



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of: )  
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----- ) ISCR Case No. 20-03383  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Tovah Minister, Esq., Department Counsel  
For Applicant: *Pro se*

11/17/2021

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for access to classified information. He did not present sufficient evidence to mitigate his history of drug involvement and substance abuse (marijuana, for the most part), which includes using marijuana while his security clearance application was pending. Accordingly, this case is decided against Applicant.

**Statement of the Case**

Applicant completed and submitted a Standard Form (SF) 86, Questionnaire for National Security Positions, the official form used for personnel security investigations, in February 2020. (Exhibits 3 and 5) The automated version of the SF 86 is the e-QIP. The SF 86 is commonly known as a security clearance application.

Applicant was interviewed during the course of a 2020 background investigation. (Exhibit 4) He provided additional information in response to written interrogatories in December 2020. (Exhibit 4) Thereafter, on April 16, 2021, after reviewing the available information, the DoD 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 in form and purpose to a complaint, which is the initial pleading that starts a civil action; in some states this pleading is known as a petition; and in criminal law it is a formal charge accusing a person of an offense. Here, the SOR detailed the factual reasons for the action under the security guidelines known as Guideline H for drug involvement and substance misuse, Guideline J for criminal conduct, and Guideline E for personal conduct. The sole allegation under Guideline E is a cross-allegation to the various matters under Guidelines H and J.

Applicant answered the SOR in an undated one-page memorandum. He admitted the various SOR allegations, and he asserted that he would not participate in such activities moving forward. He also provided a short explanation for why he believes he is suitable for national security eligibility and listed two references. He did not provide supporting documentation. He stated that he wished to have an administrative judge issue a decision based on the written record in lieu of a hearing.

On July 19, 2021, Department Counsel submitted a file of relevant material (FORM). It consists of Department Counsel's written brief and supporting documentation. The FORM was mailed to Applicant, who received it August 6, 2021. He did not reply to the FORM. The case was assigned to me October 6, 2021.

### **Findings of Fact**

Applicant is a 24-year-old employee who is seeking to obtain a security clearance for the first time. (Exhibit 3 at Section 25) He is employed as a junior software developer for a company doing business in the defense industry. He has had this job since about January 2020. Before that, he was enrolled as a full-time college student during 2015-2019, which resulted in a bachelor's degree in December 2019. He has never married and has no children.

Applicant disclosed a history of drug involvement and substance misuse in his February 2020 security clearance application. (Exhibit 5 at Section 23) His drug of choice was marijuana, for which he reported the following details: (1) he used marijuana with varying frequency, from daily to taking extended breaks in use, from about May 2015 to January 2020; and (2) he sold marijuana to close friends while he was a college student during 2016-2018 for two brief periods. In addition to marijuana, he reported using the prescription drug Adderall without a prescription during 2015-2018. He did so to help him stay up late to study. He also reported three to four instances of cocaine use during 2015-2019, and a single use of LSD in 2016.

In addition to his substance misuse, Applicant disclosed a police record involving marijuana. (Exhibit 3 at Section 22) He was arrested for driving under the influence of alcohol (DUI) and possession of less than 10 grams of marijuana in August 2018. He noted that both offenses resulted in suspended imposition of sentence in August 2019.

As I understand it, a suspended imposition of sentence is typically used in this particular state for first-time offenders who plead guilty and are then placed on probation. Along with probation, the court required him to serve 40 hours of community service, complete two educational courses, attend a victim-impact panel, and pay a fine.

Applicant provided additional details about his marijuana involvement during his background investigation. (Exhibit 4) Of note, in a May 2020 interview, he admitted using marijuana about a week before the interview. He also admitted buying marijuana one to two times monthly while a college student. Concerning his 2018 arrest, he explained that he was placed on unsupervised probation for two years (until about August 2021) and paid \$600 in fines. He noted the arrest was a life-changing event for him because it was a wakeup call to stop being stupid and focus on his life and his future.

In reply to written interrogatories, Applicant admitted continued use of marijuana. (Exhibit 4) He stated that his frequency of use was monthly, and that his last use of marijuana was November 14, 2020, which was the month before he answered the interrogatories. Concerning his 2018 arrest, he stated that he was still serving unsupervised probation.

In his answer to the SOR, Applicant wrote that he did not believe that the matters in the SOR reflected who he is, his trustworthiness, his alignment with national security, and his job performance. He described his successes at work, and that he is also working to overcome the mistakes of his youth.

### **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 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. . . .

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.

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

AG ¶ 25(a) any substance misuse;

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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(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

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.

The SOR allegations under Guideline H are established. The evidence shows that Applicant has an extensive and recent history of marijuana use (2015-2020). In particular, I note his continued marijuana use after submitting his February 2020 security clearance application and while his case was pending adjudication. He was using marijuana within a week of his May 2020 interview. Thereafter, he continued using marijuana, monthly, with his last known usage occurring in November 2020. Given his continued use of marijuana as recently as 2020, I conclude Applicant failed to clearly and convincing commit to discontinue such misuse.

I have considered the totality of Applicant's involvement with marijuana and his other substance misuse as outlined in the findings of fact. It includes using marijuana for more than five years and as recently as about November 2020. The latter fact means he smoked marijuana during his employment with a federal contractor engaged in the defense industry. 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 with a federal contractor. Furthermore, it is likely that his marijuana use in 2020 was in violation of his employer's drug-free workplace policy.<sup>9</sup>

Applicant's case in mitigation is not persuasive. The one item that stands out in his favor is his candor and willingness to disclose his drug involvement and substance misuse during the security clearance process. But the credit in mitigation is limited due to his continued marijuana use after completing his 2020 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. Neither applies in Applicant's favor. His marijuana use occurred over a period of years and is recent enough to be of concern. It also occurred while his security clearance application was pending. The latter circumstance cannot be overlooked, ignored, or explained away. With that said, I am less concerned about his more limited substance misuse involving cocaine, LSD, and Adderall. That misuse was relatively infrequent and appears to have run its course while Applicant was a college student. On this basis, I find for Applicant on those allegations. Otherwise, the evidence is not sufficient to mitigate the drug-related security concern.

Under Guideline J for criminal conduct, the suitability of an applicant may be questioned or put into doubt when that applicant has a history of involvement with criminal conduct. The overall concern as set forth in AG ¶ 30 is aptly put: "By its very nature, [criminal conduct] calls into question a person's ability or willingness to comply with laws, rules, and regulations."

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

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;

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

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.

The SOR allegation under Guideline J is established. The key facts are not in dispute. Applicant was arrested in August 2018 for the misdemeanor offenses of DUI and possession of less than 10 grams of marijuana. About a year later in August 2019, he pleaded guilty and received a disposition that is typically given for first-time offenders. He states that he satisfied the various terms and conditions imposed by the court, and it would appear that his term of unsupervised probation ended in about August 2021, a few months ago.

Nevertheless, the evidentiary record here creates much uncertainty. First, Applicant continued using marijuana while serving probation, which is troubling. Second, he did not provide documentary proof that he successfully completed his term

of probation and that his criminal case is now closed. The lack of documentary proof provides additional reasons to be uncertain. Third, his continued use of marijuana during 2020, after completing his security clearance application, means I cannot safely exclude the possibility that he may again face arrest and prosecution for a marijuana-related offense. The evidence is not sufficient to mitigate the criminal conduct security concern.

The Guideline E matters consist of a sole allegation that is merely a cross-allegation to the various matters under Guidelines H and J, adding nothing of factual substance to the case. The judgment, honesty, reliability, and trustworthiness concerns under Guideline E are implicitly if not directly at issue under Guidelines H and J. Accordingly, the Guideline E matters are decided against Applicant under the same rationale set forth under Guidelines H and J. Additional discussion is unnecessary.

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 gave weight to Applicant's relative youth and inexperience in the ways of the world, but those matters are outweighed by his continued marijuana use while his security clearance application was pending. 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.f:	Against Applicant
Subparagraphs 1.b, 1.c, 1.d:	For Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraph 3.a:	Against Applicant

## **Conclusion**

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

Michael H. Leonard  
Administrative Judge