



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



In the matter of: )  
 )  
----- ) ISCR Case No. 10-10324  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Eric H. Borgstrom, Esq., Department Counsel  
For Applicant: *Pro se*

02/27/2012

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for a security clearance to work in the defense industry. The evidence shows Applicant has a recent history of illegal drug use taking place during the period November 2009–January 2010 when he used marijuana, Ecstasy, LSD (acid), muscle relaxers, and morphine. His drug abuse took place just months before he completed his July 2010 security clearance application, in which he disclosed his drug abuse. Although he has stated that he has no intention to abuse drugs in the future, insufficient time has passed to allow a conclusion that his drug abuse was minor or an aberration. For the reasons discussed 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 20, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) explaining it was unable to find that it was clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the reasons for the action under the security guidelines known as Guideline H for drug involvement, Guideline J for criminal conduct, and Guideline E for personal conduct.<sup>2</sup>

Applicant timely answered the SOR. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.<sup>3</sup>

On or about November 26, 2011, Department Counsel submitted their case consisting of all relevant and material information that could be adduced at a hearing.<sup>4</sup> This so-called file of relevant material (FORM) was mailed to Applicant and received by him on or about December 22, 2011. Applicant then had a 30-day period to submit a response setting forth objections, rebuttal, extenuation, mitigation, or explanation. To date, Applicant has not replied. The case was assigned to me February 14, 2012.

## Findings of Fact

The SOR alleged Applicant engaged in drug abuse during the period November 2009–January 2010 by using marijuana, Ecstasy, LSD (acid), muscle relaxers, and morphine. In Applicant's reply to the SOR (Answer), he admitted the drug abuse as alleged with explanations. His admissions are accepted and adopted and incorporated herein as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

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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 *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

<sup>2</sup> Both the Guideline J and Guideline E allegations simply cross reference Applicant's drug abuse allegations under Guideline H. Because the security concerns stemming from his drug abuse are fully covered under Guideline H, the Guideline J and Guideline E allegations are decided for Applicant and those matters will not be discussed further herein.

<sup>3</sup> Directive, Enclosure 3, ¶ E3.1.7.

<sup>4</sup> The file of relevant material consists of Department Counsel's written brief and supporting documents, some of which may be identified as exhibits in this decision.

Applicant is a 34-year-old employee of a federal contractor. He has worked as a technical writer for a federal contractor since June 2010. His employment history includes about 19 different jobs since 1999.<sup>5</sup> Likewise, he has lived at about 20 different residential addresses since 1999.<sup>6</sup> His educational background includes a master's degree obtained from a foreign university in 2005. He has never married and has no children.

Applicant is seeking to obtain a security clearance for his current job. He completed a security clearance application in July 2010.<sup>7</sup> In response to the relevant question, he reported illegally using a controlled substance within the last seven years. He reported illegal drug use from November 2009 to January 2010 by using marijuana several times, one-time experimentation with Ecstasy, LSD (acid), and muscle relaxers, and two-time experimentation with morphine. He also explained that during that time he lived in an artist cooperative in another state; he did not purchase any of the drugs; and his intent was to never experiment or use illegal drugs in the future. He provided further confirming details about his drug abuse and his future intentions during his background investigation and in response to interrogatories issued by DOHA.<sup>8</sup>

There is no evidence that Applicant has tested positive or negative for illegal drug use. There is no evidence that he has been evaluated for drug abuse or dependence by a qualified medical professional, a licensed clinical social worker, or other qualified person. And there is no evidence that any sort of drug-treatment program or counseling has been prescribed for him.

### **Law and Policies**

It is well-established law that no one has a right to a security clearance.<sup>9</sup> As noted by the Supreme Court in *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>10</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>5</sup> Exhibit 3.

<sup>6</sup> Exhibit 3.

<sup>7</sup> Exhibit 3.

<sup>8</sup> Exhibit 4.

<sup>9</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>10</sup> 484 U.S. at 531.

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>11</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>12</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>13</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>14</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>15</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>16</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>17</sup> The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>18</sup>

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

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>19</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>11</sup> Directive, ¶ 3.2.

<sup>12</sup> Directive, ¶ 3.2.

<sup>13</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>14</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>15</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>16</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>17</sup> *Egan*, 484 U.S. at 531.

<sup>18</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>19</sup> Executive Order 10865, § 7.

## Discussion

Under Guideline H,<sup>20</sup> the security concern is that the use of an illegal drug, or misuse of a prescription drug, raises questions about a person's judgment, reliability, and trustworthiness. In this context, the term drug abuse means "the illegal use of a drug or use of a legal drug in a manner that deviates from the approved medical direction."<sup>21</sup> The guideline also expresses a concern that drug involvement may call into question a person's ability or willingness to follow laws, rules, and regulations.

Here, the evidence is more than sufficient to establish security concerns based on Applicant's history of drug abuse.<sup>22</sup> The evidence shows he engaged in drug abuse during the period November 2009–January 2010. He used marijuana, Ecstasy, LSD (acid), muscle relaxers, and morphine at house parties he attended while living at an artist cooperative in another state. His drug abuse took place when he was over the age of 30 and just months before he completed his July 2010 security clearance application. His drug abuse also amounts to illegal conduct, and it reflects poorly on his judgment, reliability, trustworthiness, and ability to properly handle and safeguard classified information.

There are several mitigating conditions to consider under Guideline H. The following mitigating conditions are most pertinent:

AG ¶ 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

AG ¶ 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; or
- (4) a signed statement of intent with automatic revocation of clearance for any violation.

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<sup>20</sup> AG ¶¶ 24–26 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>21</sup> AG ¶ 24(b).

<sup>22</sup> AG ¶ 25(a) is the disqualifying condition for any drug abuse.

After considering the disqualifying and mitigating conditions, the central issue is whether Applicant presented sufficient evidence to mitigate and overcome the drug involvement security concerns. I conclude that he has not. His drug abuse, while limited to a discrete period, took place rather recently during November 2009–January 2010. Moreover, it took place when he was over the age of 30, when he was a mature man, with a master’s degree, who should have known better. It also took place just months before he completed his July 2010 security clearance application. These circumstances reflect poorly on Applicant’s fitness or suitability for a security clearance. Although he has stated that he has no intentions to abuse drugs in the future,<sup>23</sup> insufficient time has passed to allow a conclusion that his drug abuse was minor or an aberration.

I have also considered this case in light of the evidence as a whole and the nine-factor whole-person concept.<sup>24</sup> In particular, I considered the nature, extent, and seriousness of Applicant’s illegal drug involvement; the circumstances surrounding the conduct; the frequency and recency of the conduct; his age at the time of the conduct; the presence of rehabilitation and other positive changes; and the likelihood of recurrence. Given the relative recency of his drug abuse, it is too soon to tell if his drug abuse is safely in the past. He did not present sufficient evidence of a track record of reform and rehabilitation to mitigate and overcome the security concerns. Accordingly, I conclude that 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.e:	Against Applicant
Paragraph 2, Guideline J:	For Applicant
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	For Applicant
Subparagraph 3.a:	For Applicant

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<sup>23</sup> Given this case is decided on the written record, I cannot assess Applicant’s credibility on this point.

<sup>24</sup> AG ¶ 2(a)(1)–(9).

## **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