



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



In the matter of: )  
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----- ) ISCR Case No. 11-00221  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Braden M. Murphy, Esq., Department Counsel  
For Applicant: *Pro se*

January 12, 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 gave a deliberately false answer in response to a question, posed in an October 2010 security clearance application, about illegal drug use. His answer disclosed a single use of marijuana in September 2001, when the evidence shows his illegal drug use during the relevant period was more recent, frequent, and extensive. His explanation that his incorrect answer was due to oversight is not credible. He failed to present sufficient evidence to overcome the security concerns stemming from his deliberate falsification. Accordingly, as 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 or about July 26, 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 factual basis for the action under the security guideline known as Guideline E for personal conduct.

Applicant answered the SOR and requested a hearing. The case was assigned to another judge on October 5, 2011, before it assigned to me on October 14, 2011. The hearing took place November 3, 2011. The transcript (Tr.) was received November 14, 2011.

## Findings of Fact

The SOR alleged that Applicant gave deliberately false answers about his illegal drug use in response to two questions on a security clearance application completed in October 2010. Applicant denied both allegations in his reply to the SOR, although he admitted the underlying illegal drug use. At the close of evidence, Department Counsel conceded the evidence was insufficient to prove the second falsification allegation (SOR ¶ 1.b).<sup>2</sup> Accordingly, a favorable finding will be made on this allegation and it will not be discussed further. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 28-year-old employee of a federal contractor. He has been employed as a software engineer for a large company engaged in defense contracting since June 2007. He married a little more than a year ago. He and his wife, who is a software test engineer employed by the same company, have no children. He has a good employment record as established by written performance assessments for the years 2007–2011.<sup>3</sup>

Applicant's education background includes undergraduate and post-graduate work. He attended a state university during 2001–2006, and he was awarded a bachelor's degree in computer engineering in December 2006. At hearing, he

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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> Tr. 85–86.

<sup>3</sup> Exhibit B.

anticipated completing a master's degree in engineering in December 2011. His employer is paying a substantial amount of the cost for the master's degree. He is enjoying academic success in the master's program with a GPA of 3.54 on a 4.0 scale.<sup>4</sup>

Applicant completed a security clearance application in October 2010.<sup>5</sup> In doing so, he was required to provide true, complete, and correct answers to multiple questions about his background, to include any involvement with illegal drug use or drug activity. Question 23a asked if, in the last seven years, he had illegally used any of a number of controlled substances such as marijuana or cocaine. He answered the question in the affirmative. He reported a single use of marijuana in about September 2001, which was outside the seven-year scope of the question (October 2003–October 2010). He explained that he tried marijuana while in college and stated that it did not reflect the type of professional person he was today.

About a month later in November 2010, Applicant was interviewed by a government investigator as part of a background investigation.<sup>6</sup> When asked Question 23a by the investigator, Applicant provided a detailed accounting of marijuana, cocaine, and LSD<sup>7</sup> usage as follows:

- He stated that he began using marijuana in September 2001 when he entered college, and he used marijuana approximately 50 to 100 times until about June 2007. He described smoking marijuana out of a pipe, taking one to two hits on each occasion he smoked it.
- He stated that he used cocaine by snorting it about five times during the same period.
- He stated that he used LSD twice during the same period.
- For all three drugs, he stated that he thought he had included this information on his security clearance application and was unaware why it was not listed.

Applicant was requested to respond to written interrogatories about his illegal drug use, to which he replied in March 2011.<sup>8</sup> He provided detailed information, written in his own hand, about his use of marijuana, cocaine, and LSD as follows:

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<sup>4</sup> Exhibit C.

<sup>5</sup> Exhibit 1.

<sup>6</sup> Exhibit 3.

<sup>7</sup> The SOR used the term acid, which is slang for lysergic acid diethylamide, commonly abbreviated LSD. I have used the abbreviation throughout this decision.

<sup>8</sup> Exhibit 2.

- He denied currently using marijuana and any intention to use it in the future. He stated that his last use of marijuana was in April 2007. He stated that he used marijuana as a college student during 2001–2006 on a weekly and sometimes daily basis. He stated that he continued using it weekly in 2007 before starting with his current employer in June 2007.
- He denied currently using cocaine and any intention to use it in the future. He stated that his last use of cocaine was in August 2007. He stated that he used cocaine on a monthly basis from about late 2006 and then continuing into 2007.
- He denied currently using LSD and any intention to use it in the future. He stated that his last use of LSD was in summer 2005. He stated that he used LSD twice, once in about October 2004 and again in summer 2005.

At hearing, he denied any intention to deliberately falsify or misrepresent his answer to Question 23a of his security clearance application. Consistent with his Answer, he stated that his incorrect answer to Question 23a was due to oversight. He stated that his last use of marijuana was in April 2007. He also stated that his last use of cocaine was before June 2007, not August 2007 as he stated in the interrogatories.<sup>9</sup> He denied any illegal drug use in 2008 and 2009. He answered that he could not recall in response to multiple questions about his illegal drug use.

Applicant's spouse testified as a character witness. She has known Applicant since 2008, and she has seen no indication of illegal drug use during their relationship. Applicant also presented multiple letters of recommendation, which are all highly favorable and supportive.<sup>10</sup>

### Law and Policies

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 *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.

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<sup>9</sup> Tr. 53–57.

<sup>10</sup> Exhibit A.

<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.

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 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 DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>20</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>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>13</sup> Directive, ¶ 3.2.

<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.

## Discussion

The issue here is whether Applicant made a deliberately false statement by misrepresenting the full extent of his illegal drug use when answering Question 23a on his October 2010 security clearance application. Under Guideline E for personal conduct,<sup>22</sup> the suitability of an applicant may be questioned or put into doubt due to false statements and credible adverse information that may not be enough to support action under any other guideline. The overall security concern under Guideline E is:

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>23</sup>

A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if, for example, the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

Claiming oversight, Applicant denies any intention to deliberately falsify or misrepresent his answer to Question 23a. Department Counsel contends that the evidence proves the falsification allegation given the paucity of information Applicant disclosed on the security clearance application in light of the full extent of his illegal drug use in his college years and beyond.<sup>24</sup> Based on the evidence, to include an opportunity to listen to Applicant's testimony and observe his demeanor, Department Counsel's contention is far more persuasive, and I conclude that Applicant made a deliberately false statement.<sup>25</sup> His claim of oversight is not credible.<sup>26</sup> He failed to credibly explain how he unintentionally failed to correctly answer Question 23a—by reporting a September 2001 single use of marijuana—in light of his extensive use of marijuana over a period of years and limited use of cocaine and LSD. Based on the evidence as a whole, I conclude that he gave a deliberately false answer to Question

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<sup>22</sup> AG ¶¶ 15–17 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>23</sup> AG ¶ 15.

<sup>24</sup> Tr. 89–90.

<sup>25</sup> AG ¶ 16(a).

<sup>26</sup> An administrative judge in a security clearance case may believe all, some, or none of a witness's testimony. See *United States v. Bates*, 614 F.3d 490, 495 (8<sup>th</sup> Cir. 2010) (quoting *United States v. Candie*, 974 F.2d 61, 65 (8<sup>th</sup> Cir. 1992) (“Like any other factfinder who assesses witness credibility, the sentencing judge is free to believe all, some, or none of a witness's testimony.”)).

23a by misrepresenting the full extent of his illegal drug use, because he knew that a full, frank, and truthful answer would reflect poorly on him and his suitability for a security clearance.

In reaching these conclusions, I considered all the mitigating conditions under Guideline E,<sup>27</sup> and none, individually or in combination, are sufficient to overcome and mitigate the security concerns.<sup>28</sup> Indeed, making a deliberately false statement to the federal government during the security clearance process is serious misconduct, and it is not easily explained away, extenuated, or mitigated.

Applicant's deliberately false statement justifies current doubts about his judgment, reliability, and trustworthiness. Following *Egan* and the clearly-consistent standard, I resolve these doubts in favor of protecting national security. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I gave due consideration to the whole-person concept<sup>29</sup> and Applicant's favorable evidence (e.g., Exhibits A, B, and C). Although these matters weigh in his favor, they are insufficient to 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 E:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	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>27</sup> AG ¶ 17(a)–(g).

<sup>28</sup> In particular, the mitigating condition at AG ¶ 17(a) does not apply because misrepresenting illegal drug use on a security clearance application and then not revealing the true information until asked about it during an official interview is not a prompt, good-faith effort to correct the misrepresentation.

<sup>29</sup> AG ¶ 2(a)(1)–(9).