



**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. 15-07176

**Appearances**

For Government: Andrew H. Henderson, Esquire, Department Counsel

For Applicant: *Pro se*

June 6, 2017

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**Decision**

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ROSS, Wilford H., Administrative Judge:

**Statement of the Case**

Applicant submitted his most recent Electronic Questionnaire for Investigations Processing (e-QIP) on May 7, 2014. (Government Exhibit 1.) On June 9, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing (Answer) on July 6, 2016, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on August 11, 2016. The case was assigned to me on August 17, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on August 30, 2016. I convened the hearing as scheduled on October 18, 2016. The Government offered Government Exhibits 1 through 3, which were admitted without objection.<sup>1</sup> Applicant offered Applicant Exhibits A through D, which were admitted without objection, and testified on his own behalf.<sup>2</sup> One additional witness testified on Applicant's behalf. DOHA received the transcript of the hearing (Tr.) on October 26, 2016.

### **Findings of Fact**

Applicant is a single, 30-year-old employee of a defense contractor. He received a bachelor's degree in 2010. (Government Exhibit 1 at Section 12.) He has been employed by a defense contractor since 2010, and is seeking to retain a security clearance previously granted in connection with that employment.

#### **Paragraph 1 (Guideline H – Drug Involvement)**

The Government alleged in this paragraph that Applicant is ineligible for clearance because he has used illegal drugs. Applicant admitted all the allegations under this paragraph. He also submitted additional evidence to support the finding of eligibility for access to classified information.

1.a. Applicant admitted that from approximately 2004 through 2009, when he was in high school and college, he used marijuana approximately 50 times primarily during summer months. (Government Exhibit 1 at Section 23, Exhibit 3 at 6; Tr. 20, 32-33, 61-62.)

In addition, Applicant stated that in 2011 he ate a piece of cake that, unknown to him, had marijuana in it. (Government Exhibit 3 at 7; Tr. 20-21, 33-35.)

1.b. Applicant admitted he used various hallucinogenic drugs, including LSD, Ecstasy, ketamine, and psilocybin mushrooms from 2004 through 2009. Applicant estimated he used such substances between 20 and 30 times during this period. Applicant admitted that he liked using hallucinogens for the experience. He further admitted that he missed drug use, "A little bit." However, Applicant has repeatedly stated

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1 Department Counsel also requested administrative notice be taken of facts contained in publications from the U.S. Department of Justice, Drug Enforcement Administration and the National Institutes of Health. Applicant had no objection, and the documents are entered into the record as Government Exhibits 4 and 5. The facts administratively noticed are set forth in the Findings of Fact, below. (Tr. 11-13.)

2 Applicant submitted a written closing statement on October 21, 2016. Department Counsel objected, stating that the record was not left open for submission of additional documentation. Pursuant to Directive, Additional Procedural Guidance ¶ E3.1.10 I am admitting the document as Applicant Exhibit E for Identification, and considering its content as argument only.

that he will not use any illegal drugs while possessing a security clearance. (Government Exhibit 1 at Section 23, Exhibit 3 at 8-11; Tr. 37-43, 60, 62-64, 70-71.)<sup>3</sup>

1.c. In 2012 Applicant used the substance. He had used it several times while in college. Department Counsel affirmed that salvia, while a hallucinogen, is not a controlled substance. Applicant stated that his use of salvia after obtaining a security clearance was a mistake. He further testified, “I regretted that immediately. That was a moment of weakness. I do feel bad about that. I shouldn’t have done that.” (Tr. 46-47.)

1.e, 1.f, 1.g, 1.h, and 1.i. Applicant admitted that he used several other potentially hallucinogenic substances on an experimental basis (usually less than five times for each substance) during the period from 2004 through 2009. These included 2C-I, 2C-E, eating a cactus, kawa kawa (Kava), and nitrous oxide. At the time of Applicant’s use, none of these substances was a Federal controlled substance. However, the synthetic hallucinogens 2C-I and 2C-E became Schedule I controlled substances in 2012. (Government Exhibit 4; Tr. 12, 43-45, 60-62.)

1.d. Applicant admitted using drugs while employed as a lifeguard during the period from 2004 through 2009. He further admitted that his employment as a lifeguard could be viewed as one directly affecting public safety. Applicant stated in his Answer, “When using drugs other than marijuana, I gave myself at least one rest day before going in to work.” (Tr. 49-51.)

An additional evidentiary fact of note is that Applicant has lived, and continues to live, with a person he used to use drugs with. (Tr. 48-49.)

## **Paragraph 2 (Guideline E – Personal Conduct)**

The Government alleged in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct that shows poor judgment, untrustworthiness or unreliability.

Applicant filled out an e-QIP on April 7, 2010. (Government Exhibit 2.) Section 23 of the questionnaire asked Applicant about his drug use history. Applicant admitted using and selling marijuana, mushrooms, Ecstasy, and LSD on an infrequent basis from 2004 through 2007. This answer understated the extent of Applicant’s drug use, as well as misstating the date it actually ended in 2009. Applicant testified that he panicked when filling out this questionnaire because of the difficulties people had at that time in finding employment in his profession. He further stated in his testimony, about his answer concerning when he ended drug use, “That [answer] was false. Just plain false.” He

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<sup>3</sup> Though not alleged in the SOR, Applicant also admitted that he purchased and sold LSD and psilocybin mushrooms in 2006 and 2007. These facts cannot be used against Applicant in determining whether the Government has established a *prima facie* case. They can, however, be considered in determining whether Applicant has mitigated the allegations against him, and in considering the whole-person factors. (Government Exhibit 3 at 8-9; Tr. 38-41, 53.)

further testified that in making false statements on this questionnaire, "I very much broke my own moral code." (Tr. 18-21.)

Applicant filled out a second e-QIP on May 7, 2014. (Government Exhibit 1.) He was much more forthcoming about his drug use in Section 23 of this questionnaire. He was also much more truthful during interviews with investigators from the Office of Personnel Management. (Government Exhibit 3; Tr. 17-18, 66-70.)

The SOR also alleged Applicant falsified Government Exhibit 2 by not admitting he used the synthetic hallucinogens 2C-E and 2C-I during 2004 and 2006. However, as stated above, those substances were not Schedule I controlled substances at the time of his use, or at the time he filled out the first questionnaire. Accordingly, since the question asks about "illegal use of drugs or drug activity," the exclusion of those drugs from his answer was correct at the time. These subparagraphs are found for Applicant.

Applicant did not admit in his 2010 questionnaire that he had used ketamine once in 2006. The SOR alleged that this failure also amounted to a falsification. Given his other admissions on that form of extensive drug use, even though far from complete, I find this omission to be accidental. Accordingly, this subparagraph is also found for Applicant.

In his 2010 questionnaire Applicant answered, "No," to the question of whether he had ever used an illegal controlled substance while in a position directly or immediately affecting public safety. When Applicant filled out a new e-QIP in 2014 he changed that answer and admitted that he had used drugs while employed as a lifeguard during the summers from 2004 through 2006. Applicant stated that he had changed his mind during the ensuing years as to whether his work as a lifeguard was directly concerning public safety. (Tr. 15-17, 51.) I find that Applicant was genuinely confused about whether his job as a lifeguard affected public safety when he filled out the first e-QIP in 2010. Therefore, his negative answer was not an attempted falsification. This subparagraph is also found for Applicant.

## **Mitigation**

A co-worker and friend testified on Applicant's behalf. He has known Applicant since 2010. The witness has knowledge of the allegations in the SOR. He finds Applicant to be a "very stable, intelligent, honest and loyal friend and citizen," worthy of a security clearance. The witness also testified that the allegations in the SOR are inconsistent with the Applicant he has known since 2010. (Tr. 74-84.)

Letters of recommendation were submitted for Applicant from people who know him personally and professionally. (Applicant Exhibits A, B, C, and D.) All of his co-workers, including his current supervisor, recommend him for a position of trust, and also indicated their understanding of security clearance requirements. The writers of Applicant Exhibits C and D specifically indicated that they have knowledge of the drug and falsification allegations concerning Applicant. (Tr. 30-31.)

## Policies

Security clearance decisions are not made in a vacuum. When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions (DCs) and mitigating conditions (MCs), which are to be used in evaluating an applicant's eligibility for access to classified information.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context of a number of variables known as the whole-person concept. The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

A person applying for access to classified information seeks to enter 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 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

## **Analysis**

### **Paragraph 1 (Guideline H – Drug Involvement)**

The security concern relating to Drug Involvement is set forth in AG ¶ 24:

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:

(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.

I have examined the disqualifying conditions under AG ¶ 25 and especially considered the following:

(a) any drug use;

(g) any illegal drug use after being granted a security clearance; and

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

The following mitigating conditions under AG ¶ 26 may also apply to the facts of this case:

(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

(b) a demonstrated intent not to abuse any drugs in the future, such as:

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence.

Applicant engaged in significant illegal drug use, along with the use of then-legal hallucinogenic drugs, from 2004 through 2009. He used many of these drugs experimentally, in that he wanted to gain knowledge from the experience. Applicant testified that he enjoyed using drugs, and misses using drugs “a little bit.” It is also of note that his long-time roommate is a person who Applicant used drugs with in the past.

On the other hand, Applicant has not knowingly used any illegal drugs in seven years as of the date the record closed. He expressed considerable regret at his one-time use of the legal substance salvia in 2012. Applicant has repeatedly stated that he will not use illegal drugs in the future while he holds a security clearance. Applicant’s testimony was blunt and honest about his past drug use and his intentions about not using drugs in the future.

Examining the record as a whole, particularly the period of abstinence from illegal drug use, I find that Applicant has clearly and convincingly committed to not using drugs in the future. He has successfully mitigated the security significance of his drug use. Paragraph 1 is found for Applicant.

## **Paragraph 2 (Guideline E – Personal Conduct)**

The security concern relating to Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules or 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.

I have examined the disqualifying conditions under AG ¶ 16 and especially considered the following:

(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; 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. . .

The following mitigating conditions under AG ¶ 17 apply to the facts of this case:

(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; and

(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 facts that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

In 2010 Applicant falsified his first e-QIP by not telling the absolute truth. Indeed, Applicant admitted that his conduct was purposeful in understating the extent and longevity of his illegal drug use. He was in his early 20s at that time and a recent graduate looking for his first adult job. To his credit, Applicant did not use those reasons as an excuse for his conduct. By 2014 Applicant had been employed in the defense industry for several years and better understood the requirement for truthfulness. His 2014 e-QIP was extensive and truthful. Applicant well understood the possible adverse consequences of his truthfulness. He has mitigated the impact of his original incomplete questionnaire, which was filled out six years before the record closed. AG ¶¶ 17(b) and 17(c) apply. Paragraph 2 is found for Applicant.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The 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.



Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant has mitigated his intentional illegal drug use that ended at least seven years ago, and sufficient time has passed since he falsified a questionnaire, particularly since he has been truthful since then. I have particularly considered his truthfully admitting his history of buying and selling various drugs at least nine years ago. His history since 2010 is of a law abiding, trustworthy, and responsible person and employee. Overall, the record evidence does not create doubt as to Applicant's present 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 ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraphs 1.a through 1.i:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a through 2.f:	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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS  
Administrative Judge