



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



In the matter of: )  
 )  
 [Name Redacted] ) ISCR Case No. 10-01470  
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 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Richard A. Stevens, Esquire, Department Counsel  
For Applicant: Robert D. Fogel, Esquire

May 17, 2011

**Decision**

MALONE, Matthew E., Administrative Judge:

Applicant failed to mitigate the security concerns raised by his involvement with illegal drugs between 1995 and 2009. Applicant’s request for a security clearance is denied.

**Statement of the Case**

On September 10, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a set of interrogatories<sup>1</sup> to clarify or augment information obtained by investigators. After reviewing the results of the background investigation and Applicant’s responses to the interrogatories, DOHA adjudicators were unable to make a preliminary

<sup>1</sup> Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

affirmative finding<sup>2</sup> that it is clearly consistent with the national interest to grant Applicant's request for access to classified information. On August 17, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise security concerns addressed in the adjudicative guideline (AG)<sup>3</sup> for illegal drug involvement (Guideline H).

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on November 10, 2010. Pursuant to a Notice of Hearing issued on November 16, 2010, I convened a hearing in this matter on December 9, 2010. DOHA received a transcript (Tr.) of the hearing on December 28, 2010.

The parties appeared as scheduled. The Government presented three exhibits, which were admitted without objection as Government's Exhibits (Gx.) 1 - 3. Applicant testified and presented three exhibits, identified as Applicant's Exhibits (Ax.) A - C. Department Counsel objected to the admissibility of Ax. B, but I admitted it over his objection. Ax. A and Ax. C were admitted without objection. I admitted Ax. B over Department Counsel's objection. (Tr. 17 - 19)

### **Findings of Fact**

Under Guideline H, the Government alleged that Applicant used marijuana with varying frequency, and at times daily, between 1995 and April 2009 (SOR 1.a); that he used cocaine with varying frequency between 2002 and October 2007 (SOR 1.b); that he used mushrooms with varying frequency between 2000 and 2007 (SOR 1.c); that he used ecstasy with varying frequency between 1999 and 2002 (SOR 1.d); and that he bought the drugs he used between 1995 and 2009 (SOR 1.e). Applicant admitted, with explanation, all of the SOR allegations. Applicant's admissions are incorporated in my findings of fact. Having reviewed the response to the SOR, the transcript, and exhibits, I make the following additional findings of relevant fact.

Applicant is 34 years old and employed by a defense contractor in a position that requires a security clearance. Applicant has worked for his current employer since February 2008. He has worked in the information technology field since he graduated from college in 1999. (Gx. 1)

Applicant started using marijuana in college at about age 19, when it was offered to him by friends and at parties. After college, he began to purchase small amounts of marijuana for personal use. He began to smoke marijuana more often, sometimes daily. His daily use lasted until about February 2008. (Gx. 2 and 3; Tr. 55 - 56) Applicant used marijuana about 12 times in 2008 and 2009. He also used mushrooms, ecstasy, and

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<sup>2</sup> Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

<sup>3</sup> The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006). Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

cocaine between 2002 and 2007. Applicant last used marijuana at a Super Bowl party in February 2009, and at a golf tournament in April 2009. (Gx. 1; Gx. 2; Gx. 3)

Applicant used ecstasy once in 1999. He was given one ecstasy pill while at the beach with friends. While on trips with friends on six other occasions between 2000 and 2002, Applicant purchased and used the drug. (Gx. 2.) Between about May 2000 and October 2007, Applicant used cocaine while on trips with friends and at home. He sometimes purchased cocaine by contributing to the cost of the drug when it was provided by others. (Id.) Applicant also used hallucinogenic mushrooms about six times between 2002 and 2007. The mushrooms were provided by friends while camping. He also contributed to the purchase of mushrooms he used with friends at a music festival in 2002, 2003, and 2005. (Id.)

In October 2010, Applicant self-referred for a professional substance evaluation and urinalysis. The latter was negative for any illegal substances. (Ax. C) The evaluation concluded that Applicant does not have a substance abuse problem that requires clinical treatment. The evaluation also stated that Applicant's reported drug use was experimental and "ended several years ago." (Ax. B) While his use of cocaine, ecstasy and mushrooms was sporadic, Applicant acknowledged that his marijuana use "far exceeds the notion of experimentation." (Tr. 32 - 33)

Applicant enjoys a good reputation at work for his professionalism, intelligence, and hard work. Military customers, co-workers, and long-time friends regard him as reliable and honest. (Ax. A) Applicant testified that he stopped using drugs in April 2009, in part, because of his application for a security clearance, and because he is in a committed relationship with a woman whom he is likely to marry. She disapproves of illegal drug use. (Answer; Tr. 30 - 31)

## **Policies**

A security clearance decision is intended to resolve 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. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,<sup>5</sup> and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (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

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

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

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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. 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 AG ¶ 24 (Drug Involvement).

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. Thus, 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 her 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

### Drug Involvement

The Government presented sufficient information to show that Applicant used marijuana extensively from about 1995 until April 2009. The Government's information also established that Applicant used cocaine, ecstasy, and hallucinogenic mushrooms on multiple occasions between 1999 and 2007. Available information also showed that Applicant purchased illegal drugs for personal use and to use with others. These facts raise a security concern addressed in AG ¶ 24 as follows:

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.

(a) Drugs are defined as mood and behavior altering substances, and include:

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

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

(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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

More specifically, available information requires application of the disqualifying conditions listed at AG ¶ 25(a) (*any drug abuse (see definition [at AG ¶ 25(a)]*) and AG ¶ 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*).

By contrast, the mitigating condition at AG ¶ 26(b) (*a demonstrated intent not to abuse any drugs in the future, such as: (1) dissociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence...*) must be considered here. Applicant has not used illegal drugs since April 2009. It also appears that his personal and social life no longer includes substance abuse.

However, none of the other pertinent mitigating conditions apply. His drug use started in college at about age 19, which is not unusual. However, his drug use became more frequent and diverse over the course of the 15 years after he graduated. It did not end until he was 33 years old. Because of the length and scope of his illegal drug involvement, Applicant's abstinence over the past two years is insufficient to support application of the mitigating condition at AG ¶ 26(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*).

Applicant presented a clinical evaluation and a negative drug test; however, without more information about the evaluation and the person who provided it, Ax. B and C are not sufficient to support application of the mitigating condition at AG ¶ 26(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*). On balance, Applicant has failed to mitigate the security concerns about his past drug use.

### **Whole-Person Concept**

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines H. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 34 years old and presumed to be a mature adult. However, his behavior for the past 15 years reflects serious defects in his judgment and trustworthiness. I have considered that his personal life now appears to be more responsible, and that he was candid and forthcoming during the investigation and adjudication of his suitability for a clearance. Nonetheless, it

is too soon, given this extensive record of misconduct and questionable judgment, to conclude that his drug use will not recur. A fair and commonsense assessment<sup>8</sup> of all available information bearing on Applicant's past and current circumstances shows that doubts remain about his ability to protect the Government's interests as his own. Because protection of the national interest is paramount in these determinations, such doubts must be resolved for the Government.<sup>9</sup>

### **Formal Findings**

Formal findings 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 APPLICANT

Subparagraphs 1.a - 1.e:           Against Applicant

### **Conclusion**

In light of all of the foregoing, it is not clearly consistent with the national interest to grant Applicant access to classified information. Request for security clearance is denied.

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MATTHEW E. MALONE  
Administrative Judge

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<sup>8</sup> See footnote 5, *supra*.

<sup>9</sup> See footnote 7, *supra*.