



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



In the matter of: )  
 )  
 ) ISCR Case No. 16-02718  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Andrew H. Henderson, Esq., Department Counsel  
For Applicant: *Pro Se*

02/05/2018  
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**Decision**  
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CERVI, Gregg A., Administrative Judge:

Applicant failed to mitigate drug involvement and substance misuse 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 February 19, 2016. On November 28, 2016, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, Drug Involvement and Substance Misuse.<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 9, 2016, and requested a hearing before an administrative judge. The case was assigned to me on July 1, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 7, 2017, scheduling the hearing for July 11, 2017. The hearing was convened as scheduled. Government Exhibits (GE) 1 and 2 were admitted into evidence without objection. Applicant Exhibits (AE) A and B were admitted into evidence without objection. Applicant and one witness testified on his behalf at the hearing. DOHA received the hearing transcript (Tr.) on July 19, 2017.

### **Findings of Fact**

Applicant is a 25-year-old engineer who is being sponsored for a security clearance by a prospective defense contractor. He graduated from high school in 2010, and received a bachelor's degree in engineering physics and electrical engineering in December 2016. He is unmarried and has not previously held a security clearance.

The SOR alleges Applicant used and purchased marijuana from November 2009 to at least June 2016. He admitted the SOR allegations. Applicant began using marijuana about once per month while in high school,<sup>3</sup> and began daily use in 2010 while in college. He typically received the drug from friends or he purchased the drug weekly for about \$25. While he lived with his grandfather, he drove nightly to a friend's house to use marijuana, then drove back to his home, likely under the influence of the drug. He completed an SCA in February 2016, where he affirmatively answered questions about illegal drug use, claiming it was used for medicinal and recreational purposes, beginning in November 2009 to February 2016, when he completed the SCA. He noted it was part of his sleep routine and helped with his insomnia. Of note, he continued to use marijuana after completing the SCA until about a week before his security clearance interview. He testified that he is "safe," and not vocal about his drug use.

Applicant recognizes that marijuana is illegal, but believes it can improve judgment, not impair it, and should be regulated like alcohol and cigarettes. Applicant has not sought medical assistance for his insomnia, and has not been diagnosed with a condition that would implicate the use of "medical" marijuana. He claimed that he self-prescribed it to assist with his sleeping problems. At the hearing, he refused to disclose names of people that he used marijuana with for fear of jeopardizing their jobs. He has not obtained drug counseling and continues to associate with friends that use marijuana.

Applicant's mother, a facilities security officer for a defense contractor, testified at the hearing. She supported her son's intelligence, sincerity, and work ethic. She did not know about his history of drug use. When she became aware of the SOR, she encouraged her son to obtain a private drug test. The test was conducted in March 2017, and reported negative results for illegal drugs. Applicant also submitted a supportive letter of recommendation from a former supervisor during a college internship. However, Applicant did not make the supervisor aware of the reason for the letter, or his history of

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<sup>3</sup> Applicant admitted to first using marijuana in 2009 in his answer to the SOR, but testified that he first used in 2010.

illegal drug use. I held the record open for Applicant to review the mitigating conditions and submit any additional evidence, including an opportunity to submit a signed statement of intent to abstain from drug use acknowledging that any future involvement or misuse is grounds for revocation of a security eligibility. He did not submit any additional evidence after the hearing.

## **Law and Policies**

The Director of National Intelligence (DNI) issued revised adjudicative guidelines (AG) in a Security Executive Agent Directive, effective on June 8, 2017. These AGs are applicable to this decision.

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>4</sup> In *Department of Navy v. Egan*<sup>5</sup>, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>6</sup>

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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*,

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<sup>4</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan.27, 1995).

<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> *Egan*, 484 U.S. at 531.

“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>7</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).

## Analysis

### Guideline H: Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Controlled substance means any “controlled substance” as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline notes conditions that could raise security concerns under AG ¶ 25. The disqualifying condition potentially applicable in this case includes:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia.

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<sup>7</sup> *Egan*, 484 U.S. at 531.

Applicant has a history of illegal drug use and purchases, from approximately 2009 to 2016, including daily use from 2010 to 2016. Additionally, he used marijuana after completing a security clearance questionnaire in February 2016 until about a week before his interview by a government investigator. Disqualifying conditions under AG ¶¶ 25 (a) and (c) are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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;
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:
  - (1) disassociation from drug-using associates and contacts;
  - (2) changing or avoiding the environment where drugs were used;
  - (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility; and
- (d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Although Applicant is a young adult, his history of illegal drug use has not been mitigated. He admitted he used and purchased marijuana from November 2009 to at least June 2016, including daily use since 2010. Despite completing an SCA in February 2016, where he affirmatively answered questions about illegal drug use, he continued to use marijuana until about a week before his security clearance interview. He has not sought drug counseling but submitted one drug test that was negative. He continues to associate with friends that use marijuana, and did not submit a signed statement of intent to abstain from all drug involvement and substance misuse, despite our discussion of this mitigating condition at the hearing and the additional time I gave him to do so after the hearing. Applicant expressed his view that use of marijuana can improve his judgment, and would not impair it. He noted in his SCA that he used marijuana for medicinal and recreational purposes, as part of a relaxation ritual that helps him sleep.

Despite a negative 2017 drug test, Applicant has not shown a clear and convincing commitment to discontinue further drug use or to change the environment where illegal

drugs are being used. He has not attended a drug treatment program. Applicant's history of illegal drug use and failure to submit convincing evidence in mitigation, raises serious questions about his willingness to comply with rules and regulations, his overall maturity and judgment. No mitigation is applicable.

### **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.

Applicant's history of daily illegal drug use, including after completing a security clearance questionnaire, without convincing testimony or documentary evidence in mitigation, leaves me with serious questions about his future intent with regard to marijuana use, and his willingness to follow rules and regulations. I am not convinced that he fully appreciates the legal and policy implications of illegal drug use, and he has not clearly and convincingly established a commitment to abstain from future use.

Accordingly, I conclude Applicant has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility for access to classified information.

### **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
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Subparagraphs 1.a and 1.b:	Against Applicant
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### **Conclusion**

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

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Gregg A. Cervi  
Administrative Judge