



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



In the matter of:	)	
	)	
	)	ISCR Case No. 11-09675
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Christopher Morin, Esquire, Department Counsel  
For Applicant: *Pro se*

02/11/2013

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**Decision**

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O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I conclude that Applicant has mitigated the security concern raised under the guideline for personal conduct, but has not mitigated the concerns about his drug involvement. His request for a security clearance is denied.

**Statement of the Case**

On September 28, 2012, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) citing security concerns under Guidelines H (drug involvement) and E (personal conduct) of the Adjudicative Guidelines (AG).<sup>1</sup>

In his Answer to the SOR, notarized on October 26, 2012, Applicant admitted three of the four drug-related allegations. He denied the allegations regarding deliberate

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<sup>1</sup> Adjudication of the case is controlled by Executive Order 10865, as amended; DOD Directive 5220.6 (Directive), as amended; and the Adjudicative Guidelines, which supersede the guidelines listed in Enclosure 2 to the Directive. They apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

falsification of his security clearance application. He requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on December 13, 2012, and I convened the hearing as scheduled on January 23, 2012. I admitted two Government exhibits (GE 1 and 2), and six exhibits offered by the Applicant (AE A through F). DOHA received the transcript on January 31, 2012.

### **Findings of Fact**

Applicant's admissions to three drug-related allegations are incorporated as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant is 37 years old, single, and has no children. In 2000, he completed a bachelor's degree in building science, and in 2010, he completed a second bachelor's degree in architecture. Starting in 2000, Applicant worked as an architect for about 10 years, including with Company A. In August 2010, he began his current position as a facilities design analyst and architect with a defense contractor, Company B. (GE 1)

Applicant began using illegal drugs in 1992, at the age of 16. He used marijuana one or two times per year, with friends, when he returned to his home town during college breaks. He continued to use it while employed, between 2000 and 2009. Applicant last used marijuana in July 2009, at the age of 34. Applicant used powder cocaine four times. He first used it when it was offered to him at a friend's house in early 2009. About six months later, he and the same friend were at a club, and he again accepted the offer of cocaine. He testified,

"It just felt like, okay, I'm in sort of this sort of environment, which, with music, and I felt comfortable doing that. I didn't feel at that point I was like not in control. I know it's illegal by law to have and to possess. At that point it was clearly a judgment of – bad judgment call on my part." (Tr. 24)

Several months later, the friend introduced Applicant to a drug dealer at a club, and asked Applicant to lend him money to buy cocaine. Applicant gave his friend about \$12 toward the purchase of a "\$25 bag" of cocaine. They shared the cocaine that evening. Applicant testified that he was willing to engage in the risky behavior of breaking the law. He acknowledged it was wrong, and he regrets his actions. (GE 2; AE F; Tr. 23-25, 29, 39-44, 48)

The last time Applicant used cocaine was in July 2010. He had recently learned that he was accepted for a position with Company B, his current employer. He knew that he would be expected to apply for a security clearance. He celebrated the job offer by meeting friends at the same club where he had used cocaine previously. He drank alcohol, and became "a little intoxicated." He asked the drug dealer to sell him a \$25 bag of cocaine. They went to the dealer's car, and Applicant bought it. After taking a

“bump” of cocaine in a nearby park, a police car approached. Applicant threw the cocaine aside, but the police found it and arrested him. He described this as “his low point,” and testified, “So I was very – very disappointed with myself...” (GE 2; AE F; Tr. 25-28, 43-47, 58-61)

Applicant was arrested and charged with possession of a controlled substance. He spent about 10 hours in jail. At his court appearance on September 15, 2010, the court ordered probation without adjudication of guilt. Applicant was placed on three months supervised probation. His probation conditions included, *inter alia*, that he “Obtain treatment for drug dependency or abuse in accordance with the following plan: Drug testing and treatment ordered.” (GE 2; AE F; Tr. 30, 54-56)

Applicant met with his probation officer for three months. He completed approximately seven drug tests during the period, all of which were negative. On October 23, 2010, he was discharged from probation. On the same date, the official records of Applicant's arrest, charge, and probation were expunged. (GE 2; AE B; Tr. 56-57)

Applicant submitted a written document stating that he has no intent to use illegal drugs in the future and he understands that his security clearance would be revoked if he did so. He no longer associates with the friend who introduced him to cocaine. He has “eliminated that – those types of people from my life,” and does not “go into those types of environments.” He is in a committed relationship and does not socialize in the same way as he did in the past. He has long-term plans for buying a house and starting a family. He has not used marijuana or cocaine since his arrest in 2010. (AE A; Tr. 28, 50-51)

In August 2010, about one month after his arrest, Applicant began his current employment with Company B. He testified that he did not inform his supervisor or security personnel about his arrest because, although he had received a job offer, he was not an employee of Company B when he was arrested. He also testified, “. . . it did not dawn on me that I needed to report that to them.” He stated,

. . . I had just accepted the job. I didn't want to sort of jeopardize anything in the sense of like I hadn't submitted any of my security clearance information. And at that point I felt like that happened prior -- the event happened prior to me actually starting the job, so at that point I didn't think it was necessary to tell them....

Applicant's court appearance occurred on September 15, 2010, after he had begun his job with Company B. He told a co-worker about his court date, but he did not tell anyone else. At the time he was arrested, he was aware that Company B had a drug-testing program. He testified that, in light of its drug-testing program, Company B might have rescinded its job offer if it learned about his drug-related arrest. (Tr. 51-56, 61, 64-65, 68)

Applicant waited about three months after his probation ended before submitting his security clearance application in February 2011. He waited to submit the application because he believed that he would not receive a security clearance if he was still on probation. (Tr. 61-64)

On his 2011 security clearance application, in response to questions 23(a) and 23(c), Applicant disclosed that he used marijuana and cocaine, and that he had purchased and possessed it. He also provided the dates he used each drug. During his March 2011 security interview, Applicant disclosed his drug use. He told the security investigator that he used marijuana infrequently, from 1992 to 2009, with friends, and that he never purchased it. Applicant disclosed that he used cocaine four times, and purchased it twice, between 2009 and 2010. He discussed the circumstances of his arrest for possession of a controlled substance in July 2010. Applicant also disclosed his illegal drug use in his response to DOHA interrogatories, and attached copies of his court orders. (GE 1, 2)

Question 23.d on his security clearance application asked if he had been ordered to attend drug treatment within the previous seven years. Applicant answered “No” even though his court order included a requirement to attend drug treatment. Applicant did not have the court order with him when he completed the application at work. He thought the question asked if he had actually attended drug treatment. He answered “No” because he never attended such treatment. Applicant believes that, although drug treatment is listed on the court order, his probation officer did not require him to attend treatment because he never tested positive during the frequent tests for illegal drugs during his three-month probation. (GE 2; Tr. 36-39)

Applicant's performance evaluation of September 2011 lists his work as “Good” or “Excellent” in all categories. Applicant's supervisor of more than two years noted in a character reference letter that Applicant has assumed a leadership role and demonstrated responsibility and trustworthiness. His supervisor is not aware of Applicant's drug history. Applicant's colleague, who is also a friend of 17 years, described Applicant as a “model citizen” and a role model to youth in his community. She stated that she has not observed or suspected him of using illegal substances, and believes him to possess “high moral and ethical character.” This friend is not aware of Applicant's drug use. It also appears that Applicant's co-workers and friends who were interviewed during Applicant's security investigation, and recommended him for a security clearance, were not aware of his drug use because they stated that he did not engage in criminal conduct or use illegal drugs. (AE C, D, E, F; Tr. 68, 72-73)

### **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>2</sup> Decisions 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 does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed when 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 adjudicative factors addressed under Guideline H (Drug Involvement) and Guideline 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>3</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>4</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 interest as her 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>5</sup>

## **Analysis**

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

AG ¶ 24 expresses the security concern pertaining 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

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<sup>2</sup> Directive. 6.3.

<sup>3</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>4</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>5</sup> See *Egan*; Administrative Guidelines, ¶ 2(b).

because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

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

- (a) any drug abuse;<sup>6</sup> and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Between 1992 and 2009, Applicant illegally purchased and used marijuana, once or twice a year, for 17 years. He also purchased cocaine twice and used it four times between 2009 and 2010. AG ¶ 25(a) and (c) apply.

Two of the four mitigating conditions under AG ¶ 26 are relevant:

- (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.

Applicant's last use of illegal drugs is not recent, as it occurred approximately more than two years ago. However, he has a long history of using marijuana for 17 years. He used it with friends at social events, in situations that were not unusual. His use of cocaine also occurred in common situations, with friends at clubs. I cannot conclude that Applicant will not use illegal drugs in the future, because he chose to use illegal drugs not only when he was an adolescent, but well into his adult years. He chose to begin using an illegal drug—cocaine—at age 34. Applicant's use of illegal

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<sup>6</sup> Adjudicative Guidelines, Guideline H, ¶ 24(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.

drugs as a mature adult casts serious doubt on his reliability and good judgment. AG ¶ 26(a) does not apply.

Some mitigation is available to Applicant under AG ¶ 26(b) because he has abstained from illegal drug use for more than two years. He does not associate with the friends with whom he used marijuana or the friend with whom he used and purchased cocaine. Applicant signed a statement that he will not use illegal drugs in the future. However, other facts weigh against mitigation. The fact that Applicant knowingly engaged in the risky behavior of using illegal drugs when he was a mature adult raises questions about whether he will successfully abstain in the future. Only partial mitigation is available under AG ¶ 26(b). Overall, the partial mitigation is insufficient to outweigh Applicant's long history of illegal drug use.

### **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 following disqualifying condition is relevant 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.

AG ¶ 16(a) applies where an applicant deliberately falsifies documents during a security clearance investigation. The SOR alleges that Applicant knowingly falsified his answer to question 23.d on his 2011 security clearance application because he failed to disclose that he was court-ordered to attend drug treatment. Applicant explained during his hearing that he did not attend drug treatment. Applicant's testimony credibly demonstrated that he misunderstood question 23.d by confusing actually attending drug treatment, with being ordered to attend drug treatment.

Applicant's answers to other drug-related questions (questions 23(a) through (c)) are relevant to whether or not he deliberately falsified his response to question

23.d. Applicant disclosed on his application that he used illegal drugs within the previous seven years (question 23.a), that he illegally possessed and purchased controlled substances within the previous seven years (question 23.c). Applicant also provided descriptions and dates of his use of cocaine and marijuana. In response to question 22, he also disclosed that he was arrested for possession of a controlled substance and that he received probation. If he had wished to hide the fact that he was ordered to attend drug treatment, it is unlikely he would have disclosed his illegal drug use and drug-related arrest. Applicant misunderstood question 23.d concerning drug treatment, and did not have the requisite intent to conceal information required by AG ¶ 16(a). Because Applicant did not engage in deliberate falsification of his security clearance application, no mitigation is required.

### **Whole-Person Analysis**

Under the whole-person concept, an administrative judge must evaluate the applicant's security eligibility 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):

- (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 an overall commonsense judgment based on careful consideration of the guidelines and the whole-person concept. Under the cited guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant has demonstrated positive behaviors, including his abstinence from illegal drug use for more than two years, steady and well-regarded job performance for more than 10 years, and his current stable home life. His supervisor's and friends' opinions about his trustworthiness and reliability are of limited value in light of the fact that they are unaware of his illegal drug use.

Applicant's history of illegal drug use outweighs these positive factors. In evaluating the facts, I considered the entirety of Applicant's illegal drug use from 1992 to 2010. He knowingly violated the law over a period of 18 years. At the time he stopped using marijuana in 2009, he had used it—though infrequently—for 17 years, more than half his life. He took up a new illegal drug at the mature age of 34,



demonstrating poor judgment, lack of trustworthiness, and a willingness to engage in not only risky, but criminal, behavior. He attempted to mislead the police in 2010 when he tried to hide his cocaine. He was not open with his employer about his drug history, possibly because he feared the effect it could have on his job security. His current abstinence is a positive sign, but his use of illegal drugs as a mature adult raises questions about whether he will maintain abstinence. Applicant's willingness to violate for years his duty to be law-abiding and trustworthy raises doubts about his suitability for access to classified information. Such doubts must be resolved in favor of the national security.

A fair and commonsense assessment of the available information shows Applicant has not satisfied the doubts raised about his suitability for a security clearance. For these reasons, I conclude he has not mitigated the security concerns arising from the drug involvement adjudicative guideline.

### **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 as follows:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a – 1.d:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For 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