



**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. 17-01800

**Appearances**

For Government: Daniel F. Crowley, Esquire, Department Counsel  
For Applicant: *Pro se*

September 20, 2018

**Decision**

ROSS, Wilford H., Administrative Judge:

On January 8, 2016, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP). (Item 3.) On June 22, 2017, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H (Drug Involvement and Substance Misuse), E (Personal Conduct), and J (Criminal Conduct). The action was taken under Executive Order (EO) 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 (AG) effective within the Department of Defense on June 8, 2017.

Applicant answered the SOR in writing (Answer) on July 21, 2017, and requested his case be decided on the written record in lieu of a hearing. (Item 2.) On August 28, 2017, Department Counsel submitted the Department's written case. A complete copy

of the file of relevant material (FORM), consisting of Items 1 to 5, was provided to Applicant, who received the file on September 11, 2017.

Applicant was given 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant submitted additional material on September 11, 2017. Department Counsel had no objection and the documentation is identified as Applicant Exhibit A and admitted into evidence. In that exhibit, Applicant raised an objection as to the accuracy of certain statements in Item 5. That item is a Report of Investigation (ROI) of an interview of the Applicant by an investigator from the Office of Personnel Management (OPM) on March 7, 2017. Applicant did not object to Item 5 as a whole, and it is admitted into evidence. His objections will be taken into account in the Findings of Fact.

The case was assigned to me on December 18, 2017. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

### **Findings of Fact**

Applicant is 36 and single. He has a master's degree and has been employed by a defense contractor since December 2008 as a Manager, Program Control. He has held a security clearance since 2009, and seeks to retain national security eligibility for access to classified information in connection with his employment. (Item 3 at Section 13A, Item 4.)

#### **Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has used illegal drugs. Applicant admitted all four allegations under this paragraph.

Applicant used marijuana when he was in high school, ending in about 2001. Applicant did not use marijuana or any illegal drugs again until about December 2012, when he was 31 years old. At that time Applicant began using illegal drugs when attending music festivals with friends and relatives. He went to these festivals several times a year from 2012 through April 2015. He explained the decision to use drugs at these festivals on page 1 of his Answer:

I had left a long term relationship and had thought to myself that I have never done anything "crazy" in my life. I didn't do anything "crazy" in college, so why not live life a little while I am still somewhat young. It was a voluntary and conscious decision I made, and it was based on the facts that I was not harming anyone but myself and I was not in possession of any classified information.

1.a. Applicant used cocaine about ten times from September 2013 to April 2015. During all that time Applicant held a security clearance. (Item 2, Item 3 at Section 23, Item 4, Item 5; Applicant Exhibit A.)

1.b. Applicant used marijuana at least ten times from June 2013 to April 2015. During all that time Applicant held a security clearance. (Item 2, Item 3 at Section 23, Item 4, Item 5; Applicant Exhibit A.)

1.c. Applicant used ecstasy about ten times from December 2012 to April 2015. During all that time Applicant held a security clearance. (Item 2, Item 3 at Section 23, Item 4, Item 5; Applicant Exhibit A.)

1.d. Applicant admitted purchasing and selling ecstasy twice between approximately April 2014 to April 2015. Applicant stated that he acted as the middle man between his cousin, who had the drugs, and the person who wanted them. (Item 2, Item 3 at Section 23, Item 4, Item 5; Applicant Exhibit A.)<sup>1</sup>

Applicant self-reported his drug use to his employer's security office on September 3, 2015. He stated, "I deeply and sincerely apologize for not self-reporting the incidents sooner. I am not proud of my decision to include myself in such activities and have stopped all use. I have also committed to not using any illegal drugs in the future." (Item 4.)

Applicant took a drug-abuse self-assessment on September 11, 2017. It is attached to Applicant Exhibit A. The Assessment Results states, "Based on your responses to the quiz you do not appear to have a current problem with a substance use disorder."

In his Answer, Applicant states:

I have worked hard to get to where I am in my career and do not want to jeopardize it by continuing to do something irresponsible and unlawful. I do not intend . . . to use controlled substances in the future and if I am allowed to keep my clearance I am willing to be subjected to an automatic revocation of my clearance in the future if it were to occur.

Applicant's Answer is signed and notarized. I am viewing it as a signed statement of intent to abstain from drug involvement under Mitigating Condition ¶ 26 (b)(3).

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<sup>1</sup> In answering Section 23 of Item 3 concerning the sale of illegal drugs Applicant stated the following, "The friends that I was attending the music festivals with were having a difficult time purchasing ecstasy and had asked if I knew of anyone selling. At the time, I knew of a friend of a friend who was able to help acquire some." In fact, as Applicant admitted later to an OPM investigator, the person he acquired ecstasy from was his cousin.

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

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct that shows questionable judgment, lack of candor, dishonesty, or an unwillingness to comply with rules and regulations. Applicant admitted both allegations under this paragraph.

2.a. Applicant admitted that he continues to associate with his cousin. His cousin would use illegal substances with Applicant. He also provided Applicant with illegal substances, including ecstasy that Applicant sold to other people on at least two occasions. (Item 5.)

Applicant also stated that he was moving to another state to further his career, and be away from the people with whom he used illegal drugs. Documentation in the record confirms that he has moved from his original state of residence. (Item 2.)

2.b. The Government alleges that Applicant's conduct as set forth under Paragraph 1, above, is cognizable under this guideline as well.

## **Paragraph 3 (Guideline J, Criminal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal activity that creates doubt about his judgment, reliability, and trustworthiness.

3.a. The Government alleges that Applicant's conduct as set forth under Paragraph 1, above, is cognizable under this guideline as well.

Applicant did not submit any evidence concerning the quality of his job performance. He submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

## **Policies**

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 and mitigating conditions, which are useful 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, the administrative judge applies the guidelines 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(c), the entire process is a conscientious scrutiny 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.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, "Any doubt concerning personnel being considered for national security eligibility 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.

According to 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."

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 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.

Finally, as emphasized in Section 7 of EO 10865, "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." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## Analysis

### Paragraph 2 (Guideline H – Drug Involvement and Substance Misuse)

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

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. §802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above. (Emphasis in original.)

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

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant has a history of purchasing, selling, and using illegal drugs. This occurred between 2012 and 2015, while he held a security clearance. All three of the stated disqualifying conditions apply.

The following mitigating conditions under AG ¶ 26 have also been considered:

- (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) the individual acknowledges his or her drug-involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used; and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant had not used illegal drugs for a little over two years when the record closed. He has moved and, therefore, allegedly no longer associates with the people he used drugs with in the past. However, on the other side is the fact that Applicant is a smart, capable, and mature individual. He was a project manager for his employer. He was over 30 years old when these events happened. The excuse of going “crazy” over a bad breakup may explain one or two uses over a brief period of time. That is not what occurred here. Applicant used the drugs repeatedly over a more than two year period. He sold drugs to other people at least twice. He obtained the drugs from his cousin, who he identified as a “friend of a friend” on his e-QIP. Given the state of the evidence, Applicant has not met his burden under this guideline. Paragraph 1 is found against Applicant.

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

The concern under this guideline is set out in AG ¶ 15:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation

with medical or psychological evaluation, or polygraph examination, if authorized and required; and  
(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The following disqualifying conditions are applicable under AG ¶ 16:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing; and

(g) association with persons involved in criminal activity.

Applicant admitted using, purchasing and selling illegal drugs. He obtained many of the drugs from his cousin. Both of the cited disqualifying conditions have application in this case.

The following mitigating conditions are potentially applicable under AG ¶ 17:

(c) the offense is so minor, or so much time has passed, or the behavior was 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

(g) association with persons involved in criminal activities was unwitting, 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.

Applicant has moved, but it is unclear whether he has continuing contact with his cousin and other drug-abusing friends. His drug use is recent, occurred over an extended period, and is still a concern. Paragraph 2 is found against Applicant.



### **Paragraph 3 (Guideline J, Criminal Conduct)**

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

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.

The guideline at AG ¶ 31 contains five disqualifying conditions that could raise a security concern and may be disqualifying. Two conditions apply:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Appellant used and purchased marijuana, cocaine, and ecstasy between 2012 and 2015. He sold ecstasy at least twice during this time period. All of this was potentially illegal conduct under both his state's and Federal law.

The guideline in AG ¶ 32 contains four conditions that could mitigate criminal conduct security concerns:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) no reliable evidence to support that the individual committed the offense; and
- (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant's conduct as described in the Findings of Fact was serious, recent, and criminal. He has introduced insufficient evidence to support a finding that he has mitigated his misconduct under this guideline. Paragraph 3 is found against 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(d):

(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 national security eligibility and 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 facts and circumstances surrounding this case. Overall, the record evidence as described above leaves me with questions and substantial doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising under the guidelines for Drug Involvement and Substance Misuse, Personal Conduct, and Criminal Conduct.

### **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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant

Paragraph 2, Guideline E:           AGAINST APPLICANT

    Subparagraph 2.a:               Against Applicant

    Subparagraph 2.b:               Against Applicant

Paragraph 3, Guideline J:           AGAINST APPLICANT

    Subparagraph 3.a:               Against Applicant

### **Conclusion**

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

WILFORD H. ROSS  
Administrative Judge