



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 17-02605

**Appearances**

For Government: Adrienne Driskill, Esq., Department Counsel

For Applicant: Bruce R. Heurlin, Esq.

09/13/2018

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. He presented sufficient evidence to explain and mitigate his self-reported history of drug involvement and substance misuse. Accordingly, this case is decided for Applicant.

**Statement of the Case**

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on February 21, 2017.<sup>1</sup> This document is commonly known as a security clearance application. Thereafter, on August 30, 2017, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, 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 eligibility for access to classified

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<sup>1</sup> Exhibit 1.

information. The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guidelines known as Guideline H for drug involvement and substance misuse and Guideline E for personal conduct (a single cross-allegation to the sale of marijuana alleged under Guideline H).

With assistance of counsel, Applicant submitted a comprehensive answer to the SOR on October 27, 2017. He admitted the SOR allegations; he provided an extensive explanation as outlined in a ten-page memorandum, to include supporting documentation marked as Exhibits A - EE; and he requested a hearing before an administrative judge.

The case was assigned to me on November 27, 2017. The hearing was conducted as scheduled on April 11, 2018. At the start of the hearing, Department Counsel withdrew the SOR allegation under Guideline E for personal conduct.<sup>2</sup> Accordingly, that matter will not be discussed further. Both Department Counsel and Applicant offered documentary exhibits, which were admitted as Government Exhibits 1 and 2 and Applicant's Exhibits A - HH. The hearing transcript was received on April 19, 2018.

### **Findings of Fact**

Applicant is a 29-year-old employee who requires a security clearance for his employment with a large company doing business in the defense industry. He is employed as an export license and compliance specialist with an annual income of about \$65,000. He has been so employed since December 2016. This is his initial application for a security clearance. He has never married and has no children.

Applicant was a successful student and athlete in high school, finishing in the top 20% of his graduating class in 2007.<sup>3</sup> He then attended college and graduated with a 3.51/4.0 GPA, with a bachelor's degree in political science in 2011; he also earned certificates in classical studies and European studies.<sup>4</sup> While in college, he participated in a foreign policy study trip to two European countries, he was recommended for a fellowship in international affairs, and he published a scholarly article in a journal for international studies.<sup>5</sup> He continued his studies during 2012-2014 by pursuing a graduate degree at a university in our Nation's capital. He graduated in December 2014 with a 3.74/4.0 GPA, with a master's degree in international affairs with a specialization in international politics.<sup>6</sup> During his master's program, he was awarded a \$3,500 scholarship from a foundation, he presented a paper to a conference on international

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<sup>2</sup> Tr. 9-10.

<sup>3</sup> Exhibits B1, C, and D.

<sup>4</sup> Exhibit H.

<sup>5</sup> Exhibits E, F, and G.

<sup>6</sup> Exhibit M.

studies, and he contributed to an intelligence analysis practicum delivered to a federal intelligence agency as part of his capstone (thesis) project.<sup>7</sup> He had a difficult time finding employment in his field of studies or his areas of interest. As a result, he worked as a researcher and office manager for a law office of a solo practitioner from May 2013 to September 2016. He then worked for a few months as a writer and editor for a federal contractor until he began his current employment.

Applicant has a history of drug involvement and substance misuse, which he does not dispute. Most but not all of his substance misuse occurred when he was a student. He self-reported this adverse information in his February 2017 security clearance application.<sup>8</sup> He then provided further information when he was interviewed during the course of his 2017 background investigation.<sup>9</sup> In particular, he disclosed the following concerning his illegal use of drugs or drug activity in response to Section 23 of the application:

- Using marijuana (“smoked pot with friends and classmates”) beginning in about July 2003 and ending in about July 2016. His reported use started in high school and college, usually in recreational or social settings, and occurred once in the last two years or so.
- Using cocaine on a few occasions over a ten-year-period beginning in about July 2006 and ending in about July 2016. His reported use occurred during celebratory or party events (e.g., weddings, concert, etc.) maybe a dozen times.
- Using LSD and mushrooms a few times beginning in about May 2008 and ending in about July 2016. His reported use was less than ten times.
- Selling marijuana (“sold a little bit of weed in high school and college”) beginning in about April 2007 and ending in about July 2012. He described the activity as “a low volume of infrequent transactions mostly involving his friends.”
- Misusing two prescription drugs on occasion for sports, as a study aid, or to stay awake during long drives beginning in about August 2006 and ending in about May 2016.
- Throughout his responses to the questions in Section 23, he stated that he intends to abstain from all illegal use or misuse of drugs, that he values his career and a drug-free lifestyle, and he desires to practice his hobbies and build relationships in a drug-free context.

At the hearing, I found his hearing testimony to be credible and worthy of belief. I also found him to be an intense, serious young man.<sup>10</sup> At the beginning of his testimony, he described his behavior as “very regrettable” and acknowledged that his behavior was a cause of concern. Under a thorough cross-examination, he provided further details or

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<sup>7</sup> Exhibits I, J, and K.

<sup>8</sup> Exhibit 1.

<sup>9</sup> Exhibit 2.

<sup>10</sup> Tr. 81-82.

clarification or both about his illegal drug involvement as alleged in the SOR.<sup>11</sup> Each SOR allegation is discussed below in light of the cross-examination.

Applicant explained that his use of LSD and mushrooms together occurred eight to ten times, which includes using LSD about three times, the last usage occurring in July 2016 and the other two uses taking place about ten years ago. His mushroom use occurred about four or five times during 2008-2010 while he was an undergraduate student.

Applicant explained that he began using marijuana sometime when he was in high school, and his usage continued until the last incident in July 2016. He was unable to estimate the frequency of his marijuana use, but described it as varying, intermittent, and perhaps monthly during his student years. He did not use marijuana alone and always used it in some sort of social setting. He also recalls smoking marijuana approximately six times during 2012-2016, as the frequency decreased after his undergraduate studies.

Concerning cocaine, Applicant explained that he used it on a few occasions, less than a dozen, during 2006-2016. The last time was July 2016, and the second to last time was in 2014 during an overseas trip. His use of cocaine occurred during social events or vacation.

Applicant explained that he misused the two prescription drugs, which he viewed as probably interchangeable, less than 20 times during 2006-2016, with the last misuse taking place in about May 2016 during a long driving trip. He misused the drugs for the purpose of increasing his focus during certain activities. He never bought the drugs, but obtained them when a friend would give the pill to him.

Concerning the sale of marijuana, Applicant explained that this was an on-again, off-again activity during 2007-2012. He recalls the frequency was at a high point in early 2007 during his senior year in high school. The frequency decreased when he went away to college because he did not know anyone there. He would sell again when he was home over the summer. He would typically buy an ounce of marijuana, which would be enough for him to use a couple of times and then sell a couple of very small amounts to his friends for \$5 or \$10 to offset his own costs.

Applicant also explained that he no longer associates with his two cousins with whom he primarily used drugs. He now sees them once or twice a year when he travels cross-country for a holiday visit with his family. His cousins have not visited him in his current location. He explained that his parents do not want him to associate with the two cousins or even speak to them. His parents and larger family are aware that he is going through the security-clearance process and they support him in his efforts to disassociate from his two cousins. He does not associate with drug-using people in his current location, he has friends both at work and outside of work, he plays sports, and he's involved in a local church, all of which makes up a drug-free social network for him.

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<sup>11</sup> Tr. 44-74.

Applicant also addressed the circumstances surrounding his last use of illegal drugs—consisting of marijuana, cocaine, and LSD on a single occasion in July 2016. He had previously made a conscious decision to abstain and had done so since about December 2014, because he knew a drug-free lifestyle was necessary for his desired employment with the federal government or a federal contractor. He explained that he used the three illegal drugs at a July 4<sup>th</sup> party because he felt he was at a low point in his life, probably depressed and certainly frustrated with the difficulty he experienced in finding a suitable job. He used drugs that were available at the party, he did not go out and buy them. He woke up the next day and was very unhappy with himself and his failure in discipline, because this event in effect required him to restart the clock on his drug-free lifestyle. He attributes his misconduct to feeling like his spirit was crushed due to prolonged job-hunting frustration and he lapsed into juvenile, unlawful behavior. Regretting his behavior, he decided to “double down” on his drug-free behavior and “double down” on seeking suitable employment, which paid off a few months later when he was called for an interview by his current employer.<sup>12</sup>

Applicant successfully completed a pre-employment drug test for his current job. At the hearing, he restated his intention to abstain from all illegal drug use and misuse of prescription drugs. To that end, he submitted a signed statement of intent to abstain from all drug involvement and substance misuse in the future, and he understands that any future involvement is grounds for revocation of eligibility.<sup>13</sup> He understands and was able to articulate the security concern associated with his drug misconduct, and he explained that it was important for him to be truthful during the security-clearance process.<sup>14</sup>

In addition to the pre-employment drug test noted above, Applicant voluntarily took a drug test in December 2017, and he tested negative for all tested substances.<sup>15</sup> He also voluntarily submitted to a substance-abuse evaluation in December 2017, conducted by a licensed clinical social worker (LCSW), a licensed independent substance abuse counselor (LISAC), and a licensed clinical supervisor with 20 years of experience in her field.<sup>16</sup> The evaluation of Applicant reached a diagnostic assessment of substance use disorder not present; he did not meet any criteria for substance use related disorder; he self-reported what appears to be a history of situational or social substance misuse; no treatment was recommended; and the overall prognosis was assessed as good.

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<sup>12</sup> Tr. 82-84.

<sup>13</sup> Exhibit A; Tr. 40-41.

<sup>14</sup> Tr. 22-23.

<sup>15</sup> Exhibit GG.

<sup>16</sup> Exhibit HH.

Applicant presented extensive documentary evidence in mitigation.<sup>17</sup> The documentation consists of 12 letters of recommendation, two certificates of job training, two certificates of achievement related to job training, and seven achievement or spot awards from his current employer. Taken together, the documentary evidence shows that Applicant is known as a dedicated, devoted, ethical, loyal, hard-working, reliable, and trustworthy person who has good judgment. The documentation of his job training and achievement awards attest to a good employment record for a relatively new employee.

## Law and Policies

This case is adjudicated under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.<sup>18</sup>

It is well-established law that no one has a right to a security clearance.<sup>19</sup> As noted by the Supreme Court in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>20</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. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.<sup>21</sup> The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.<sup>22</sup>

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>23</sup> An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>24</sup>

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<sup>17</sup> Exhibits L-FF.

<sup>18</sup> The 2017 AG are available at <http://ogc.osd.mil/doha>.

<sup>19</sup> *Department of the 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>20</sup> 484 U.S. at 531.

<sup>21</sup> 484 U.S. at 531.

<sup>22</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>23</sup> Directive, ¶ 3.2.

<sup>24</sup> Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>25</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>26</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>27</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>28</sup>

## **Discussion**

Under Guideline H for drug involvement and substance misuse, the concern is that:

[t]he illegal use of controlled substances, to include the misuse of prescriptions and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are use 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. . .<sup>29</sup>

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state laws (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions:

AG ¶ 25(a) any substance misuse;

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<sup>25</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>26</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>27</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>28</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>29</sup> AG ¶ 24.

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

AG ¶ 26(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

AG ¶ 26(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; and (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 of revocation of national security eligibility.

I have considered the totality of Applicant's drug involvement and substance misuse from its inception in 2003 (marijuana use) until the last occurrence in July 2016 when he used marijuana, cocaine, and LSD at a party. Any illegal drug use is relevant in the context of evaluating a person's security worthiness, but it becomes more relevant (and more of a concern) depending on the nature, extent, and seriousness of the conduct. Here, we have a case where Applicant's substance misuse occurred for the most part when he was a student, in high school, college, or graduate school, which he completed in December 2014. He then abstained for a period of about 16 months until he misused the prescription drug in May 2016, and he then lapsed again at the July 4<sup>th</sup> party in 2016. The last incident in July 2016 predates his security clearance application by about eight months and predates the hearing by about 21 months. His substance misuse involved different drugs over a period of years, and it went beyond mere youthful experimentation on a few occasions. And his drug involvement included the possession and sale of marijuana, although this was not a money-making activity. It was a low-level activity done to offset his own costs for the marijuana. Taken together, the nature, extent, and seriousness of his drug involvement and substance misuse raise valid concerns under the disqualifying conditions mentioned above. Indeed, this case is at or near my full level of tolerance for a favorable decision in a drug case.

In mitigation, Applicant provided sufficient evidence in reform and rehabilitation to persuade me that he is an acceptable security risk. I reached that conclusion for the following reasons: (1) his drug involvement and substance misuse ended with the last incident in July 2016, about 21 months before the record closed in this case, which is considered not recent; (2) he self-reported and disclosed his drug involvement and substance misuse use throughout the security-clearance process; (3) he gave full, frank, and candid answers to all questions asked during the hearing, and he expressed a good understanding of the security concern; (4) he presented affirmative, documentary evidence from reliable sources that he is no longer using illegal drugs and does not have a substance-abuse problem; (5) he pledged in a signed statement of



intent that he will no longer engage in substance abuse and he understands the consequences should he violate his pledge; (6) his record of success in higher education, a good employment record with his current defense-contractor employer, and the highly favorable letters of recommendation also speak well for him; and (7) he appears to be in a stable, structured work environment in which he enjoys and excels, and I'm persuaded that he has no intention of putting his job in jeopardy.

In particular, I was impressed by Applicant's willingness to self-report the totality of his drug involvement and substance misuse. He was candid at every step of the security-clearance process, and he took ownership of his past drug-related misconduct. His willingness to do so strongly suggests he will report any potential security infraction or violation committed by himself or his co-workers, which is exactly what is expected of every applicant. Overall, I am persuaded that Applicant's drug involvement and substance misuse are safely in the past, that he is no longer involved with people who are involved with illegal drugs, and that he will adhere to a drug-free lifestyle in the foreseeable future.

Following *Egan* and the clearly-consistent standard, I have no doubts or concerns about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified or sensitive information. In reaching this conclusion, I weighted the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the whole-person concept. I conclude that he has met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### **Formal Findings**

The formal findings on the SOR allegations are:

Paragraph 1, Guideline H:	For Applicant
Subparagraphs 1.a – 1.f:	For Applicant
Paragraph 2, Guideline E:	Withdrawn
Subparagraph 2.a:	Withdrawn

### **Conclusion**

It is clearly consistent with the national interest to grant Applicant access to classified information. Eligibility is granted.

Michael H. Leonard  
Administrative Judge