



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 14-04961
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Philip J. Katauskas, Esq., Department Counsel<sup>1</sup>  
For Applicant: *Pro se*

12/15/2015

**Decision**

MENDEZ, Francisco, Administrative Judge:

Applicant, a prospective employee of a Defense contractor, mitigated security concerns raised by his past involvement with illegal drugs while in college. He has not been involved with illegal drugs in nearly two years. He demonstrated, through his words and action, a commitment to remain drug free. Clearance is granted.

**History of the Case**

On December 2, 2014, the Department of Defense (DOD) sent Applicant a Statement of Reasons (SOR), alleging that his conduct and circumstances raised security concerns under the drug involvement and personal conduct guidelines.<sup>2</sup> On December 26, 2014, Applicant answered the SOR and requested a hearing to establish his eligibility for access to classified information (Answer).

<sup>1</sup> Aubrey M. DeAngelis, Esq., Legal Intern, Defense Office of Hearings and Appeal, sat at counsel table and observed the proceedings.

<sup>2</sup> This action was taken under Executive Order (E.O.) 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 implemented by DOD on September 1, 2006.

On August 26, 2015, Department Counsel notified the Hearing Office that the Government was ready to proceed to hearing. I was assigned the case on September 17, 2015, and after conferring with the parties scheduled the hearing for November 24, 2015. See Hearing Exhibit (Hx.) II, scheduling correspondence.<sup>3</sup>

At hearing, Department Counsel offered four exhibits (Ex. 1 – 4). Applicant testified and also offered four exhibits (Ex. A – D). See Hx. III and IV, the parties' exhibit lists. Post-hearing, Applicant submitted an additional exhibit (Ex. E). All exhibits were admitted into evidence without objection. The hearing transcript (Tr.) was received on December 2, 2015, and the record closed on December 11, 2015.

### **Administrative Notice**

Prior to the start of the hearing, I provided the parties copies of a number of publically available documents from the Drug Enforcement Administration (DEA) website regarding a synthetic drug referenced in a number of the SOR allegations, which I was considering for administrative notice. These documents were marked and are included in the record as Hx. V. I left the record open to provide Applicant an opportunity to review the DEA documents and submit any objections, comments, or additional information regarding these matters. He did not submit any post-hearing matters or objection regarding the information contained in the DEA documents.

DOHA administrative judges may accept for administrative notice uncontroverted, easily verifiable facts from official U.S. Government reports and the official position or pertinent statements of appropriate federal agencies. DOHA judges may also take administrative notice of pertinent domestic law. However, the source documents (or, at least the relevant portion(s) of the source document) that a judge relies upon in reaching a fact for administrative notice must be included in the record for potential appellate review regarding the accuracy and relevancy of the fact(s) administratively noticed. See *generally*, ISCR Case No. 08-09480 (App. Bd. Mar. 17, 2010); ISCR Case No. 05-11292 (App. Bd. Apr. 12, 2007).

The following facts regarding 25C-NBOMe are administratively noticed: 25I-NBOMe, 25C-NBOMe, and 25B-NBOMe, which go by the street names: N-bomb, Smiles, 25I, 25C, and 25B, are synthetic substances encountered on the designer illegal drug market. These substances are sold online and through illicit channels, commonly purported to be illicit hallucinogens. In October 2013, these substances were placed on the Controlled Substances Act (CSA), Schedule I, by the Deputy Administrator of the DEA upon a finding "that the placement of these synthetic phenethylamines into Schedule I of the CSA is necessary to avoid an imminent hazard to the public safety." These drugs remain on Schedule I of the CSA. Hx. V.<sup>4</sup>

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<sup>3</sup> Documents establishing that, at the time of the hearing, Applicant was being sponsored for a clearance are included in the record as Hx. I. See ISCR Case No. 05-04831 (App. Bd. Nov. 29, 2006), jurisdiction was lost before the start of the hearing when individual lost job sponsoring him or her for a clearance.

<sup>4</sup> Department Counsel stated in opening: "As I walked in here today, I believe that the Government would not be able to carry its burden under Allegations 1D and 1G involving the purchase and sale of [25C-NBOMe], simply because I was not able to track it down on the list of scheduled substances under the

## Findings of Fact

Applicant is currently pursuing a graduate degree and has two pending job offers upon graduation. One of the job offers is from a Defense contractor that is sponsoring Applicant for a clearance. Applicant experimented with illegal drugs and one time used his sister's prescription medication for anxiety while in college. He began using drugs his freshman year of college and stopped when he started his junior year in September 2012. Applicant decided to stop using illegal drugs because he realized that drug use was inconsistent with his professional and life goals. He looked around at the individuals he was associating with at the time and realized that they had no ambition other than to get "high." He stopped associating with these individuals and has not used illegal drugs in over three years. (Tr. at 34-36)

Applicant admits he tried to help a former college classmate buy the synthetic drug 25C-NBOMe in approximately January 2014. He did not realize that 25C-NBOMe was an illegal drug (it had recently been placed on Schedule I of the CSA by the DEA). Applicant stopped his former classmate from going through with the drug transaction when he found out the drug that was actually being sold was LSD, not 25C-NBOMe. Recognizing the illegal and dangerous nature of LSD, Applicant convinced his former classmate not to purchase it. Applicant is remorseful for his role in this matter and has not been involved with illegal drugs since this incident nearly two years ago.

Since the January 2014 incident, Applicant accepted internships with two companies, to include the Defense contractor sponsoring him for a clearance. Both companies have drug-free workplace policies and require pre-employment drug screens for all employees, to include interns. Applicant passed the drug screens and complied with the drug-free workplace policies. He properly handled and safeguarded sensitive information entrusted to his care by his former employers. (Tr. at 32-37)

Applicant credibly testified that he is fully committed to remaining drug free. (Tr. at 34) He recognizes that illegal drug involvement is incompatible with his professional goals and the requirements of holding a security clearance. He submitted a statement of intent to refrain from illegal drug involvement in the future with automatic revocation of his clearance for any such violation.

Applicant submitted a security clearance (SCA) in February 2014. He has not previously held a security clearance. He voluntarily disclosed his past illegal drug involvement and fully discussed it during the ensuing background investigation.

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Controlled Substances Act. . . . but the DEA November 2013 exhibit, the Hearing Exhibit that you provided, does establish on the very front page under control status that that substance is a Schedule I controlled substance, so that will remain in the mix." Tr. at 19. See Directive, Adjudicative Guidelines 24(a), defining "drugs as mood and behavior altering substances, and include: (1) drugs . . . identified and listed in the [CSA] . . . ." Department Counsel's candor and efforts to present evidence, both favorable and unfavorable, are applauded. However, counsel and judges need to be wary of making any statements or comments, on or off the record, which could be misconstrued by an applicant. See e.g., ISCR Case No. 10-09607 (App. Bd. Nov. 18, 2011), where the case was remanded because on-the-record comments raised bias and fairness concerns.

## Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865, § 2.

When evaluating an applicant’s eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

An administrative judge must ensure that due process proceedings are conducted “in a fair, timely and orderly manner.” Directive ¶ E3.1.10. Judges are required to make certain that an applicant “received fair notice of the issues raised, had a reasonable opportunity to litigate those issues, and was not subjected to unfair surprise.” ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014)

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, recognizing the paramount importance of protecting national security in all suitability determinations, the Supreme Court has held that “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531. See also ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.”).

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. 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 an 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.

## Analysis

### Guideline H, Drug Involvement

The security concern regarding illegal drug involvement is explained at 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.

Applicant's involvement with illegal drugs and abuse of prescription medication raises the drug involvement concern. It also triggers application of the disqualifying conditions at AG ¶¶ 25(a), any drug abuse,<sup>5</sup> and 25(c), illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant's illegal drug involvement primarily took place over a two-year window while he was in college. He came to realize that he had little in common with those he used drugs with and that illegal drug use was incompatible with his goals. He stopped using illegal drugs over three years ago. His lapse in judgment in January 2014 does not undercut the favorable evidence in this case. Once Applicant recognized the illegality and dangerousness of the drug that his classmate was planning on purchasing (LSD), he stopped the transaction from going forward and convinced his friend not to buy the drug. He is remorseful for his role in this incident and has not been involved in any other incident since then that calls into question his judgment, reliability, or ability to comply with rules and regulations. To the contrary, he passed several drug screens, complied with rules and regulations for the proper handling of sensitive information, and submitted a statement of intent to refrain from illegal drug involvement in the future.

Furthermore, Applicant is on the verge of completing his graduate degree and beginning a professional career that is incompatible with illegal drug involvement. Additionally, I found Applicant credible when he testified about his intent to remain drug free. Accordingly, all of the preceding leads me to conclude that Applicant established the following mitigating conditions:

AG ¶ 26(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

AG ¶ 26(b): a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an

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<sup>5</sup> The Directive defines "drug abuse" as the "illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." See AG ¶ 24(b).

appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

### **Guideline E, Personal Conduct**

The personal conduct security concern is set forth at AG ¶ 15:

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.

The SOR cross-alleges Applicant's past drug involvement as a security concern under Guideline E. Applicant's past drug involvement raised concerns about his judgment, reliability, and willingness to comply with rules and regulations. See AG ¶ 16(c). For similar reasons explained under the drug involvement guideline, I find that Applicant mitigated these concerns. See AG ¶¶ 17(c), 17(d), 17(e), and 17(f).

### **Whole-Person Concept**

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).<sup>6</sup> I incorporate my drug involvement and personal conduct analysis herein and highlight some additional whole-person factors.

Applicant is clearly a hardworking individual and the only blemish on an otherwise spotless record is his experimentation with illegal drugs while in college. He is on the cusp of earning a master's degree and has at least two job offers, one of which is from a Defense contractor. He hopes to attain a security clearance to put his talents to work for the U.S. Government. He has a demonstrated track record of handling and safeguarding sensitive information. Even though he recognized the potential adverse consequence, he voluntarily revealed his past drug involvement on his SCA and discussed it during the course of the security clearance process. Applicant's honesty further demonstrates rehabilitation on his part and the lack of any potential for coercion from his past drug involvement. Applicant mitigated the security concerns at issue.

A security clearance determination is not intended to punish a person for past conduct or circumstances. Instead, these decisions serve as predictive judgments about an individual's security suitability, where the person's past conduct is the best indicator

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<sup>6</sup> The non-exhaustive list of factors are: (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.

of future behavior.<sup>7</sup> Here, Applicant demonstrated that he possesses the requisite good judgment, reliability, and trustworthiness to be entrusted with classified information. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility for a security clearance.

### **Formal Findings**

I make the following formal findings regarding the allegations in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive:

Paragraph 1, Guideline H (Drug Involvement)	APPLICANT
Subparagraphs 1.a – 1.i:	For Applicant
Paragraph 2, Guideline E (Personal Conduct)	FOR APPLICANT
Subparagraph 2.a:	For Applicant

### **Conclusion**

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

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Francisco Mendez  
Administrative Judge

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<sup>7</sup> ISCR Case No. 11-13626 at 3-4 (App. Bd. Nov. 7, 2013). See also, ISCR Case No. 01-25941 at 5 (App. Bd. May 7, 2004) ("Security clearance determinations are not an exact science, but rather predicative judgments about a person's security suitability in light of that person's past conduct and present circumstances.") (citing, *Egan*, 484 U.S. at 528-529).