



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



In the matter of:	)	
	)	
	)	ISCR Case No. 08-09697
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: John B. Glendon, Esquire, Department Counsel

For Applicant: *Pro se*

February 26, 2010

**Decision**

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has mitigated the security concerns raised under the guideline for drug involvement. Accordingly, his request for a security clearance is granted.

**Statement of the Case**

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on August 14, 2008. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>1</sup> that it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

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<sup>1</sup> Required by Executive Order 10865, as amended, and DoD Directive 5220.6 (Directive), as amended.

On August 21, 2009, DOHA issued to Applicant a Statement of Reasons (SOR), which specified the basis for its decision: security concerns addressed in the Directive under Guideline H (Drug Involvement) of the Revised Adjudicative Guidelines (AG).<sup>2</sup>

Applicant signed his notarized Answer on October 7, 2009. He admitted both allegations under Guideline H and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on November 6, 2009, and the case was assigned to me on November 16, 2009. DOHA issued a Notice of Hearing on December 11, 2009. I convened the hearing as scheduled on January 6, 2010. Government counsel offered two exhibits, which I admitted as Government Exhibits (GE) 1 and 2. Applicant testified on his own behalf and presented the testimony of two witnesses. He also offered five exhibits. I marked and admitted Applicant Exhibits (AE) A through D. Department Counsel objected to parts of AE E. I admitted AE E, reserving my decision on its weight. DOHA received the transcript on January 13, 2009.

### **Evidentiary Ruling**

Applicant's Exhibit E is a report from a private polygrapher that contained the following: the polygrapher's description of Applicant's pre-polygraph interview, listing his questions to Applicant and Applicant's responses (pages 1 and 2); the polygrapher's opinion as to Applicant's truthfulness (page 2); results of Applicant's polygraph (page 3); Applicant's identifying information (page 4); polygrapher's license (page 5); polygrapher's curriculum vitae (pages 6 - 13); and the polygrapher's identification card (page 14).

Department Counsel objected to the portion of page 2 that contains the polygrapher's opinion as to Applicant's truthfulness; and to page 3, the technical results of the polygraph. The Appeal Board has held that an applicant's statements made during the course of a polygraph examination are admissible, while polygraph results and the polygrapher's opinion of a subject's veracity are not admissible.<sup>3</sup> Accordingly, I assign no weight to that portion of page 2 containing the polygrapher's opinion of Applicant's truthfulness, and no weight to the polygraph results on page 3. As to the remainder of the exhibit, I found that the admissible portions did not substantively contribute to the case, and accorded them little weight.

### **Findings of Fact**

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<sup>2</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. The Revised Adjudicative Guidelines supersede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

<sup>3</sup> See ISCR Case No. 02-31428 (App. Bd. Jan 20, 2006) at 3.

Applicant's admissions in response to the SOR are incorporated herein as findings of fact. After a thorough review of the pleadings, Applicant's response to the Statement of Reasons, and the record evidence, I make the following additional findings of fact.

Applicant, who is 32 years old, earned a bachelor's degree in management science and information technology in 1999. He has worked as a web consultant since 2002. He has been employed by the same defense contractor in that position since 2007. Applicant is single and has no children. This is his first application for a security clearance. (GE 1; Tr. 49-50)

Applicant stated in his Answer that he used ecstasy at a friend's house between 2000 and 2002. In his Answer and at the hearing, he stated that it occurred "in what I believe was 1999." He adjusted the date because he realized he used it during vacation, before he graduated college in December 1999. This was the only time he used Ecstasy. (GE 2; AE A; Tr. 78-79)

In his security clearance application, Applicant listed five uses of marijuana between 1999 and 2008. In his Answer and at the hearing, he clarified that he was exposed to marijuana five times, but only smoked it himself on three of those occasions. In 1999 and in the spring of 2001, Applicant was exposed to marijuana when he was driving with friends. He stated that he did not use marijuana himself on either of these occasions, and no longer associates with these friends. In the summer of 2001, while at a beach party, Applicant accepted an offer to "take a drag from the bong." He stated in his Answer that, "This was actually the first time I ever inhaled." In 2002, while on a cruise, he shared a marijuana cigarette that was passed among his friends. He did not know the man who offered him the cigarette, and he has not seen him since then. His last use of marijuana occurred in July 2008. Applicant was at a friend's house preparing to leave for a kickball game. He was offered a joint and accepted it, taking one "drag." He has not seen this friend since the winter of 2008. (AE A; Tr. 49-58)

Applicant denies purchasing or selling either marijuana or ecstasy. He used marijuana in response to peer pressure. His employer and his parents are aware of his drug use. Applicant has not participated in drug counseling or a drug treatment program, but was evaluated by a drug counselor in November 2009. He took three drug tests, administered by prospective employers, all of which were negative. He no longer associates with any of the friends with whom he used drugs. Applicant has had no involvement with law enforcement related to illegal drug use. He disclosed his drug use on his security clearance application, during his security interview, and in his interrogatory responses. He admits that he made bad decisions when he decided to use illegal drugs. He has no intent to use illegal drugs in the future. He submitted a signed statement declaring this intent, aware that future use could result in revocation of any security clearance that he is granted. (GE 1, 2; AE A, D; Tr. 28-47, 62-63, 87-88)

Applicant's current supervisor testified on Applicant's behalf. He has supervised Applicant since April 2009. Applicant informed him of his drug use in approximately August 2009. He has never seen Applicant under the influence of drugs or alcohol. Applicant performs well at his job. His supervisor finds him reliable and trustworthy, and recommends him for a security clearance. (Tr. 19-25)

In November 2009, Applicant contacted a drug counselor to obtain an evaluation. At the hearing, the counselor offered his professional opinion of Applicant's current drug status.<sup>4</sup> The witness holds a master's degree in counseling, and has been a state-licensed professional counselor since 1997. He is a nationally certified master addiction counselor, and is certified by the U.S. Department of Transportation as a substance abuse professional. He has been in practice 12 years. He is also the director of an outpatient mental health and substance abuse practice. He conducted an in-depth interview of Applicant, a urinalysis, and substance-abuse testing. He found that Applicant's illegal drug use stemmed from curiosity and peer pressure. Applicant's conduct does not meet the definition of either drug abuse or dependence, as defined by the Diagnostic and Statistical Manual (DSM). Based on his evaluation, he concluded that there is "a very low probability of [Applicant] using again" in the future. (Tr. 28-47)

Applicant's project manager, who has known Applicant for two years, submitted a notarized affidavit in which he stated that Applicant has never shown any indication of illegal drug use. Applicant informed him of his drug use when they both submitted security clearance applications in 2008. The affiant noted that Applicant has been discrete in his handling of sensitive information. He believes Applicant to be honest and trustworthy. Applicant's former project manager, who has also known Applicant for two years, submitted a notarized affidavit stating that Applicant informed him in 2008 of his illegal drug use. As the witness holds a security clearance, he is aware of the responsibility to report risks posed by others. He believes Applicant to be honest and trustworthy, and has never seen him engage in questionable behavior. (AE B, C).

### **Policies**

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised AG.<sup>5</sup> Decisions must also reflect consideration of the "whole person" factors listed in ¶ 2(a) of the Guidelines.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable

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<sup>4</sup> Department Counsel had no objection to the witness's qualifications to provide an expert opinion. (Tr. 40)

<sup>5</sup> Directive. 6.3.

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 Guideline H (Drug Involvement).

A security clearance decision is intended only to resolve the questions of whether it is clearly consistent with the national interest<sup>6</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>7</sup> A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, 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 his 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>8</sup>

## Analysis

### Guideline H, 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.

Of the eight disqualifying conditions listed at AG ¶ 25, the following are relevant:

(a) any drug abuse; and

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<sup>6</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>7</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>8</sup> See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant did not purchase illegal drugs, but admits illegally using marijuana and Ecstasy. He used Ecstasy once, and marijuana between 3 and 5 times from 1999 to 2008. Applicant's illegal drug use demonstrated poor judgment and willingness to break the law. Both disqualifying conditions apply.

AG ¶ 26 includes three mitigating conditions that warrant consideration in relation to these facts:

(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

(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;

(4) a signed statement of intent with automatic revocation of clearance for any violation; 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 used ecstasy one time in approximately 1999. I consider this use distant in time and experimental. He used marijuana three to five times in nine years, between the years of 1999 and 2008. I find this use to be infrequent. Applicant credibly testified that he ended his marijuana use in July 2008, one-and-one-half years ago. Since 2007, he has been working steadily at a full-time, professional position. According to his supervisor, he is performing responsibly, and is trustworthy and dependable. These facts support a finding of current trustworthiness and reliability. Mitigating condition AG ¶ 26(a) applies.

Mitigation is also available under AG ¶ 26(b) (1), (3) and (4). Applicant no longer associates with the friends with whom he used drugs. He has abstained from illegal drugs for approximately one-and-one-half years. This is not an extensive period of abstinence, but in light of the other favorable factors, it is an additional positive indication of his commitment to avoid illegal drugs. The drug tests administered by three prospective employers were negative. In addition, Applicant submitted a statement that he will not use illegal drugs in the future, with the understanding that any use would jeopardize his security clearance. AG ¶ 26(b) applies.

Partial mitigation is available under AG ¶ 26(d). This mitigating condition involves completion of a drug treatment program, which does not apply to Applicant. However, it warrants discussion because Applicant did undergo an evaluation by a qualified medical professional. In the expert opinion of the drug counselor, Applicant does not meet the DSM criteria for drug abuse or drug dependence, and has a very low probability of using illegal drugs in the future. I consider his testimony to be a favorable prognosis. Mitigating condition 26(d) applies in part.

### **Whole Person Analysis**

Under the whole person concept, an administrative judge must evaluate the applicant's security eligibility by considering the totality of the Applicant's conduct and all the circumstances. An 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guideline and the whole person concept. I considered the potentially disqualifying and mitigating conditions under the guideline in light of all the facts and circumstances surrounding this case.

Applicant used Ecstasy once between eight and ten years ago. He used marijuana three to five times. Most of the marijuana use occurred between 1999 and 2002, with a single use in 2008. Most of his illegal drug use is distant in time. Although his 2008 use is more recent; and does not represent an extensive period of abstinence, I evaluate it in conjunction with his other conduct: his dissociation from his drug-using associates, his supervisor and co-workers' opinions of his trustworthiness, his intent to

avoid future use, and the expert's opinion of a very low likelihood of recurrence. Applicant demonstrated maturity by realizing that he made poor decisions when he used illegal drugs, and by fully disclosing his drug use during the security clearance process. He now holds a responsible, full-time job where he has performed dependably for more than two years. His conduct reflects positively on his current trustworthiness.

Overall, the record evidence satisfies the doubts raised about Applicant's suitability for a security clearance. for all these reasons, I conclude applicant has mitigated the security concerns arising from the drug involvement guideline.

### **Formal Findings**

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraphs 1.a. – 1.b.:	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 allow Applicant access to classified information. Applicant's request for a security clearance is granted.

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RITA C. O'BRIEN  
Administrative Judge