



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



In the matter of: )  
)  
) ISCR Case No. 10-09119  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel  
For Applicant: *Pro se*

November 10, 2011

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant illegally used drugs from 2000 until April-May 2008. She used drugs after she was granted a security clearance in February 2008. I find not enough time has passed to establish that Applicant’s use of drugs is unlikely to recur. Clearance is denied.

**Statement of the Case**

Applicant submitted the pending security clearance application (SCA) on April 7, 2010. 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 for a security clearance.

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<sup>1</sup> Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

On July 5, 2011, DOHA issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of the adjudicative guidelines (AG).<sup>2</sup> Applicant answered the SOR on July 20, 2011, and she requested a hearing before an administrative judge. The case was assigned to me on August 16, 2011. DOHA issued a notice of hearing on August 19, 2011, convening a hearing on September 22, 2011. The Government offered exhibits (GE) 1 through 6, which were admitted without objection. Applicant testified, presented the testimony of one witness, and introduced exhibit (AE) 1, which was admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 30, 2011.

### **Procedural Issue**

On August 10, 2011, the Government moved to amend the SOR by substituting the number “1999” with “2000” from SOR ¶¶ 1.a and 2.c; by striking SOR ¶¶ 2.b, 2.d, and 2.e; and by renumbering SOR ¶ “2.f” as “2.b.” Applicant did not object. I granted the amendment as requested, except that I did not renumber SOR ¶ 2.f. The Amendment to the Statement of Reasons was marked as Hearing Exhibit (HE) 1.

### **Findings of Fact**

Applicant admitted all the factual allegations in the amended SOR. Her admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, including her answer to the SOR and her demeanor and testimony, I make the following additional findings of fact.

Applicant is a 28-year-old consultant employed by a defense contractor. She attended college from 2000 until 2004, when she received her bachelor’s degree. She completed her master’s degree in May 2005. Applicant has never been married, and she has no children.

Applicant started illegally using marijuana around 2000, while she was in college. She estimated she smoked marijuana approximately five times during college. She smoked marijuana socially while visiting friends at their homes. After college, she did not use marijuana again until April-May 2008. On this occasion, she went to a four-day concert with a “good friend from college,” her friend’s husband, and some high school friends of her friend’s husband. While at the concert, she smoked marijuana twice and experimented with Ecstasy once. She claimed her last used any illegal drug was in April-May 2008.

Applicant started working for a government contractor in January 2006. She submitted her first Questionnaire for Public Trust Positions on April 28, 2006. (GE 3) In that questionnaire, Applicant was asked whether in the last year she had used any

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<sup>2</sup> Adjudication of this case is controlled by the AGs, implemented by the DOD on September 1, 2006.

illegal drugs. She answered “No,” because she had not used any illegal drugs since she graduated from college in 2004.

Applicant also was asked whether in the last seven years she had been arrested for, charged with, or convicted of any offenses. She answered “No,” and failed to disclose that in October 2001, she received a ticket for underage drinking. The charge was amended to a disorderly conduct charge, and she pled guilty to it. Her conviction was quickly expunged after she attended court-mandated counseling. Applicant explained she did not disclose her underage drinking charge, or the disorderly conduct conviction, because it was expunged from her record. Since it was expunged, she mistakenly believed she was not required to disclose it.

On April 28, 2006, Applicant also submitted a Supplemental Questionnaire for Selected Positions in which she was asked whether “since the age of 16 or in the last seven years” she had used any illegal drugs. She answered “No,” and failed to disclose that she had illegally used marijuana from 2000 until 2004. Applicant credibly testified she misread the question and believed she was being asked again whether in the last year she had used an illegal substance.

On December 18, 2007, Applicant submitted a Security Prescreen Questionnaire to her company’s security office. In that questionnaire, Applicant disclosed that in the last 10 years she had illegally used marijuana “very few times and not recently (not sure of the month/year).” On January 10, 2008, Applicant submitted her first SCA. On it, she disclosed that from November 2000 until May 2004, she illegally used marijuana approximately five times. She did not disclose her October 2001 ticket for underage drinking, or that she pled guilty to an amended charge of disorderly conduct. Applicant was granted a secret security clearance on February 28, 2008.

On April 7, 2010, Applicant submitted the pending SCA requesting an upgrade of her secret security clearance. In her 2010 SCA, Applicant again disclosed her history of marijuana use from 2000 until May 2004. She further disclosed she illegally used marijuana (twice) and Ecstasy (once) in April-May 2008, after she was granted a secret security clearance in February 2008. She also disclosed that in October 2001, she was charged with underage drinking, convicted of the amended charge of disorderly conduct, and that her conviction was expunged.

Applicant is considered to be a valuable employee. She was recently promoted to a management position and placed in charge of the supervision of two teams. She cares for the people she works with, and believes in the mission of her work project in support of U.S. government agencies. She is dedicated to her work, and would not do anything to put that at risk. She would never do anything to compromise the United States. She credibly testified that she misread the question about illegal use of drugs in the Supplemental Questionnaire for Selected Positions, and that her mistake led her to provide an incorrect answer.

Applicant claimed that she no longer associates with her drug-using friends. Most of them are now married and in the process of raising a family. She believes her drug use was infrequent, that it happened under circumstances that are not likely to recur, and that her use is now temporarily remote. She currently has an important and demanding job with substantial responsibilities, and she is dedicated to her work. She has matured since her last use of illegal drugs. Additionally, she has been in a stable relationship with her live-in boyfriend since September 2008. He does not use or condone the use of illegal drugs.

Notwithstanding, Applicant has social contact, at least once a month, with her "good friend from college" and her husband -- the same couple that invited Applicant to a four-day concert where they smoked marijuana and used Ecstasy in April-May 2008. She does not know whether they continue to use illegal drugs, but she has not seen them use any illegal drugs since 2008. She also has associated, although infrequently, with other members of the 2008 concert party. Since 2008, she met some of them at a wedding, and some of them came over to visit her. (Tr. 46)

### **Policies**

The Secretary of Defense may grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or has not met the

strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## Analysis

### Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern about 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.

Applicant illegally used drugs, although infrequently, from 2000 (age 18) until April-May 2008 (age 25). She used illegal drugs while working for a government contractor, and after she was granted a secret security clearance in February 2008.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Three drug involvement disqualifying conditions raise a security concern and are disqualifying in this particular case:

(a) any drug abuse;<sup>3</sup>

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<sup>3</sup> 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.”

(c) illegal drug possession; and

(d) any illegal drug use after being granted a security clearance.

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

(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; and

(4) a signed statement of intent with automatic revocation of clearance for any violation;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(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.

None of the Guideline H mitigating conditions fully apply. Applicant's use of illegal drugs, although infrequent, spanned a period of approximately eight years. She started using drugs while she was in college (age 18), and her use extended until April-May 2008 (age 26). She illegally used drugs socially, and not under extraordinary circumstances. She knew that her use of drugs was illegal, and that it would adversely affect her ability to hold her job and a security clearance. Notwithstanding, she illegally used drugs while working for a government contractor, and after she was granted a security clearance in February 2008.

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AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including: (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.

Applicant believes her questionable behavior is mitigated by the passage of time because her use was sporadic, she last used marijuana and Ecstasy in April-May 2008, and her abstinence since demonstrates her intent not to abuse drugs in the future. Additionally, she believes her circumstances and lifestyle have changed. She is now a more mature person. She is dedicated to her demanding work and her boyfriend. She promised never to use illegal drugs ever again.

Applicant's actions are not sufficient to mitigate drug involvement concerns. She was charged with minor in possession of alcohol (convicted of disorderly conduct in 2001), and she learned little from that experience. She continued her illegal use of marijuana during college. She was made aware of the Government's serious concerns about her past illegal drug use four different times -- when she submitted her 2006 Questionnaire for Public Trust Positions, and in the Supplemental Questionnaire for Selected Positions in April 2006, when she completed her employer's Security Prescreen Questionnaire in 2007, and when she submitted her 2008 SCA. Notwithstanding, she illegally used marijuana and Ecstasy in April-May 2008, after she was granted a secret security clearance in February 2008. Applicant's use of Ecstasy raises more serious security concerns. It is an escalation of her illegal marijuana use, and demonstrates an increased lack of judgment. Ecstasy is considered to be a more dangerous illegal drug than marijuana.

In light of Applicant's age, experience, the period she used drugs, her job responsibilities, and her possession of a security clearance at the time she used drugs, her promise not to use drugs without corroboration (e.g., clear evidence of lifestyle changes and disassociation from her drug-using friends) is not sufficient to show her use of drugs is unlikely to recur. Considering the record evidence as a whole, I find there has not been a sufficient period of abstinence or changed circumstances. Applicant continues her association with her drug-using friends. She failed to demonstrate a clear intent to not use illegal drugs in the future. Her past questionable behavior still casts doubt on her reliability, judgment, and willingness and ability to comply with the law. Her favorable evidence is not sufficient to mitigate the Guideline H security concerns.

### **Guideline E, Personal Conduct**

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

Applicant failed to disclose her October 2001 underage drinking charge and the resulting disorderly conduct conviction on both her 2006 Questionnaire for Public Trust

Positions and on her 2008 SCA. She also failed to disclose on her 2006 Supplemental Questionnaire for Selected Positions that she used marijuana from 2000 until 2004.

Applicant's failure to disclose the above information, trigger the possible applicability of 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;

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

(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

AG ¶ 17 lists seven conditions that could potentially mitigate the personal conduct security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶¶ 17(a), (c), (d), (e), and (f) apply. Applicant disclosed on her employer's 2006 Security Prescreen Questionnaire, on her 2008 SCA, and on her 2010 SCA that she illegally used marijuana from 2000 until 2004. Moreover, she disclosed on her 2010 SCA that she used marijuana and Ecstasy in April-May 2008, after she was granted a secret security clearance in February 2008.

Applicant was aware that her use of drugs was illegal and that it would adversely affect her ability to hold a security clearance. Notwithstanding, she complied with her moral and legal obligation to be truthful and honest in her security clearance documents. Concerning her failure to disclose her 2001 underage drinking charge and resulting disorderly conduct conviction, after considering the evidence as a whole, and having observed her demeanor while testifying and evaluated her testimony, I find that her omissions were the result of an honest mistake.

In sum, I find that Applicant's omissions were not deliberate or made with the intent to mislead the Government. She corrected her omissions before being confronted with the facts. As such, she also has taken steps to eliminate any possible vulnerability to exploitation, manipulation, or duress. Her omissions do not cast doubt on Applicant's reliability and trustworthiness.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). Applicant receives credit for correcting her omissions on subsequent security clearance documents. I find that she was truthful and forthcoming during the security clearance hearing. She stopped using illegal drugs in April-May 2008, because she wants to develop a career. She has done well working for a government contractor and earned a promotion to a management position. She seems to be on the correct path to accomplish her rehabilitation.

Notwithstanding, in light of Applicant's age, her eight years of sporadic illegal drug use, her drug use after she was made aware of the Government's concerns about the use of illegal drugs, and her drug use after she was granted a secret security clearance, her promise to not use illegal drugs in the future does not hold much weight. Her misconduct demonstrates a serious lack of judgment and there has not been a sufficient passage of time to show her questionable behavior is unlikely to recur. At this time, the record evidence fails to convince me of Applicant's good judgment, trustworthiness, and her eligibility and suitability for a security clearance.

### **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 APPLICANT
Subparagraphs 1.a - 1.c:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a, 2.c, & 2.f:	For Applicant

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance is denied.

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JUAN J. RIVERA  
Administrative Judge