



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



In the matter of: )  
 )  
 ----- ) ISCR Case No. 09-01491  
 SSN: ----- )  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Richard Stevens, Esq., Department Counsel

For Applicant: Leslie L. Junge, Personal Representative

February 26, 2010

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a security clearance to work in the defense industry. The record evidence shows Applicant used marijuana from about 2001 to March 2006. At times, he used marijuana as often as two to three joints every other day. In March 2006, he was arrested and charged with two felony-level drug offenses relating to his possession and cultivation of marijuana plants. He pleaded guilty to one charge, and the state court withheld adjudication of guilt and ordered Applicant to serve probation for 18 months. He has been drug-free since his March 2006 arrest, and has since relocated to a different state and no longer associates with the individuals with whom he used marijuana. His evidence in mitigation, while not insubstantial, is insufficient to outweigh the nature, extent, and seriousness of his illegal drug involvement and the concomitant security concerns. Accordingly, as explained below, this case is decided against Applicant.

## Statement of the Case

Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> on July 10, 2009, the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) explaining it was unable to find it is clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the factual basis for the action under the security guidelines known as Guideline H for drug involvement and Guideline E for personal conduct. The SOR also recommended that the case be submitted to an administrative judge to decide whether or not to deny or revoke Applicant's security clearance.

Under Guideline H, the SOR alleged the following: (1) Applicant used marijuana from about 2001 to March 2006; (2) Applicant purchased marijuana; (3) Applicant cultivated marijuana during 2005–2006; and (4) Applicant was arrested and charged with two felony-level drug offenses in March 2006, to which he pleaded guilty to one offense and the state court withheld adjudication of guilt and ordered him to serve probation for 18 months. Under Guideline E, the SOR allegation is merely a cross-reference to the matters alleged under Guideline H.

Applicant answered the SOR in a timely fashion and requested a hearing. In doing so, he admitted the factual allegations and provided explanations. The case was assigned to me September 2, 2009. The hearing took place October 28, 2009. The transcript (Tr.) was received November 5, 2009.

## Findings of Fact

Applicant's admissions in his answer to the SOR are incorporated herein. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 37-year-old employee of a federal contractor. He has never married and has no children. He earned a Bachelor of Science degree in Electrical/Electronics Engineering Technology (BSEET) in 1999. He has worked as a radio-frequency technician in the field of avionics since September 2008.

Applicant is seeking to obtain an industrial security clearance for the first time. To that end, he completed a security clearance application in October 2008. He disclosed his March 2006 drug-related charges in response to questions about his police record. In response to questions about his use of illegal drugs and drug activity, he disclosed

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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 DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines), effective within the Defense Department on September 1, 2006, apply to this case. They supersede or replace the guidelines published in Enclosure 2 to the Directive.

using marijuana, from an estimated date of January 2002 to March 2006, and he described the frequency of his usage as a few times weekly.

After earning his degree in 1999, Applicant obtained employment with a major communications company and worked there until he was laid off in about May 2001. He was unemployed for more than a year, and he moved to another state where he lived with his father. His father was a longtime user of marijuana, and Applicant began using marijuana within about four months. Initially, he smoked half a joint once per month or once every other month while with friends.<sup>2</sup> His marijuana usage increased beginning in 2001, and he smoked one joint one to two times per month during 2001 until about 2003 or 2004.<sup>3</sup> From 2004 until his March 2006 arrest, he smoked two to three joints every other day.<sup>4</sup> He attributes the increase in usage to his father's death in 2001, when his father was grievously injured in a motorcycle accident. Applicant was required to decide to terminate life support for his father, and this was a weighty decision for him.

In about 2005, Applicant decided to start growing his own marijuana to offset the expense, as he previously purchased the marijuana. He grew the marijuana in the garage. In March 2006, local law enforcement executed a search warrant at Applicant's home, and they found about 20 marijuana plants at various stages of growth.<sup>5</sup> Applicant was arrested and charged with two offenses: (1) sale, manufacture, or deliver, or possession with intent to sell, manufacture, or deliver a controlled substance; and (2) being a person in actual or constructive possession of marijuana. Both charges were felony-level offenses.<sup>6</sup>

He pleaded guilty to the first charge in April 2006, and the state court withheld adjudication of guilt.<sup>7</sup> The court also ordered Applicant to serve probation for 18 months. Applicant completed probation without a violation.

In about August 2008, Applicant relocated to his state of current residence, a distance of more than 450 miles from his previous residence, where he lives with his mother and stepfather. He began his current employment the following month. He was required to undergo and pass a drug test before starting employment. He has proved himself to be an able employee, as a former supervisor described Applicant as "an outstanding employee," and his initial employee evaluation was favorable.<sup>8</sup>

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<sup>2</sup> Exhibit 2.

<sup>3</sup> Exhibit 2.

<sup>4</sup> Exhibit 2.

<sup>5</sup> Exhibit 2.

<sup>6</sup> Exhibit 3.

<sup>7</sup> Exhibit 4.

<sup>8</sup> Exhibit A.

Applicant states that he has had no involvement with marijuana since March 2006, there is no record evidence showing otherwise, and he pledged to remain drug-free in the future. Applicant submitted a signed “statement of intent with automatic revocation” wherein he agreed to automatic revocation of a security clearance should he violate any local, state, or federal drug law, or should he possess, use, or cultivate marijuana anytime in the future.<sup>9</sup>

Applicant’s mother and sister both appeared as character witnesses at the hearing. Both witnesses were sincere and credible in their testimony.

His mother explained that Applicant had no problems with the law or drugs until he moved in with his father in 2001. She described Applicant’s drug involvement and his March 2006 arrest as “heart wrenching.”<sup>10</sup> She also described Applicant as a devoted son who has been extremely helpful around the house since his return in 2008.

His sister explained that she and Applicant have always had a close relationship. His relocation in 2008 has allowed them to reconnect. She now sees Applicant three to five times weekly. During this time, she has not seen any indications that Applicant was under the influence of drugs.

## Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, the only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information.

It is well-established law that no one has a right to a security clearance.<sup>11</sup> As noted by the Supreme Court 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>12</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>13</sup> An

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<sup>9</sup> Exhibit C.

<sup>10</sup> Tr. 70.

<sup>11</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>12</sup> 484 U.S. at 531.

<sup>13</sup> Directive, ¶ 3.2.

unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>14</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>15</sup> The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>16</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>17</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>18</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>19</sup> The Agency's appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>20</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 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 clearance is not a determination of an applicant's loyalty.<sup>21</sup> Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

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<sup>14</sup> Directive, ¶ 3.2.

<sup>15</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>16</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>17</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>18</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>19</sup> *Egan*, 484 U.S. at 531.

<sup>20</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>21</sup> Executive Order 10865, § 7.

## Analysis

The security concern under Guideline H for drug involvement<sup>22</sup> is as follows:

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>23</sup>

Drug abuse means "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."<sup>24</sup>

Applicant's history of illegal drug use and illegal drug activity raises serious security concerns under Guideline H. Applicant engaged in drug abuse<sup>25</sup> when he used marijuana from about 2001 until his arrest in March 2006. At times, he was a heavy user, smoking two to three joints every other day. He purchased marijuana until he began growing his own in 2005, and he had about 20 marijuana plants under cultivation when arrested.<sup>26</sup> He then served probation for 18 months after he pleaded guilty to one of the two charges against him. Although the court withheld adjudication of guilt, the record evidence shows Applicant was in no way innocent of the drug-related offenses.

The guideline also provides that certain conditions may mitigate security concerns. I considered all the mitigating conditions and the most pertinent here are:

- ¶ 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.
- ¶ 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;

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<sup>22</sup> Revised Guidelines, ¶¶ 24, 25, and 26 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>23</sup> Revised Guidelines, ¶ 24.

<sup>24</sup> Revised Guidelines, ¶ 24(b).

<sup>25</sup> Revised Guidelines, ¶ 25(a).

<sup>26</sup> Revised Guidelines, ¶ 25(c).

(4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant receives partial credit under ¶ 26(a). The record evidence shows his last involvement with illegal drugs was March 2006, when he was arrested, which is about four years ago. In that sense, his illegal drug involvement may be viewed as not recent. It cannot be described as infrequent or isolated conduct, however, as he was a regular marijuana user over a period of years, and he cultivated multiple marijuana plants during 2005–2006. Also, I cannot conclude that his actions do not continue to cast doubt on his current reliability, trustworthiness, or good judgment given the seriousness of his drug involvement. He was not a 20-year-old college student inexperienced in the ways of the world when he was using marijuana during 2001–2006. And he was approximately 32 or 33 years old when he began growing marijuana in 2005. Given his age and maturity when he was involved with illegal drugs, I cannot consider his actions as the product of youthful foolishness.

Applicant also receives credit under ¶ 26(b). He demonstrated an intent not to engage in drug abuse in the future by remaining drug-free since March 2006, by relocating to a different state thereby removing himself from his drug-using associates, and by signing the statement of intent with automatic revocation.

Under the whole-person concept, an administrative judge must evaluate a person's eligibility by considering the totality of the person's conduct and all the circumstances. An administrative judge should consider the nine factors listed in the Revised Guidelines as follows:

(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>27</sup>

I gave due consideration to Applicant's case in light of the whole-person concept, but any credit due him is not enough to overcome the security concerns. On balance, Applicant's evidence in mitigation is insufficient to prevail. In reaching this conclusion, I gave substantial weight to the nature, extent, and seriousness of his illegal drug involvement and the concomitant security concerns. Growing marijuana in a private residence to such an extent that it comes to the attention of the police raises serious questions or doubts about Applicant's reliability, trustworthiness, and good judgment, and it reflects poorly on his fitness or suitability for access to classified information. Following the principles of *Egan* and the clearly-consistent standard, those questions or

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<sup>27</sup> Revised Guidelines, ¶ 2(a)(1) – (9).

doubts are resolved against Applicant and in favor of the national interest. To conclude, Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision.

### **Formal Findings**

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline H:	Against Applicant
Subparagraphs 1.a–1.d:	Against Applicant
Paragraph 2, Guideline E:	For Applicant <sup>28</sup>
Subparagraph 2.a:	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>28</sup> The SOR allegation under Guideline E is merely a cross-reference to the matters alleged under Guideline H, which were addressed above. Because Applicant's illegal drug involvement is explicitly covered under Guideline H and is sufficient by itself for an adverse clearance decision, there is no good reason to consider the same matters under the personal conduct guideline. Accordingly, on this basis, Guideline E is decided for Applicant.