



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
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----- ) ISCR Case No. 19-00101  
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Applicant for Security Clearance )

**Appearances**

For Government: Ross Hyams, Esq., Department Counsel  
For Applicant: Leon J. Schachter, Esq.

12/02/2020

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**Decision**

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LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for access to classified information. He did not present sufficient evidence to mitigate his cocaine use in 2017, when he was a federal employee holding a top-secret security clearance. Accordingly, this case is decided against Applicant.

**Statement of the Case**

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format), the official form used for personnel security investigations, on August 6, 2017. (Exhibit 1) This document is commonly known as a security clearance application. Thereafter, on February 28, 2020, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information. The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guidelines known as Guideline H for drug involvement and substance misuse and

Guideline E for personal conduct. The sole allegation under Guideline E is simply a cross-allegation to two of the three matters alleged under Guideline H.

Applicant answered the SOR on March 19, 2020. His answer was extensive, consisting of a lengthy memorandum and supporting documents marked as Exhibits A – F. For the Guideline H allegations: (1) he admitted using cocaine twice, but denied using cocaine with “varying frequency” between March and April 2017; (2) he admitted failing a drug test because he tested positive for cocaine on or about April 12, 2017; and (3) he admitted using cocaine twice while holding a security clearance. For the Guideline E allegation, which cross-alleged the matters in (1) and (3) above, he denied that the allegation relates to any conduct of current security significance because it is wholly derivation of the SOR allegations under Guideline H. He also requested a hearing before an administrative judge.

The case was assigned to me on September 15, 2020. The case was heard as scheduled on October 27, 2020. Both Department Counsel and Applicant offered documentary exhibits. Government Exhibits 1, 3, and 4 were admitted. Exhibit 2 was not admitted per Applicant’s objection. Applicant relied on Exhibits A - F included in his Answer and also presented Exhibit G, all of which were admitted without objection. No witnesses were called other than Applicant. The hearing transcript (Tr.) was received on November 13, 2020.

### **Findings of Fact**

Applicant is a 42-year-old employee who is seeking to retain a security clearance previously granted to him by the Defense Department. (Tr. 5-6) He has worked as a project manager for a company doing business in the defense industry since October 2019. He was recently assigned collateral duties as acting vice-president of a sister company. His formal education includes a bachelor’s degree awarded in 2005, and a master’s degree awarded in 2008. He is married to an active duty servicemember, and they have no children.

Applicant’s employment history includes honorable active duty military service during 1999-2006. (Exhibit E - DD Form 214) His military service included performance of hazardous duties. He left active military duty and worked for a federal contractor as a senior telecommunications specialist for a couple of years. He had a similar job with another federal contractor during 2008-2010. He then worked the next several years, 2010-2017, as an information technology (IT) specialist for a federal criminal investigative organization. His pay grade was GS 13. He resigned from federal employment in early May 2017. Thereafter, he worked as a self-employed site-survey specialist for a company doing business in the defense industry. The job required extended travel, both domestically and overseas. He was so employed until October 2019 when he began his current employment.

Applicant used cocaine in about March 2017 and April 2017, when he was a 39-year-old federal employee holding a top-secret security clearance with SCI access. He did so on both occasions at a nightclub where he was offered cocaine by an

acquaintance (“a friend of a friend”). (Tr. 21, 29) He accepted the cocaine on both occasions. It was powder cocaine. He used it by snorting it. Subsequently, he was selected for a random drug test by his federal employer on April 12, 2017, and he tested positive for cocaine. (Exhibits 3 and 4) He was contacted by the medical review officer and informed of the positive test result on April 26, 2017. He then contacted his supervisor and reported that the medical review officer had notified him of the positive drug test. He “insisted” to his supervisor that the drug test was wrong. (Exhibit 4) He was less than candid with his supervisor about the positive drug test due to his shame and embarrassment. He later admitted to his supervisor that the positive drug test was correct and that he had used cocaine. He resigned from federal employment in early May 2017. His resignation occurred before his employer initiated any form of disciplinary action.

Applicant described his use of cocaine as “the biggest mistake of my life.” (Exhibit 1 at 35) He attributed his cocaine use to the underlying issue of sleep apnea, which is long-standing and often left him “tired and miserable.” (Exhibits E and F; Tr. 21-22) His chronic fatigue was such that he found it difficult to wake up in the morning and was sometimes late for work, leading him to be counseled for occasional lateness by his supervisor during his federal employment. He explained that he used the cocaine because “he just wanted to enjoy a life of energy like everyone else.” (Answer at 5) After years of seeing doctors, he was recommended for corrective surgery to address the problem in May 2017. (Exhibit 1 at 36) He had the surgery during the summer of 2019, and he reports that he is now able to better tolerate the CPAP machine and his sleep has improved. His history of sleep apnea, the sleep disruption it caused, and the post-surgery improvement of his sleep was confirmed and verified by his spouse, who is well aware of the matter. (Exhibit D)

Applicant stated that he has not used cocaine since 2017, and there is no record evidence to establish cocaine usage other than the two occasions in 2017. He no longer associates with the group of people he was with when he used cocaine in 2017. (Tr. 37-39) He submitted a signed statement of intent setting forth his intention to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility. (Exhibit C)

In addition to the signed statement of intent, Applicant submitted a number of documents in support of his case. (Exhibits A - G) Taken together, the documentation shows that he has enjoyed a good record of employment over the years. The documents also include highly favorable recommendations from several people. Those matters are summarized below.

Applicant’s former supervisor during his federal employment provided an affidavit wherein he stated the following: (1) Applicant had a solid work ethic and always received positive annual performance reviews resulting in further recognition and bonuses; (2) the former supervisor is well aware of the facts and circumstances in the SOR, and he believes Applicant’s use of cocaine was out of character and will not recur; and (3) he believes Applicant can be trusted with access to classified information. (Exhibit A1)

Applicant's former chief information officer provided an affidavit wherein he stated the following: (1) Applicant was a careful, considerate, efficient, and dedicated employee who completed all assignments ahead of schedule; (2) the CIO is aware of the facts and circumstances in the SOR, and he believes Applicant's use of cocaine was an unfortunate situation and probably one of a kind; and (3) he believes Applicant can be trusted with access to classified information. (Exhibit A2)

Applicant's longtime friend and fellow IT professional provided an affidavit wherein he stated the following: (1) he has known Applicant for more than 20 years as they met through mutual friends in their hometown and they communicate almost daily via text message and social media; (2) he is aware of the facts and circumstances in the SOR, and he believes Applicant's cocaine use was "an extraordinary anomaly and not reflective of his character"; (3) Applicant confided in him after resigning from federal employment and was both very regretful and disappointed in himself; and (4) he believes Applicant should be granted a security clearance. (Exhibit A3)

Applicant's current company president provided an affidavit wherein he stated the following: (1) Applicant has proved himself to be a trusted and reliable employee during his relatively short tenure with the company, which resulted in his assignment as acting vice-president of a sister company; (2) he is aware of the facts and circumstances in the SOR, and he believes those matters do not reflect Applicant's character, current conduct, and willingness and ability to protect classified information, and that the cocaine usage was an aberration that will not recur; and (3) he believes Applicant can be trusted with access to classified information. (Exhibit G)

### **Law and Policies**

This case is adjudicated under Executive Order (E.O.) 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.

It is well-established law that no one has a right to a security clearance.<sup>1</sup> As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>2</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.<sup>3</sup> The Appeal Board has

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<sup>1</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

<sup>2</sup> 484 U.S. at 531.

<sup>3</sup> 484 U.S. at 531.

followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>4</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>5</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>6</sup> An Applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>7</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>8</sup>

### **Discussion**

Under Guideline H for drug involvement and substance misuse, the concern as set forth in AG ¶ 24 is that:

[t]he illegal use of controlled substances, to include the misuse of prescriptions and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are use 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. . . .

In addition to the above concern, I note that Applicant's illegal drug use while a federal employee was contrary to Executive Order 12564—Drug-Free Federal Workplace, which was signed by President Ronald Reagan on September 15, 1986, and was in effect when Applicant used cocaine in 2017. The main points of the Executive Order are: (1) federal employees are required to refrain from using illegal drugs; (2) use of illegal drugs by federal employees, on or off duty, is contrary to the efficiency of the service; and (3) persons who use illegal drugs are not suitable for federal employment.

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions:

AG ¶ 25(a) any substance abuse;

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<sup>4</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>5</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>6</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>7</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>8</sup> Directive, Enclosure 3, ¶ E3.1.15.

AG ¶ 25(b) testing positive for an illegal drug;

AG ¶ 25(f) any illegal drug use while granted access to classified information or holding a sensitive position;

AG ¶ 26(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

AG ¶ 26(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 of revocation of national security eligibility.

I have considered the totality of Applicant's involvement with cocaine. It consisted of the two admitted uses of cocaine in 2017. It was detected by a random drug test in April 2017. His cocaine use occurred during his employment with a federal criminal investigative organization while he held a top-secret security clearance with SCI access. Any illegal drug use is relevant in the context of evaluating a person's security worthiness, but it is particularly egregious if it occurs during the course of federal employment while granted access to classified information. More was expected of Applicant given his age (39), educational background, and maturity in 2017. He also should have known better in light of his previous military service and his years of employment while holding a security clearance. His cocaine use was an egregious lapse of good judgment.

Applicant presented a good case in mitigation. It is apparent that he understands the seriousness of his misconduct. He is both remorseful and regretful. He has disassociated himself from drug-using associates and contacts. He is career focused, has a good record of employment (including honorable military service), and has highly favorable recommendations from co-workers and friends. His cocaine use occurred more than three years ago, there is no evidence of further illegal drug use, and he has pledged to abstain from all illegal drug involvement and substance misuse. I have also considered the underlying issue of Applicant's long-standing medical condition of sleep apnea. It played a role in his decision to use cocaine. And it is noteworthy that his sleep apnea is now much improved due to the medical treatment he had in 2019.

Nonetheless, I am not persuaded that Applicant is an acceptable security risk within the meaning of ¶ 2(a) of Appendix A of Enclosure 2 to the Directive. I reached this conclusion for a couple of reasons. First, his 2017 cocaine use was clearly forbidden conduct that he chose to engage in despite knowing the potential negative consequences. In addition to being a serious lapse in good judgment, his cocaine use

demonstrated a willingness to engage in high-risk behavior, which does not make him a good candidate for a security clearance. Second, I doubt Applicant's cocaine use would have come to light but for the random drug test. Indeed, he did not report his cocaine use to his federal employer before the random drug test. Third, when confronted with a positive result from the drug test, Applicant insisted to his then supervisor that the test result was wrong. Taken together, the seriousness of his misconduct, his reluctance to voluntarily self-report his cocaine use, and his initial lack of candor undermine his security suitability. Finally, I note that the ultimate outcome here is consistent with similar cases that I have decided involving illegal drug use while holding a security clearance. *E.g.*, ISCR Case No. 17-02225 (May, 10, 2019), which was affirmed by the DOHA Appeal Board in ISCR Case No. 17-02225 (App. Bd. Jun. 25, 2019).

Following *Egan* and the clearly consistent standard, I have doubts and concerns about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified or sensitive information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the whole-person concept. In particular, I considered Applicant's honorable military service and his sleep apnea. I conclude that he has not met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### **Formal Findings**

The formal findings on the SOR allegations are:

Paragraph 1, Guideline H:	Against Applicant
Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant <sup>9</sup>

### **Conclusion**

It is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Eligibility is denied.

Michael H. Leonard  
Administrative Judge

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<sup>9</sup> The SOR cross-allegation under Guideline E for personal conduct concerns Applicant's questionable judgment in light of his cocaine use. After considering the applicable disqualifying and mitigating conditions under Guideline E, the matter is decided against Applicant under the rationale discussed above under Guideline H. Further discussion under Guideline E is redundant.