



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



In the matter of:	)	
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SSN: -----	)	ISCR Case No. 08-10016
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Kathryn D. MacKinnon, Esquire, Department Counsel  
For Applicant: James R. Klimaski, Esquire

June 11, 2009

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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 January 28, 2009. 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 drug involvement.

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<sup>1</sup> This case is adjudicated under 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). In addition to the Executive Order and Directive, this case is adjudicated under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. 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. 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 on March 3, 2009, and he requested a hearing. The hearing took place as scheduled on May 7, 2009. The transcript (Tr.) was received on May 22, 2009. For the reasons discussed below, this case is decided for Applicant.

### **Findings of Fact**

Applicant admitted the factual allegations in SOR ¶ 1.a. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 25-year-old employee of a federal contractor. He has worked as a computer engineer since July 2008. His duties consist of writing software for his customer, a federal research laboratory. He has not married and has no children. He is seeking to obtain an industrial security clearance for the first time.

He graduated from high school in 2002. He then relocated to another state and enrolled at a local community college. In December 2005, he earned an associate in arts degree. In 2006, he enrolled in a nearby state university, and he earned a B.S. in computer science in April 2008. He then moved to the state of his current residence, he received an offer of employment in June 2008, and he started work the following month. He learned of the company's drug-free workforce policy when he received the job offer, and he was required to undergo drug testing as a condition of employment (Exhibit A).

Applicant admits a history of drug involvement from about July 2000 to April 2008, all of which occurred when he was a student and before his employment in the defense industry. The record evidence establishes the following:

- He used marijuana about 10 to 15 times between July 2000 to August 2007;
- He used cocaine about four times between May 2004 and April 2008; and
- He misused a narcotic pain medicine one or two times during 2002–2003.

Applicant used these substances in social settings (parties), and he never purchased the substances as they were provided to him by others. His possession of these substances was incidental to his use.

He disclosed, in detail, his drug involvement when he completed a security-clearance application in July 2008 (Exhibit 1–response to Question 24a). He also provided the following additional comments about his drug involvement:

There were 1-2 instances of using narcotic pain killers while I was in college, although I do not remember the dates nor the substance used. My use of marijuana was never continuous; it was only a random social activity among friends. I used cocaine three times between 2004 and 2005 and then decided to put it behind me. On my birthday in 2008, I had a major lapse in judgment by deciding to partake in the use of cocaine. The amount of times I used these drugs were relatively few, as this type of

behavior is uncharacteristic of me. Being in a college atmosphere, experimenting with drugs seemed trivial, but looking back I recognize the seriousness and highly regret ever doing so (Exhibit 1 at 30).

In addition to the security-clearance application, he confirmed and provided information about his drug involvement in his background interview of August 2008 and in response to interrogatories in November 2008 (Exhibits 2 and 3). In both, he expressed an intention not to abuse drugs in the future.

In his hearing testimony, Applicant repeated his intention, as he is now a young professional who is focused on building his career in computer science, he has no desire to abuse drugs, and it is not something he wants in his life (Tr. 78–79). He spends his free time indulging in several hobbies, such as reading, cooking, bicycling, and jogging. In addition, Applicant signed an affidavit in which he declared an intent to avoid abusing drugs and he understands any violation of his pledge is grounds for the revocation of any clearance granted to him (Exhibit B).

Applicant called two witnesses, both long-time employees at the federal research laboratory, who vouched for his good character and trustworthiness. The first witness was Applicant's older brother who is a research scientist at the lab. Applicant lived with the brother for several months during 2008–2009 and now lives nearby in the same apartment complex. The brother has observed that Applicant has shed his college attitude and is now focused on the professional workplace (Tr. 29). Both Applicant and his brother were exposed to marijuana while attending a poker game, and both removed themselves from the situation (Tr. 39). The brother believes that Applicant understands that drug abuse is incompatible with holding a security clearance, and he has observed that Applicant has expressed a good deal of regret during the past year (Tr. 43–44).

The second witness works as the head or chief of the information technology section of the lab and has supervisory responsibility over Applicant. He opined that Applicant has done a "terrific job" and has exceeded his expectations (Tr. 49). He also believes that Applicant has been very responsible and trustworthy, and he has had no concerns about Applicant's honesty or truthfulness (Tr. 49–50). Overall, the supervisor has been quite pleased with Applicant's work and supports his application for a security clearance.

## **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>2</sup> As noted by the Supreme Court in 1988 in the case of *Department of Navy v. Egan*, "the

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<sup>2</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.").

clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>3</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>4</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>5</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>6</sup> The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>7</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>8</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>9</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>10</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>11</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. The decision to deny a person a security

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<sup>3</sup> *Egan*, 484 U.S. at 531.

<sup>4</sup> Directive, ¶ 3.2.

<sup>5</sup> Directive, ¶ 3.2.

<sup>6</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>7</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>8</sup> Directive, Enclosure 3, ¶ E3.1.15.

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

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

<sup>11</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

clearance is not a determination of an applicant's loyalty.<sup>12</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>13</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>14</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>15</sup>

Based on the record evidence as a whole, the following conditions raise a security concern: Any drug abuse (see above definition).<sup>16</sup> I considered the other DC under the guideline, but none apply based on the facts and circumstances of this case.

Applicant's history of drug abuse raises security concerns because it calls into question his judgment, reliability, trustworthiness, and willingness to obey the law. His marijuana use (10 to 15 times) began in high school and spanned a period of years until he ceased in 2007. Most of his cocaine use took place during 2004–2005 except for his most recent drug abuse in April 2008. His misuse of pain killers took place several years ago in 2002–2003. Overall, these facts and circumstances show that Applicant was an irregular or periodic drug abuser.

The four MC under Guideline H have been considered and one of the four applies in Applicant's favor. The evidence in mitigation establishes a demonstrated intent not to abuse drugs in the future based on three main reasons.<sup>17</sup> First, he no longer socializes with the people he abused drugs with when he was a college student. He graduated from college, relocated to another state, and started the next phase of his life as a young professional who is seeking to excel in his chosen field. Second, his misuse of pain killers took place several years ago and is dated, his abuse of marijuana

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<sup>12</sup> Executive Order 10865, § 7.

<sup>13</sup> Revised Guidelines at 17–18 (setting forth the security concern as well as the disqualifying and mitigating conditions).

<sup>14</sup> Revised Guidelines at 17.

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

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

<sup>17</sup> Revised Guidelines at 18.

ended in 2007, and his last abuse of cocaine took place in April 2008, before he accepted the offer of employment and before he completed the security-clearance application. These circumstances demonstrate a period of abstinence of about 13 months. Third, he also demonstrated his intent via his affidavit wherein he agreed to the revocation of clearance for any violation (Exhibit B). Taken together, these three reasons or circumstances amount to substantial evidence of Applicant's intent not to abuse any drugs in the future.

## **2. *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>18</sup>

I considered all nine factors as well as the favorable testimony from Applicant's witnesses. For the first factor, I considered the circumstance that Applicant's drug abuse went beyond the youthful use of marijuana and extended to cocaine, which is a far more serious drug. In this regard, I considered the reports from the National Institute on Drug Abuse on drug abuse and addiction, cocaine, marijuana, and prescription medications (Exhibits 4, 5, 6, and 7). For the second factor, I considered the circumstance that Applicant's drug abuse occurred when he was a high-school or college student and that is no longer the case. He is now a young adult with far more responsibilities. For the third factor, I considered the irregular or periodic nature of Applicant's drug abuse as well as his abuse of cocaine about 13 months ago. For the fourth factor, I considered Applicant's age and maturity and conclude that he was young-and-dumb when he engaged in drug abuse. Certainly, Applicant is not the first (nor will he be the last) person to engage in foolish misbehavior while in college and subsequently regret it.

In addition, I considered the circumstance that Applicant disclosed his drug abuse when he completed his security-clearance application, during his background interview, and in response to interrogatories. He deserves credit for reporting adverse information, and it comes into play for the eighth and ninth factors. His disclosure reduces the potential for pressure, coercion, exploitation, or duress. Likewise, his

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<sup>18</sup> Revised Guidelines at 1–2.

disclosure, when combined with the other favorable evidence, reduces the likelihood of continuation or recurrence of drug abuse.

This case presents both unfavorable and favorable evidence, which requires thoughtful balancing in light of the clearly-consistent standard. I have considered the totality of facts and circumstances and conclude that the favorable evidence is persuasive. I am persuaded that Applicant's drug abuse is a thing of the past and he will not abuse drugs in the future. It is likely that I would have reached the opposite conclusion, however, had Applicant's drug abuse been more frequent or if he had engaged in drug abuse in violation of his company's drug-free workplace policy or after submitting his security-clearance application.<sup>19</sup> Applicant would be well advised to bear this in mind.

To conclude, Applicant presented sufficient evidence to rebut, explain, extenuate, or mitigate the drug involvement security concerns, and 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:

Paragraph 1, Guideline H:	For Applicant
Subparagraph 1.a:	For Applicant

### **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

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<sup>19</sup> See ISCR Case No. 07-13082 (Jun. 27, 2008) (deciding case against a 24-year-old software engineer who used marijuana about 200 times over a period of years, including using it in violation of his company's drug-free workforce policy).