



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



In the matter of:	)	
	)	
SSN:	)	ISCR Case No. 08-02406
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Daniel F. Crowley, Esquire, Chief Department Counsel  
For Applicant: *Pro Se*

January 30, 2009

**Decision**

MATCHINSKI, Elizabeth M., Administrative Judge:

**Statement of the Case**

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on May 24, 2007. On July 30, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H that provided the basis for its decision to deny him a security clearance. The action was taken under 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 guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense as of September 1, 2006.

Applicant answered the SOR in writing on August 20, 2008, and requested a hearing before an administrative judge. The case was assigned to me on September 26, 2008, to consider whether it is clearly consistent with the national interest to grant or

continue a security clearance for him. On November 13, 2008, I scheduled a hearing for December 1, 2008.

The parties appeared as scheduled. Four government exhibits (Ex. 1-4) and five Applicant exhibits (Ex. A-E) were admitted without any objections and Applicant testified, as reflected in a transcript (Tr.) received by DOHA on December 11, 2008. Based on a review of the pleadings, exhibits, and hearing testimony, eligibility for access to classified information is denied.

### **Findings of Fact**

DOHA alleged under Guideline H, drug involvement, that Applicant used marijuana with varying frequency from February 1997 through May 2007 (SOR ¶ 1.a), purchased marijuana from at least December 2002 through May 2007 (SOR ¶ 1.b), used Ritalin at least 35 to 40 times from May 2006 through April 2007 when it was not prescribed for him (SOR ¶ 1.c), used “magic mushrooms” at least once in May 2003 (SOR ¶ 1.d) and used opium at least once in June 2002 (SOR ¶ 1.e). Applicant admitted the allegations but denied any intent to repeat the behavior. After considering the evidence of record, I make the following findings of fact.

Applicant is a 30-year-old senior product design engineer who has been employed by a defense contractor since October 2006 (Ex. 1). He is seeking a secret clearance for his duties (Ex. B).

Applicant started smoking marijuana in about February 1997, at the beginning of his second semester in college in state X. He used the drug throughout the remainder of his undergraduate study, usually at parties about once a month (Ex. 1, Ex. 2, Tr. 40). In May 2000, he was awarded his bachelor of science degree in electrical engineering. That summer, he remained at the college, working on his graduate research (Ex. 1).

In September 2000, he began master’s degree studies at a university in a large city in state X where illegal drugs were more easily accessible. While in graduate school, he continued to smoke marijuana at a somewhat higher frequency than in college, “mainly for relaxation purposes in the comfort of [his] own home.” (Ex. 1, Tr. 40). He purchased the drug through friends (Tr. 41). In June 2002, he tried opium while on a weekend trip visiting friends (Tr. 46).

After earning his master’s degree in electrical engineering in December 2002, he began pursuing his doctorate in the same discipline at the same university (Ex. 1, Tr. 38). In late March 2003, Applicant and his spouse married (Ex. 1, Tr. 39). He continued to smoke marijuana. In May 2003, he tried hallucinogenic mushrooms out of curiosity one weekend while visiting a friend (Ex. 1, Ex. 2, Tr. 46).

Applicant’s spouse brought some debt into the marriage that they were not able to satisfy on their income. Applicant had a small stipend as a graduate research assistant at the university. Yet, they managed to qualify for a mortgage, and bought a

home in state X in about September 2003. In February 2004, his spouse stopped working on the birth of their first child (Ex. 1, Tr. 39). She subsequently pursued a career in real estate for a short time until she became pregnant with twins, who were born in September 2006 (Ex. 1, Tr. 39).

Applicant continued to smoke marijuana at home after the birth of his first daughter and while his spouse was pregnant with their twins. In about May 2006, he started using Ritalin, which had been prescribed for his spouse to treat her attention deficit disorder (ADD) (Tr. 42-43). In researching her mental illness and the drug (Tr. 45), Applicant learned that it increased concentration/focus, and he began taking some of her medication so that he could better concentrate on his doctoral thesis (Ex. 1).<sup>1</sup>

In about September 2006, Applicant briefly ceased using marijuana in anticipation of a pre-employment drug screen (Ex. 1).<sup>2</sup> In late October 2006, he began working for the defense contractor in state Y. His employer had a zero tolerance policy against drug abuse on the job or on company premises and indicated in its employee handbook that drug abuse by employees off the job could result in disciplinary action by the company (Ex. 3).

In November 2006, Applicant and his family moved into temporary housing paid for by his employer near his job in state Y. They were unable to obtain a mortgage for a home in the area due to their poor credit (Ex. 1, Tr. 41). In February 2007, Applicant's spouse and children moved back to their home in state X to prepare the premises for sale while Applicant began sharing an apartment near work with a male roommate. Almost every weekend, Applicant drove home, about 500 miles round trip, to see his spouse and children. He resumed smoking marijuana on those weekend trips to state X, assuming, if not knowing, that his employer would not condone it.<sup>3</sup> His spouse, who was also using marijuana at that time, sometimes procured the drug for them. Other times, he bought the drug himself (Tr. 52). Early on Monday mornings, he left his family and drove the 250 miles directly to work in state Y (Tr. 41-42). From February to April 2007, he ingested some of his spouse's Ritalin before he left his house in state X to help him stay awake during the long drive (Ex. 1, Tr. 41-44). Applicant stopped using the Ritalin because of remorse/guilt about using a medication not prescribed for him (Tr. 44).

In May 2007, Applicant was asked by his employer to apply for a DoD security clearance. Applicant informed the facility security officer (FSO) about his use of

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<sup>1</sup>Applicant was eventually awarded his doctorate degree in electrical engineering, although there is discrepant information about the date. On his e-QIP (Ex. 1), he indicated the degree was awarded in June 2007. At his hearing, he testified he received his degree about two weeks before he started work in October 2006 (Tr. 50).

<sup>2</sup>There is no evidence that Applicant ever took a drug screen for his job.

<sup>3</sup>Applicant cannot recall whether he read the employee handbook by which the policy information is disseminated to employees, or whether he just assumed his employer would have a drug policy (Tr. 49).

marijuana in college (Ex. B, Ex. C), and with the FSO's consent,<sup>4</sup> Applicant completed an e-QIP on May 24, 2007. He was candid about his and his spouse's financial difficulties, and about his illegal drug involvement. In response to question 24 concerning any illegal drug use in the preceding seven years, he indicated he used marijuana "many" times from about February 1997 to May 2007; often during undergraduate school, to relax during graduate school, and after a brief cessation in anticipation of a pre-employment drug screen for his present job, on an occasional basis on weekends after he began working for the defense contractor. He averred that on filing out his e-QIP, he decided to cease use of marijuana. Applicant also disclosed that he used Ritalin about 35 to 40 times between May 2006 and April 2007, initially to concentrate while writing his Ph. D thesis, and since February 2007 to stay awake while returning from visits home to see his family. He also listed his one-time uses of "magic mushrooms" in May 2003 and opium in about June 2002. Applicant listed some debts and indicated that at times, he was faced with the choice of buying food or paying the bills (Ex. 1). Applicant told his spouse that he had applied for a security clearance. He told her to not get in any trouble, and that they both needed to stop using marijuana (Tr. 59).

Sometime in summer 2007, Applicant attended a social gathering in state Y where a friend from state X smoked marijuana. This friend was in the area visiting his relatives, and Applicant had suspicions that their socialization would involve marijuana (Tr. 54). Applicant had informed this person in May 2007 not to offer him marijuana in the future because he was applying for a security clearance. Applicant left the premises while the marijuana was smoked (Tr. 55-56), but his spouse smoked the drug (Tr. 57-58). Applicant observed his spouse smoking marijuana on about ten occasions between May 2007, when he asked her to stop using the drug, and December 2007, when they moved to their present residence in state Z (Tr. 58-61).<sup>5</sup> Applicant asserts, with no evidence of record to the contrary, that his spouse ceased her marijuana use in December 2007 (Tr. 58). As of early December 2008, she was still taking Ritalin (Tr. 62).

On May 20, 2008, Applicant was interviewed by a government investigator for further details about his illegal drug involvement. Applicant indicated he stopped using

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<sup>4</sup>The FSO, who is also familiar with Applicant's work in his capacity as chief scientist, indicated on November 14, 2008, that Applicant was up-front about his use of marijuana in college when he was filling out his application for a security clearance. He added that he would not have requested a clearance for him had Applicant showed "any tendency or evidence of his using marijuana while employed with our company." (Ex. C). There is no indication that Applicant told the FSO that he had used marijuana and Ritalin since becoming an employee of the company.

<sup>5</sup>Applicant somewhat reluctantly volunteered the details of his spouse's marijuana involvement. When asked how he obtained the marijuana he used after October 2006, Applicant indicated that his spouse was still living in state X and had contacts there ("I was able to, when I went down to the weekend, have access to it."). In response to whether his spouse was using marijuana as well at that time, Applicant stated, "I don't know if that's relevant." (Tr. 51). Subsequently asked for the number of times that he observed his spouse use marijuana from May 2007 to December 2007, Applicant claimed initially that he could not recall but went on to testify that it was "approximately ten times." (Tr. 60).

marijuana in May 2007 because he did not want to lose his job (“I do not intend to use marijuana again. The temptation is there but there are more important things to do, and I have children. I want to set a good example for them.”). Applicant detailed his use of Ritalin in 2007 and denied any intent to use Ritalin again unless it was prescribed for him. Applicant indicated that his spouse, siblings, and friends are aware of his previous drug involvement so it could not be used against him (Ex. 2).

Applicant and his spouse have been in marital counseling with a clinical psychologist since June 2008. After it was pointed out that some of his symptoms were common to a diagnosis of ADD, the clinical psychologist referred Applicant for a psychiatric evaluation. ADD was ruled out in favor of a depressive disorder (Ex. E, Tr. 35). As of early December 2008, Applicant was in treatment with the clinical psychologist to relieve his mild depression (Tr. 37, 66).

At his hearing, Applicant submitted a written statement of intent not to use or purchase an illegal drug or to misuse a prescription drug again with the full understanding that any security clearance he held would be automatically revoked for any violation (Ex. D). He wants to be a good role model for his children and to retain the job that he loves (Tr. 47). About once or twice a year, Applicant socializes with those friends from state X with whom his spouse used marijuana in summer 2007 (Tr. 56).

Applicant was hired by his employer to work on a new sensor system involving infrared laser technology. During the past two years, he has fully lived up to his employer’s expectations, and has demonstrated an ability to interact with various functional groups. The maturity of his approach to the job and responsiveness to organizational needs led to unsolicited praise from several senior managers (Ex. A, Ex. B).

## **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 overarching 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**

### **Guideline H, Drug Involvement**

The security concerns about drug involvement are set out in 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.

(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.

Applicant began using marijuana during his freshman year of college at parties. He continued to smoke the drug while in graduate school to relax, at times with his spouse, and he purchased the drug on occasion through friends. While he stopped smoking for a brief period in anticipation of a drug screen for his job in fall 2006, he resumed smoking marijuana on weekends until May 2007. He also abused Ritalin while working on his doctoral thesis, and again from February 2007 to April 2007, taking it to stay awake while driving back from visits to his spouse and children. He estimates that over the 2006/07 time frame, he ingested Ritalin that had not been prescribed for him on about 35 to 40 occasions. Applicant also tried opium in June 2002, and hallucinogenic mushrooms in May 2003 out of curiosity. AG 25(a), "any drug abuse," and AG ¶ 25(c), "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," apply.

Concerning potential factors in mitigation under Guideline H, Applicant's involvement with opium and hallucinogenic mushrooms was "so infrequent" as to fall within AG ¶ 26(a), "the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is likely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." However, AG ¶ 26(a) cannot reasonably be applied to his overall drug involvement, given his ten years of marijuana use and abuse of Ritalin about 35 to 40 times over about one year.

At his hearing, Applicant furnished the statement required for AG ¶ 26(b)(4), "a demonstrated intent not to abuse any drugs in the future, such as: (4) a signed statement of intent with automatic revocation of clearance for any violation." AG ¶ 26(b)(4) applies, but it is only one factor to consider in assessing the risk of future abuse. Marijuana was a significant part of Applicant's recreational lifestyle for some ten years. He obviously enjoyed the drug's effects, and he and his spouse continued to smoke even after the births of their three children and despite significant financial problems. On his e-QIP, he indicated that at times, he had to choose between paying the bills and buying food. Yet, these financial difficulties did not stop him from purchasing marijuana. He gave little thought to the illegality of using his spouse's Ritalin without a prescription on many occasions. Concerned that he could test positive in a pre-employment drug screen for his current job, Applicant stopped smoking marijuana for a brief period in fall 2006. However, after he was secure in his position, he resumed his involvement with marijuana. From February to April 2007, he again abused Ritalin on the weekends.

Applicant resolved in May 2007 to abstain from all future illegal drug use, including any use of controlled substances not prescribed for him. A demonstrated intent not to abuse any drugs in the future can be shown by "an appropriate period of abstinence" (see AG ¶ 26(b)(3)). The frequency and duration of previous abuse are

factors to consider in assessing whether the term of abstinence is sufficient to guarantee against recurrence. Applicant's present abstinence of some 18 months is not insignificant, although it is relatively short when compared to his years of marijuana abuse. Moreover, a friend aware that Applicant had to cease his drug use for his job nonetheless pulled out marijuana at a social function attended by Applicant and his spouse in summer 2007. Applicant had suspicions that marijuana would be present at the function and he attended anyway (Tr. 54). Although he showed good judgment in temporarily removing himself from the situation, his spouse smoked the drug on that occasion. Furthermore, Applicant was around his wife when she smoked marijuana on about ten occasions between May and December 2007. While he testified he told her that they both needed to cease their involvement with the drug, he condoned her drug use by staying around while she used it.

Applicant submits that AG ¶ 26(b)(1), "disassociation from drug-using associates and contacts," and AG ¶ 26(b)(2), "changing or avoiding the environment where drugs are used," apply in that drugs are no longer part of his or his spouse's lifestyle since they moved to their present residence in December 2007. There is no evidence that Applicant and his spouse socialize with any regularity with their drug-using friends from state X, but they have not completely terminated the relationships ("Every now and again, we—they're in the area for some family events, so we see them occasionally, once or twice a year at most." Tr. 56). Without the opportunity to assess Applicant's spouse's commitment to remaining drug free, I cannot fully apply AG ¶ 26(b)(1), AG ¶ 26(b)(2), or AG ¶ 26(b)(3). As recently as May 2008, Applicant acknowledged to a government investigator that the temptation is there to use marijuana, and Ritalin is readily available in the home. He now denies any desire to use marijuana ("There's no physical or emotional—what do I want to say—binding with me and marijuana." Tr. 37) or Ritalin, but I am unable to conclude based on the available record that his drug abuse is safely in the past.

### **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 in light of 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

Applicant knew when he used the marijuana, hallucinogenic mushrooms, opium, and Ritalin that he was engaging in illegal conduct. Concerned that he would test positive for marijuana in any pre-employment screen for his present job, he abstained for a brief period, only to resume his involvement once he was on the company's payroll. He continued to smoke marijuana at home for some seven months, and abused Ritalin over three months of that time, assuming if not knowing that his employer would not condone that abuse (see AG ¶¶ 2(a)(1), 2(a)(2), 2(a)(3), 2(a)(4), and 2(a)(5)). Applicant exhibited some maturation in resolving to give up drugs on applying for a clearance, and in candidly disclosing his drug abuse on his e-QIP (see AG ¶ 2(a)(6)). But he also looked the other way while his spouse continued to smoke marijuana for at least seven more months. His desire to retain his employment and the increasing likelihood of his children being affected by his and his spouse's conduct in the home are not sufficient to overcome the drug involvement concerns.

### **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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ELIZABETH M. MATCHINSKI  
Administrative Judge