



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



In the matter of: )  
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SSN: ----- ) ISCR Case No. 08-00477  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Stephanie C. Hess, Esquire, Department Counsel  
For Applicant: Susan M. Rotkis, Esquire

September 19, 2008

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**Decision**

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LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on March 31, 2008. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The issues in this case fall under Guideline H based on Applicant’s illegal drug use (marijuana) and Guideline E for personal conduct. For the reasons discussed below, this case is decided for Applicant.

In addition to the Executive Order and Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005.

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<sup>1</sup> Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive).

The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.<sup>2</sup> The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

Applicant's Answer to the SOR is dated May 8, 2008, and he requested a hearing (Tr. 9). The case was assigned to another administrative judge who scheduled a hearing for June 26, 2008. It did not take place as scheduled due to a medical emergency of the judge. The case was reassigned to me on July 21, 2008. The hearing took place as scheduled on August 13, 2008. The transcript (Tr.) was received on August 21, 2008.

The record was left open until August 27, 2008, to allow Applicant an opportunity to submit additional documentary evidence. Applicant made a timely submission and the post-hearing exhibits are admitted as follows: 1) Exhibit E—court reporter's verification of Applicant's divorce in 2004; 2) Exhibit F—stipulation on conservatorship, possession, support, and other issues in Applicant's divorce; and 3) Exhibit G—letter from a clinical and forensic psychologist in connection with Applicant's divorce. Counsel's cover letter for the exhibits is not admitted as evidence, but it is filed in the correspondence folder of the case file. The same applies to department counsel's e-mail expressing no objections to the post-hearing exhibits.

### **Findings of Fact**

Under Guideline H for drug involvement, the SOR alleges that Applicant used marijuana approximately eight to ten times during the period January 1988 to July 2007. Under Guideline E for personal conduct, the SOR alleges that Applicant used marijuana in July 2007 after completing and submitting a security-clearance application in April 2007, in which he was placed on notice that illegal drug use was a security concern. In his eight-page Answer, Applicant admitted the marijuana use as alleged under Guideline H and he admitted using marijuana in July 2007 as alleged under Guideline E. In addition, Applicant provided additional facts and information intended to explain, extenuate, or mitigate the SOR allegations. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 40-year-old employee of a software-development company that has contracts with the federal government, including the Defense Department. He has worked for his current employer as a general manager (director of product development) since January 2007. He has worked in the software industry for several

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<sup>2</sup> See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

companies in various capacities since earning a bachelor's degree in computer science in 1992. He is seeking to obtain an industrial security clearance for the first time.

Applicant married in 1993 and divorced in 2004 (Exhibits 1, E, F, and G). He and this wife had one child, a daughter, born in 1999. Applicant's wife suffered from postpartum depression, which later led to other serious mental-health issues (Tr. 31–34). His wife's condition deteriorated to the point in May 2003 when Applicant sought and obtained a temporary protective order against his wife based on a clear and present danger of family violence (Exhibit F). Applicant now has custody of his daughter.

About four months after he started his current job, Applicant completed a security-clearance application in April 2007 (Exhibit 1). In response to Question 24a, he disclosed that he had illegally used a controlled substance within the last seven years. He reported using marijuana eight to ten times during the period January 1997 to April 2007.

In about March 2008, Applicant responded to written interrogatories issued to him by DOHA (Exhibit 2). He reported using marijuana very rarely, no more than one to two breaths per setting. He reported that he last used marijuana in July 2007, and that he had no intention to use it in the future. He explained that he had decided after the July 2007 usage to never again participate in using marijuana, and that he would remove himself from any situation where marijuana was present.

He confirmed and provided additional information about his marijuana use in his hearing testimony. Among other things, he stated the following about his marijuana involvement:

- That he has never purchased marijuana and has no plans to do so (Tr. 25).
- That his marijuana use goes back to about 1988 when he used it a few times with college friends (Tr. 39–40).
- That his marijuana use during 2006–2007 took place on dates when the women offered marijuana (Tr. 42–43).
- That he decided to never use marijuana again after the July 2007 use because he “was appalled” by the circumstances (Tr. 51–52).
- Applicant described his marijuana use in July 2007 as “ridiculous,” and he now realizes how naive he was as he did not appreciate the potential ramifications on a security clearance (Tr. 53).
- Using marijuana was not part of his marriage and it is not part of his current relationship (Tr. 61–62).
- His reported marijuana use is an estimate and he has “padded” the number to err on over reporting (Tr. 62–63).
- He estimates using marijuana eight to ten times during the period January 1997 to present, and he estimates using marijuana a total of about 12 times, which includes his use in college (Tr. 62–64).

Applicant states that marijuana use occupies no place in his life and he has no intention of using marijuana again. He executed an affidavit to that effect in which he pledged that he will never again use marijuana, and he understands that any security clearance will be automatically revoked for any illegal use of a controlled substance (Exhibit B).

Professionally, Applicant is a well-regarded employee whom his direct supervisor describes as a consummate executive, an employee that the supervisor recruited to work for the company (Exhibit A). Other individuals, witnesses and by letters of reference, attest to Applicant's professional and personal qualities and believe Applicant is a trustworthy individual (Exhibits C and D). The witnesses included Applicant's girlfriend who is a program manager for a federal contractor and she holds a security clearance as well. She was "extremely disappointed" when she learned about Applicant's marijuana use, and she will end their relationship if he uses marijuana again (Tr. 93–95). She assessed Applicant's priorities as his daughter and family first and his career and work second (Tr. 95). And she described Applicant as an individual who follows the rules, giving as an example Applicant's habit of adhering to speed limits, which she finds frustrating from time to time (Tr. 63–64).

### **Policies**

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, no one has a right to a security clearance.<sup>3</sup> As noted by the Supreme Court in 1988 in the case of *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>4</sup> A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>5</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>6</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.

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<sup>3</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) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.").

<sup>4</sup> *Egan*, 484 U.S. at 531.

<sup>5</sup> Directive, ¶ 3.2.

<sup>6</sup> Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>7</sup> The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>8</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>9</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>10</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>11</sup> The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>12</sup>

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. 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. An adverse decision is not a determination of an applicant's loyalty.<sup>13</sup> Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

## **Analysis**

### **1. The Drug Involvement Security Concern**

Under Guideline H for drug involvement,<sup>14</sup> the security concern is that "use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and

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<sup>7</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>8</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>9</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>10</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>11</sup> *Egan*, 484 U.S. at 531.

<sup>12</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>13</sup> Executive Order 10865, § 7.

<sup>14</sup> Revised Guidelines at 17–18 (setting forth the security concern as well as the disqualifying and mitigating conditions).

regulations.”<sup>15</sup> The definition of drug abuse is “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”<sup>16</sup>

Based on the record evidence as a whole, the following conditions raise a security concern:

- Any drug abuse (see above definition); and
- Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.<sup>17</sup>

Applicant’s history of drug abuse (and incidental possession of marijuana) raises security concerns because it calls into question his judgment, reliability, trustworthiness, and willingness to obey the law. His use of marijuana in social settings goes back to his college days and extends to July 2007. Altogether, the evidence shows he used marijuana about a dozen times during this period of nearly two decades. Of most concern is his marijuana use during 2006–2007 when he was beyond the age of 35, a time in life when most people have left such activity in the past. His marijuana use during 2006-2007 took place in social settings (while dating), and he did not buy, provide, or seek out the marijuana as it was offered to him. Nevertheless, these circumstances show that Applicant used poor judgment on these occasions.

The four mitigating conditions under Guideline H have been considered and the most pertinent here is MC 2.<sup>18</sup> It provides that security concerns may be mitigated if an applicant is able to show a demonstrated intent not to abuse any drugs in the future by actions such as: 1) disassociation from drug-using associates and contacts; 2) changing or avoiding the environment where drugs were used; 3) an appropriate period of abstinence; or 4) a signed statement of intent with automatic revocation of clearance for any violation. MC 2 applies in Applicant’s favor for four reasons. First, he is no longer associating with the marijuana users from the 2006-2007 period as he is no longer casually dating and instead is involved in a serious, exclusive relationship. Second, he has pledged to avoid marijuana by removing himself from the area and people if marijuana is present. Third, his last use of marijuana took place in July 2007, more than one year ago. That is an appropriate period of abstinence given his relatively infrequent use of marijuana (a dozen times during nearly two decades). And fourth, Applicant has pledged, in an affidavit, not to use any controlled substance in the future and has agreed to automatic revocation of any clearance for any violation. Given all these circumstances, I am persuaded that Applicant has no intention to engage in drug abuse in the future.

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<sup>15</sup> Revised Guidelines at 17.

<sup>16</sup> Revised Guidelines at 17.

<sup>17</sup> Revised Guidelines at 17.

<sup>18</sup> Revised Guidelines at 18.

## **2. The Personal Conduct Security Concern**

Personal conduct under Guideline E<sup>19</sup> includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. In particular, a security concern may arise due to:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.<sup>20</sup>

As alleged in SOR ¶ 2.a, the issue here is the security significance of Applicant's July 2007 marijuana use, which took place after he completed a security-clearance application about four months earlier. Although this incident was considered under Guideline H, it has independent security significance under Guideline E. Indeed, Applicant used particularly poor judgment when he used marijuana after completing a security-clearance application. It was inappropriate behavior and he plainly should have known better. Accordingly, the most pertinent disqualifying condition is DC 4,<sup>21</sup> which covers a broad spectrum of credible adverse information that indicates questionable judgment, untrustworthiness, unreliability, unwillingness to comply with rules and regulations, etc.

The security concerns under Guideline E are mitigated under a similar rationale used to mitigate Guideline H, as Applicant has demonstrated an intent not to engage in drug abuse in the future. In addition, MC 4<sup>22</sup> applies in his favor. Applicant, through his self-reporting, has acknowledged the behavior and taken positive steps, as discussed under Guideline H, to alleviate the circumstances that caused poor judgment. And given the infrequency of his marijuana use, the passage of time since July 2007 without recurrence, the strong incentives Applicant has to refrain from marijuana use (in particular, his personal life would be in some jeopardy), it is quite unlikely that Applicant's drug abuse will recur.

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<sup>19</sup> Revised Guidelines at 10–12 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>20</sup> Revised Guidelines at 10.

<sup>21</sup> Revised Guidelines at 10–11.

<sup>22</sup> MC 4 is "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur."

### **3. The Whole-Person Concept**

Under the Directive, an administrative judge must evaluate an applicant's eligibility for access to classified information by considering the totality of an applicant's conduct and all the relevant facts and circumstances. This analysis includes nine adjudicative factors:

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.<sup>23</sup>

I considered these nine factors, as well as Applicant's good employment record and favorable character evidence. First, Applicant impressed me as a serious, focused, and hard-working individual who is doing his best to do right by his daughter, his girlfriend, and his employer. Second, I also considered the circumstance that he voluntarily reported his marijuana use when he completed his security-clearance application in 2007 and in response to written interrogatories in 2008. A core value or principle of the industrial security clearance program is that the government must have confidence that those individuals with access to classified information can be relied on to exercise good judgment, which includes the willingness to report adverse information, security violations, etc. Applicant's willingness to self-report his marijuana use shows that he can be relied on to exercise good judgment. On balance, my analysis under the whole-person concept weighs in Applicant's favor.

Based on the record evidence as a whole, Applicant presented sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided for Applicant.

#### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

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|---------------------------|---------------|
| Paragraph 1, Guideline H: | For Applicant |
| Subparagraph 1.a:         | For Applicant |
| Paragraph 2, Guideline E: | For Applicant |
| Subparagraph 2.a:         | For Applicant |

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<sup>23</sup> Revised Guidelines at 1–2.



## **Conclusion**

In light of all of the circumstances, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard  
Administrative Judge