



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



In the matter of: )  
)  
) ISCR Case No. 15-05683  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Aubrey M. De Angelis, Esq., Department Counsel  
For Applicant: *Pro se*

05/30/2017

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**Decision**

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CERVI, Gregg A., Administrative Judge:

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

**Statement of the Case**

Applicant submitted an Electronic Questionnaire for Investigations Processing on February 25, 2015.<sup>1</sup> On March 8, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H (drug involvement).<sup>2</sup> Applicant responded to the SOR on March 16, 2016, and elected to have the case decided on the administrative record in lieu of a hearing. The Government's

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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 (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

written case was submitted on August 12, 2016. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant did not submit any documentary evidence in response. The case was assigned to me on May 19, 2017. The Government's exhibits included in the FORM are admitted in evidence without objection.

### **Findings of Fact**

The SOR alleges Applicant used marijuana from approximately September 1980 to at least March 2015. It also alleges he intends to continue to use marijuana in the future when abstinence is no longer required for his employment or security clearance. He admitted using marijuana as alleged, but denied future intent to use marijuana.

Applicant is a 55-year-old senior executive for a defense contractor. He has been employed in this position since December 2014, and held a similar position from 2011 to 2014. He has served on three non-profit corporate boards. He completed high school in 1980, earned a bachelor's degree in 1985, and a master's degree in 1989.<sup>3</sup> He married in 1987 and divorced in 2008, and has two children. He resides with a woman since February 2011. He is applying for his first security clearance.<sup>4</sup>

In his SCA completed in February 2015, Applicant listed his past marijuana use, from 1980 to June 2014. He indicated that during this period, he used on occasion and "tens of times" since going to college. He noted that he did not intend to use the drug in the future because it is a condition of his employment to stay drug-free.<sup>5</sup>

Applicant was interviewed by an Office of Personnel Management (OPM) investigator in April 2015. He confirmed his SCA entry that the last time he used marijuana was in June 2014, but then stated in the interview that his last use was actually in March 2015. He claimed to have abstained from use while employed from 1997 to 2011. He noted that he did not intend to use while employed in his current position or while holding a security clearance, but may use marijuana again if no longer prohibited by his employer or to hold a security clearance.

In his January 2016 response to Government interrogatories, he reported using marijuana from September 1980 to March 2015. He reported his use was infrequent, and that he has no intention of using illegal drugs while prohibited by his employer or required to hold a security clearance.<sup>6</sup>

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<sup>3</sup> Item 5, Personal Subject Interview (PSI).

<sup>4</sup> Item 4.

<sup>5</sup> *Id.*

<sup>6</sup> Item 5.

In his answer to the SOR, Applicant clarified that he no longer intended to use marijuana in any circumstance. He stated his personal situation has changed since his divorce, and that he is committed to living drug-free. He noted that he has been active in his career and community for 26 years, has shown his reliability and trustworthiness in his career responsibilities, and that his security clearance eligibility benefits the Government and his employer.

## **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>7</sup> In *Department of Navy v. Egan*<sup>8</sup>, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>9</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

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

<sup>8</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>9</sup> *Egan*, 484 U.S. at 531.

Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.<sup>10</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 Exec. Or. 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* Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **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 under AG ¶ 25 apply:

(a) any drug abuse;<sup>11</sup> and

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

Applicant has a history of illegal drug use from 1980 to March 2015. AG ¶¶ 25(a) applies.

The following mitigating conditions under AG ¶ 26 are potentially relevant:

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<sup>10</sup> *Egan*, 484 U.S. at 531.

<sup>11</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).

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(b) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant acknowledged his past drug involvement. Despite completing an SCA in February 2015 and stating his last use of marijuana was in June 2014, he continued to use marijuana until March 2015. He also gave inconsistent statements with regard to his intent for future use. He noted in his SCA that he did not intend to use the drug in the future because it is a condition of his employment to stay drug-free. In his OPM interview and in his response to interrogatories, he asserted the possibility of use in the future when not prohibited by his employer or while holding a security clearance. However, in his answer to the SOR, he recanted any future intent to use marijuana.

Applicant has not shown an ability to consistently abstain from illegal drug use. There was no evidence presented of illegal drug counseling or treatment. He has not shown sufficient evidence of a changed environment, disassociation from family or friends that use drugs, or a signed a statement of intent to refrain from illegal drug use in the future. No mitigation credit is warranted.

### **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.

Overall, Applicant has acknowledged his past drug use, but has not shown a consistent track record of abstinence. His use of marijuana, after completing an SCA that specifically inquired into illegal drug use, is inconsistent with behavior expected of a security clearance applicant. He was also inconsistent about his intent to refrain from future use. He has not shown any evidence that would lead me to find that his personal circumstances have changed or that he intends to change his behavior. I considered all of the evidence, especially his long work history, significant employment and board positions, and stated commitment to live a life free of illegal drug use. However, I am not convinced of his intentions.

Based on the record, Applicant's history of drug involvement and inconsistent statements with regard to future use casts doubt on his reliability, trustworthiness, and good judgment.

### **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 and 1.b:	Against 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