



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



In the matter of: \_\_\_\_\_ )  
 )  
 ) ISCR Case No. 09-04479  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Melvin A. Howry, Esquire, Department Counsel

For Applicant: -----, Personal Representative

February 7, 2011

**DECISION**

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on December 8, 2008. (Government Exhibit 1.) On February 18, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline H (Drug Involvement), Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on March 15, 2010, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on March 29, 2010. I received the case assignment on April 6, 2010. DOHA issued notices of hearing on April 7 and April 23, 2010. I convened the hearing as scheduled on June 9, 2010. The Government offered Government Exhibits 1 through 7, which were received without objection. Applicant testified on his own behalf, called one

additional witness, and submitted Applicant Exhibits A through D, which were also admitted without objection. Applicant requested that the record remain open for an additional period of time for receipt of additional documents. He submitted Applicant Exhibit E on June 18, 2010. Department Counsel objected to my considering this exhibit. The objection is overruled and the exhibit is admitted. DOHA received the transcript of the hearing on July 7, 2010. The record closed on June 25, 2010. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Findings of Fact**

Applicant is 35 and single. He has a doctorate degree, is employed by a defense contractor, and seeks to retain a security clearance in connection with his employment in the defense industry. Applicant admitted allegations 1.a., 1.b., 1.d., 1.e., 1.h., 2.b., and 3.e. in the SOR. Those admissions are deemed findings of fact. He denied the remaining allegations. He also submitted additional information supporting his request for a continued security clearance.

#### **Paragraph 1 (Guideline H - Drug Involvement)**

The Government alleges under Guideline H that the Applicant is ineligible for clearance because he has used illegal drugs.

Applicant has been employed in the defense industry since 2006. (Government Exhibit 1, Section 11.) He has held a security clearance since 2008.

He first began using marijuana in 1996. He continued to use marijuana until May 2010, a month before the hearing, and after receiving the Notices of Hearing about this case. His frequency varied from daily use to long periods of abstinence. (Government Exhibit 3 at 2; Transcript at 62-64, 100, 138-143.) He also purchased marijuana at various times. The last purchase occurred in May 2010. (Transcript at 100-101.)

Applicant submitted that the majority of his marijuana use since November 2007 has been pursuant to a physician's advice. In support of this, Applicant submitted evidence showing that he had a doctor's recommendation that his health would benefit from "compassionate medical cannabis use." This recommendation was made in accordance with applicable state law. The two periods for which written evidence exists are November 2007 through November 2008, and October 2009 through October 2010. Neither document in the record is a prescription form, and there is no evidence that the Applicant received a prescription for cannabis. (Applicant Exhibits D and E; Tr. 78.)

While marijuana was his drug of choice, he also used cocaine from 1996 through 2005, and Ecstasy during the period 1996 through 2009. He used marijuana and Ecstasy after being granted a security clearance by the Department of Defense in 2008. (Government Exhibit 3 at 2; Tr. 97-98, 105.) Applicant testified that he used marijuana during the period after he received a security clearance because he had a doctor's

recommendation. He stated, "I thought it was a gray area. I wasn't, you know, I wasn't sure I guess what the law was. This whole issue of State versus Federal. I found that very confusing; and, at that time, to be honest, I was just looking for treatment." (Tr. 98-99.)

In January and February 2006 Applicant was hospitalized twice due to a severe psychotic disorder. (SOR ¶1.f.) His first hospitalization lasted from January 14 through January 20, 2006. The second lasted from February 7 through February 17, 2006. The medical records show that he was diagnosed both times with "Psychotic disorder NOS [Not Otherwise Specified]," along with "Polysubstance use and dependence." While the records show that his treating psychiatrist was very concerned about the Applicant's drug and alcohol use, it was in the context of the treatment of his mental disorder. Significantly, his hospitalizations were obviously psychiatric in nature, and the records do not show that he received any specific treatment aimed at his drug or alcohol use. In addition, alcohol or drug counseling or treatment was not recommended in his aftercare treatment plan. (Government Exhibit 6; Tr. 73-77, 104-105.)

Between January 3, 2006, and February 1, 2006, Applicant was seen seven times by three mental health care professionals at the Student Psychological Services clinic connected to the university where he was receiving his Ph.D. (SOR ¶1.g.) His diagnoses from this clinic included "Generalized Anxiety Disorder; Substance Abuse; Psychosis, Reactive, Brief." Once again, while substance abuse was a diagnosis, a reading of the medical records shows that it was not the focus of the treatment. Rather, much of this particular treatment was in the context of helping the Applicant psychologically in order to allow him to finish his doctoral dissertation. Once again, he was not recommended to receive alcohol or drug addiction treatment. (Government Exhibit 7; Tr. 71-73, 104-105.)

Finally, beginning in October 2007 and continuing until August 2009, the Applicant received individual psycho-therapy from a psychiatrist. (SOR ¶1.c.) The diagnosis from the psychiatrist includes, "Axis I: r/o [rule out] schizoaffective disorder r/o recurrent (*sic*) breif (*sic*) reactive psychosis r/o bipolar disorder." (Government Exhibit 5 at 9.) During the course of treatment the Applicant's recurrent drug use is often discussed. However, the treatment by this psychiatrist is aimed at the Applicant's mental health, and cannot be seen as drug abuse treatment. This provider also did not recommend that the Applicant receive any type of alcohol or drug abuse treatment. (Government Exhibit 5; Tr. 77-80, 90-92, 102-106.)

Applicant submitted a written statement at the hearing stating that he intends not to use illegal substances in the future, and he agrees that any future use of illegal substances will result in the automatic revocation of his security clearance. (Applicant Exhibit C.) Applicant was initially reluctant to give this statement, due to what he believes are the beneficial effects of marijuana use on his mental health in the recent past. (Tr. 126-131, 143-145.) In testifying about his use before 2006 Applicant stated, "the pattern of alcohol and marijuana abuse, that was really related to not knowing how to cope with depression, not knowing what was wrong with me, and trying to work that issue out." (Tr. 83-84.)

## **Paragraph 2 (Guideline G - Alcohol Consumption)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he uses intoxicants to excess.

Applicant admits that he used alcohol to excess between January 2006 and January 2009. (Answer.) As stated above, Applicant used alcohol and marijuana as a way to cope with his depression starting in 2006. However, his current alcohol use is very moderate, consisting of one to two beers or a glass of wine daily. (Government Exhibit 4.)

The SOR alleges that Applicant's alcohol abuse caused him to obtain the treatment set forth in Government Exhibits 5, 6 and 7. As also stated above, while Applicant's alcohol use was noted as a possible factor in the Applicant's psychotic problems, his treatment was primarily psychiatric in nature.

## **Paragraph 3 (Guideline E - Personal Conduct)**

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has made false statements to the Government during the clearance screening process; or engaged in conduct which shows poor judgment, unreliability or untrustworthiness.

3.a. Applicant was interviewed by a DoD investigator in February 2009. During that interview, Applicant admitted using marijuana 500 times from 1999 to 2006. He also stated that he had no intention of using marijuana again in the future. (Government Exhibit 2 at 6-10.) This statement was false as the Applicant had used marijuana after 2006. Applicant testified that, since he had a doctor's recommendation to use marijuana after 2006, he believed he did not have to admit the use. (Tr. 111-116.)

3.b. Applicant filled out an e-QIP on December 8, 2008. (Government Exhibit 1.) In that Questionnaire the Applicant was required to answer Section 24, which asked whether he had illegally used controlled substances within the last seven years, whether he had illegally used a controlled substance while holding a security clearance, and whether, in the last seven years, he had been involved in the illegal purchase of controlled substances. Applicant answered by describing his drug use as ending in 2006, that he did not use drugs while holding a security clearance, and that he had not been involved in the purchase of drugs. These were false answers to relevant questions about his history of drug use. Applicant stated, "I purposely left off marijuana because I was under the impression that it was not illegal since I had a doctor's recommendation." (Tr. 112, 116-120.)

3.c. The same Questionnaire, at Section 25, asked the Applicant whether, in the last seven years, his use of alcohol resulted in any "alcohol-related treatment or counseling (such as for alcohol abuse or alcoholism)." He stated, "No." Applicant stated that he did not seek treatment for alcohol abuse, but rather for his depression. With regards to the diagnosis of poly-substance abuse, he stated, "I mean I saw that

[diagnosis] as sort of a contributing factor. Like I said, for me, it was sort of having anxiety because of the psychotic episodes and depression. I was self-medicating myself, but it was not that I was an alcoholic and so I sought treatment for alcohol abuse.” (Tr. 102.) Applicant fully disclosed his psychological treatments in Section 21 of the Questionnaire.<sup>1</sup>

3.d. Applicant was interviewed by a DoD investigator in November 2007. During that interview, Applicant admitted using marijuana 500 times from 1999 to 2006. He also stated that he had no intention of using marijuana again in the future. (Government Exhibit 2 at 3-5.) This statement was false as the Applicant had used marijuana after 2006. Applicant testified that, since he had a doctor’s recommendation to use marijuana after 2006, he believed did not have to admit the use. (Tr. 122-123.) In fact, it was in November 2007 that the Applicant first obtained a doctor’s recommendation concerning the use of marijuana. (Applicant Exhibit D.)

3.e. The Government also alleges that Applicant is ineligible for clearance because he associates with individuals involved in criminal activity. Applicant admitted this allegation, and testified that he knew one person who was involved in criminal activity. However, this person had died in December 2009. Applicant further emphasized, “But it’s not like I, on purpose, try to associate myself with people involved in criminal activity.” (Tr. 87.)

## **Mitigation**

Applicant’s co-worker testified on his behalf. The witness testified that she has worked with the Applicant for almost two years, trusts the Applicant, and believes him to be a man of good character. The witness also testified that there have been many changes in the Applicant in last one and a half years. Witness testified that she had not seen evidence of drug use by Applicant in the last year and a half. As stated above, Applicant admits using marijuana up to one month before the hearing. (Tr. 24-36.)

Applicant submitted letters of recommendation from coworkers, supervisors, and friends. He is described as someone who is taking the security clearance adjudication process seriously, a person of good character, someone who takes security seriously, a responsible person, a person with integrity. His roommates describe the Applicant as someone who is honest, and of strong character. Once again, there is no indication that the letter writers were aware Applicant had continued to use marijuana up to one month before the hearing. (Applicant Exhibit A.)

## **Policies**

Security clearance decisions are not made in a vacuum. When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider

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<sup>1</sup>Section 25 of the Questionnaire states, “If you answered ‘Yes.’ provide an entry for each treatment to report. Do not repeat information reported in response to Section 21.” (Emphasis supplied.)

the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used as appropriate 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 over-arching 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized by the President in Section 7 of Executive Order 10865, "Any determination under this order . . . shall be a determination 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

### Paragraph 1 (Guideline H - Drug Involvement)

The security concern relating to the guideline for 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. Drugs are defined as mood and behavior altering substances, and include: (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; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under AG ¶ 25 and especially considered the following:

- (a) any drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;
- (g) any illegal drug use after being granted a security clearance; and
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant used marijuana on a frequent basis, from 1996 until May 2010. He used marijuana during the period he had a security clearance. Applicant purchased marijuana during the entire period he used it. In addition, he admits using cocaine and Ecstasy as well, though his cocaine use ended in 2005, and his use of Ecstasy was infrequent, ending in 2009. And, he was diagnosed with substance abuse during his hospitalizations and when seen by the Student Psychological Services.

I have considered all of the mitigating conditions under AG ¶ 26 and especially considered the following:

(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 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 are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant argues that his marijuana use after 2006 should be excused because he was using it pursuant to a doctor's recommendation. Firstly, the evidence submitted does not comport to being a *prescription* for cannabis. Rather, under applicable state law, Applicant was allowed to purchase marijuana based on a doctor's *recommendation*, which meant he could not be arrested for possession of marijuana. These are far from the same thing. In addition, Applicant admitted several times that he knew there was a gray area between Federal law about marijuana use and the state law. It was his responsibility to find out what was, and what was not, allowed.

The evidence is clear that the Applicant's extensive use of marijuana, as well as cocaine and Ecstasy, were the voluntary actions of a mature and intelligent person. Applicant stated several times that he would not use marijuana in the future, and submitted a signed statement to that affect. However, he expressed concern that, if he felt it necessary for his mental health, he might use marijuana again in the future. Based on the facts of this case, his statements do not carry much weight. Enough time has not passed for me to say with any degree of confidence that he will not use marijuana in the future. Paragraph 1 is found against the Applicant.

## **Paragraph 2 (Guideline G - Alcohol Consumption)**

The security concern relating to the guideline for Alcohol Consumption is set out in AG ¶ 21:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

Applicant admitted that he used alcohol, usually to excess, from January 2006 until January 2009. He drinks very moderately since that date.

There are three disqualifying conditions that arguably apply to this case. AG ¶ 22(a) "Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or



alcohol dependent.” In addition, AG ¶ 22(c) states a concern is, “Habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.” Finally, under AG ¶ 22(d), there is a “diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) or alcohol abuse or alcohol dependence.”

Under the particular facts of this case, the following mitigating conditions apply to the Applicant’s situation. AG ¶ 23(a) states that it can be mitigating when, “So much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness or good judgment.” In addition, AG ¶ 23(b) states that is mitigating where, “The individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser.”

Applicant’s alcohol abuse was directly related to his psychological problems. Those problems appear to be in remission. His alcohol use now is very moderate and does not appear to be a problem. Under the particular circumstances of this case, Applicant has mitigated the security significance of his past alcohol use. Paragraph 2 is found for the Applicant.

### **Paragraph 3 (Guideline E - Personal Conduct)**

The security concern relating to Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules or regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.

Allegation 3.e. is found for the Applicant as he no longer associates with persons involved in criminal activity.

I have considered the disqualifying conditions under AG ¶ 16 and especially considered the following:

(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

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant knowingly and purposely mislead the Government on several occasions concerning the true extent of his drug use. Applicant argues that he did not have to admit his marijuana use after 2006 because he was using marijuana pursuant to a doctor's recommendation, therefore it was not illegal drug use. However, this argument is undercut by the Applicant's admission that he knew this was a gray area. It is particularly worth noting that he denied drug use after 2006 in November 2007, the same month he first received a doctor's recommendation. Applicant had an obligation to be completely forthcoming with the Government, he failed. He is a highly intelligent person who knew exactly what he was doing. Paragraph 3 is found against the Applicant.

### **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 relevant circumstances. Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. 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 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. My findings under Paragraphs 1, 2 and 3, above, are also relevant to this discussion. The Applicant is a hard-working, respected, professional who has engaged in frequent marijuana use for many years. He used it up to one month before the hearing in this case. In my opinion, his statement that he will not use it again in the future can be given little weight. In addition, he falsified material information in several interviews and on a Government Questionnaire. In viewing all the facts of this case, I find that the Applicant has not mitigated the security significance of his prior conduct. As set forth above, I find that there have not been permanent behavioral changes under AG ¶ 2(a)(6). In addition, I find that there is still potential for pressure, coercion, exploitation, or duress (AG ¶2(a)(8)), and that there is likelihood of recurrence (AG ¶2(a)(9)).

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude the Applicant has not mitigated the security concerns arising from his drug

involvement and personal conduct as expressed in Paragraphs 1 and 3 of the Government's Statement of Reasons. Paragraph 2 is found for the Applicant.

### **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:

Paragraph 1, Guideline H:	AGAINST THE APPLICANT
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Subparagraphs 1.a through 1.h:	Against the Applicant
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Paragraph 2, Guideline G:	FOR THE APPLICANT
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Subparagraphs 2.a. through 2.d:	For the Applicant
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Paragraph 3, Guideline E:	AGAINST THE APPLICANT
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Subparagraphs 3.a. through 3.d.:	Against the Applicant
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Subparagraph 3.e.:	For the Applicant
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### **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.

WILFORD H. ROSS  
Administrative Judge