



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



In the matter of:

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ISCR Case No. 09-01767

Applicant for Security Clearance

**Appearances**

For Government: Julie R. Mendez, Esquire, Department Counsel

For Applicant: *Pro se*

December 10, 2009

**Decision**

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the case file, pleadings, and exhibits, I conclude that Applicant has not mitigated the security concerns raised under the guidelines for drug involvement and personal conduct. Accordingly, his request for a security clearance is denied.

**Statement of the Case**

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP), on October 31, 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.

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

On August 17, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) that 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 signed his notarized Answer on September 10, 2008, in which he admitted all allegations under Guideline H<sup>3</sup> and Guideline E. In his Answer, Applicant also requested a decision without a hearing. DOHA Department Counsel submitted a file of relevant materials (FORM), dated September 24, 2009, which included nine documents (Items 1-9) proffered in support of the government's case. Applicant received the FORM on October 6, 2009, and was given 30 days to file a response. He did not submit a response to the FORM. The case was assigned to me on December 7, 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 FORM submitted by the government, I make the following additional findings of fact.

Applicant is 60 years old. He served in the U.S. Army from 1970 until his honorable discharge in December 1971. Applicant has never been married and has no children. He attended trade school from approximately 1972 to 1974 and received a certificate in electronics technology. Since 1974, he has worked for the same defense contractor, where his current position is electronics technician (Items 4, 5).

Applicant started smoking marijuana in 1970, at approximately 21 years old, when he was in the U.S. Army. He smoked marijuana throughout the 1970s, sometimes daily, and also purchased it. His purchases amounted to approximately \$5,500 between 1970 and 1981. Applicant continued to use marijuana, although less frequently after he started using cocaine. He did not use marijuana from December 1986 to July 1990 (Item 8).

In 1979, when he was about 30 years old, Applicant tried cocaine. By 1983, he was using it about once per month, and in 1986, he began to use it on a daily basis. At

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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> Applicant clarified in his Answer that in 1989 his security clearance was denied, not revoked, as alleged in subparagraph 1.e.

that point, he was spending about \$3,000 per year on cocaine, and buying from local dealers. His use began to affect his work performance, and he entered his employer's Employee Assistance Program (EAP) in 1987. He completed a 28-day inpatient program that year. Shortly after his release, he began using cocaine again, while he was in a six-month aftercare program (Item 8).

In May 1987, Applicant was arrested and charged with Dangerous Drugs-Conspiracy (Item 9). He received probation before judgment. About six weeks after starting probation, he received a positive result on a urinalysis, which violated his probation requirements. Subsequently, he was sentenced to four years incarceration (suspended) and continuation of his probation. After his probation ended in November 1989, he continued using cocaine (Item 8).

Applicant was treated for drug addiction from November 1987 to March 1988, and he did not use drugs during that time. The record is silent as to a diagnosis or prognosis. At about this time, he also participated in court-ordered therapy with a psychiatrist for approximately one year (Item 6), and attended Narcotics Anonymous (NA). Applicant relapsed and resumed cocaine use (Item 8).

Applicant's pattern of cocaine use was to use the drug for three to four days, then abstain for three to four weeks. This pattern continued from 1989 to about 1991. Applicant's spending on drugs amounted to several thousand dollars per year, and led to financial problems. Applicant stated during his subject interview of February 1991 that he could not say with certainty that he would not use illegal drugs in the future, in part because he was addicted to cocaine. Applicant applied for a security clearance in approximately 1989, but it was denied. He was told at the time that the denial was based on his drug use and the resulting financial problems (Items 4, 6).

In 1992, Applicant's car was stopped by a police officer, who discovered marijuana. He was charged with Controlled Dangerous Substance--Possession of Marijuana, as well as possession of paraphernalia. In 1993, the charge was placed on the stet docket (Items 6, 7).

In January 2009, when Applicant met with an agent from the Office of Personnel Management (OPM), he stated that he first attended NA before the drug arrest in 1987. He became involved with the program and held several offices. About seven to eight years ago, he stopped using cocaine, and has attended NA meetings less regularly since then. He also noted that he does not socialize with cocaine users, and has no intent to use it in the future (Item 6).

Applicant also informed the agent that he had stopped using marijuana about one year before the interview, in December 2007. He stopped because it made him lethargic and also affected his heart. He does not associate with people who use marijuana. He stated that although he had no plans to do so, there was a possibility that he might use marijuana in the future. However, when he responded to a DOHA

Interrogatory in July 2009, he stated, “I now have no intentions of any future marijuana use.” (Items 5, 6).

In October 2008, when Applicant completed his security clearance application, he answered “No” to question 24(a), which asked if he had used illegal drugs during the previous seven years. He failed to disclose that he had used marijuana as recently as December 2007. He explained to the investigating agent that he answered incorrectly because he was focusing on his cocaine use, and not thinking of his marijuana use, when he completed the questionnaire (Item 6). In his Answer to the Statement of Reasons, he admitted that he deliberately falsified the answer in his security clearance application (Items 3, 4).

### **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>4</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>5</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>6</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

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<sup>4</sup> Directive. 6.3.

<sup>5</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>6</sup> See *Egan*, 484 U.S. at 528, 531.

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>7</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 apply:

- (a) any drug abuse;
- (b) testing positive for illegal drug use;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant admits to illegally using illegal drugs, specifically marijuana and cocaine. He also purchased both drugs regularly. While on probation on a charge of Dangerous Drug: Conspiracy, Applicant continued to use illegal drugs, and failed a random drug test. Moreover, although he now states that he has no intent to use illegal drugs in the future, he told investigators in 1991 and again in 2009 that he might use illegal drugs in the future. These statements, as well as his use of marijuana as recently as December 2007, raise doubts as to his commitment to avoid illegal drugs.

AG ¶ 26 includes three 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

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<sup>7</sup> See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

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.

(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's last use of illegal drugs in December 2007 is recent. He used them over a period of approximately 38 years. He used illegal drugs when he was a mature adult, and admits that he was a cocaine addict. His recent use, at the age of 58, casts serious doubt on his current reliability and good judgment. AG ¶ 26(a) does not apply. Applicant's conduct has not shown a clear intent to avoid drugs in the future. Although he states that he does not associate with drug users, his claimed two-year abstinence from marijuana is insufficient to show rehabilitation, given his decades of past use. Moreover, although he completed a drug treatment program, he returned to cocaine and marijuana use after the program. The record is silent as to a prognosis. AG ¶ 26(b) and (d) do not apply.

### **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:

(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.

The government alleges that Applicant deliberately falsified information when he failed to disclose his marijuana use on his 2008 application. Given that he used marijuana over a period of almost 40 years, including the period covered by question 24(a), his statement to the investigator that he was thinking only of his cocaine use when he completed his security clearance application is not credible. Applicant admits it was false, and AG ¶ 16(a) applies.

Mitigating condition 17(a) (*the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*) is relevant. However, Applicant cannot claim mitigation under AG ¶ 17(a) because he did not make an effort to correct the falsification. In fact, when he was interviewed, he again falsified by lying about why he answered as he did.

### **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 has used marijuana and cocaine for almost 40 years. He started when he was 21 years old, and last used marijuana in 2007, about two years ago, when he was 58 years old. He was arrested on charges related to both drugs. Despite inpatient treatment in the late 1980s, and a year of psychiatric treatment in 1988, he continued using both drugs. He admits he was a cocaine addict. Applicant also deliberately falsified his 2008 security clearance application. His willingness to provide false information to the government undermines the credibility of his statement that he has no intent to use illegal drugs in the future, and raises serious doubts about his suitability for access to classified information.

For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guidelines.

### **Formal Findings**

Paragraph 1, Guideline H	Against Applicant
Subparagraphs 1.a. – 1.g.	Against Applicant
Paragraph 2, Guideline E	Against Applicant
Subparagraph 2.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 interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

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RITA C. O'BRIEN  
Administrative Judge