



**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. 17-03658

**Appearances**

For Government: Mary Margaret Foreman, Esquire

For Applicant: *Pro se*

06/08/2018

**Decision**

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

**Statement of the Case**

On December 29, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H (Drug Involvement) and Guideline J (Criminal Conduct).<sup>1</sup> In a response signed on January 26, 2018, he admitted all allegations raised and requested a determination based on the written record. On February 23, 2018, the Government issued a File of Relevant Material (FORM) with nine attachments ("Items"). The case was assigned to me on May 23, 2018. Based on my review of the case file and submissions, I find Applicant failed to mitigate criminal conduct security concerns.

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<sup>1</sup> 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 (AG) effective within the DOD on or after September 1, 2006. Since that time, the AG were amended as *Guideline H: Drug Involvement and Substance Abuse*, and it is now in effect for any adjudications on or after June 8, 2017.

## Findings of Fact

Applicant is 26 years old and has been employed by the same defense contractor as a fire protection engineer since March 2015. He has earned a bachelor's degree and completed a master's degree in December 2017. At work, he was named as a "top performer," which meant he ranked in the top 10% of employees in his company. Applicant is single and has no children.

Between August 2009 and December 2013, Applicant attended undergraduate school. He began using the prescription drug Adderall in about October 2012, then very briefly experimented with illegal drugs between September 2013 and November 2013. (FORM, Item 5, at 3) He ended his abuse of illegal drugs by graduation.

After beginning his current job, Applicant completed a security clearance application (SCA). He was subsequently granted a secret clearance in July 2015. From around October 2015 until about December 2016, Applicant again used the prescription medication Adderall, although he had no prescription for the medication. Also in December 2016, he used MDMA, popularly known as "Ecstasy" or "Molly."<sup>2</sup>

Indeed, Applicant's use of MDMA coincided with his traveling to another state to see a concert. Between about 18:30 and 22:30, he consumed a couple of alcoholic beverages and a single capsule of MDMA.<sup>3</sup> The effect of the MDMA wore off in about two hours.

By 02:30, Applicant, his sister, and a female friend headed back to his home state by automobile. Around 03:00, he stopped at a rest area to nap. Within an hour, he had purchased an energy drink and was back on the road. Still exhausted, he began to doze behind the wheel. He was awakened by a passenger's cry as he struck the rear of a parked tractor trailer. He was traveling at about 65 m.p.h. at the time.

Stunned, and trapped behind deployed airbags, Applicant surveyed his injured passengers. Emergency personnel eventually arrived, having to cut into the vehicle to remove everyone. His sibling suffered from a broken sternum and collarbone, while Applicant had broken ribs and a collapsed lung. Another passenger, a female contemporary of Applicant, suffered the worst, requiring multiple surgeries to address her extremely serious injuries. Related surgeries and rehabilitation continue to date. During a search, a state trooper found the severely injured female passenger's Adderall and MDMA, which the guilt-ridden Applicant volunteered as being his. (SOR Response)

As a result, Applicant was summarily arrested for both driving under the influence of drugs and for felony possession of both Adderall and MDMA. In May 2017, he pled

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<sup>2</sup> MDMA stands for the chemical compound 3,4-Methylenedioxymethamphetamine, a psychoactive drug that produces effects that resemble both stimulants and psychedelics.

<sup>3</sup> In an August 2017 interview, Applicant volunteered this scenario. (FORM, Item 5, at 25; *cf.* FORM, Item 2, at 3)

guilty to driving under the influence of drugs – 1<sup>st</sup> offense (DUI1), a misdemeanor.<sup>4</sup> He was sentenced to 90 days in jail, with all but five days suspended. He remains on probation for the offense through at least May 2020. In August 2017, Applicant pled guilty to the possession of MDMA, a felony, and was granted probation before judgment for one year. He remains on probation for that offense until at least August 2018.

As a result of the charges, Applicant has received significant education with regard to drugs, substance abuse, and mental health, including personal counseling. He found that education to be eye-opening. He has completed all ordered education and counseling-related components of his convictions. He is required to remain drug-free through the end of his probationary periods, a condition he has readily accepted in his grief for all the harm incurred by his sibling and passenger. He intends to never be illegally involved with controlled substances again. He views his life going forward as his “second chance,” and he does not intend to jeopardize that opportunity with any future association with controlled or illegal drugs.

### **Policies**

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. 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. 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. Under the AG, any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national interest. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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<sup>4</sup> In its FORM, at page 3, the Government wrote that Applicant’s charge for driving under the influence was the result of a positive test for MDMA. It attributed this assertion at footnote 8 to the SOR Response at 3-4 (SOR Response). That document is at odds with this assertion to the extent Applicant denied taking a drug that night in his SOR Response. (FORM, Item 2, at 3) However, given his plea, his August 2017 interview comments, and his admission to the related SOR allegation, I conclude that Applicant had consumed MDMA within sufficient time of the accident to carry the charge raised, although it remains unclear whether he tested positive for the drug.

The Government must present evidence to establish controverted facts alleged in the SOR. Under the Directive, 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 and has the ultimate burden of persuasion to obtain a favorable security 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. The Government reposes a high degree of trust and confidence in those granted access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard such information. Decisions shall be in terms of the national interest and do not question the loyalty of an applicant.

## **Analysis**

### **Guideline H – Drug Involvement and Substance Misuse**

The security concern for this guideline is set forth in AG ¶ 24, where it is noted that the illegal use of a controlled substance, and the use of other substances that can 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. Such use also raised questions about a person's ability or willingness to comply with laws, rules, and regulations.

Here, Applicant admitted he used MDMA in December 2016 and that he used Adderall without a prescription from about October 2015 to December 2016, both while granted a security clearance. These facts are sufficient to raise AG ¶ 25(a): any substance misuse and ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position. The Government's substantial evidence, as confirmed by Applicant's own admissions, raises security concerns under Guideline H. Therefore, the burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate related security concerns.

Under Guideline H, conditions that could mitigate security concerns arising from drug involvement and substance misuse are enumerated. The following mitigating conditions under AG ¶ 26 potentially apply to Applicant's 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) 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.

Regarding AG ¶ 26(a), the drug use at issue occurred under mundane circumstances and the most recent incident was only about a year-and-a-half ago (December 2016). Indeed, in terms of time, the incident at issue was sufficiently recent as to otherwise sustain doubts regarding Applicant's current good judgment, particularly given the fact he maintained a security clearance at the time.

The subsequent trauma he personally suffered and his genuine sense of responsibility for the grievous injury inflicted on his peers, however, are apparent, well-expressed, and understandable. This is not simply a story of carefree "partying" without consequences with only professional repercussions: He caused grievous injury to a sibling and a friend. It is apparent he has learned from both the experience and his subsequent counseling, and that this type of drug-related incident will not recur. While more time is needed to test his resolve in staying clear of drugs, I find the Applicant of today to be credible and genuine in his intention to eschew drugs in the future. Consequently, I find AG ¶ 26(a) to apply, in part, and AG ¶ 26(b)(1)-(2) to fully apply.

## **Guideline J – Criminal Conduct**

The concern raised by 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.

Applicant admits he was arrested in December 2016 for driving under the influence of drugs and felony possession of Aderall, for which he lacked a prescription, and MDMA. In May 2017, he pled guilty to DUI1, a misdemeanor. He was sentenced to 90 days in jail, all but five days of which were suspended. He remains on probation for this count through at least May 2020. In addition, in August 2017, he pled guilty to possession of MDMA, a felony, for which he was granted probation before judgment for one year. He remains on probation for this count until at least August 2018. Such facts and admissions are sufficient to raise disqualifying conditions:

AG ¶ 31(a): a pattern of minor offenses, any 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;

AG ¶ 31(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; and

AG ¶ 31(c): individual is currently on parole or probation.

The following mitigating conditions are potentially relevant:

AG ¶ 32(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, and

AG ¶ 32(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.

For many of the same considerations underlying my conclusion that AG ¶ 26(a) applies, in part, I find AG ¶ 32(a) similarly applies in part here, given the circumstances and repercussions at issue. Moreover, there is evidence that Applicant has learned from his mistake and from the drug counseling and education he has received. His guilt for the accident is apparent, as is his attempt to take responsibility for the injury inflicted on his passengers. However, less than two years have passed since the accident, and Applicant yet remains on probation for both the DUI1 and possession charges. The terms of those probations appear to be solidly considered gauges of committed abstinence and demonstrated rehabilitation. Consequently, while Applicant is clearly on the right track, insufficient time has passed to evidence successful rehabilitation given the facts presented here.

### **Whole-Person Concept**

Under the whole-person concept, one must evaluate security clearance eligibility by considering the totality of the applicant's conduct and all relevant circumstances. Consideration shall be given to the nine adjudicative process factors listed in the AG. The final determination 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, and conducted a whole-person analysis based on the record. In addition to Applicant's drug use, I considered factors such as his age, profession, educational attainments, past employment, and lifestyle.

This is not a situation involving youthful indiscretion. Applicant was solidly in his 20s, had earned a college degree, and had been granted a security clearance when he decided to be involved with MDMA and Adderall. While his admissions led to his

criminal conviction for DUI1 and possession, it was his reckless behavior that led to the sad consequences that resulted.

Through Applicant's written narratives, there is little doubt that he is extremely contrite about what happened. He has stayed mindful of the horrific accident and the injuries sustained while he has moved on at work and in academe. Through harsh realities, appropriate education, and counseling, he has learned his lesson. I am persuaded that he will exercise better judgment going forward. However, he remains on probation for both convictions.

Those probationary periods are appropriate for the criminal charges to which Applicant pled guilty. They provide more than sufficient time for him to demonstrate his commitment to eschew both drug use and drug involvement in the future. While probation through May 2020 may prove excessive, given Applicant's personal successes and contrition, a period of only one-and-a-half years since his last drug involvement is insufficient to regain the level of trust expected from one to whom the government has granted a security clearance. Therefore, while I find Applicant has mitigated security concerns related to drug involvement and substance misuse, security concerns related to criminal conduct remain unmitigated.

### **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:

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|---------------------------|-------------------|
| Paragraph 1, Guideline H: | FOR APPLICANT     |
| Subparagraphs 1.a-1.b:    | For Applicant     |
| Paragraph 1, Guideline J: | AGAINST APPLICANT |
| Subparagraphs 1.a-1.c:    | 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 a security clearance. Eligibility for access to classified information is denied.

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Arthur E. Marshall, Jr.  
Administrative Judge