



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



In the matter of: )  
 )  
----- ) ISCR Case No. 08-04799  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: James B. Norman, Esquire, Chief Department Counsel  
For Applicant: Andrew J. McKay, Esquire

January 26, 2009

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**Decision**

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MATCHINSKI, Elizabeth M., Administrative Judge:

**Statement of the Case**

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on February 8, 2008. On July 24, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H, Guideline E, and Guideline J 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 12, 2008, and requested a hearing before an administrative judge. The case was assigned to me on September

23, 2008, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for him. Counsel for Applicant entered his appearance on October 14, 2008. On October 21, 2008, I scheduled a hearing for November 19, 2008.

The parties appeared as scheduled on November 19, 2008. Two government exhibits (Ex. 1-2) and two Applicant exhibits (Ex. A-B) were admitted without any objections and Applicant testified, as reflected in a transcript (Tr.) received by DOHA on November 28, 2008.

### **Findings of Fact**

DOHA alleged under Guideline H, drug involvement, that Applicant used marijuana with varying frequency from about January 2006 to at least September 2007 (SOR ¶ 1.a), cocaine in at least Summer 2007 (SOR ¶ 1.b), and hallucinogenic mushrooms (psilocybin) in at least 2007 (SOR ¶ 1.c). Under Guideline E, personal conduct, DOHA alleged that Applicant falsified his February 2008 e-QIP by not disclosing his use of cocaine and psilocybin (SOR ¶ 2.a). Because of the alleged falsification of his e-QIP, Applicant was alleged under Guideline J, criminal conduct, to have committed a felony violation of 18 U.S.C. § 1001 (SOR ¶ 3.a). Applicant admitted the allegations, but offered to submit a statement of intent not to use any illegal drugs in the future. After considering the evidence of record, I make the following findings of fact.

Applicant is a 24-year-old computer hardware engineer who has been employed by a nonprofit federally funded research and development firm since February 2008 (Ex. 1, Tr. 25). He requires a security clearance for his duties (Ex. B).

Applicant attended a vocational/technical high school from September 1998 to May 2002. He graduated first in his class (Tr. 23) and, in August 2002, began college studies in electrical and computer engineering. He had work-study obligations of about 15 hours a week around his academic schedule, and resided during his freshman year in a dormitory at the college (Tr. 21).

Although Applicant had not previously used illegal drugs, in about May 2003, he joined a fraternity that had a reputation on campus for marijuana use among its residents (Tr. 52). He continued to focus on his academic studies and to fulfill his work-study obligations, abstaining from illegal drugs and alcohol out of fear that he might become an alcoholic or addict as his father had been (Answer, Ex. 1, Ex. 2, Tr. 27, 51).

Toward the end of his junior year in college, Applicant began to experiment with alcohol. He found he could drink responsibly at college parties without letting alcohol get in the way of his studies or personal relationships (Answer, Tr. 27, 51). In January 2006, at the start of his last college semester, Applicant tried marijuana. Although he did not enjoy marijuana as much as he did alcohol, he smoked the drug, usually at weekend parties at the fraternity house (Answer, Ex. 2, Tr. 27, 35). On occasion, Applicant smoked marijuana with longtime friends from his hometown (Tr. 40). Applicant did not seek out the marijuana but smoked when it was offered to him (Tr. 28). In May 2006,

Applicant was awarded his B.S. degree in electrical and computer engineering (Ex. 1). He was given an academic prize for being one of the top students in his major (Tr. 22-23). During his four years as an undergraduate, Applicant volunteered every year in local events to benefit the Special Olympics and March of Dimes (Tr. 24).

In July 2006, Applicant relocated to pursue graduate study in electrical and computer engineering, which he commenced that September (Ex. 1, Tr. 23). He continued to work about 15 hours a week at the hardware engineering company where he had been employed part-time since March 2006 (Tr. 21-22). The company built high-end computers for signal and image processing applications and performed work for the U.S. government (Tr. 30-31). Applicant was unaware of whether the company had a policy against substance abuse (Tr. 31).

In May 2007, Applicant left the job for a research assistant position in the university's college of engineering (Ex. 1, Tr. 34). Applicant tried cocaine and psilocybin one time each in 2007. He used the cocaine while at a party at a female friend's apartment sometime that summer (Ex. 2, Tr. 28). He did not experience immediate noticeable effects other than to become more talkative, but the following day felt a "bit of a craving for it." (Tr. 42) Concerned about the financial cost and potential addiction associated with continuing to use cocaine, he resolved not to use it again (Tr. 28-29, 42). He used the hallucinogenic mushrooms out of curiosity with a close friend, whom he has known since middle school (Ex. 2, Tr. 41). The drug had unpleasant effects ("like food poisoning") such that it was not worth trying again (Tr. 42-43).

Applicant continued to use marijuana while in graduate school until about September 2007 (Ex. 1, Ex. 2, Tr. 34). In January 2008, Applicant was awarded his master's degree in electrical and computer engineering (Ex. 1, Tr. 23).

In about November 2007, Applicant attended a career fair at the university where he learned of job opportunities with his current employer (Tr. 24). On being called in for a job interview, Applicant decided to refrain from any future use of illegal drugs (Answer, Tr. 44). He accepted a position while he was working on defending his thesis (Tr. 25).

Needing a security clearance, Applicant executed an e-QIP on February 8, 2008. He responded affirmatively to whether he had illegally used any controlled substance since the age of 16 or in the last seven years, whichever is shorter. He disclosed he had used marijuana an estimated 15 times between January 2006 and September 2007, and added the following comment: "Occasional responsible recreational use. Never a heavy user, I have stopped using for personal and professional reasons." (Ex. 1). Applicant did not disclose the "isolated occasions" on which he used cocaine and psychedelic mushrooms in "self-defense and self-preservation." He believed they did not reflect him as a person and he did not want to embarrass or incriminate himself or his friends (Answer). Except for a few friends, no one was aware that he had used cocaine and psilocybin and Applicant was concerned that others would learn about these "mistakes" that he was ashamed about (Tr. 38-39). Applicant regrets his "poor

judgment” in not revealing his involvement with cocaine and psilocybin on the e-QIP (Tr. 38).

After he submitted his security clearance application, Applicant realized it was not his call to make about whether or not the drug use reflected adversely on his character, including his trustworthiness (Tr. 39). On March 12, 2008, Applicant was interviewed by a government investigator about his illegal drug use. He indicated that he used marijuana approximately 15 times from January 2006 to September 2007. He was unable to recall when he last used marijuana other than it occurred at least five months earlier. He had smoked it with two of his closest friends, including his friend from middle school, although it was usually at random parties on weekends in college. Applicant averred he had resolved not to use any illegal drug in the future as soon as he heard about his present job. After he had discussed his marijuana involvement, he was asked whether there was anything else he wanted to add (Tr. 46). At that point, Applicant disclosed he had tried cocaine and psilocybin once each while socializing with different friends, and that he had omitted this involvement from his e-QIP because of his one-time abuse of the substances. Applicant denied ever purchasing any illegal drug and any intent of future involvement (Ex. 2).

Applicant was aware when he used marijuana, cocaine, and psilocybin that the use of such substances was illegal. He personally does not believe he should be labeled as a criminal because of his drug use, which he characterized as “safe, responsible, recreational, and very occasional.” (Answer). He has yet to formulate an opinion as to whether cocaine should be illegal (Tr. 53-54). He is willing to execute a statement of intent not to use any illegal drugs in the future (Tr. 47).

Applicant continues to socialize with the old friends from his hometown with whom he used marijuana on occasion and psilocybin once in the past. He considers them his “best friends.” He is also still friendly with “a handful” of his college friends with whom he smoked marijuana in the past (Tr. 40). Applicant has had the opportunity to use marijuana while socializing with his friends since September 2007, to include as recently as November 2008 (Tr. 49). He refrained from illegal drug use but others used marijuana in his presence (Tr. 50). Applicant did not see it as a problem since he did not partake (“I mean if my friends want to make their own decisions, that’s fine.” Tr. 50). Marijuana is around “not all the time but frequently enough” in that context (Tr. 44). When asked whether he intended to continue to associate with his drug-using friends, Applicant responded:

I mean if you want me to leave the room, that’s not a problem, but I mean some of these people are my best friends. Some of them aren’t my best friends, they are just people I happen to hang out with, but I mean none of them are really heavy users either. (Tr. 57-58)

Applicant has told his friends that he no longer uses illegal drugs (Tr. 50). Realizing the opportunity for drug use persists within his social circle, Applicant submits he has “the strong willpower to avoid the situations” if he needs to (Tr. 58).

In his first few months on the job with the defense contractor, Applicant became a key contributor on his primary task focusing on the security of information in embedded devices, and in a part-time task involving a next generation of communications protocol for the military (Ex. A, Tr. 26). His level of performance set him apart from other entry-level staff members (Ex. A). Applicant's supervisor attests that Applicant has the skill set in hardware design, digital signal processing, secure electronics, and embedded systems needed for the work in the electronic systems development department of the company, and that the nature of the work requires classified access (Ex. B). Applicant understands he needs the clearance to keep what he regards as "a dream job" for him (Tr. 29). His employer and most of his friends are unaware that he has used cocaine or psilocybin. Although Applicant has told his father about his drug involvement, he has not told other family members (Tr. 39).<sup>1</sup>

### **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

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<sup>1</sup>In response to whether his parents know of his drug involvement, Applicant responded, "I have had to tell my dad." (Tr. 39). It may reasonably be inferred that other family members, including his mother, remain unaware.

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 concern about drug involvement is 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.” Applicant began using marijuana during his senior year of college. He continued to smoke the drug while in graduate school until about September 2007. He also tried cocaine and psilocybin one time each in 2007 when socializing with friends. AG ¶ 25(a), “any drug abuse,” applies. Apart from having physical control of marijuana, cocaine, and psilocybin on the occasions of usage, there is no evidence that Applicant otherwise possessed illegal drugs or paraphernalia that would warrant application of AG ¶ 25(c), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.”

Concerning potential factors in mitigation under Guideline H, Applicant’s involvement with cocaine and psilocybin (once each) was “so infrequent” 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, given his marijuana involvement on about 15 occasions over a 21-month time span and continuing to at least September 2007.

In his favor, Applicant resolved in Fall 2007 to refrain from any illegal drug use in the future. When he answered the SOR and at his hearing, Applicant expressed his willingness to execute 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.” While I do not doubt the sincerity of his intent, there is an unacceptable risk of a relapse where he continues to associate with friends who use illegal drugs. As recently as two weeks before his November 2008 hearing, he remained in the presence of his friends while they smoked marijuana. Although he has told his friends that he no longer uses controlled substances, 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,” clearly do not apply. While a demonstrated intent not to abuse any drugs in the future can yet be shown by “an appropriate period of abstinence” (see AG ¶ 26(b)(3)), it must be considered that during the past 14 months, Applicant has at times been in the presence of others smoking marijuana around him.

Applicant asserts he has the willpower to “definitely avoid the drugs” in the future, including to leave the room while his friends smoke. At the same time, he considers some of them his best friends, and he is likely to continue to associate with them. They have not changed their drug-using behavior around Applicant, who acknowledged at his hearing that the opportunity for him to use drugs is frequent enough. With his job on the line, one would expect that Applicant would at a minimum take steps to avoid being around when others are using illegal drugs. His failure to do so considerably undercuts his reform.

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

The security concern about personal conduct is set out in 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.

When Applicant applied for a security clearance in February 2008, he disclosed his involvement with marijuana but deliberately omitted his abuse of cocaine and psilocybin out of embarrassment and concern that the information may become known beyond the few friends aware of his then very recent abuse of those two drugs. The security concerns under AG ¶ 16(a), “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities,” and AG ¶ 16(e), “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing,” are established.

Applicant is credited with detailing his involvement with both cocaine and psilocybin when he was interviewed in March 2008. While Applicant's admissions at that time were in response to a general query from the investigator (Tr. 46), there is no indication he had to be confronted with the facts. AG ¶ 17(a) applies in mitigation where "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification, before being confronted with the facts." His effort to correct the record is viewed as sufficiently prompt in this case, given it occurred at his first opportunity. Applicant was not asked at his hearing whether he knew he could have contacted the government directly to correct the record.

Applicant satisfies AG ¶ 17(d), "the individual has acknowledged the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur," but only in part. He recognized on his own that his disclosure of his more extensive involvement with marijuana did not relieve him of his obligation to report his experimentation with cocaine and psychedelic mushrooms. He candidly admitted he was in the presence of friends who were using drugs as recently as two weeks before his hearing. But in light of the recency of his falsification and his continued concealment of his drug involvement from his employer and some family members, it is too soon to conclude that the behavior is unlikely to recur. AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress," is implicated where Applicant informed his father about his drug involvement. At the same time, he has yet to be forthcoming about his drug abuse with other family members, his employer, and the supervisor who provided a character reference on his behalf.

Personal conduct concerns may be raised by ongoing association with persons involved in criminal activity, which would include illegal drugs (see AG ¶ 16(g), "association with persons involved in criminal activity"). As discussed under Guideline H, *supra*, Applicant also exercised poor judgment that would fall within the general concerns underlying Guideline E (see AG ¶ 15) by using illegal drugs. Since his drug abuse and ongoing socialization with drug-using friends were not alleged as raising personal conduct concerns, they cannot provide independent bases for denial under Guideline E. However, they are appropriate to consider when evaluating Applicant's suitability for continued access to classified information under the whole-person concept, *infra*.

## **Guideline J, Criminal Conduct**

The security concern about criminal conduct is set out in AG ¶ 30: "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." By signing his February 2008 e-QIP, Applicant certified his statements on the form were "true, complete, and correct to the best of [his] knowledge and belief and [were] made in good faith." He was on notice that a knowing and willful false statement was punishable as a crime. His deliberate omission of his cocaine and



psilocybin involvement from his e-QIP constituted felony violations of federal law under 18 U.S.C. §1001. Disqualifying condition AG ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted,” applies.

As discussed under Guideline E, *supra*, his voluntary rectification at his first available opportunity carries considerable weight in assessing his rehabilitation. After he submitted his e-QIP, Applicant realized he was not in a position to determine what should be considered in evaluating his security suitability or personal character. He was candid at his hearing about his ongoing association with illegal drug users, and about his enjoyment of the effects of at least the marijuana and cocaine (“I can’t sit here and honestly tell you that drugs don’t make you feel good,” Tr. 28). His recent performance evaluation (Ex. A) confirms his positive contributions at work, and he has a record of community involvement in that he volunteered to assist with the Special Olympics and the March of Dimes while in undergraduate school. However, I am unable to fully apply AG ¶ 31(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.” Applicant risks future drug abuse and exhibits extremely poor judgment by remaining in situations conducive to relapse. His family, most of his friends, and his employer, are likely unaware of his continued socialization with known drug users.

### **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 controlled substances during his last year of college and in graduate school that his conduct was illegal. Concerned that his involvement with drugs like cocaine and psychedelic mushrooms could affect others’ opinions of his character, he was not completely forthcoming about his illegal drug

involvement on his security clearance application. While his decision to forego future drug use and his subsequent candor with the government alleviate some of the security concerns in this case, considerable doubts persist about his judgment and reliability where just two weeks before his hearing, he chose to remain around his friends while they smoked marijuana in his presence. His failure to appreciate the inappropriateness and risk presented by that behavior post-SOR is especially troubling. Based on the record presented, I am unable to conclude it is clearly consistent with the national interest to grant him access to classified information.

### **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:

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|---------------------------|-------------------|
| Paragraph 1, Guideline H: | AGAINST APPLICANT |
| Subparagraph 1.a:         | Against Applicant |
| Subparagraph 1.b:         | Against Applicant |
| Subparagraph 1.c:         | Against Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |
| Subparagraph 2.a:         | Against Applicant |
| Paragraph 3, Guideline J: | AGAINST APPLICANT |
| Subparagraph 3.a:         | 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