



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



In the matter of: )  
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----- ) ISCR Case No. 11-04395  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Gregg A. Cervi, Esq., Department Counsel  
For Applicant: *Pro se*

07/31/2012

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for a security clearance. The evidence shows Applicant has a history of drug abuse (primarily marijuana use) during 2001–2009. In addition, he resumed his illegal drug activity in June 2012 by (1) making two purchases of marijuana, (2) using it on several occasions, to include about five days before the hearing, and (3) possessing marijuana at his residence. Given these circumstances, it is too soon to tell if his drug involvement is safely in the past or an activity he will continue to pursue. Accordingly, 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 May 4, 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 Applicant access to classified information. The SOR is similar to a complaint, and it detailed the reasons for the action under the security guideline known as Guideline H for drug involvement.

Applicant timely answered the SOR and requested a hearing. The hearing took place July 9, 2012. The transcript (Tr.) was received July 26, 2012.

## Rulings on Procedure

At the hearing, Department Counsel moved to amend SOR ¶ 1.e to conform to the information provided in Applicant's answer to the SOR.<sup>2</sup> Applicant did not object, and the motion was granted.

## Findings of Fact

The SOR, as amended, alleged a history of drug abuse during 2001–2009 that covered both use of illegal drugs (marijuana, cocaine, and psilocybin mushrooms) and misuse of legal drugs (Adderall and Xanax). He admitted the allegations in his answer to the SOR. 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.

Applicant is a 25-year-old employee of a company engaged in defense contracting. He is seeking a security clearance for his job as a grounds maintenance worker at a U.S. Air Force base. He began this job in December 2009, upon completion of his bachelor's degree. He recently completed the first two semesters of a master's degree program, and he reports a cumulative grade-point average exceeding 3.5 on a 4.0 scale.

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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. 19–20.

Applicant completed a security clearance application in September 2010.<sup>3</sup> In doing so, he disclosed use of illegal drugs and misuse of legal drugs. He provided further details about his drug abuse during the background investigation.<sup>4</sup> And in response to the SOR, he admitted to a history of drug abuse as follows: (1) using marijuana about 500 times between 2001 and 2009; (2) using cocaine about ten times between 2005 and 2009; (3) misusing Adderall about 20 times in 2009; (4) using psilocybin mushrooms about three times between 2007 and 2009; and (5) misusing Xanax in 2005.

Although the majority of his drug abuse ended in 2009, during the hearing Applicant disclosed recent drug involvement. He admitted making two purchases of marijuana for a total cost of \$400 for about 23 grams in June 2012; he admitted using marijuana on several occasions in June 2012; he admitted last using marijuana on July 4<sup>th</sup>, just days before the hearing; and he admitted having about 17 or 18 grams of marijuana at his residence. He attributed his recent marijuana use to a moment of weakness and stress, and he expressed both regret and remorse of his actions.

### Law and Policies

It is well-established law that no one has a right to a security clearance.<sup>5</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>6</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>7</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>8</sup>

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<sup>3</sup> Exhibit 1.

<sup>4</sup> Exhibit 2.

<sup>5</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>6</sup> 484 U.S. at 531.

<sup>7</sup> Directive, ¶ 3.2.

<sup>8</sup> Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>9</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>10</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>11</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>12</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>13</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>14</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>15</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

The security concern under Guideline H for drug involvement is:

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>16</sup>

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<sup>9</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>10</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>11</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>12</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>13</sup> *Egan*, 484 U.S. at 531.

<sup>14</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>15</sup> Executive Order 10865, § 7.

<sup>16</sup> AG ¶ 24.

The term 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>17</sup>

In light of Applicant’s history of drug involvement as described in the findings of fact, the following disqualifying conditions are most pertinent:

AG ¶ 25(a) any drug abuse;

AG ¶ 25(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

The guideline also has four conditions that could mitigate security concerns.<sup>18</sup> I have considered all four mitigating conditions and none, individually or in combination, are sufficient to mitigate and overcome the security concerns stemming from Applicant’s history of drug involvement. His drug abuse through 2009 could perhaps be discounted and mitigated as a product of youth, inexperience, and immaturity as he was then 22 years old or younger. But his illegal drug involvement in 2012 demonstrates otherwise. Not only did he buy and use marijuana after receiving the SOR, but he was in possession of marijuana on the day of his hearing. In this regard, his drug abuse is viewed as quite recent, and his possession of marijuana is viewed as ongoing. No mitigation is available under these circumstances, notwithstanding his full, frank, and candid disclosure of these matters. Simply put, it is too soon to tell if his drug involvement is safely in the past or an activity he will continue to pursue. Given his recent activities in June and July 2012, I am not persuaded that Applicant has clearly and convincingly committed to discontinue marijuana use.

Following *Egan* and the clearly-consistent standard, I have doubts or concerns about Applicant’s fitness or suitability for a security clearance. 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>19</sup> Having done so, I conclude that Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision.

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<sup>17</sup> AG ¶ 24(b).

<sup>18</sup> AG ¶ 26(a)–(d).

<sup>19</sup> AG ¶ 2(a)(1)–(9).

## **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

## **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