



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



In the matter of: )  
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SSN: ----- ) ISCR Case No. 08-03349  
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Applicant for Security Clearance )

**Appearances**

For Government: Stephanie Hess, Esquire, Department Counsel  
For Applicant: Steven Louth, Esquire

December 17, 2008

**Decision**

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 June 12, 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 involvement (cocaine) and Guideline E for personal conduct. For the reasons discussed below, this case is decided against 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 was received July 16, 2008, and he requested a hearing. The case was assigned to me October 7, 2008. The hearing took place November 18, 2008, as scheduled pursuant to written notice. The transcript (Tr.) was received November 26, 2008.

### **Findings of Fact**

Under Guideline H for drug involvement, the SOR alleges the following: (1) that Applicant used cocaine in 1986, 2006, June 2007, July 2007, and September 2007; (2) that in June 2007 he was arrested and charged with the offenses of possession of a controlled substance, possession of drug paraphernalia, and driving while ability was impaired (DWAI); (3) that he tested positive for cocaine in July 2007 during an alcohol evaluation before his court date; (4) that he tested positive for cocaine in September 2007 while on probation; (5) that he cannot state that he would never use cocaine again; and (6) that he used cocaine while holding a security clearance. Under Guideline E for personal conduct, the SOR alleges the following: (1) that he used cocaine while holding a security clearance; and (2) that he intentionally did not report the June 2007 drug charges to his employer.

In response to the SOR, Applicant admitted the factual allegations under both guidelines. He also provided a one-page memorandum wherein he explained the surrounding facts and circumstances and clarified some of his admissions. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 51-year-old employee of a federal contractor. He has lived in the same community since 1982. He has worked for the same employer since 1977. His current position or job title is senior financial analyst and he works as a program accountant. He has held a security clearance, which he is seeking to retain, since about 1998.

Applicant married in 1977 and divorced in 2006. The end of his marriage and the divorce were devastating events for him and these events preceded his drug involvement and the criminal charges. Some but not all of his cocaine use occurred

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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).

with a woman he met after his divorce. He has not associated with her for about a year and has no plans to associate with her further.

His cocaine use came to light in June 2007 when he was arrested and charged with the three criminal offenses. He reported the DWAI offense to his employer but not the drug offenses because he was unsure what he was charged with until he made his initial appearance in court. On advice of counsel, he sought treatment in July 2007, was subject to drug testing, and tested positive for cocaine. The court record indicates that the offenses were disposed of and the sentence was imposed on July 23, 2007 (Exhibit 3). The two drug offenses were dismissed (Applicant maintains the items found in the car belonged to the woman) and he pleaded guilty to the DWAI offense. The court sentenced him to serve probation for 6 to 18 months. The court also imposed the following conditions on the sentence: (1) to submit to an alcohol evaluation and treatment; (2) to abstain from alcohol and drugs; (3) to submit to substance abuse monitoring; (4) to serve 24 hours of community service; and (5) to pay a fine, costs, and fees. Applicant is still on probation, which he expects to end in January 2009.

About two months after pleading guilty, he used cocaine in September 2007 while on a camping trip. Subsequently, he tested positive for cocaine. Although this use violated his probation, he was not prosecuted for it, but the probation office increased the substance abuse monitoring.

Applicant was interviewed by an investigator in October 2007 to discuss his arrest (Exhibit 2). He described the circumstances surrounding his arrest, to include that he used both alcohol and cocaine before his arrest. He also confirmed and provided additional details about his cocaine use.

His most recent cocaine use took place in July 2008. He used it at a party to celebrate his birthday. Subsequently, he tested positive for cocaine. Again, he was not prosecuted for this violation of his probation.

Concerning his previous statement that he could not definitely state that he would never use cocaine again, Applicant explained that he made this statement while undergoing treatment, was concerned about a relapse, and was being honest (Tr. 27). He does not intend to return to his post-divorce lifestyle and he has taken steps to avoid future cocaine use. For example, his adult daughter recently moved into his home and he believes her presence will be a stabilizing factor in his life.

## **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>

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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

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.

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

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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.

<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).

grants access to classified information. The decision to deny a person a security clearance 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 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 disqualifying conditions apply to Applicant's case:

- Any drug abuse (see above definition);
- Testing positive for illegal drug use; and
- Any illegal drug use after being granted a security clearance.<sup>17</sup>

Applicant's history of cocaine use raises security concerns because it calls into question his judgment, reliability, trustworthiness, and willingness to obey the law. His cocaine use on several occasions during the period 2006–2008 is relatively recent and took place while holding a security clearance. Moreover, some of his cocaine use took place while on probation. These circumstances show that Applicant used grossly poor judgment on multiple occasions.

The four mitigating conditions under Guideline H have been considered and none apply in Applicant's favor. The evidence in his favor is minimal, as his cocaine use is too recent to be mitigated. And it is too soon to determine how he will progress and if his efforts will result in a permanent change in his behavior. What is missing here is a proven record of reform and rehabilitation that demonstrates his intent not to abuse drugs in the future. Accordingly, Guideline H is decided against Applicant.

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<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).

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

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

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

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

Personal conduct under Guideline E<sup>18</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>19</sup>

SOR ¶ 2.a alleged the circumstance that Applicant used cocaine while holding a security clearance. This allegation is redundant with and repetitive of SOR ¶ 1.f. This circumstance was adequately covered under Guideline H—indeed, a specific DC applies to this circumstance—and I gave this circumstance substantial weight. Additional discussion under Guideline E would add little to the analysis, and it will make no difference in the ultimate outcome of the case. Accordingly, on this basis, this allegation is decided for Applicant.

In SOR ¶ 2.b the government asserts Applicant intentionally did not report the possession of paraphernalia offense to his employer. The government did not allege or present any authority that Applicant was required to report this matter. Accordingly, on this basis, this allegation is decided for Applicant.

## **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

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<sup>18</sup> Revised Guidelines at 10–12 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>19</sup> Revised Guidelines at 10.

for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.<sup>20</sup>

I considered these nine factors, as well as Applicant's longtime employment and the circumstance that Applicant voluntarily reported his cocaine use when he was interviewed in October 2007. I also considered the circumstance that some of his cocaine use was likely tied to the end of his marriage, which had a significant effect on him. In short, an analysis under the whole-person concept is insufficient to overcome the security concerns raised by Applicant's cocaine use.

A core value or principle of the industrial security clearance program is that the government must have confidence that those people with access to classified information can be relied on to exercise good judgment. Based on the record evidence, Applicant remains under a cloud of doubt due to his history of cocaine use during the period 2006–2008. Without a proven record of reform and rehabilitation, the record evidence is not sufficient to explain, extenuate, or mitigate the drug involvement security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against 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:

Paragraph 1, Guideline H:	Against Applicant
Subparagraphs 1.a–1.f:	Against Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraphs 2.a–2.b:	For Applicant

### **Conclusion**

In light of all of the circumstances, 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>20</sup> Revised Guidelines at 1–2.