



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 15-07349

**Appearances**

For Government: Andrew Henderson, Esquire, Department Counsel

For Applicant: *Pro se*

05/30/2017

**Decision**

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant mitigated the security concerns regarding his use of drugs. Eligibility for access to classified information is granted.

**History of Case**

On November 16, 2016, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DoD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AGs) implemented by DoD on September 1, 2006.

Applicant responded to the SOR on December 9, 2016, and requested a hearing. The case was assigned to me on February 8, 2017, and was scheduled for hearing on March 7, 2016. At hearing, the Government's case consisted of four exhibits (GEs 1-4). Applicant relied on one witness (himself) and six exhibits (AEs A-F). The transcript (Tr.) was received on March 20, 2017.

### **Procedural Issues**

Before the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with 2015 performance evaluations (Tr. 33-34). There being no objections, and for good cause shown, Applicant was granted seven days to supplement the record. Department Counsel was afforded two days to respond. Within the time permitted, Applicant documented his 2015 performance evaluations. Applicant's submission was admitted as AE G.

### **Summary of Pleadings**

Under Guideline H, Applicant allegedly (a) used Ecstasy with varying frequency from July 1995 through July 2012 and (b) used drugs after being granted a security clearance in July 2007. Under Guideline E, the allegations of drug use were incorporated.

In his response to the SOR, Applicant admitted each of the allegations with explanations. He claimed he used Ecstasy with varying frequency between 1995 and 2001, and only once since 2001: over four years ago in July 2012. He claimed he is a hardworking man who has been employed by his current employer for over ten years. He denied failing to cooperate and claimed he left the interview process after being interrogated for over four hours without food or liquids.

Applicant further claimed he works in an unclassified area but needs a security clearance to log into network switches and telephone equipment. He claimed he has excellent financial credit and has received multiple awards from his employer recognizing his company contributions. And he claimed he received negative drug results from his voluntary drug test he submitted to in December 2016.

### **Findings of Fact**

Applicant is a 44-year-old network data analyst for a defense contractor who seeks a security clearance. (GEs 1-2 and AE C; Tr. 20) The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

### **Background**

Applicant is not married and has one 11-year-old son from a previous relationship who he cares for as a single parent. (GEs 1-2; Tr. 24, 27-28, 31) He earned a Bachelor's degree in 1998 and reported no military service. (GEs 1-2 and AC C; Tr. 20-21, 29-30)

Applicant has worked for his current employer since June 2006. (GEs 1-2 and AEC; Tr. 19, 21, and 23) Between September 1998 and May 2006, he was employed by a non-defense contractor. (GEs 1-2) He was granted a security clearance in July 2007 and again in September 2013. (GEs 1-2; Tr. 31)

### **Drug history**

Applicant was introduced to Ecstasy in 1995 at the age of 22. (GE 2) He first experimented with the drug in his early 20s while in college out of curiosity. (GE 2; Tr. 20) Between July 1995 and 2005, he estimates to have used Ecstasy once or twice a year in social situations for a total of 15 total times over a ten-year period. (GEs 1-2 and AE C; Tr. 22-23)

Between 2006 and July 2012, he abstained from illegal drug use. (GE 2 and AE C; Tr. 24) While Applicant's estimates of Ecstasy use between 1995 and 2005 differ slightly from the 1995-2001 estimates he provided in his answer, the adjusted time estimates are sufficiently consistent to be reconcilable.

After Applicant was granted a security clearance in January 2007, he avoided all use of illegal drugs until he slipped on one occasion and accepted Ecstasy from a friend at a birthday party after consuming alcohol in July 2012. (GE 2 and AE C; Tr. 27-28) Applicant acknowledged his awareness of his employer's anti-drug policy at the time of his characterized mishap and accepted full responsibility for his mishap. (Tr. 27-28) Citing maturity and his parental responsibilities for his young son, he has avoided illegal drugs since July 2012, a period of over four years. (GE 2; Tr. 27-28)

In an interview with an investigator from the Office of Personnel Management (OPM) in April 2014, Applicant assured the investigator he understands the responsibilities of raising his son and being a good role model to his son and his girlfriend's family (GE 2) Expressing regret over his using the Ecstasy drug, he stressed the value he placed on his employment and security clearance and assured the OPM investigator he had no intention of using Ecstasy (the only illegal drug he has ever used) in the future. (GE 2)

In non-random drug tests conducted in December 2016 and February 2017 by Applicant's primary care physician, Applicant tested negative for illegal drugs (inclusive of Ecstasy). (AEs A-B)

Applicant has not used Ecstasy or any illegal drug since July 2012 and is committed to avoiding illegal drugs in the future. Applicant's assurances are corroborated by over four years of sustained abstinence and are accepted.

### **Endorsements**

Applicant's documented performance evaluations for his employment years of 2013 through 2016 reflect excellent ratings in all performance categories. (AEs F-G) rated categories cover strategic initiatives, operational support, accountability, and program responsiveness. (AEs F-G)

Applicant earned a number of recognition awards from his employer. In 2013 and 2014, he received awards that recognize employees for serving others and achieving results for their efforts (SOAR) (AEs D-E; Tr. 34-36)

Besides his recognized employment contributions and operation commitments, Applicant made important contributions to his community. (GE 2 and AE C) Cited examples include his coaching his son's little league team. (Tr. 40)

### **Policies**

The AGs list guidelines to be used by administrative judges in the decision-making process covering security clearance cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. The AGs include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." They must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person.

The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk. The following AG ¶ 2(a) factors are pertinent: (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.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Drug Involvement**

*The Concern:* 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 AG ¶ 24.

### **Personal Conduct**

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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. AG, ¶ 15.

### **Burden of Proof**

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

### **Analysis**

Between July 1995 and July 2012, Applicant used Ecstasy recurrently. For a ten-year span between July 1995 and 2005, he estimated to have used the drug on 15

occasions, or roughly annually in social situations. Except for a one-time slip in July 2012, he never used Ecstasy or any illegal drug after he received his security clearance in July 2007. Applicant was at all times aware of his employer's anti-drug policy.

On the strength of the evidence presented, several disqualifying conditions of the Adjudicative Guidelines for drug abuse are applicable: DC ¶ 25(a), "any drug abuse," DC ¶ 25(c), "illegal possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," and DC ¶ 25(g), "any illegal drug use after being granted a security clearance." Judgment concerns exist over Applicant's past drug use while holding a security clearance with acknowledged awareness of the anti-drug use policies placed in force by his employer and inferred awareness of the DoD's anti-drug policy.

Judgment concerns over Applicant's use of illegal drugs while holding a security clearance are also covered by the personal conduct guideline. DC ¶ 16(c), "credible, adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information," fully applies to the judgment issues raised by Applicant's recurrent drug use while holding a security clearance.

In assessing security concerns associated with drug use and drug offenses, the Appeal Board has established no bright lines for determining whether the drug use and related conduct is sufficiently dated to mitigate. Each determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4 2004) See ISCR Case No. 14-05095 at 3n. 1 (App. Bd. Feb. 18, 2016) (affirming lack of bright-line test for recency of illegal drug use)(citing ISCR Case No. 14-01847 at 3 (App. Bd. Apr. 9, 2015))

Considering Applicant's long avoidance of Ecstasy and any other illegal drugs since 2006, except for one slip at a birthday party in July 2012, and the overall performance record he has forged with his employer and contributions he has made to his community initiatives in his community, potentially pertinent mitigating conditions covered by AG ¶ 24 are available to Applicant. MC ¶ 24(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," and MC ¶ 24(b), "a demonstrated intent not to use any drugs in the future, such as (1) disassociation from drug-using associates and contacts, and (3) an appropriate period of abstinence," fully apply to Applicant's situation.

Appeal Board decisions finding sufficient passage of time for applicants with recurrent histories of illegal drug use and relatively extended periods of time elapse since cessation of drug use while holding security clearances include the following: See Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006) (finding error in the judge's failure to place more emphasis on the applicant's lifestyle changes and therapy); ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004) (finding judge's failure to mitigate drug use concerns

after the passage of more than six years from the previous drug abuse constituted error); and ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (finding error in the judge's failure to give an explanation why he did not apply MC ¶ 24(a) to the facts of the applicant's case)

Applicant is credited with excellent performance evaluations. His credited contributions to his employer are considerable and reflect overall sound judgment, reliability, and trustworthiness. His documented contributions to his employer are impressive from a whole-person perspective and are enough to enable him to surmount security concerns over his recurrent use of Ecstasy over a number of years, with a last use occurring in July 2012 following a number of years of sustained avoidance of illegal drugs. Safe predictable judgments can be made at this time that Applicant is a safe risk to abstain from recurrent drug involvement.

Taking into account all of the facts and circumstances surrounding Applicant's recurrent drug use over the course of 22 years, and significant period of sustained cessation (over four years from a last acknowledged use in July 2012), drug concerns are mitigated. Favorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a-1.b of Guideline H and subparagraph 2.a of Guideline 2.a.

### **Formal Findings**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE H: (DRUG INVOLVEMENT):      FOR APPLICANT

Subparagraphs 1.a-1.b                              For Applicant

GUIDELINE E: (PERSONAL CONDUCT):      FOR APPLICANT

Subparagraph 2.a                                      For Applicant

### **Conclusions**

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

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Roger C. Wesley  
Administrative Judge

