



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
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SSN: ----- ) ISCR Case No. 08-01310  
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Applicant for Security Clearance )

**Appearances**

For Government: Ray T. Blank, Esquire, Department Counsel  
For Applicant: Pro Se

December 30, 2008

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**Decision**  
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MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits and testimony, Applicant's request for eligibility for a security clearance is granted.

On August 24, 2007, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for her job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a set of interrogatories to obtain clarification of and/or additional information about adverse information in her background.<sup>1</sup> After reviewing the results of the background investigation, including her response to the interrogatories (Gx. 2), DOHA adjudicators were unable to make a preliminary affirmative finding<sup>2</sup> that it is

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<sup>1</sup> Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

<sup>2</sup> Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

clearly consistent with the national interest to allow Applicant access to classified information. On July 11, 2008, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the Revised Adjudicative Guidelines (AG)<sup>3</sup> under Guideline J (criminal conduct) and Guideline H (drug involvement).

Applicant timely responded to the SOR and requested a hearing.<sup>4</sup> The case was assigned to me on September 9, 2008, and I convened a hearing on October 21, 2008. The parties appeared as scheduled. The government presented three exhibits (Gx. 1 - 3). Applicant testified and submitted one exhibit (Ax. A). DOHA received the transcript of hearing (Tr.) on November 5, 2008.

### **Procedural Issue.**

Department Counsel moved to amend the SOR based on evidence presented at the hearing. Applicant did not object to the motion. I also made changes to the SOR to correct typographical errors. (Directive, E3.1.17; Tr. 16 - 19, 55 - 59) As a result, SOR ¶ 1 has been amended to read as follows:

“a. On or about September 2006, in Charleston, South Carolina, you were charged with Possession with Intent to Distribute (PWD) Cocaine. As of April 29, 2008, disposition in this case is pending.

b. On or about August 2006, you were arrested in or around Charleston, South Carolina and charged with Simple Possession of Marijuana. You spent one night in jail and were released on a bond in the approximate amount of \$465.00. As of April 29, 2008, disposition in this case is pending.

c. In approximately August 2002, you were arrested in or around Charleston, South Carolina and charged with Distribution of Ecstasy. After completing a five-month pre-trial intervention program, the charge was dismissed on approximately May 6, 2003.”

### **Findings of Fact**

In addition to the allegations of criminal conduct (Guideline J) in SOR ¶¶ 1.a - 1.c, cited above, the government alleged that, in August 2002, Applicant purchased for \$250 with intent to transport 10 tablets of Ecstasy, and that she subsequently transported same from Florida to South Carolina (SOR ¶ 1.d); and that she illegally

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<sup>3</sup> Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, the Revised Adjudicative Guidelines supercede the guidelines listed in Enclosure 2 to the Directive.

<sup>4</sup> My file did not contain a copy of Applicant's request for hearing. However, at hearing, Department Counsel produced his copy of Applicant's request, and Applicant confirmed she had requested a hearing as part of her response to the SOR.

used marijuana in June 2001 (SOR ¶ 1.e). The government cross-alleged the same conduct as involvement with illegal drugs (Guideline H) in SOR ¶¶ 2.a - 2.e. Although she did not specifically answer the SOR ¶ 2 allegations, her answers to SOR ¶¶ 1.a - 1.e apply to SOR ¶ 2. (Tr. 11 - 13) Applicant admitted the SOR allegations in SOR ¶¶ 1.b - 1.e, but denied the allegation in SOR ¶ 1.a. I have also made the following additional findings of relevant fact.

Applicant is 25 years old and employed as a logistics manager by a defense contractor. She was hired by her employer in September 2006 as a stock clerk and has been steadily promoted during her tenure there. (Gx. 1; Tr. 51 - 52) Applicant graduated from high school in 2001. Her one and only use of illegal drugs was a single use of marijuana in June 2001 around the time she graduated. In July 2001, she got married, but the relationship turned abusive and she left her husband in December 2001. A divorce was finalized in September 2006. In her e-QIP, she indicated she did not know her ex-husband's whereabouts because of a restraining order in place against him. (Gx. 1; Tr. 44)

In January 2002, Applicant enrolled in a South Carolina college to complete degree studies she had started at a community college while she was still living with her ex-husband. In August 2002, Applicant was visiting a friend in Florida. A college friend, whom Applicant had known only a short time, called Applicant and asked her to participate in a drug deal. Applicant agreed to meet a third party, obtain 10 tablets of ecstasy,<sup>5</sup> an illegal drug, and bring the drugs back to South Carolina. Applicant did so, and when she met her friend<sup>6</sup> she was arrested and charged with Distribution of Ecstasy, a violation of South Carolina law. Because Applicant was not the major drug source the police were looking for, she was able to reach an agreement with prosecutors to avoid trial. Applicant completed a pre-trial diversion program, which resulted in dismissal of the charges and expungement of the matter from her record in July 2003. (Gx. 2; Tr. 33 - 35, 45 - 46)

On August 5, 2006, Applicant was arrested and charged with simple possession of marijuana (28 grams or less). She had been on a boat with her then-boyfriend and three other people. All five people aboard had bags in which they carried personal items, snacks, and so on. At some point, Department of Natural Resources police patrolling the area stopped the boat Applicant was in. A search of the boat ensued and a small amount of marijuana was found in one of the five bags. The owner of the boat took responsibility for the drugs. However, when the boat returned to shore the police decided to charge everyone with possession of marijuana. No drugs were found in

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<sup>5</sup> According to the National Institute on Drug Abuse web page (<http://www.nida.nih.gov>), ecstasy (methylenedioxymethamphetamine or MDMA) is a synthetic, psychoactive drug that is chemically similar to the stimulant methamphetamine and the hallucinogen mescaline. It produces an energizing effect as well as feelings of euphoria, emotional warmth, and distortions in time perception and tactile experiences. MDMA is taken orally as a capsule or tablet. It was initially popular among adolescents and young adults in the nightclub scene or at weekend-long dance parties known as raves.

<sup>6</sup> This person was working with local police as an informant to gain favor after she herself was arrested for a drug-related offense. (Gx. 2)

Applicant's bag or on her person. Nor was anyone using drugs while on the boat. (Gx. 2; Tr. 35 - 43, 47 - 48)

The August 2006 drug possession charge was still pending as of Applicant's hearing in this matter. She has never had to appear in court to answer this charge. An October 15, 2008, letter from her attorney to the presiding judge indicated that the charge will likely be disposed of through Applicant's plea of guilty to a charge of disorderly conduct. The drug charge would then be dismissed. (Ax. A) At one point during the pendency of the drug charge, Applicant was told by her attorney that police had obtained a direct indictment, that is, an indictment by a grand jury without a preliminary hearing on the charge of possession of cocaine with intent to distribute. Applicant saw the police find marijuana during the search but never saw them find any cocaine. (Tr. 38, 47 - 48)

When Applicant submitted her e-QIP, she answered "yes" to question 23(a) (*Have you ever been charged with or convicted of any felony offense?*) and listed a September 2006 direct indictment for possession of cocaine with intent to distribute. (Gx. 1) When she responded to the DOHA interrogatories in April 2008, she answered question #7 (*Have you ever been arrested, charged, or held by any law enforcement authorities for any reason?*) in the affirmative. She listed her 2002 arrest for ecstasy distribution, her 2002 arrest for marijuana possession, and a possession of cocaine with intent to distribute charge. (Gx. 2) At her hearing, she testified that she listed the cocaine charge because of what her attorney had told her. In another part of her response to interrogatories, Applicant further stated that she and her attorney had not received any paperwork about the cocaine charge. The government has presented no independent evidence showing Applicant has ever been charged with a cocaine-related offense. The FBI arrest record presented as Gx. 3 lists only the August 2006 marijuana charge. Applicant's attorney has since told her that there was no indictment for cocaine possession. Having heard Applicant's testimony on this matter, including her responses on cross-examination and to questions from the bench (Tr. 28, 38 - 39, 43 - 44, 48 - 50), and having considered the government's argument in support of the allegations in SOR ¶¶ 1.a and 2.a, I specifically find as fact that Applicant was not charged with any cocaine-related offense.

Since her 2002 arrest, Applicant has disassociated herself from people who use drugs. She testified credibly that she was unaware her boyfriend was involved with drugs until they were arrested in September 2006. Thereafter, she threw him out. Applicant lives a stable lifestyle. She owns her own home and is active in the community through volunteer work with a crisis hotline, the SPCA, and the Girl Scouts. (Tr. 31)

## **Policies**

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,<sup>7</sup>

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<sup>7</sup> Directive. 6.3.

and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole person” concept, those 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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under AG ¶ 24 (Guideline H - Drug Involvement) and AG ¶ 30 (Guideline J - Criminal Conduct).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>8</sup> for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.<sup>9</sup>

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Thus, the government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.<sup>10</sup>

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<sup>8</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>9</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>10</sup> See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

## Analysis

### Criminal Conduct.

The government's information does not support the controverted allegation in SOR ¶ 1.a that Applicant was charged with possession of cocaine with intent to distribute. While the SOR allegation was made in good faith based on Applicant's disclosures in her e-QIP and in her response to DOHA interrogatories, no other independent evidence of the alleged conduct was presented by the government. All available information bearing on this allegation shows Applicant, based on what she had been told by her attorney at the time, was simply being candid, albeit misinformed, in response to the government's questions. However, as to the remaining allegations of criminal conduct, the government presented sufficient information to show Applicant had used an illegal substance in 2001, that she had bought and transported interstate an illegal drug in 2002, conduct for which she was arrested, charged and convicted in 2002, and that she was arrested and charged with possession of marijuana in 2006. The foregoing raises a security concern addressed in AG ¶ 30 (criminal conduct); to wit:

Criminal activity creates doubt about a person'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.

More specifically, Applicant's conduct requires application of the disqualifying conditions at AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*). However, as to the 2006 marijuana charge that is still pending after more than two years and is likely to be disposed of through a plea deal, the record supports a conclusion that Applicant did not possess marijuana as alleged and likely has not used marijuana or any other illegal substance since 2001. As to her 2002 arrest and conviction, this appears to be her most recent criminal activity. Owing to the passage of time and positive information about her lifestyle since then, this offense does not currently reflect adversely on her judgment and she is not likely to engage in such conduct in the future. The foregoing requires application of the mitigating conditions listed at AG ¶ 32 (a) (*so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment*), AG ¶ 32(c) (*evidence that the person did not commit the offense*) and AG ¶ 32(d) (*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*). On balance, I conclude the security concerns presented by the government's information about Applicant's criminal conduct are mitigated.

### Drug Involvement.

As alleged in SOR ¶¶ 2.c, 2.d and 2.e, the government presented sufficient information to show that Applicant used marijuana once in 2001 and that she bought,

possessed and transported ecstasy in 2002. For the reasons noted above, there is no support for the SOR ¶ 2.a allegation that Applicant possessed or intended to distribute cocaine. Nor does it appear that she possessed marijuana in 2006 as alleged through SOR ¶ 2.b. Nonetheless, the government's information raises a security concern addressed in AG ¶ 24 as follows:

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.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

More specifically, available information requires application of the disqualifying conditions listed at AG ¶ 25(a) (*any drug abuse (see definition [at AG ¶ 25(a)])*) and AG ¶ 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*). By contrast, available information shows Applicant's last knowing involvement with illegal drugs was in August 2002. She was unaware until a police stop and search that anyone she was with on the boat in August 2006 was involved with illegal drugs. Indeed, when she became aware that her boyfriend used drugs, she ended their relationship. She has not knowingly associated with anyone who uses drugs since 2002.

Available information requires application of the mitigating conditions listed at 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) dissociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence...*). Having considered all of the information bearing on the allegations under this guideline, including positive information about her current lifestyle, I conclude the security concerns presented by the government's information about Applicant's drug involvement are mitigated.

### **Whole Person Concept.**

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines H and J. I have also reviewed the record before me in the context of the whole person factors listed in AG ¶ 2(a). Applicant is 25 years

old and presumed to be a mature adult. She has worked in the same job for just over two years and has been promoted steadily, ostensibly as a result of her reliability. Her employment record does not reflect periods of unemployment that might be characteristic of someone with a drug problem or who is prone to criminal conduct. She lives a stable lifestyle as a homeowner and community volunteer. Having observed her demeanor at hearing, I found her credible and her testimony devoid of any evasiveness or attempts to avoid responsibility for her actions. The facts and circumstances of Applicant's criminal conduct and drug involvement no longer present an unacceptable risk to the national interest were she to be given access to classified information. A fair and commonsense assessment<sup>11</sup> of all available information shows Applicant has overcome the doubts about her ability or willingness to protect the government's interests as her own raised by the adverse information in her background.

### **Formal Findings**

Formal findings 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 J:	FOR APPLICANT
Subparagraph 1.a - 1.e:	For Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraph 2.a - 2.e:	For Applicant

### **Conclusion**

In light of all of the foregoing, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

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MATTHEW E. MALONE  
Administrative Judge

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<sup>11</sup> See footnote 7, *supra*.