



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



In the matter of:	)	
	)	
	)	ISCR Case No. 09-01510
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: James F. Duffy, Esquire, Department Counsel  
For Applicant: *Pro Se*

October 27, 2009

**Decision**

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the written record in this case, I conclude that Applicant failed to rebut or mitigate the government’s security concerns under Guideline H, Drug Involvement. His eligibility for a security clearance is denied.

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on November 7, 2008. On July 31, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, Drug Involvement. 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 for SORs issued after September 1, 2006.

In his Answer to the SOR, dated August 10, 2009, Applicant requested a decision on the record in lieu of a hearing. The government compiled its File of Relevant

Material (FORM) on September 17, 2009. The FORM contained documents identified as Items 1 through 9. By letter dated September 22, 2009, DOHA forwarded a copy of the FORM to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the file on October 8, 2009, and he provided additional information in response to the FORM, which DOHA received on October 14, 2009. On October 22, 2009, the case was assigned to me for a decision. Without objection, I admitted to the record Applicant's one-page response to the FORM.

### **Findings of Fact**

The SOR contains five allegations of disqualifying conduct under Guideline H, Drug Involvement (SOR ¶¶ 1.a. through 1.e.). In his Answer to the SOR, Applicant admitted the five Guideline H allegations. Applicant's admissions are entered herein as findings of fact. (Item 1; Item 4.)

Applicant is 27 years old, never married, and employed as a software engineer/security researcher by a government contractor. In 2005, he received a Bachelor of Science degree in Computer Science. He has been employed part-time and full-time in information technology since about 2001. (Item 5.)

On November 7, 2008, Applicant completed and signed an e-QIP. Section 24a of the e-QIP asks the following question: "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used a controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?" (Item 5; emphasis in original.)

Applicant answered "yes" to Question 24a and provided additional information. He stated that he used the prescription drug adderall illegally approximately six times from January 2000 to October 2008. He also stated that he used prescription drugs containing hydrocodone illegally approximately 30 times from January 2002 to October 2008. Additionally, Applicant stated he had illegally used a prescription drug muscle relaxer, not further identified, once in August 2008. (Item 5 at 28.)

Applicant also acknowledged the illegal use of the controlled substance marijuana "numerous" times between January 1998 and September 2008. In response to Question 24a, he added the following information: "I've smoked marijuana numerous times throughout my life, but would never describe the use as chronic, more as casual. I would probably average the usage out to be 1 time per month for the last 10 years (probably less)." (Item 5 at 28.)

In his response to Question 24a, Applicant also reported illegal use of the controlled substance cocaine approximately 20 times between January 2001 and August 2007. He added the following information: "I'm going with a higher number than

times I can actually recall. I first tried [c]ocaine in college and have done it a few times since then.” (Item 5 at 28-29.)

Applicant was interviewed about his illegal drug use by an authorized investigator from the U.S. Office of Personnel Management (OPM) on December 30, 2008. In the interview, as summarized by the investigator, Applicant confirmed the drug usage he had listed on his e-QIP in response to Question 24a. He denied purchasing any of the prescription drugs he used illegally. He stated that the drugs were provided to him by friends in social settings. He reported that adderall made him “stay awake, hyper and jittery”; that he used hydrocodone about twice a year in social settings “to have fun and feel good” and that it made him “feel great”; and that his one-time use of a muscle relaxer in August 2008 was experimental and “did nothing for him and had no effect on him.” (Item 6 at 3-4.)

In the interview with the OPM investigator, Applicant also confirmed that he smoked marijuana and snorted cocaine, as listed in his responses to Question 24a. He denied any dependency on illegal drugs, any treatment for drug abuse, and ever testing positive for illegal drug use. He stated that his family and friends knew of his illegal drug use. He claimed that his illegal drug use had no effect on his personal life or professional career. He also stated he had no intention of using illegal drugs in the future. In a sworn and notarized response to DOHA interrogatories on March 25, 2009, Applicant confirmed that the investigator’s summary of their interview on December 30, 2008, accurately reflected the information he had provided to the investigator during the interview. (Item 6, 3-6.)

I take administrative notice that the controlled substances marijuana and cocaine have been identified by the National Institute on Drug Abuse (NIDA) as commonly abused drugs. NIDA lists the intoxication effects of marijuana as “euphoria, slowed thinking and reaction time, confusion, impaired balance and coordination/cough, frequent respiratory infections; impaired memory and learning; increased heart rate, anxiety; panic attacks; tolerance, addiction.” NIDA identifies cocaine as a stimulant and lists the following intoxication effects and potential health consequences for those who use cocaine: “rapid breathing/tremor, loss of coordination; irritability, anxiousness, restlessness, delirium, panic, paranoia, impulsive behavior, aggressiveness, tolerance, addiction, psychosis.” (Item 7 at 1-2.)

I also take administrative notice that the stimulant adderall is prescribed for use in treating the hyperactivity condition known as attention-deficit disorder and that hydrocodone is an opiate compound prescribed to suppress coughs and to alleviate moderate to moderately severe pain. The misuse of these prescription drugs can have severe or fatal consequences. (Item 8; Item 9.)

Applicant provided the following statement in response to the FORM:

I feel that I am an excellent candidate for [a] security clearance and would like reconsideration. I deal not only with [deleted] trade secrets, but

those of many other large companies and governments on a daily basis. Handling of secure information is a large part of my job and requires me to be an extremely trustworthy individual. I can provide multiple character references which can testify to my sincerity regarding national, international and corporate security practices. Although my drug history may be beyond what you consider reasonable, I have never had a problem with substance abuse of any kind, nor intend to experiment in the future. I feel that I could be of great assistance to the United States government and help secure our technological infrastructure if given this clearance. In closing, I would like to request a re-examination of my case.

(Applicant's Response to FORM at 1.)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge applies these guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense 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**

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. AG ¶ 24(a) defines drugs as “mood and behavior altering substances.” The definition of drugs includes “(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.” AG ¶ 24(b) defines drug abuse as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

The record shows that Applicant admitted the illegal use of marijuana, with varying frequency, for approximately 10½ years, from January 1998 to at least September 2008. He admitted the illegal use of cocaine, with varying frequency, for approximately 6½ years, from approximately January 2001 to at least August 2007. From January 2000 to at least October 2008, he used the prescription drug adderall, without a prescription, From January 2002 to at least October 2008, he used the prescription drug hydrocodone, without a prescription. He also used a muscle relaxer drug without a prescription once in August 2008.

The record establishes that Applicant, who is now 27 years old, used multiple drugs illegally and abused prescription drugs during a span of over ten years. This conduct occurred during his adolescence and throughout his college years. It continued

even after he graduated from college in 2005, and after he began his professional career. As recently as August 2008, as a 26-year-old adult, he experimented with and used a prescription muscle relaxer drug illegally. This conduct casts doubt on his reliability, trustworthiness, and good judgment. It also raises security concerns about his ability or willingness to comply with laws, rules, and regulations. I conclude that Applicant's illegal drug use and illegal use of prescription drugs raises security concerns under AG ¶¶ 25(a) and 25(c). AG ¶ 25(a) reads: "any drug abuse [as defined at AG ¶ 24(b)]." AG ¶ 25(c) reads: "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia."

Two Guideline H mitigating conditions might apply to the facts of Applicant's case. If Applicant's drug use happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on his current reliability, trustworthiness, or good judgment, then AG ¶ 26(a) might be applicable in mitigation. If Applicant demonstrated an intent not to abuse any drugs in the future by disassociation from drug-using associates and contacts, changing or avoiding the environment where drugs were used, abstaining from drug use for an appropriate period, or signing a statement of intent with the automatic revocation of his security clearance for any violation, then AG ¶ 26(b) might be applicable.

From 1998 to 2008, Applicant's illegal drug use was on-going and frequent. The record shows that Applicant's illegal drug use and abuse of prescription drugs continued until September and October of 2008, a short time before he completed and signed his e-QIP in November 2008. Applicant's illegal drug use and prescription drug abuse was a long-term lifestyle choice.

When Applicant was interviewed by an authorized OPM investigator in December 2008, he asserted that he had no intention to use illegal drugs in the future. However, he provided no information to demonstrate his intent: he failed to provide evidence that he had abstained from drug use for an appropriate period; that he had disassociated from those with whom he had used drugs in the past; or that he had changed his conduct to avoid environments where drugs are used. Moreover, he failed to provide a signed statement of intent with an automatic revocation of his security clearance for any future illegal drug use or abuse of prescription drugs. Absent evidence of demonstrated intent not to abuse any drugs in the future, I conclude that AG ¶¶ 26(a) and 26(b) do not apply in mitigation to the security concerns raised by the facts in Applicant's case.

### **Whole Person Concept**

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all relevant circumstances. The 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

