



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



In the matter of: )  
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----- ) ISCR Case No. 11-04598  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel  
For Applicant: *Pro se*

08/13/2012

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for a security clearance to work in the defense industry. The evidence shows Applicant received nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 815, for wrongful use of marijuana in April 2010 while on active duty with the U.S. Navy. He was issued a general discharge under honorable conditions upon the end of his enlistment the same year. These matters took place just months before he completed his November 2010 security clearance application, in which he disclosed marijuana use in March 2010, explaining it was a one-time unknowing use. Although he has stated that he has no intention to abuse drugs in the future, insufficient time has passed to conclude that similar conduct will not recur. 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 March 5, 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 guideline known as 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 May 23, 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 and received by him on or about June 11, 2012. Applicant then had a 30-day period to submit a response setting forth objections, rebuttal, extenuation, mitigation, or explanation. Applicant timely replied with a three-page submission, and it is admitted without objection as Exhibit A. The case was assigned to me August 1, 2012.

## Findings of Fact

The SOR alleged two matters related to Applicant's use of marijuana. First, the SOR alleged Applicant received nonjudicial punishment under Article 15, UCMJ, for wrongful use of marijuana in April 2010 while on active duty with the U.S. Navy and while holding a security clearance. Second, the SOR alleged Applicant made a deliberately false statement during his background interview when he stated that he had never used illegal drugs before March 2010, when he had used marijuana about six times during 1995–2001. In his answer to the SOR, he admitted the first allegation and denied the second. His admissions are accepted and adopted and incorporated as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 32-year-old employee of a federal contractor. He is employed as a video teleconference (VTC) technician, and he has been with the company since

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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> 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.

August 2010. His job site is a U.S. military installation. Married in 1999, he and his wife have three children. He is seeking to retain a security clearance previously granted to him.

Applicant's employment history includes military service in the U.S. Navy from November 2001 to August 2010. He rose to the rank of second class petty officer (pay grade E-5), but was discharged at the pay grade of E-4. He was reduced to a lower pay grade by nonjudicial punishment under Article 15, UCMJ, for wrongful use of marijuana. In particular, he tested positive for marijuana during random drug testing in April 2010. The command imposed nonjudicial punishment in June 2010, and Applicant received the following punishment: (1) restriction for 60 days; (2) forfeiture of \$1,147 per month for two months; and (3) reduction to the next inferior pay grade.<sup>4</sup> He was separated from the Navy in August 2010 with a general discharge under honorable conditions. There is no indication in the record that he was subject to administrative separation from the Navy due to misconduct or unsuitability.

Applicant first applied for a security clearance in September 2001 as part of the military enlistment process.<sup>5</sup> He disclosed in that document that he had used marijuana about six times from April 1995 to July 2001. He completed another security clearance application in November 2010 for his current job.<sup>6</sup> He disclosed in that document the following adverse matters: (1) the general discharge from the Navy in 2010; (2) the nonjudicial punishment imposed in 2010; (3) use of marijuana in March 2010, explaining it was a one-time unknowing use; and (4) two delinquent financial accounts.<sup>7</sup>

Applicant was interviewed as part of his background investigation in December 2010.<sup>8</sup> Subsequently, as part of this case, Applicant agreed with and adopted a summary of the interview as an accurate reflection of the interview with only minor corrections.<sup>9</sup> The interview addressed multiple topics, including marijuana. On that topic, he admitted receiving nonjudicial punishment for wrongful use of marijuana based on failing a random drug test due to unintentional ingestion of marijuana. He explained the marijuana use occurred when he unknowingly smoked a cigarette containing both tobacco and marijuana, which was given to him by his brother in an effort to provide Applicant relief from the side effects of a medicine he was then taking. He also explained that shortly after smoking the cigarette, he realized it was not a normal

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<sup>4</sup> Exhibit 9.

<sup>5</sup> Exhibit 6.

<sup>6</sup> Exhibit 5.

<sup>7</sup> Exhibit 5 (the use of illegal drugs question had a seven-year scope, which required him to report any drug abuse dating back to approximately November 2003).

<sup>8</sup> Exhibit 7.

<sup>9</sup> Exhibit 7.

cigarette, he felt sleepy, and his brother told him the cigarette was a mixture of tobacco and marijuana.

The background investigation also addressed any other use of illegal drugs by Applicant.<sup>10</sup> According to the summary, he denied any use of illegal drugs before the 2010 incident. He also stated it was the only time he had ever used illegal drugs.

In his answer to the SOR, Applicant explained that during the interview he denied using illegal drugs before the 2010 incident because he assumed the investigator was asking if he had used any other illegal drugs while holding a security clearance, which he had not. He also explained he would not deliberately falsify information already documented in his previous security clearance application and military enlistment papers.

In his reply to the FORM, Applicant denied that he deliberately falsified information about his 1995–2001 drug use.<sup>11</sup> He explained that this information was beyond the scope of the investigation, which he understood to be seven years.

### **Law and Policies**

It is well-established law that no one has a right to a security clearance.<sup>12</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>13</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>14</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>15</sup>

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<sup>10</sup> Exhibit 7.

<sup>11</sup> Exhibit A.

<sup>12</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>13</sup> 484 U.S. at 531.

<sup>14</sup> Directive, ¶ 3.2.

<sup>15</sup> Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>16</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>17</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>18</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>19</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>20</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>21</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>22</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 E for personal conduct,<sup>23</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

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<sup>16</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>17</sup> Directive, Enclosure 3, ¶ E3.1.14.

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

<sup>19</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>20</sup> *Egan*, 484 U.S. at 531.

<sup>21</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>22</sup> Executive Order 10865, § 7.

<sup>23</sup> AG ¶¶ 15–17 (setting forth the security concern and the disqualifying and mitigating conditions).

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>24</sup>

Addressing the falsification allegation issue first, the issue here is whether Applicant made a deliberately false statement during his background interview in December 2010, when stating that he had never used illegal drugs before March 2010, when he had used marijuana about six times during 1995–2001. In deciding this issue, I note that I have had not the opportunity to consider testimony from Applicant or the investigator who conducted the interview with Applicant. This allegation is based on paperwork prepared by the investigator; namely, the summary of the interview. Applicant has presented a reasonable explanation for his denial of pre-2010 drug use during the interview. Based on the written record before me, I am not persuaded that Applicant made a deliberately false statement as alleged. This conclusion is bolstered by Applicant’s disclosure of his 1995–2001 drug use in his September 2001 security clearance application. It would be both odd and illogical for Applicant to lie about stale drug use when he had already disclosed it in 2001, and therefore could reasonably believe that the Government was aware of it. In light of all these reasons, this matter is decided for Applicant.

The second issue concerns the evidence showing that Applicant received nonjudicial punishment for wrongful use of marijuana in April 2010 while on active duty with the U.S. Navy and while he held a security clearance. He was separated from the Navy a few months later with a general discharge under honorable conditions. These matters took place just months before he completed his November 2010 security clearance application, in which he disclosed marijuana use in March 2010, explaining it was a one-time unknowing ingestion of marijuana. The facts and circumstances surrounding this entire incident, including his unknowing ingestion explanation, raise doubts and questions about Applicant’s judgment, trustworthiness, reliability, candor, and willingness to comply with rules and regulations within the meaning of the disqualifying condition found at AG ¶ 16(c). I have considered all the mitigating conditions under Guideline E,<sup>25</sup> and none, individually or in combination, is sufficient to mitigate and overcome the security concerns. Although he has stated that he has no intention to abuse drugs in the future, insufficient time has passed to conclude that similar conduct will not recur.

I have also considered this case in light of the evidence as a whole and the nine-factor whole-person concept.<sup>26</sup> I considered the nature, extent, and seriousness of Applicant’s conduct in 2010; the circumstances surrounding the conduct; the frequency and recency of the conduct; his age at the time of the conduct; and the likelihood of

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<sup>24</sup> AG ¶ 15.

<sup>25</sup> AG ¶ 17(a)–(g).

<sup>26</sup> AG ¶ 2(a)(1)–(9).

recurrence. In particular, I consider Applicant's receipt of nonjudicial punishment for wrongful use of marijuana while on active military duty—and while holding a security clearance—to be a serious matter. And too many questions remain unanswered about the 2010 incident. Taken together, these matters militate against a favorable decision. 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