



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



In the matter of:	)	
	)	
	)	ISCR Case No. 09-05344
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Paul M. DeLaney, Esquire, Department Counsel

For Applicant: *Pro se*

March 31, 2010

**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), signed on April 15, 2009. 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 December 11, 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 Adjudicative Guidelines (AG).<sup>2</sup>

Applicant signed his notarized Answer on December 28, 2009, in which he admitted all allegations under Guideline H. The single allegation under Guideline E cross-references allegation 1.f., which states that Applicant used marijuana after completing his security clearance application in April 2009. Applicant failed to specifically admit or deny allegation 2.a. He admitted that the behavior cited in allegation 1.f. showed poor judgment. As allegation 2.a. refers to an allegation that Applicant admits (1.f.), I construe Applicant's answer as an admission of allegation 2.a.

In his Answer, Applicant also requested a decision without a hearing. Department Counsel submitted a file of relevant materials (FORM), dated January 21, 2010, which included six documents (Items 1-6) proffered in support of the government's case. Applicant received the FORM on January 29, 2010, 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 March 29, 2010.

### **Findings of Fact**

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 FORM submitted by the government, I make the following additional findings of fact.

Applicant is 33 years old. Applicant has never been married and has no children. He earned a bachelor's degree in 2002. Since then, he has been employed by the same defense contractor as a research engineer/systems administrator. (Item 5)

Applicant first used ecstasy when he purchased it at a party in 1999. He used it twice in 2000 when he purchased pills at parties. He again purchased it in 2001. Each time, the cost was about \$20 per pill. His last use occurred in December 2004, when he was about 27 years old. Applicant has no intent to use ecstasy in the future. (Items 5, 6)

Applicant used marijuana more frequently than ecstasy. Starting in 1993, Applicant used marijuana three times during high school and once during his first year

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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.

in college. During his second year of college, he began using it regularly, from three to four times per week. In 2002, Applicant was arrested and charged with marijuana use after he was stopped while driving. The officer determined that Applicant had been smoking marijuana within the past several hours. Applicant pled guilty and was convicted, fined, and sentenced to suspension of his driver's license for six months, and one year probation. During his year of probation, Applicant did not use marijuana. His family and coworkers are aware of this incident (Item 6)

During his subject interview with an agent from the Office of Personnel Management (OPM) in June 2009, Applicant stated that when he completed his probation in January 2003, he returned to using marijuana, but decreased his use to about once per month. However, he later qualified this information, noting that when marijuana was not available, he used it once per month, but if it was available, he smoked it about three times per week. He chose his city of residence because he believed it had a relaxed attitude toward marijuana use. His use has not affected his school performance, or his home or family life. Applicant has never received drug treatment. He does not believe that marijuana use is serious; however, he has not told anyone at his place of employment that he uses marijuana, because he worries that it would affect his reputation if his drug use were to become known. (Item 6)

Applicant admitted the allegation that states that he used marijuana until at least June 2009. He uses marijuana more often if he is under stress. He smokes it with friends and family members. He continues to associate with individuals who use illegal drugs. Applicant spends about \$50 every three months on marijuana purchases. He informed the OPM agent that he uses marijuana responsibly. He stated that it does not affect his judgment or reliability, but admitted that knowingly breaking the law does raise questions about his judgment. He stated that he is not happy breaking the law, but marijuana is appealing to him and he enjoys using it. Applicant has discontinued his drug use at times in the past, but has returned to it because he enjoys it. He believes marijuana use should be legal. He also told the OPM agent that he would continue to use marijuana after he receives a security clearance. He qualified this information when he completed his interrogatory in September 2009 by stating, "In an attempt to be totally honest, I answered that there was a chance I would occasionally partake if granted a security clearance. I have since come to realize that this behavior would not allow me to obtain a security clearance and have therefore discontinued my use of marijuana with the intention of never using it again." (Items 4, 6)

### **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 AG.<sup>3</sup> Decisions

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<sup>3</sup> Directive. 6.3.

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 Guidelines H (Drug Involvement) and 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>4</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>5</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>6</sup>

## **Analysis**

### **Guideline H, Drug Involvement**

AG ¶ 24 expresses the security concern related 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.

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<sup>4</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>5</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>6</sup> See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

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

- (a) any drug abuse;
- (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 that he used illegal drugs, specifically marijuana and ecstasy. He also purchased both drugs during the period that he used them. As an illegal drug user, it follows that he possessed them. Although he now states that he has no intent to use illegal drugs in the future, he told the OPM investigator in 2009 that he would continue to use marijuana in the future. These statements, as well as his use of marijuana at least to June 2009, nine months ago, raise doubts about his commitment to avoid illegal drugs.

AG ¶ 26 includes two mitigating conditions that are relevant and warrant discussion:

- (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.

When Applicant met with the OPM investigator in June 2009, he discussed his use of marijuana at that time, including the amount he pays to purchase it, who he associates with when he uses it, and that he realizes he is breaking the law when he uses it. He stated that if the marijuana is readily available, he uses it approximately three times per week, and that he uses it because he enjoys it. His use is both recent

and frequent, and his statements cast significant doubt on his current trustworthiness and reliability. AG ¶ 26(a) does not apply.

Applicant has not used ecstasy since 2004, and he says he will not use it in the future. However, he has not convincingly demonstrated that he will discontinue marijuana use. He used it infrequently during high school, but starting in 2002, he began a period of frequent marijuana use that extended seven years, to at least June 2009. He mentioned brief periods of abstinence, such as during his one year probation, but he has always returned to marijuana use because he enjoys it. His statement of intent to stop marijuana use occurred only recently, in September 2009, six months ago. As of June 2009, he had not dissociated from his friends with whom he used illegal drugs. Moreover, Applicant plainly stated to the OPM agent that he would continue to use marijuana after obtaining a security clearance. Applicant's subsequent statement that he would not longer use marijuana stems from a belated realization that using marijuana would prevent him from obtaining a security clearance. Applicant's actions and statements do not indicate a clear intent to avoid marijuana in the future. AG ¶ 26(b) does 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:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing;...

(g) association with persons involved in criminal activity.

Under Guideline E, Applicant's illegal drug use raises security concerns about his judgment, trustworthiness and ability to safeguard classified information. In addition, Applicant's actions have made him vulnerable to exploitation because he admits he worries about his reputation at work if his illegal drug use were to become known. In addition, as of June 2009, he continued to associate with the friends with

whom he used illegal drugs. He also used drugs with family members, and it is likely he will continue to associate with family members. AG ¶¶ 16(e) and (g) apply.

The following mitigating conditions are relevant under Guideline E:

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

Applicant used illegal drugs over a ten-year period from 1999 to 2009. From 2002 to 2009, he often used them up to several times per week. Such frequent use cannot be considered minor. The fact that he knowingly and willingly broke the law raises serious concerns about his judgment. Applicant has made no effort to obtain drug-related counseling, and there is no basis on which to conclude that his behavior is unlikely to recur. Finally, nothing in the record indicates that Applicant has disclosed his drug use to his coworkers, and eliminated the possibility of exploitation. None of the relevant mitigating conditions apply.

### **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 two illegal drugs, marijuana and ecstasy. Although his ecstasy use ended in 2004, he has continued to use marijuana over a period of ten years. His behavior cannot be ascribed to youthful experimentation, as he used it as recently as 2009, when he was 33 years old. Despite the fact that his marijuana use resulted in his arrest and a year of probation in 2002, he resumed illegal drug use after completing his probation. As of June 2009, it was his intent to continue to use marijuana after he obtained his security clearance. He belatedly stated, in September 2009, that he would end his marijuana use, without expressing any remorse for breaking the law over a period of ten years. His decision to quit marijuana use stems from his realization that it will interfere with his obtaining a security clearance. Applicant's conduct 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.f.	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