



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
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aka ----- ) ISCR Case No. 13-00510  
aka ----- )  
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Applicant for Security Clearance )

**Appearances**

For Government: Eric H. Borgstrom, Esq., Department Counsel  
For Applicant: *Pro se*

02/06/2014

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his security clearance to work in the defense industry. He did not present sufficient evidence to overcome the security concerns stemming from his unresolved criminal conduct, his problematic personal conduct, and his illegal drug use while possessing a security clearance. Accordingly, this case is decided against Applicant.

**Statement of the Case**

On or about July 2, 2013, the Department of Defense (DOD) sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant or continue access to classified

information.<sup>1</sup> The SOR is similar to a complaint, and it detailed the reasons for the action under the security guidelines known as Guideline J for criminal conduct, Guideline E for personal conduct, Guideline H for drug involvement, and Guideline B for foreign preference.

Applicant answered the SOR on August 12, 2013. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.<sup>2</sup>

Thereafter, on November 14, 2013, Department Counsel submitted all relevant and material information that could be adduced at a hearing.<sup>3</sup> This so-called file of relevant material (FORM) was mailed to Applicant, who received it December 16, 2013. He replied to the FORM with a one-page memorandum within the 30-day period allowed under the Directive. The case was assigned to me January 17, 2013.

### **Ruling on Evidence**

Exhibit 7 is a report of investigation from the background investigation of Applicant. The three-page document is a summary of an interview of Applicant on February 22, 2013. Under the rules that govern these cases, a report of investigation may be received and considered as evidence when it is authenticated by a witness.<sup>4</sup> Exhibit 7 is not authenticated in any way, and so, it is not admissible.

### **Findings of Fact**

Applicant is a 25-year-old employee who is seeking to retain a security clearance previously granted to him by the Defense Department. His relevant employment history consists of (1) working as an interpreter for a federal contractor during 2009–2010, (2) working as a linguist for a second federal contractor during 2010–2012, (3) a period of unemployment of less than one year during 2012–2013, and (4) working as a linguist for a third and current federal contractor since February 2013. All three jobs required

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<sup>1</sup> This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

<sup>2</sup> Directive, Enclosure 3, ¶ E3.1.7.

<sup>3</sup> The file of relevant material consists of Department Counsel's written brief and supporting documents, some of which may be identified as evidentiary exhibits in this decision.

<sup>4</sup> Directive, Enclosure 3, ¶ E3.1.20; see ISCR Case No. 11-13999 (App. Bd. Feb. 3, 2014) (the Appeal Board restated existing caselaw that a properly authenticated report of investigation is admissible).

Applicant to live and work in Afghanistan in support of the U.S. military. He has never married and has no children.

Applicant is a native of Afghanistan. He and his immediate family left Afghanistan and relocated to Pakistan in about 1998. They lived there until about 2001, when they immigrated to the United States as refugees. He obtained U.S. citizenship in January 2009. His father is now deceased, but his mother and four siblings are U.S. residents and citizens.

In addition to his immediate family members, the SOR alleges, under Guideline B for foreign influence, that Applicant has contact with two people who are residents in and citizens of Afghanistan. The first is his sister-in-law who was a resident in and a citizen of Afghanistan, but she is now lawfully residing in the United States with her husband, Applicant's brother. The second is a fellow linguist Applicant met in Afghanistan working in support of the U.S. military. Applicant has limited work-related contact with him, and has no further relationship with him.<sup>5</sup>

Within a year of obtaining U.S. citizenship, Applicant began working for the first federal contractor. He applied for and obtained a security clearance. As part of that process, he completed counterintelligence-focused security screening in September 2009.<sup>6</sup> He held that job from September 2009 to May 2010 when he left for what he viewed as mismanagement by the contractor.

Applicant began working for the second federal contractor in June 2010 and remained there until March 2012. About one year into the second job, in June 2011, an Army major e-mailed Applicant's supervisors notifying them that she was terminating his work for that military unit.<sup>7</sup> The e-mail's subject line was "We are firing [Applicant]," and it set forth multiple reasons:

1. Attempting to conduct human-intelligence operations without authorization.
2. Substandard or unimpressive translation skills.
3. Avoiding work and tardiness.
4. Claiming to be a former Marine scout/sniper, which was untrue.
5. Telling Afghans he was a member of the U.S. Special Forces, which was untrue.

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<sup>5</sup> In light of these facts and circumstances, the foreign influence concern under Guideline B is decided for Applicant, and it will not be discussed further.

<sup>6</sup> Exhibit 5.

<sup>7</sup> Exhibit 17.

6. Suspected of smoking hashish, although drug use was not confirmed by eyewitness or testing.

Applicant remained employed with the second federal contractor until March 2012. A business record from his employer, entitled *Exit Interview*, states that he resigned his position for personal reasons on March 14, 2012, and returned to the continental United States the next day.<sup>8</sup> Another business record from his employer, entitled *Termination Report*, dated March 16, 2012, states that his contract-end date was March 6, 2012, and his last day at work was March 15, 2012. It further states that his status was unfavorable and noted the following relevant remarks: (1) he was fired by a military unit for operational security violations, poor translation, and poor attitude; (2) he was then transferred to complete his contract; and (3) he was not to be rehired.

Applicant was then unemployed until February 2013, when he began his current job for the third federal contractor. While unemployed, he was arrested and charged with driving under the influence of alcohol (DUI) in November 2012.<sup>9</sup> Applicant maintains the DUI was dismissed.<sup>10</sup> He did not provide a court record or other record to support his claim of dismissal.

Applicant completed a security clearance application on February 5, 2013.<sup>11</sup> He disclosed the 2012 DUI in response to Question 22 about his police record. He did not disclose the unfavorable circumstances surrounding his employment with the second federal contractor in response to Question 13C about his employment record. He replied in the negative to Question 23 about illegal drug use or drug activity.

About two weeks later on February 19, 2013, Applicant underwent counterintelligence-focused security screening.<sup>12</sup> He reported the DUI and stated it was dismissed.<sup>13</sup> Concerning illegal drug usage, he stated that he had never used illegal drugs for personal use, but he also stated that he used hashish once in January 2010 while on a mission with the U.S. military.<sup>14</sup> He explained that he took three or four puffs of a cigarette wrapped in hashish to ensure operational security and completion of the intelligence-collection mission. He stated that he did not reveal this incident in his security clearance application because the usage for was operational reasons only.

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<sup>8</sup> Exhibit 17 at 2.

<sup>9</sup> Exhibit 6.

<sup>10</sup> Exhibits 3 and 4; response to FORM.

<sup>11</sup> Exhibit 3.

<sup>12</sup> Exhibit 4.

<sup>13</sup> Exhibit 4 at 5–6.

<sup>14</sup> Exhibit 4 at 11.

Applicant now denies using hashish in January 2010. In both his answer to the SOR and his response to the FORM, he claims he was misunderstood during the 2013 counterintelligence screening. He further explained that a third-party (nonmilitary personnel) was smoking hashish in their presence, and he was smoking a regular cigarette.

### Law and Policies

It is well-established law that no one has a right to a security clearance.<sup>15</sup> As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>16</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.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>17</sup> An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>18</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>19</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>20</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>21</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>22</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>23</sup>

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<sup>15</sup> *Department of 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>16</sup> 484 U.S. at 531.

<sup>17</sup> Directive, ¶ 3.2.

<sup>18</sup> Directive, ¶ 3.2.

<sup>19</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>20</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>21</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>22</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>23</sup> *Egan*, 484 U.S. at 531.

The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>24</sup>

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.<sup>25</sup> Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

## **Discussion**

### **1. The criminal conduct allegation**

The 2012 DUI arrest and charge are disqualifying under the criminal conduct guideline.<sup>26</sup> Without reliable documentary evidence to support his assertion, I cannot find that the DUI was dismissed or otherwise resolved in his favor. Accordingly, the unresolved DUI raises a legitimate concern about his security suitability, which he has not mitigated.

### **2. The personal conduct allegations**

The unresolved 2012 DUI, the inappropriate workplace behavior while employed with the second federal contractor, and the three falsifications of his 2013 security clearance application are disqualifying under the personal conduct guideline.<sup>27</sup> The negative implications of the unresolved DUI, alleged in SOR ¶ 2.a, are discussed above and will not be repeated here. The other matters are discussed below.

SOR ¶ 2.b alleges that in March 2012 Applicant was terminated from his employment with the second federal contractor due to operational security violations, poor translations, and poor attitude. That allegation is a misreading of the evidence, but it is not a material variance that requires amending the SOR along with notice to Applicant and an opportunity to respond. The business records from the second federal contractor show that Applicant fulfilled the terms of his contract, which terminated or

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<sup>24</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>25</sup> Executive Order 10865, § 7.

<sup>26</sup> AG ¶ 31(c).

<sup>27</sup> AG ¶¶ 16(a), 16(c), and 16(d).

ended in March 2012.<sup>28</sup> The name of the document, *Termination Report*, is simply the nomenclature used by the company to record an employee's departure under favorable, unfavorable, or derogatory circumstances. In Applicant's case, it was unfavorable. The business records also note, in the past tense, that he was fired by a U.S. military unit for operational security violations, poor translations, and poor attitude, and he was then transferred to another entity to complete his contract. The reasons for the action were explained in detail in the June 2011 e-mail from the Army major.

Those records establish that Applicant engaged in inappropriate workplace behavior that raises a legitimate concern about his security suitability. His denials, as explained in his answer to the SOR and his response to the FORM, are not persuasive. Other than his bare assertions, he did not present any documentary evidence to support or corroborate his denials.

SOR ¶¶ 2.c, 2.d, and 2.e allege that Applicant falsified his 2013 security clearance application when answering questions about his employment record and illegal drug use. He denies the allegations. In light of the facts and circumstances here, including no opportunity to listen to Applicant's testimony and observe his demeanor, I conclude Applicant knowingly and willfully gave false answers in response to three questions on his security clearance application.

His denial to Question 13C about his employment history was false because he was required to disclose the unfavorable circumstances of his employment with the second federal contractor. Question 13C is a five-part question, and the relevant parts are:

- Have you left a job by mutual agreement following charges or allegations of misconduct?
- Left a job by mutual agreement following notice of unsatisfactory performance?<sup>29</sup>

The business records establish Applicant left his job with the second federal contractor, albeit upon completion of the contract in 2012, following allegations of misconduct and unsatisfactory performance, as detailed in the June 2011 e-mail from the Army major. The timing of the allegations (2011) and when he left the job (2012) is not determinative, conclusive, or dispositive on the question if he was required to report the unfavorable circumstances. No doubt, Applicant did not disclose the unfavorable circumstances because he knew they could have a negative effect on his ability to maintain a security clearance and his employment.

In addition, Applicant's denials to Question 23 (another multi-part question) about illegal drug use are false. In deciding this issue, I have relied on the 2013

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<sup>28</sup> Exhibit 17 at 1–3.

<sup>29</sup> Exhibit 3 at 20 of 51.

counterintelligence document.<sup>30</sup> It is a business record or official record or both,<sup>31</sup> and it is the type of document that reasonable people rely on when making important decisions in the Defense Department and the U.S. military. As such, it is considered reliable information. Applicant's denial of hashish use in January 2010, although not wholly improbable, is not sufficient to rebut or overcome the unequivocal information recorded in the counterintelligence document that establishes he used hashish in January 2010. Accordingly, I conclude Applicant knowingly and willfully gave false answers in response to Question 23 when he failed to report illegal drug use within the last seven years as well as illegal drug use while possessing a security clearance.

To summarize the personal conduct, Applicant's 2012 DUI is unresolved, he engaged in inappropriate workplace behavior while employed by the second federal contractor, and he gave false answers in response to three questions on his 2013 security clearance application. I have considered the seven mitigating conditions under Guideline E, and none, individually or in combination, are sufficient to mitigate the security concern. The 2012 DUI appears to be an isolated incident, but it is unresolved. He also engaged in highly inappropriate workplace behavior as detailed in the June 2011 e-mail from the Army major. His behavior is probative of unreliability, untrustworthiness, and poor judgment. And he made false statements during the security clearance process, which is serious misconduct that is not easily explained away, excused, or mitigated.

### **3. The illegal drug use allegation**

SOR ¶ 3.a alleges that Applicant used hashish in January 2010 while possessing a security clearance and while on a mission with the U.S. military deployed overseas. This matter was discussed above and resolved against Applicant. It is serious misconduct and raises a security concern.<sup>32</sup> Given his denial, he is not credited with evidence of reform and rehabilitation.

### **4. The whole-person concept**

After weighing the relevant disqualifying and mitigating conditions and evaluating the evidence in light of the whole-person concept,<sup>33</sup> I conclude Applicant did not present sufficient evidence to explain, extenuate, and mitigate the security concerns stemming from his unresolved criminal conduct, his problematic personal conduct, and his illegal drug use while possessing a security clearance. In reaching this conclusion, I gave substantial weight to Applicant's employment in support of the U.S. military in Afghanistan, which is a high-risk job in a dangerous place. Nonetheless, the negative

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<sup>30</sup> Exhibit 4.

<sup>31</sup> See Fed.R.Evid. 803(6) and 803(8).

<sup>32</sup> AG ¶¶ 25(a) and 25(g).

<sup>33</sup> AG ¶ 2(a)(1)-(9).



implications of his misconduct militate against a conclusion that Applicant “is an acceptable security risk.”<sup>34</sup> Accordingly, Applicant 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. This case is decided against Applicant.

### **Formal Findings**

The formal findings on the SOR allegations are:

Paragraph 1, Guideline J:	Against Applicant
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraphs 2.a–2.e:	Against Applicant
Paragraph 3, Guideline H:	Against Applicant
Subparagraph 3.a:	Against Applicant
Paragraph 4, Guideline B:	For Applicant
Subparagraphs 4.a–4.b:	For Applicant

### **Conclusion**

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard  
Administrative Judge

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<sup>34</sup> AG ¶ 2(a).