



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



In the matter of: )  
 )  
----- ) ISCR Case No. 11-02373  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Melvin A. Howry, Esq., Department Counsel  
For Applicant: *Pro se*

10/16/2012

---

**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 evidence shows Applicant has a history of drug abuse (use of marijuana) and a history of criminal conduct, neither of which he fully disclosed when he completed a security clearance application in October 2010. He did not present sufficient evidence to mitigate the concerns about his fitness and suitability to hold a security clearance. 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 April 26, 2012, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him 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.

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>2</sup>

On or about August 3, 2012, Department Counsel submitted all relevant and material information that could be adduced at a hearing.<sup>3</sup> This so-called file of relevant material (FORM) was mailed to Applicant, who received it August 20, 2012. His reply to the FORM consists of the following matters: (1) Exhibit A—Applicant's written statement declaring that any future use of marijuana will result in automatic revocation of a security clearance; (2) Exhibit B—letter of reference from Applicant's manager; (3) Exhibit C—Applicant's marriage certificate; (4) Exhibit D—birth certificate for Applicant's child; and (5) Exhibit E—eight certificates of completion related to job training. Those five matters are admitted without objections. The case was assigned to me October 2, 2012.

## Findings of Fact

The SOR, in general, alleged the following matters: (1) use of marijuana, with varying frequency, from about 2001 to January 2010; (2) arrests for criminal conduct in January 2005, April 2005, and May 2010; and (3) deliberate falsification of a security clearance application by failure to fully disclose past marijuana use as well as the 2005 arrests for criminal conduct. In his answer to the SOR, he admitted the allegations with explanations. His admissions and explanations are accepted and adopted and incorporated as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

---

<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> Directive, Enclosure 3, ¶ E3.1.7.

<sup>3</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 29-year-old employee of a federal contractor. His educational background includes attending high school during 1999–2001, although he did not obtain a diploma. He has been married since 2009, and he and his wife have one child.<sup>4</sup> He has worked as a material coordinator for his current employer since September 2010. He has a good employment record in his current job.<sup>5</sup> Before that, he was self-employed as a computer technician and network administrator for several years. He is seeking a security clearance for the first time, submitting an application in October 2010.<sup>6</sup>

In completing his security clearance application, Applicant was required to answer multiple questions about his background and personal history, including questions about use of illegal drugs and drug activity as well as his police record. He answered in the affirmative to Questions 22a, 22b, and 22e about his police record. He reported a 2010 conviction for driving under the influence of alcohol (DUI), for which he was convicted and was sentenced to four days in jail and 36 months probation. He disclosed nothing more about his police record. He also answered in the affirmative to Question 23a about illegal drugs. He reported using marijuana at a New Year's Eve party in December 2009–January 2010. He disclosed nothing more about his illegal drug use or involvement.

Subsequently, it was established that Applicant's police record and marijuana use were far more extensive than he reported in his security clearance application.<sup>7</sup> In addition to his 2010 DUI offense, in January 2005 he was arrested and charged with burglary, furnishing liquor to a minor, conspiracy to commit a crime, and possession of a controlled substance with intent to sell. And in April 2005, he was arrested and charged with malicious destruction of property, vagrancy lodging, trespass, sale/furnish liquor to a minor, and possession of one ounce or less of marijuana. Concerning his marijuana use, he used marijuana during 2001–2010 as follows: (1) from the ages of 18–21, he smoked marijuana three to four times weekly; (2) from the ages of 21–22, he smoked marijuana three to four times monthly; (3) and from the age of 22 to the year 2010, he smoked marijuana about once a year.<sup>8</sup>

In his answer to the SOR, Applicant admitted that he has made mistakes and he has been working for several years to better himself. In addition to his marriage and becoming a father, he has furthered his education.<sup>9</sup> He stated that he no longer uses

---

<sup>4</sup> Exhibits C and D.

<sup>5</sup> Exhibits B.

<sup>6</sup> Exhibit 1.

<sup>7</sup> Exhibits 7, 8, 9, 10, and 11.

<sup>8</sup> Exhibit 11.

<sup>9</sup> Exhibit E.

marijuana and is a light drinker of alcohol. In his reply to the FORM, he included a declaration wherein he agreed that any future use of marijuana will result in automatic revocation a security clearance.<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.

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>

---

<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.

<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.

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.

### **Discussion**

Under Guideline H,<sup>22</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>23</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>24</sup> The evidence shows he engaged in drug abuse by the periodic use of marijuana during 2001–2010. The last incident of marijuana use took place just several months before he completed his October 2010 security clearance application. And his drug abuse amounts to illegal conduct (possession and use of marijuana),<sup>25</sup> which reflects poorly on his judgment, reliability, trustworthiness, and willingness to follow laws, rules, and regulations.

There are several mitigating conditions to consider under Guideline H.<sup>26</sup> Based on the record before me, none of the mitigating conditions apply fully to Applicant’s

---

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

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

<sup>22</sup> AG ¶¶ 24–26 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>23</sup> AG ¶ 24(b).

<sup>24</sup> AG ¶ 25(a).

<sup>25</sup> AG ¶ 25(c).

<sup>26</sup> AG ¶ 26(a)–(d).

case. With that said, the central issue here is whether Applicant presented sufficient evidence to mitigate and overcome the security concerns raised by his history of drug abuse. I conclude that he has not done so. He did not present sufficient evidence of reform and rehabilitation to persuade me that his use of marijuana is safely in the past. In particular, his December 2009–January 2010 marijuana use is troubling and raises questions about his judgment, because it took place after his 2009 marriage, after the birth of his child, and just months before he began employment for a federal contractor.

Under Guideline J for criminal conduct,<sup>27</sup> the security concern is that criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.

Applicant’s police record during 2005–2010 raises a legitimate security concern. This is especially true in light of the ongoing 36-month period of probation. The facts and circumstances surrounding Appellant’s police record fall under the disqualifying conditions at AG ¶¶ 31(a), (c), and (d).

I have considered the mitigating conditions under Guideline J, and none, individually or in combination, are sufficient to mitigate the criminal conduct security concern. Applicant is serving probation until sometime in 2013, and it is too soon to tell if he will complete it successfully. His status as a probationer strongly militates against a favorable decision. What is missing here is a demonstrable track record of Applicant conducting himself as a law-abiding person, preferably while no longer serving probation. Until then, it is premature to conclude that he is suitable for security clearance eligibility.

Under Guideline E for personal conduct,<sup>28</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 can 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>29</sup>

---

<sup>27</sup> AG ¶¶ 30, 31, and 32 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>28</sup> AG ¶¶ 15–17 (setting forth the security concern and the disqualifying and mitigating conditions).

<sup>29</sup> AG ¶ 15.

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.

The issue here is whether Applicant made deliberately false statements when completing his security clearance application by omitting his 2005 police record and by omitting the full extent of his marijuana use. In deciding this issue, I have not had the opportunity to consider testimony from Applicant and assess his credibility and demeanor. I have considered both his admissions and his various explanations as set forth in his answer to the SOR and during his background investigation. Based on the record before me, I am not persuaded that his omissions were the result of genuine forgetfulness or inattention, or were due to an honest mistake or misunderstanding. The circumstances point to the conclusion that Applicant was minimizing the adverse information he reported on his security clearance application. In other words, he misrepresented the full extent of his police record and marijuana use because he knew that full, frank, and truthful answers would reflect poorly on him. Accordingly, I conclude that Applicant made deliberately false statements in response to questions about his police record and his illegal drug use.<sup>30</sup>

In reaching these conclusions, I considered all the mitigating conditions under Guideline E,<sup>31</sup> and none, individually or in combination, are sufficient to overcome and mitigate the security concerns. 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.

Taken together, Applicant's marijuana use, his police record (to include the ongoing probation), and his deliberately false statements justify 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 also gave due consideration to the whole-person concept.<sup>32</sup> Having done so, I conclude that Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision.

---

<sup>30</sup> AG ¶ 16(a).

<sup>31</sup> AG ¶ 17(a)–(g).

<sup>32</sup> AG ¶ 2(a)(1)–(9).

## **Formal Findings**

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline H:	Against Applicant
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraphs 2.a–2.c:	Against Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraphs 3.a–3.c:	Against 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