



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 10-09123
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Raashid S. Williams, Esq., Department Counsel  
For Applicant: Philip D. Cave, Esq.

December 8, 2011

**Decision**

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MARSHALL, Jr., Arthur E., Administrative Judge:

On May 16, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant enumerating security concerns arising under Guideline H (Drug Involvement) and Guideline J (Criminal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

In a June 7, 2011, response, Applicant admitted all nine allegations raised under Guideline H and two of the three allegations raised under Guideline J. He also requested a hearing before a DOHA administrative judge. DOHA assigned the case to me on July 25, 2011. The parties agreed to a hearing date of September 7, 2011, and a notice to that effect was issued on August 17, 2011. At Applicant's request, the hearing was rescheduled for September 27, 2011. A notice to that effect was issued on September 6, 2011. I convened the hearing as scheduled.

Applicant gave testimony, introduced two witnesses, and presented 14 documents for consideration, which were accepted without objection as exhibits (Exs.)

A-N. Department Counsel offered two documents, which were admitted as exhibits (Exs.) 1-2 without objection. The parties were given until October 5, 2011, to submit any other documents for consideration. A final document was timely submitted by Applicant and forwarded by Department Counsel without objection. It was accepted as Ex. O. The transcript (Tr.) of the proceeding was received on October 6, 2011, and the record was closed. Based on a review of the testimony, submissions, and exhibits, I find Applicant met his burden of mitigating the security concerns raised. Clearance is granted.

### **Findings of Fact**

Applicant is a 34-year-old full-time doctoral student and college professor. He is the recipient of a government-sponsored research scholarship. He is considered to be a gifted student and a valued employee. A professor who has known him for several years remarked that she has seen him mature considerably in the past couple of years.<sup>1</sup> He is single and has no children.

In 1997, after completing an associate's degree in audio production, Applicant began using marijuana with varying frequency.<sup>2</sup> He spent about \$50 each time he bought marijuana. With his audio training, he moved to a major metropolitan area and entered the music industry, where he was "exposed to a lot of illegal substances."<sup>3</sup> Applicant began using other drugs. He used ecstasy twice in 2000, used heroin<sup>4</sup> twice between October 1999 and March 2000, and began using cocaine with varying frequency in 2000. He spent about \$20 each time he used cocaine. In August 2002, he moved to another major city. There, he used mushrooms twice, spending about \$40 to \$80 each time he used them. Applicant also used crack cocaine two or three times between August 2002 and December 2002. His non-marijuana drug use was mainly with peers associated with the music industry.

In 2006, Applicant's grandfather died suddenly. In his grief, he contemplated changing the direction of his life and maturing. Meanwhile, he had a dispute with an associate who would not return or pay for recording equipment he had acquired from Applicant, and Applicant refused to continue business with the man under the circumstances. Applicant was unable to resolve the impasses successfully despite repeated attempts. The man reported Applicant for making harassing phone calls. Unable to conduct other business while his equipment was in the associate's possession, Applicant went to the man's house, kicked in the door, and retrieved his

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<sup>1</sup> Tr. 25-27. The professor, who lost a sibling to drug abuse, is aware of Applicant's past drug use. She has witnessed no indication that he has used drugs since meeting him when he arrived on campus in 2008-2009.

<sup>2</sup> Applicant noted, "sometimes I would use a couple of times a month. Sometimes I wouldn't use it at all. I would go a month or two without using." There were also long periods when he did not use it at all. His cocaine use was similarly sporadic. Tr. 50-52.

<sup>3</sup> Tr. 30.

<sup>4</sup> At allegation ¶ 1.f, the SOR inaccurately states that Applicant used "heroin," a term commonly used to describe a legendary or literary female character having the characteristics of a hero. The SOR is hereby amended to read "heroin," the controlled opiate narcotic, to comport with the evidence.

possessions. He then left a message offering to repair the door after his possessions were collected. Applicant contacted the police about retrieving other equipment that the man held that was not in the house. A few weeks later, he was arrested in May 2007 for Malicious Destruction of Building Over \$200 and Breaking and Entering – Illegal Entry, but the charges were *nolle prosequi* under a deferred prosecution program and under the condition Applicant “stay out of trouble.”<sup>5</sup> Applicant has never had any other adverse experiences involving the police.

In late 2007, Applicant used a financial inheritance from his late grandfather to return to college and leave his current professional milieu. There, he started to distance himself from “those people mainly that I was hanging around with to get away from that drug use.”<sup>6</sup> In 2008, he chose to move to another state, committed to changing his life. There, Applicant decided to quit using illegal drugs entirely. He accomplished that goal in July 2008, knowing that drug use was incompatible with his aspirations to follow a career path in information security.<sup>7</sup> He had no physical problems associated with his cessation of drugs. He concentrated on his studies and developed a new circle of friends who were appreciative of his goals and his commitment to stay clear of drugs.<sup>8</sup> He chose to associate only with successful people because he believes “that will help [him] be successful ultimately.”<sup>9</sup> He is committed to remaining drug-free and maintaining his 4.0 grade point average in his current studies.<sup>10</sup> Applicant has completed two master’s degrees since December 2009 and is now working on a doctorate. He does not “want to jeopardize everything” to “go back to that old person I was. . . .”<sup>11</sup> Applicant signed a statement of intent not to use drugs in the future, accepting that to do so would lead to the automatic revocation of any security clearance granted.<sup>12</sup> In accepting his government-sponsored scholarship, Applicant also affirmed that he would not use drugs in the future.<sup>13</sup> In anticipation of the hearing, he met with a drug counselor who did not find it necessary to recommend treatment at this time.<sup>14</sup>

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<sup>5</sup> Tr. 58.

<sup>6</sup> Tr. 29.

<sup>7</sup> Tr. 36.

<sup>8</sup> *Id.*

<sup>9</sup> Tr. 39.

<sup>10</sup> Applicant earned a second associate’s degree in 2008 and a third associate’s degree in 2009 at the college where he presently studies and works. Tr. 41-43; Ex. A (Security Clearance Application, dated Aug. 20, 2009).

<sup>11</sup> Tr. 37.

<sup>12</sup> Ex. O (Statement of intent, dated Sep. 29, 2011).

<sup>13</sup> Tr. 49-50. Applicant has not previously signed any commitments not to abuse drugs.

<sup>14</sup> Tr. 53. Applicant noted, however, that he was willing to pursue

Although Applicant has quit using drugs, he acknowledges that they are present on his college campus. He has been aware of students using drugs and notes that drugs have been offered to him.<sup>15</sup> One such incident occurred shortly before the issuance of the SOR.<sup>16</sup> Applicant actively avoids drug users and drugs. He lives off-campus. He no longer visits students in dormitories because he knows drugs may be encountered there.<sup>17</sup> Aside from avoiding places and situations where drugs are used, he only socializes with those who do not use illegal substances. Many of those individuals are professional or staff members. He is committed to not jeopardizing either his studies or his continued success in his career path with any criminal activity.

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### **Policies**

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all reliable information about the person, past and present, favorable and unfavorable, in making a 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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." <sup>18</sup> The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.<sup>19</sup>

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

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<sup>15</sup> Tr. 38.

<sup>16</sup> Response to the SOR, Allegation ¶ 1.j.

<sup>17</sup> Tr. 47.

<sup>18</sup> See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>19</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>20</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.<sup>21</sup>

Based upon consideration of the evidence, Guideline G (Alcohol Consumption), Guideline H (Drug Involvement), and Guideline E (Personal Conduct) are the most pertinent to this case. Conditions pertaining to these AGs that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

## Analysis

### Guideline H - 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.<sup>22</sup> “Drugs” are defined as mood and behavior altering substances, and include 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 inhalants and other substances.<sup>23</sup> “Drug abuse” is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.<sup>24</sup>

Applicant used and bought marijuana from 1997 to July 2008, and used and bought cocaine between January 2000 and July 2008. Prior to December 2002, he twice used and purchased mushrooms, used crack cocaine three or four times, used

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> AG ¶ 24.

<sup>23</sup> *Id.* at ¶ 24(a)(1-2).

<sup>24</sup> *Id.* at ¶ 24(b).

ecstasy twice, and used heroin twice. Such facts are sufficient to raise Drug Involvement Disqualifying Condition AG ¶ 25(a) (*any drug abuse*) and AG ¶ 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*). With disqualifying conditions otherwise raised, the burden shifts to Applicant to mitigate related security concerns.

Applicant's use of mushrooms, crack cocaine, ecstasy, and heroin occurred between December 1999 and December 2002. While those drugs are considered to be the some of the most hardcore drugs available, his use occurred during the height of his career in the recording industry, was notably infrequent, and has since been ceased without recurrence. Although he continued to use marijuana and cocaine until July 2008, he successfully quit those drugs without difficulty. Since that time, he has matured considerably. Applicant has since completed additional college degrees, excelled in his studies, maintained a 4.0 grade point average, started a doctoral program, and received a prestigious and competitive scholarship. His achievements have earned him the respect of his academic peers and a place on the teaching staff.

Since quitting drugs, Applicant has actively sought to avoid those individuals who use drugs and venues at which drugs may be used. He left the music industry in favor of the groves of academe in a new city in an effort to change his life in a positive manner. He lives off-campus and avoids mingling with students in the dormitories. A doctoral student and instructor, he is considerably older and more mature than the average undergraduate and graduate students he teaches. He has surrounded himself with a new set of friends and professional associates who are appreciative of his attempts to eschew drugs and avoid their usage. During a recent evaluation, drug counseling was not recommended. He will not do anything that might jeopardize his studies, scholarship, or career. He has been drug-free for three-and-a-half years. His maturation during that period is reflected in the record and been noted by both himself and a professional superior. There is no indication that he will again resort to illegal drug use. He affirmed that he will not use drugs in the future when accepting his scholarship, and he signed a statement of intent with automatic revocation of any security clearance granted for any future violation. Under these circumstances, Drug Involvement Mitigating Condition AG ¶ 25(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*). Such facts also give rise to AG ¶ 26(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*).

### **Guideline J – Criminal Conduct**

The concern under this guideline is that “criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into

question a person's ability or willingness to comply with laws, rules, and regulations."<sup>25</sup> In this case, Appellant admitted the past drug involvement discussed above. In addition, he was arrested for malicious destruction of a building and breaking and entering after a reported incident that constituted phone harassment. Such facts are sufficient to raise both Criminal Conduct Disqualifying Condition AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*). Consequently, it is Applicant's burden to mitigate the security concerns raised.

Applicant's dispute with a former associate about the return of his recording equipment nearly five years ago resulted in a phone harassment claim and an arrest for breaking down the associate's door to retrieve his audio equipment. The described dispute appears to be the sort of "he-said-he-said" impasse that demanded third-party intervention. There is no doubt that Applicant behaved inappropriately and criminally during these 2007 incidents. However, the dispute seems to be an isolated incident in the life of a man who is now in his mid-30s. Given that the detaining of his equipment hindered his ability to work, his obvious frustration with the situation, as credibly conveyed during the hearing, must have been extreme when it led to this atypical conduct. Since that time, there have been no similar incidents. By all accounts, Applicant has comported his behavior within legal and appropriate boundaries since giving up drugs in July 2008, three-and-a-half years ago.

Applicant committed to changing his life when he relocated in 2008. He quit drugs, changed his milieu and profession, and made a concerted effort to avoid drugs and all criminal activity. Now entrenched in academia, he has fixated on his studies and professional aspirations. He maintains a 4.0 grade point average and completed multiple degrees. Applicant is now a trusted peer and instructor at his college. He has literally devoted the past three-and-a-half years to reinventing himself as a successful and talented academician and specialist in his field. That field, as well as his current scholarship, demands that he maintain high personal standards. He is committed to avoiding any behavior or activity that might jeopardize his current status and aspirations. Applicant has been forthcoming about all the criminal activity set forth in the SOR, and he has not tried to minimize its significance. He credibly regrets his past criminal activity. Given the passage of time since his criminal activity, remorse, successful attempts to rehabilitate himself, and his subsequent achievements, I find that Criminal Conduct Mitigating Condition AG ¶ 32(a) (*so much time has elapsed since the criminal behavior happened, 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*) and AG ¶ 32(d) (*there is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community service*) apply. None of the other mitigating conditions apply.

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<sup>25</sup> AG ¶ 30.

## Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the "whole-person" factors. Applicant is a credible and forthright 34-year-old scholarship recipient and professor who has been associated with the same institution since mid-2008, around the time he chose to turn his life around. Since that time, he has completed multiple collegiate degrees, started work on a doctorate, become a valued college instructor, and matured considerably. He is respected by his superiors and peers, both for his personal qualities and professional expertise. He is single and has no children. He has completely abandoned his former career and lifestyle in the recording industry. Applicant is devoted to his research and his future in his chosen field.

Applicant's 2007 criminal conduct regarding the harassing phone call and his self-initiated retrieval of his recording equipment plainly demonstrated immaturity and poor judgment. However, both incidents were related to the same issue, were aberrational in the context of his entire life, and are now regretted. To the court's satisfaction, the incidents were disposed of through a *nolle prosequi* and Applicant's demonstrated ability to not commit any similar incidents in the following year. Since that time, Applicant has matured considerably. The following year he quit drugs, returned to school, and started to achieve his recent successes.

Of the utmost concern is Applicant's past use of illegal drugs. It cannot be overlooked that his drug use went well beyond the illegal use of marijuana, the so-called "gateway drug," to more hardcore substances. His use of those substances, however, was highly infrequent, and he ceased their use many years ago. While he did continue to use marijuana and cocaine on occasion until June 2008, his use was apparently infrequent or sporadic. He quit them without difficulty. There is no indication that substance abuse or related counseling is warranted.

Applicant's cessation of all drugs in 2008 was part of his purposefully implemented plan to change his life. In executing that plan, he did considerably more than become drug-free. As previously noted, he has also achieved much academic and professional success through hard work and diligence. In the process, as noted by one superior and reflected by the record, he matured considerably. While three-and-a-half years may not seem like a long time, it is a significant period in the life of a 34-year-old. He has shown that he is capable of avoiding the temptations of campus life while leading the life of a professional adult. He has no intention, after all the hard work and success he has earned since implementing his plan to change his life, of jeopardizing



his personal and professional future. That fact, in tandem with his demonstrated ability and commitment to eschew drugs, helps me conclude that he will continue to eschew drugs and criminal activity. In light of these considerations and the facts of record, I conclude that Applicant met his burden in mitigating drug involvement and criminal activity security concerns. Clearance is granted.

### **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:	FOR APPLICANT
Subparagraphs 1.a-1.j:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraphs 2.a - 2.c:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Clearance is granted.

ARTHUR E. MARSHALL, JR.  
Administrative Judge