



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
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----- ) ISCR Case No. 20-01772  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Bryan Olmos, Esq., Department Counsel  
For Applicant: *Pro se*

06/28/2021

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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 history of marijuana use, which includes using marijuana after being granted a 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 April 17, 2018. (Exhibit 4) He was interviewed during the course of a 2019 background investigation. (Exhibit 5) Thereafter, on November 23, 2020, after reviewing the available information, 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 guideline known as Guideline H for drug involvement and substance misuse.

Applicant answered the SOR in December 1, 2020, in a three-page memorandum. He admitted (he used the word “accept”) the factual allegations in SOR ¶¶ 1.a through 1.e. He also elaborated or provided explanatory remarks for his admissions. He did not provide supporting documentation. Subsequently, on February 18, 2021, he clarified his answer regarding a hearing by submitting a request for a decision based on the written record in lieu of a hearing.

On March 12, 2021, Department Counsel submitted a file of relevant material (FORM). It consists of Department Counsel’s written brief and supporting documentation, some of which are identified as evidentiary exhibits herein. The FORM was mailed to Applicant on March 23, 2021; he received it on April 14, 2021. He submitted a timely reply to the FORM, which consists of a two-page memorandum without supporting documentation. It is marked and made part of the record as Exhibit A. The case was assigned to me on June 15, 2021.

### **Findings of Fact**

Applicant is a 61-year-old employee who is seeking eligibility for access to classified information. He is employed as a principal or senior software engineer for a large company doing business in the defense industry. He has had this job since August 2014. He was previously employed by the same company (or its predecessor in interest) during 2007-2012. His educational background includes a bachelor’s degree awarded in 1982. He married in 1981, and he and his spouse have two adult children.

Applicant was initially granted a security clearance at the secret level in 2008. (Exhibits 3, 4, and 5) He received a top-secret clearance in 2010. He underwent another review in 2014, after returning to his current job, resulting in a secret level security clearance.

Applicant denied any illegal or improper drug use or activity in his November 2014 security clearance application. (Exhibit 3 at Section 23) He disclosed “occasional use of marijuana” when he completed his April 2018 security clearance application. (Exhibit 4 at Section 23). He stated that his occasional use occurred with marijuana purchased by friends in states where marijuana is legalized. He estimated using marijuana about five times during May 2015 to October 2017. He acknowledged that his use of marijuana occurred while possessing a security clearance. He also acknowledged that he intended to use marijuana in the future. He denied any other involvement with illegal drugs.

Applicant provided additional details about his marijuana use during his 2019 background investigation. (Exhibit 5) In an April 2019 interview, he stated that he began using marijuana for recreational use sometime before August 2012. He stated that he continued using marijuana after obtaining the top secret clearance in 2010. He again

stated that he intended to use marijuana in the future. In a July 2019 interview, in response to questions to clarify his history of marijuana use, he admitted first using marijuana in autumn 2016, and he last used marijuana in July 2018. He described his usage as infrequent and occurring only when he visited states where marijuana had been decriminalized. He estimated using marijuana about two to three times while holding a security clearance.

In his answer to the SOR, Applicant described his marijuana use as infrequent, occasional, and for recreational use only. Concerning the factual allegations in the SOR, he admitted the following: (1) using marijuana from about April 2018 to July 2018 after completing his April 2018 security clearance application; (2) purchasing marijuana after completing his April 2018 security clearance application; (3) using marijuana with varying frequency, occasionally, from about May 2015 to July 2018, while granted access to classified information; (4) purchasing marijuana while granted access to classified information; and (5) having an intention to use marijuana in the future, meaning in the future he may continue his occasional marijuana usage. He further admitted using marijuana once in 2019 and once in 2020.

In his reply to the FORM, Applicant did not dispute the facts, but he did dispute that those facts should result in an unfavorable clearance decision. He described his marijuana usage as occasional and responsible, not abusive or habitual, and equated it to having a couple of beers. He denied any potential for social stigma or blackmail because he has been candid about it with his friends and family. He also pointed to his history of employment in the defense industry without any security infractions or violations as well as his contributions as a senior software engineer.

### **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

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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.

the burden of proof is less than a preponderance of evidence.<sup>3</sup> The Appeal Board has 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 matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state laws (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

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

<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.

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

AG ¶ 25(a) any substance abuse;

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

AG ¶ 25(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse;

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 marijuana as outlined in the findings of fact. It includes using marijuana after he initially went through the security clearance process in 2008. It includes using marijuana after he returned to employment in the defense industry in 2014. It further includes using marijuana in 2018, 2019, and 2020. Some of his marijuana use occurred during his employment with a federal contractor and while he held a security clearance. 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 employment while granted access to classified information. Furthermore, I presume his marijuana usage was in violation of his employer's drug-free workplace policy.<sup>9</sup> Simply put, a man of Applicant's age, educational background, and work experience should have known better than to use marijuana while employed for a company doing business in the defense industry.

Applicant's case in mitigation is not very strong. The one item that stands out in his favor is his candour and willingness to disclose his marijuana usage in his 2018 security clearance application and during his 2019 background investigation. The credit is limited, however, because he continued to use marijuana after completing the 2018 security clearance application.

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<sup>9</sup> ISCR Case No. 16-00578 (App. Bd. Sep. 26, 2017) at 2 (noting the Drug-Free Workplace Act requires federal contractors with a contract over \$100,000 to establish certain drug-free workplace policies).

I also considered the two mitigating conditions noted above, and neither applies in Applicant's favor. His marijuana use may be irregular or occasional, but it has occurred over a period of years. His usage is recent too, having occurred in 2018, 2019, and 2020. In addition, he has not clearly and convincingly persuaded me that he intends to discontinue using marijuana. Indeed, after reading his answer to the SOR and his reply to the FORM, I was persuaded of just the opposite. His written responses largely relied on state law, which is interesting but not controlling here, and are otherwise filled with rationalizations or minimizations or both.

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. 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:

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|---------------------------|-------------------|
| Paragraph 1, Guideline H: | Against Applicant |
| Subparagraphs 1.a -- 1.e: | Against Applicant |

**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