



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



In the matter of:	)	
	)	
	)	ISCR Case No. 08-09470
SSN:	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Braden M. Murphy, Esquire, Department Counsel  
For Applicant: *Pro Se*

June 29, 2009

**Decision**

LAZZARO, Henry, Administrative Judge

Applicant failed to mitigate the security concern caused by his 34-year history of illegal use of marijuana. Clearance is denied.

On March 17, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.<sup>1</sup> The SOR alleges a security concern under Guideline H (drug involvement). Applicant submitted an undated response to the SOR in which he admitted all SOR allegations, except the allegation contained in SOR subparagraph 1.c.

It was unclear from Applicant's response if he was requesting a hearing or not. Department Counsel contacted Applicant, clarified that he was requesting a hearing, and

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<sup>1</sup> This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive), and revised adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

obtained a written note signed by Applicant verifying the request for a hearing. Applicant's note was marked as Appellate Exhibit (App. Ex.) I and is included in the hearing file.

The case was assigned to me on April 27, 2009. A notice of hearing was issued on May 5, 2009, scheduling the hearing for May 21, 2009.<sup>2</sup> The hearing was conducted as scheduled. The Government submitted three documentary exhibits that were marked as Government Exhibits (GE) 1-3 and admitted into the record without objection. Applicant testified and submitted one documentary exhibit that was marked as Applicant's Exhibit (AE) 1 and admitted into the record without objection. The transcript was received on May 29, 2009.

### **Findings of Fact**

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is a 48-year-old man who has been employed by a defense contractor as a fabrication technician since February 2008. He was unemployed from September 2007 until November 2007, and again from December 2007 until February 2008. The remainder of his reported work history consists of varying lengths of employment with a variety of employers working primarily as a fabricator. He graduated from high school in January 1981. He has attended some community college classes but he has not earned a degree or certificate.

Applicant has been married since December 1982. He does not have any children.

Applicant began smoking marijuana when he was about 12 years old. He continued to smoke marijuana on a daily to weekly basis until he was in his 30s. He quit smoking marijuana for about three years during the 1980s, but he then resumed using marijuana on a regular basis. He estimates that he used marijuana a total of between 20 and 30 times from 2001 until his last reported use in September 2007. He also estimates that sometimes months would pass without him using marijuana.

Applicant experimented with cocaine and crack cocaine when he was in his 20s. He also used mescaline for about one year while he was in his 20s. He has not used any illegal drug, except marijuana, since he was in his 20s.

During the 1990s, Applicant would on occasion buy larger quantities of marijuana than was necessary for his personal use. He would then sell a portion of what he purchased to reduce the overall cost of the controlled substance for himself and his purchasers because it was cheaper to buy it in larger quantities. Applicant asserts this was not intended to earn a profit but solely to reduce his expense.

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<sup>2</sup> Applicant agreed on the record to waive the 15-day notice requirement in the event he did not actually receive the formal notice of hearing more than 15 days in advance of the hearing. (Tr. 17-18)

Applicant has worked for a number of employers who had a policy against using illegal drugs. Despite their policies, Applicant continued to use marijuana, but never while working. In either 1992 or 1993, he tested positive for marijuana in an employer mandated urinalysis.

The last time Applicant smoked marijuana was in September 2007. He smoked it then with a friend who was dying from cancer. His motivation in smoking the marijuana at that time was to be sociable with the friend and also because he had just recently been laid-off from his job. The last time he was in the presence of anyone smoking marijuana was during the summer of 2008. He was visiting with others at the same dying friend's residence and a group of their mutual friends were smoking marijuana in an outbuilding at the residence. Applicant left when he saw the friends were smoking marijuana.

Applicant's wife has never used marijuana. Applicant told an investigator in August 2008 that he could not guarantee he would not use marijuana in the future because a person can never say with absolute certainty what will happen in the future. However, he has no future plans to use marijuana. Applicant has never undergone drug treatment or counseling. He relies upon his born-again religious beliefs and his desire to improve himself as a person to keep from abusing marijuana in the future. He has possessed those religious beliefs for about the past ten years.

## **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying conditions and mitigating conditions for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Guideline H (drug involvement), with its disqualifying and mitigating conditions, is most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>3</sup> The Government has the burden of proving controverted facts.<sup>4</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence,<sup>5</sup> although the Government is required to present substantial evidence to meet its burden of proof.<sup>6</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of

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<sup>3</sup> ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

<sup>4</sup> ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

<sup>5</sup> *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

<sup>6</sup> ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

the evidence.”<sup>7</sup> Once the Government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>8</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>9</sup>

No one has a right to a security clearance<sup>10</sup> and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>11</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>12</sup>

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## Analysis

### Guideline H, Drug Involvement

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.

Applicant experimented with cocaine, crack cocaine and mescaline while he was in his 20s. At least two decades have passed since he last used any of those drugs. Due to the passage of time, his abuse of those drugs in his younger years does not create an independent security concern.

However, Applicant illegally used marijuana on a daily to weekly basis from the time he was 12 years old until sometime in his 30s. He continued to use it on a less frequent basis from his 30s until his last reported use in September 2007. He purchased and sold the excess quantities of marijuana he purchased during the 1990s. He tested positive for having used marijuana in a work administered urinalysis in either 1992 or 1993.

Applicant has never undergone drug treatment or counseling. His assertion that he will not use marijuana in the future is unconvincing considering: 1) his 34-year history of abusing marijuana; 2) he quit using marijuana for several years in the 1980s but then began to abuse the substance again; 3) his reliance on his religious beliefs did not prevent him from using marijuana for many years after he came to those beliefs; 4) his regular violation of his employers’ policies against drug abuse even after he tested positive in a

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<sup>7</sup> ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

<sup>8</sup> ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

<sup>9</sup> ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

<sup>10</sup> *Egan*, 484 U.S. at 528, 531.

<sup>11</sup> *Id* at 531.

<sup>12</sup> *Egan*, Executive Order 10865, and the Directive.

work administered urinalysis; and 5) he was in the presence of friends who were using marijuana as recently as last year.

Based on Applicant's long history of abusing marijuana, Guideline H disqualifying conditions (DC) 25(a): *any drug abuse*; DC 25(b): *testing positive for illegal drug use*; DC 25(c): *illegal drug possession, including . . . purchase, sale, or distribution*; and DC 25(h): *. . . failure to clearly and convincingly commit to discontinue drug use* apply.

It has now been almost two years since Applicant last used marijuana. However, the same factors that preclude finding Applicant has convincingly renounced the future use of marijuana also preclude finding that the following mitigating conditions (MC) apply: MC 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 MC 26(b): *a demonstrated intent not to abuse any drugs in the future, 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. . . .*

The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all relevant and material facts and circumstances present in this case, including Applicant's age, the lengthy period of time he abused marijuana, his relapse in the 1980s after a few years of abstinence, his continued use of marijuana after he failed a work-administered urinalysis, and the comparatively short period of time that has elapsed since he last used marijuana. I have also considered the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying conditions. Applicant has failed to mitigate the security concern caused by his abuse of marijuana. He has not overcome the case against him nor satisfied his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

### **Formal Findings**

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

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a-d:	Against Applicant
Subparagraphs 1.e & f:	For Applicant
Subparagraph 1.g:	Against Applicant

## **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Henry Lazzaro  
Administrative Judge

