



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



In the matter of: )  
)  
) ISCR Case No. 08-09851  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Daniel Crowley, Esquire, Department Counsel

For Applicant: Kathleen E. Voelker, Esquire

December 16, 2009

**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 guidelines for drug involvement and personal conduct. Accordingly, his request for a security clearance is granted.

**Statement of the Case**

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on July 2, 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 June 23 2009, DOHA issued to Applicant a Statement of Reasons (SOR), which specified the basis for its decision: security concerns addressed in the Directive under Guidelines H (Drug Involvement) and E (Personal Conduct) of the Revised Adjudicative Guidelines (AG).<sup>2</sup>

Applicant submitted a notarized, undated Answer, which was received by DOHA on July 13, 2009. Applicant admitted all allegations under Guideline H and Guideline E and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on August 31, 2009, and the case was assigned to me on the same day. DOHA issued a Notice of Hearing on September 9, 2009. I convened the hearing as scheduled on October 6, 2009. Government counsel offered three exhibits, marked as Government Exhibits (GE) 1 through 3, which were admitted without objection. I took administrative notice of two documents provided by the government, identified as Hearing Exhibits I and II. Applicant testified on his own behalf and presented the testimony of four witnesses. He also offered seven exhibits, marked as Applicant Exhibits (AE) A through G, which were admitted without objection. DOHA received the transcript on October 13, 2009.

### **Findings of Fact**

Applicant's admissions in response to the SOR are admitted as 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 26 years old, earned a bachelor's degree in biology in May 2008. He is currently pursuing a master's degree in biotechnology (Tr. 85-88). He is single and has no children. Applicant has been employed by a defense contractor as an assistant scientist since July 2008. At that time, he submitted his first security clearance application (GE 1; Tr. 85-88).

Between 2001 and 2006, Applicant was terminated from several jobs. In 2001, when Applicant was 17, he worked as a summer camp counselor. He was terminated for drinking alcohol while on the premises. He admits that he was drinking alcohol with friends at the time, and was under the legal age to consume alcohol (Tr. 90-92). In 2005, when he was 22 years old, Applicant worked at the counter of a coffee bar. He was terminated for drinking beverages without paying for them. He was given a warning after the first time, and was terminated after the second instance (Tr. 93-95). Applicant worked at another coffee bar from June 2007 to November 2008. His supervisor in that position

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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.

submitted a character reference stating that Applicant had not used any products without purchasing them during his employment (AE G).

Applicant's third termination occurred in 2006, when he was 23. Applicant worked for a pizza delivery company. He informed his supervisor that he could not work on Sundays. Initially, he was not scheduled for that day, but eventually, the supervisor assigned him to work Sundays. Applicant called in sick when he was not sick when he was assigned to work on Sunday, and later, failed to report to work if assigned on Sunday. He was terminated for excessive absences (GE 1, 2; Tr. 96-99).

During his senior year of high school, at the age of 17, Applicant began using marijuana. He used it until August 2007, when he was 24 years old (Tr. 106). His use varied: he used it from two to three times per week from 2001 to 2002, then once or twice per month from 2002 to 2004. His use increased in 2004 until he was using marijuana almost daily toward the end of 2004. At that point, he left the out-of-state university he was attending and returned home. While living at home, he began attending a local university in the fall of 2005. His use decreased to once or twice per week. He briefly abstained from marijuana use between April and August 2006. He abstained to show that he was not addicted to marijuana. After deciding he was not addicted, he returned to using marijuana, gradually increasing his usage from twice per month, to once per week, and by the end of the fall semester, he was using it two to three times per week. Applicant continued at this pace until about May 2007. Using the drug made him complacent and had a negative effect on his grades. He began to decrease his usage until he decided, in August 2007, to quit entirely (GE 2, 3; Tr. 106-111).

Over the years, Applicant used marijuana with friends, and usually obtained it by purchasing it. When he moved back to his parents' home in 2005, he used it with his younger brother and his brother's friends, and obtained it from them. He no longer lives at his parents' home. He does see his younger brother at weekly family gatherings, but they do not associate socially, as they used to in the past. He last associated with his brother's friends in August 2007. He testified that he no longer associates with any of the people with whom he used marijuana in high school or college (GE 2, 3; Tr. 111-117).

In addition to marijuana, Applicant used other drugs illegally including ecstasy, gamma hydroxybutyrate (GHB), and cocaine. Over a six-month period from 2001 to 2002, Applicant purchased and used the drug GHB without a prescription.<sup>3</sup> He used it

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<sup>3</sup> Gamma hydroxybutyrate (GHB) is a central nervous system depressant whose use is specifically restricted by the Food and Drug Administration to the treatment of narcolepsy. Known as a "club drug," it is often abused by teenagers and young adults at clubs and weekend-long parties called raves. Repeated use can cause insomnia, anxiety, tremors and sweating. Use can result in seizures. At high doses, the sedative effects can cause sleep, coma, or death (Hearing Exhibit I: National Institute on Drug Abuse, "Club Drugs (GHB, Ketamine, and Rohypnol)" June 2009).

approximately six times, paying \$5 each time. He was 18 years old and was attending an out-of-state college at the time. Applicant also used ecstasy<sup>4</sup> two times during a weekend in the Fall of 2005, when he was 21 years old (GE 3; Tr. 117-120).

In August 2007, Applicant tried cocaine three times. Shortly after, he used marijuana again. He testified that he decided that month to stop using illegal drugs and has not used any since that time. He believes he initially used marijuana because of peer pressure, and later as a way to self-medicate when he was depressed (GE 3; Tr. 120-125).

Applicant experienced depression for a number of years. He believes he increased his marijuana use in 2004, in part, to deal with his depression. He began counseling in March 2005. He took prescribed medication to treat his depression. The medication was no longer required after August 2007. He completed therapy in January 2009. He credits the counseling with helping him to end his use of illegal drugs (GE 1; Tr. 126-127).

Applicant testified about the negative effects marijuana use has had on his life. It caused him to waste money, waste time, and it interfered with his school performance. He testified that he would have graduated approximately three years earlier if he had not been using illegal drugs. He believes that his employment difficulties stemmed from the complacency he felt when he used drugs. Applicant testified that he has no intent to use illegal drugs in the future. He submitted a document stating his intent not to use illegal drugs in the future. He also submitted the results of two random drug screenings performed by his current employer. The results of both tests, performed on December 10, 2008 and May 28, 2009, were negative (GE 2; AE D, F; Tr. 102-103, 128-130).

Applicant's witnesses included his current supervisor, his girlfriend, his supervisor from a previous job, and his brother. His current supervisor described Applicant as exemplary in accounting for his time at work, and a reliable worker who is conscientious and punctual (Tr. 25-28). She prepared his June 2009 performance evaluation, in which she found that he met expectations in all categories (AE A). Applicant's section manager submitted a character reference that also attests to his attention to detail and willingness to perform extra tasks to accomplish a goal (AE E). His girlfriend, who is also his co-worker, testified that Applicant has not used drugs in the one-and-one-half years that she has known him. He is a reliable worker and a trustworthy friend (AE A, E; Tr. 68-75). Applicant and his brother live together. He testified that he knows Applicant does not use

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<sup>4</sup> Ecstasy is the common name for the psychoactive drug methylenedioxymethamphetamine (MDMA). It was initially popular among adolescents and young adults, who used it at clubs and raves. It produces feelings of energy and euphoria, as well as distortions in time perception and tactile experience. MDMA causes confusion, depression, sleep problems, drug craving, and severe anxiety. The effect can occur days or weeks after ingestion. Animal studies have shown that harm to the brain was still apparent six to seven years after ingestion. Some people become addicted to MDMA (Hearing Exhibit II: National Institute on Drug Abuse, "InfoFacts: MDMA (Ecstasy)" June 2009).

marijuana based on Applicant's behavior, and the fact that there has been no negative effect on their finances (AE C; Tr. 50, 55).

## 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 Adjudicative Guidelines (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 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) and Guideline E (Personal Conduct).

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>

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

<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).

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

Applicant admits to illegally using several substances including marijuana, cocaine, ecstasy, and GHB. He purchased most of these drugs. Applicant's use of ecstasy, cocaine, and GHB was infrequent. However, he used marijuana over a seven-year period from 2000 to 2007, beginning when he was 17 and ending when he was 24. Applicant's marijuana use was frequent, long-standing, and demonstrated poor judgment and willingness to break the law. Both disqualifying conditions apply.

AG ¶ 26 includes two relevant mitigating conditions:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
  - (1) disassociation from drug-using associates and contacts;
  - (2) changing or avoiding the environment where drugs were used;
  - (3) an appropriate period of abstinence;

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

Over a six-year period from 2001 to 2007, Applicant used cocaine three times, GHB about six times, and ecstasy twice. I find that this use was infrequent and experimental in nature. However, his use of marijuana is more problematic, because it was frequent and long-standing. It began when he was a teenager, and continued while he was in college. Applicant credibly testified that he ended his use in August 2007, more than two years ago. Since then, he has completed his bachelor's degree, and begun a master's degree program. He has completed therapy for depression, which had been part of the reason for his marijuana use. He has taken on a full-time job as an assistant scientist, is performing responsibly, and is well-regarded by his supervisor and co-worker. Both his brother/roommate and his girlfriend, who are in constant association with him, testified that there has been no sign that he is using illegal drugs. Both of the random drug tests administered by his employer in 2008 and 2009 were negative. Applicant is unlikely to return to marijuana use. These facts support a finding of current trustworthiness and reliability. AG ¶ 26(a) applies.

Mitigation is also available under AG ¶ 26(b) (1) – (4). Applicant no longer lives in his parents' home, where he spent time with his younger brother and the friends with whom he used drugs. He does see his younger brother at family gatherings, but does not associate with him socially. He also has had no recent contact with the friends with whom he used drugs while he was attending the out-of-state college in 2001-2002. Applicant has abstained from illegal drugs for more than two years. He submitted a statement attesting to the fact that he will not use illegal drugs in the future, with automatic revocation of any security clearance for drug use. Applicant's conduct demonstrates a commitment to avoiding illegal drug use. AG ¶ 26(b) applies.

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

AG ¶ 15 expresses the security concern about personal conduct:

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.

The Guideline E allegations implicate the following disqualifying conditions under AG ¶ 16:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

Between 2001 and 2006, Applicant acted inappropriately and unreliably on the job by failing to appear for work as required and informing his supervisor that he was sick when he was not; taking beverages twice without authorization while working at a coffee bar; and drinking alcohol on an employer's premises. In each case, his employment was terminated. AG ¶ 16 (d)(1) and (2) apply.

One mitigating condition under AG ¶ 17 is relevant:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Although disregard for an employer's rules is not minor, the most recent event occurred in 2006, more than three years ago. In addition, Applicant's employment problems occurred when he was young, 17 to 22 years old. All of the events occurred during the time period when he was using marijuana. Significant aspects of Applicant's life circumstances have changed since then. Most importantly, he no longer uses marijuana, which caused the complacency that affected his job performance. Moreover, he provided evidence that he has performed well for the past one-and-one-half years at his current job, where his supervisor describes him as reliable, accurate, and punctual. Given these changes, he is unlikely to repeat his past errors. AG ¶ 17(c) applies.



## **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 guidelines and the whole person concept. Under each guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant used illegal drugs between the ages of 17 and 24. Most were used on an experimental basis, but his marijuana use was frequent and long-standing. He was motivated by a desire to "fit in" and to deal with his depression. He attended counseling for depression from 2005 to 2009. He ended his marijuana use in August 2007, midway through his counseling. He had several instances of poor job performance, all of which occurred while he was using marijuana. He has refrained from using illegal drugs for almost two-and-one-half years. He now holds a responsible, full-time job where he has been performing well for the past one-and-one-half years. His decision to end his marijuana use, as well as his demonstrated on-the-job reliability, show increased maturity and reflect 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 cited adjudicative guidelines.

### **Formal Findings**

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraph 1.a. – 1.e.:	For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a. – 2.c.: For Applicant

**Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security 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