



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



In the matter of: )  
)  
) ISCR Case No. 07-17025  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Kathryn D. MacKinnon, Department Counsel  
For Applicant: Kathleen E. Voelker, Esquire

December 18, 2008

**Decision**

HEINY, Claude R., Administrative Judge:

Applicant used illegal drugs between 1999 and August 2005, the majority of which occurred while he was a college student. He has stopped three years ago and will not use in the future as illegal drug use is inconsistent with this future plans. Applicant has rebutted or mitigated the government’s security concerns under drug involvement. Clearance is granted.

**Statement of Case**

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> the Defense Office of Hearings and Appeals (DOHA) issued to

<sup>1</sup> 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), as amended (Directive), and the revised adjudicative

Applicant a Statement of Reasons (SOR) on June 6, 2008, detailing security concerns under drug involvement.

On July 7, 2008, Applicant answered the SOR, and requested a hearing. On September 3, 2008, I was assigned the case. On October 7, 2008, DOHA issued a notice of hearing scheduling the hearing held on October 28, 2008. The government offered Exhibits (Ex.) 1 through 5, which were admitted into evidence. Applicant and one witness testified on his behalf and submitted Exhibits A through M, which were admitted into evidence. On November 6, 2008, the transcript (Tr.) was received.

### **Findings of Fact**

In his Answer to the SOR, Applicant neither admitted nor denied the allegations in SOR ¶ 1.h. He admitted the remaining allegations.

Applicant is a 27-year-old senior consultant (Tr. 46) who has worked for a defense contractor since 2006, and is seeking to obtain a security clearance. Applicant is a valuable team member, very intelligent, quick to identify problems, trustworthy, honest, a flexible and adaptive team member. He has been recognized for his knowledge and his strong analysis. (Exs. A, B, D, G, H) Applicant has received certificates of appreciation for his outstanding performance. (Tr. 48, Exs. C and D) He is actively pursuing an MBA, attending classes twice a week. (Tr. 19, 51, Ex E)

From August 1999 until December 2003, Applicant was in college. From June 1999 until December 2002, Applicant used marijuana 25 to 30 times. He first used it after high school graduation and then during his sophomore and junior years in college. (Tr. 68-69) In 2002, he stopped using marijuana because it made him feel ill. (Tr. 68, 70)

In February 2001, while a junior in college, Applicant underwent surgery for a shoulder injury; a torn ligament. (Tr. 62-63) He was prescribed hydrocodone for the pain. From April 2002 to March 2005, he used hydrocodone 15 to 20 times in a recreational, unauthorized manner. He would take a pill with a couple of beers, which gave a relaxed, jovial, and mellow effect. He thought the combination of the drug and alcohol would amplify the alcohol's effect. (Tr. 94) In late 2002 or early 2003, Applicant sold the remainder of his prescription, approximately ten pills, to a friend for \$20. (Tr. 64-65, Ex. 4)

Two years ago he was offered hydrocodone. He informed the individual he was not interested in using it or being around it. He then left the area. (Tr. 89) Applicant does not associate with the individual who bought the hydrocodone, nor does he associate with individuals using illegal drugs. (Tr. 76, Ex. 3) Drug use is inconsistent with his current life goals. (Tr. 90)

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guidelines (AG) approved by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

From March 2001 to September 2003, Applicant used Ritalin 15 times in an unauthorized manner. College friends had prescriptions for Ritalin. Before attending fraternity parties, Applicant would take a pill, mixing the drug and alcohol to enhance the effect of the alcohol. (Ex. 4) It made him feel anxious, excited, and uninhibited. It heightened his awareness and made him more outgoing. (Tr. 95) From December 2001 to February 2004, he used psychedelic mushrooms on three occasions. (Tr. 66) At the time of his last use, he was still living at his fraternity house and was offered the mushrooms by another fraternity member. (Tr. 66-67) In October 2002, Applicant tried LSD once at his fraternity house and did not like it. It had an acute effect on sound and made it more difficult to put thoughts together. (Tr. 70, Ex. 4)

In February 2000, Applicant the age 18 or 19 was charged with disorderly conduct and paid a \$90 fine. Applicant and a pizza parlor employee got into an altercation after three pizzas were knocked onto the floor. (Tr. 55, Ex. 4) In September 2003, he was charged with criminal mischief. He was with a group of eight friends who were leaving a bar when a window was broken. One of the group claimed responsibility for the damage. The charge against Applicant was dismissed. (Tr. 57, Ex. 4) He has never been arrested on drug-related charges.

In March 2005, while on a trip to Jamaica, Applicant used cocaine. (Tr. 61, Ex. 4) Applicant and a friend used some cocaine they had purchased and threw out the rest. He was not interested in trying it again and did not want to have it in the room due to the risk it posed. (Tr. 62) In August 2005, he used hashish once while on vacation with friends in Morocco, which was his last illegal drug use. (Ex. 4)

It is Applicant's intent to never use illegal drugs again. (Tr. 78, Ex. M) He asserts he has changed and matured during the last several years assuming greater responsibility for charting his life. He takes responsibility for his actions and understands the consequences. Illegal drug use is inconsistent with his plans for the future and what he hopes to accomplish in his life. (Tr. 76, Ex. 3) Applicant realizes how stupid his decision was to use marijuana and what he was risking.

Applicant listed all of his illegal drug use on his January 2007 Electronic Questionnaires for Investigations Processing (e-QIP) (Ex. 1) and his Standard Form (SF) 86, Questionnaire for Sensitive Positions. (Ex. 2) He also listed his usage in his response to interrogatories. (Ex. 3)

Applicant has \$10,000 in his current company's 401(k) retirement plan (Ex. I) and approximately \$11,000 in a previous employer's retirement account. (Ex. J) He has more than \$53,000 in his savings account (Ex. K) and pays his debts in a timely manner. (Ex. L) Applicant signed a statement of intent agreeing to automatic revocation of his security clearance should he ever use illegal drugs again. (Ex. M)

## **Policies**

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining 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 Executive Order 10865 provides that 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**

## Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement: 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.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

- (a) any drug abuse;
- (b) testing positive for illegal drug use;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;
- (e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;
- (f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;
- (g) any illegal drug use after being granted a security clearance; and
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant used marijuana following high school graduation and during his sophomore and junior year in college. He also used: psychedelic mushrooms on three occasions, with his last using in 2004; used LSD once in 2002; used hashish once in 2005; and used cocaine once in 2005. He also used Ritalin and hydrocodone in an unauthorized manner using it recreationally by mixing it with alcohol. In sold the remainder of his hydrocodone prescription in late 2002 or early 2003.

AG ¶ 25(a) drug use and AG ¶ 25(c) purchase and sale apply.

AG ¶ 26 provides conditions that could mitigate security concerns:

(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) 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 appropriate period of abstinence; and,

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

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and,

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant last use of any illegal drug occurred in 2005. The majority of his use occurred while in college living in a fraternity house. The only illegal drug use not related to his fraternity involvement was his hashish use while on vacation in Morocco in August 2005 and his cocaine use in March 2005. Each use was a single use.

Applicant intends to never use illegal drugs again. In October 2008, he signed an affidavit stating he would submit to drug testing and any drug use would result in the loss of his clearance. He has changed, matured, and assumed greater responsibility for the course of his life. He takes responsibility for his actions and understands the consequences. Illegal drug use is inconsistent with his plans for the future and what he hopes to accomplish in his life. He realizes how stupid his decision was to use illegal drugs and what he risked. He no longer associates with individuals who use illegal drugs.

Applicant did sell the remainder of his hydrocodone prescription, approximately ten pills, to a fraternity brother for twenty dollars. His action was illegal, but does not make him a drug pusher or supplier. This one-time event occurred five years ago. Viewed in context, it does not disqualify Applicant from holding a clearance.

Applicant used marijuana while in college can not be said to be infrequent. However, his use of hashish, cocaine, LSD, and psychedelic mushrooms is best

described as experimental. He used mushrooms three times and the other drugs once each. He inappropriately used alcohol with hydrocodone 15-20 times and with Ritalin 15 times. The use of these prescription drugs was more than experimental. However, It has been more than three years since his last of illegal drugs. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.”<sup>2</sup>

Because of his abstention from drug use for three years, and his recognition of the adverse impact on his life that drug abuse could cause, the incompatibility of illegal use with his goals, and his stated desire never to use again, there is reasonable certitude that he will continue to abstain from drug use. Applicant did not attempt to hide his illegal usage. He disclosed it on his e-QIP, his SF 86, and in interrogatories. His illegal drug use ending more than three years ago does not cast doubt on his current reliability, trustworthiness, or good judgment. Because he will not use illegal drugs in the future, confidence in his current reliability, trustworthiness and good judgment with respect to drug use is restored. AG ¶ 26(a) applies.

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<sup>2</sup> ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

*Compare* ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.”) (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

AG ¶ 26(b) applies because he has stated he will not use illegal drugs in the future. He has demonstrated his intent not to abuse drugs in the future by the three years since his last use and by signing a statement of intent with automatic revocation of his clearance for any violation.

AG ¶ 26(c) has limited applicability. He had a prescription for hydrocodone and misused the remaining prescription. He had no prescription for Ritalin. The abuse of these two prescription drugs ended in 2003 and is no longer a problem. AG ¶ 26(d) does not apply because he has not completed a drug treatment program.

### **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 the 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. Applicant, while in college, experimented with LSD and psychedelic mushrooms. Following college, he tried hashish once and cocaine once. His use of marijuana was more extensive as was his misuse of Ritalin and hydrocodone. It appears the majority of his illegal drug use occurred while he was in college.

He is now out of college, does not routinely see his fraternity brothers, is hard working, diligent, and responsible. His friends and co-workers praise his character and dedication. He is living within his means and is current on his debts. He has more than \$50,000 in savings and more than \$20,000 in retirement plans. His decisions reflect his maturity and life goals.



Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his drug involvement.

### **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, Drug Involvement:	FOR APPLICANT
Subparagraph 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.

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CLAUDE R. HEINY II  
Administrative Judge