 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
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraph 3.a:	Against Applicant

## Conclusion

It is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Edward W. Loughran  
Administrative Judge