



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



In the matter of: )  
 )  
 ) ISCR Case No. 15-02567  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Charles Hale, Esq., Department Counsel  
For Applicant: *Pro se*

08/31/2016  
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**Decision**  
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CERVI, Gregg A., Administrative Judge:

Applicant has not mitigated the drug involvement security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant completed a Questionnaire for National Security Positions (SF 86)<sup>1</sup> on August 4, 2014. On November 18, 2015, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H: Drug Involvement.<sup>2</sup>

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<sup>1</sup> Also known as a Security Clearance Application (SCA).

<sup>2</sup> The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DoD on September 1, 2006.

Applicant responded to the SOR on December 14, 2015, and requested a hearing before an administrative judge. The case was assigned to me on April 13, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 11, 2016, scheduling the hearing for June 8, 2016. The hearing was convened as scheduled. Government Exhibits (GE) 1 and 2 were offered into evidence. Applicant objected to a portion of a sentence in GE 2, which was sustained accordingly. The exhibits were otherwise admitted without objection. Applicant testified at the hearing. DOHA received the hearing transcript (Tr.) on June 15, 2016.

### **Findings of Fact**

The SOR alleges Applicant used marijuana with varying frequency from approximately August 1999 to March 2014; he was arrested in 2007 for possession of marijuana and drug paraphernalia; and he stated that he cannot say with certainty that he will not use marijuana again. He admitted the SOR allegations, but added written explanations with his Answer.

Applicant is a 33-year-old senior technologist for a defense contractor. He has been employed in this position since July 2014. He earned a bachelor's degree in 2004 and a master's degree in 2009. He is unmarried. He currently has a public trust position. He admitted using marijuana from 1999 to March 2014. His use fluctuated between two times per month to annually. He typically used marijuana with friends or his brother while at social gatherings. He continues to associate with his friends, some of whom continue to use marijuana on occasion. In 2007, Applicant was arrested while driving to a camping trip. He was transporting marijuana and drug paraphernalia, and was found guilty of two misdemeanor drug charges. He was 25 years old at the time. He testified that he continued to use marijuana until 2012, but then remained abstinent for about two years. He decided to use marijuana again during a ski trip in March 2014. He described that decision as "poor judgment." He began working for his current employer in July 2014, and stated he has not used marijuana since March 2014.

In his answer to the SOR, he stated that he did not plan to use marijuana again, but if it were legalized, he could use again, as he cannot predict the future. He claimed he would continue to refrain from use while it was illegal or not allowed by his employer. Under the right circumstances, he left open the possibility of marijuana use in the future. He did not submit a signed statement of intent to discontinue illegal drug use. He has not participated in drug counseling, but did undergo court-ordered general counseling after an arrest while in college for an alcohol-related incident.

### **Law and Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security clearance decision.<sup>3</sup> In *Department of Navy v. Egan*<sup>4</sup>, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>5</sup>

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." It is well-established law that no one has a right to a security clearance. As noted by the Supreme Court in *Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." 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.<sup>6</sup>

The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive and classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive or classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive or classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

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<sup>3</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan.27, 1995).

<sup>4</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>5</sup> *Egan*, 484 U.S. at 531.

<sup>6</sup> *Egan*, 484 U.S. at 531.

## Analysis

### Guideline H: Drug Involvement

The concern under this guideline is set out in AG ¶ 24:

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." Drugs are defined in AG ¶ 24(a)(1) as "[d]rugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens).

The guideline notes several conditions that could raise security concerns. Based on the evidence, I find that the following disqualifying conditions apply:

AG ¶ 25(a): any drug abuse,<sup>7</sup> and

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

Applicant has a long history of marijuana use from 1999 to 2014. He was also arrested for possession of marijuana and drug paraphernalia.

Although qualifying mitigating conditions under AG ¶ 26 may be applied to mitigate security concerns, based on the record evidence, no mitigating conditions are applicable. Applicant has a long history of marijuana use, to include a self-imposed period of abstinence and relapse, and a drug-related arrest. He described his last use in 2014 as "poor judgment." Given his return to illegal drug use after a nearly two-year period of abstinence between 2012 and 2014, his current period of abstinence is not sufficient to persuade me that he will not return to use. He has not disassociated from drug-using friends and has not provided evidence of changing his environment or behavior where drugs are used. Additionally, he has not submitted a signed statement of intent to discontinue illegal drug use as described in the Directive, or participated in drug counseling.

When considering Applicant's claim to have stopped using marijuana since 2014, I must weigh it against his age, a long history of illegal drug use, continued use after a drug-related arrest, his return to use after a two-year abstinence period, and his tepid attitude toward future drug use. Although he testified that he stopped his drug use in 2014, he has not submitted convincing evidence of no future illegal drug use. At this

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<sup>7</sup> Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. AG ¶ 24(b).

time, his most recent abstinence does not outweigh his past behavior. I find the evidence is insufficient to warrant application of mitigation.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered all of the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated the evidence, my findings of fact and comments under Guideline H in this whole-person analysis.

There is no evidence that Applicant has used marijuana since 2014. He stated that he did not intend to use marijuana while it is illegal or prohibited by his employer. However, Applicant intentionally violated the law for a number of years and disregarded the consequences of continuing illegal drug use despite his arrest in 2012 and failing to uphold a period of abstinence between 2012 and 2014. Based on the record, Applicant's history of drug involvement continues to cast doubt on his reliability, trustworthiness, and good judgment.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the substantive security concerns.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	Against Applicant
Subparagraphs 1.a – 1.b:	Against Applicant

Subparagraph 1.c:

For Applicant

**Conclusion**

In light of all of the circumstances presented by the record in this case, 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.

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Gregg A. Cervi  
Administrative Judge