



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 07-09631
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Ray T. Blank Jr., Esquire, Department Counsel  
For Applicant: *Pro Se*

April 25, 2008

**Decision**

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LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on October 18, 2007. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The issues in this case fall under Guideline H based on Applicant’s illegal drug involvement. For the reasons discussed below, this case is decided against Applicant.

In addition to the Executive Order and Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective

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<sup>1</sup> Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive).

September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.<sup>2</sup> The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

Applicant replied to the SOR in an undated response and indicated he did not wish to have a hearing. His reply or answer consisted of his handwritten responses on the SOR and two enclosures consisting of letters of recommendation. The two letters are admitted as Applicant's Exhibit A. Accordingly, the case will be decided based on the written record in lieu of a hearing.

On February 8, 2008, the government submitted its written case consisting of all relevant and material information that could be adduced at a hearing. This so-called file of relevant material (FORM)<sup>3</sup> was mailed to Applicant on February 12<sup>th</sup> and it was received by him on February 19<sup>th</sup>. He replied to the FORM within the allowed 30-day period. His response consists of a one-page letter from a drug counselor, which is admitted as Applicant's Exhibit B. The case was assigned to me on April 7, 2008.

### **Procedural and Evidentiary Rulings**

The government moved to amend SOR ¶ 1.b in light of a change to the relevant federal law. On January 28, 2008, the President signed into law Public Law 110-181, the National Defense Authorization Act for Fiscal Year 2008, Section 1072 of which repealed 10 U.S.C. § 986, formerly known as the Smith Amendment.<sup>4</sup> This change is now codified at 50 U.S.C. § 435c. Applicant was provided notice of the motion when he received the FORM. Applicant made no mention of the motion when he replied to the FORM. Accordingly, based on the change to the law, and without objections, the motion is granted, and SOR ¶ 1.b is amended as follows:

Due to the fact that you are an unlawful user of a controlled substance or an addict (as defined in section 802(1) of Title 21), 50 U.S.C. § 435c(b) disqualifies you from having a security clearance granted or renewed by a federal agency.

In addition, the government included in its FORM as an item of documentary evidence an account of an interview of Applicant (Exhibit 5). The interview was part of a

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<sup>2</sup> See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

<sup>3</sup> The government's brief includes several attachments referred to as items. They are referred to as exhibits herein.

<sup>4</sup> See Attorney Sheldon I. Cohen's seven articles on the origin, history, and demise of the Smith Amendment at [www.sheldoncohen.com/publications](http://www.sheldoncohen.com/publications).

report of investigation (ROI) prepared by the U.S. Office of Personnel Management. The ROI indicates that the Applicant's interview was an unsworn declaration made in June 2007.

The general rule is that a background ROI may not be received and considered by an administrative judge.<sup>5</sup> The exception to the general rule is "[a]n ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence."<sup>6</sup>

In past cases, the government included an ROI in its FORM without an attempt to authenticate it or offer some other method of getting the evidence to the trier of fact (for example, stipulation). The ROI was excluded from consideration in those cases. Here, the government authenticated the ROI through Applicant. In particular, in about August 2007, it issued an interrogatory to Applicant asking him to review the ROI and state if it accurately reflected the information he provided during the interview (Exhibit 5). Applicant indicated it did. Accordingly, without objections, the ROI is admitted as a business record or a public record or both and it will be considered.

### **Findings of Fact**

Under Guideline H, the SOR alleges Applicant was involved with marijuana and psilocybin mushrooms. In addition, it alleges Applicant is disqualified from having a security clearance granted or renewed under federal law. In his response to the SOR, Applicant admitted the factual allegations. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 34-year-old software engineer who is employed by a federal contractor. He is married and has no children. He has worked for his current employer since August 2003. Previously, he worked for the same company, also as a software engineer, from May 1997 to August 1999, before returning to school to further his education.

His educational background includes a master's degree in computer science. He returned to school in September 1999 and was awarded the master's degree in December 2002.

In November 2006, Applicant completed a security-clearance application (Exhibit 4). His response to Question 26 indicates the federal government has not previously investigated his background or granted him a security clearance or both. Therefore, it appears he is seeking to obtain a security clearance from the Defense Department for the first time. In addition, in response to Question 24a, Applicant indicated that he had illegally used controlled substances within the last seven years. In the explanation

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<sup>5</sup> See Directive, Enclosure 3, ¶ E3.1.20.

<sup>6</sup> *Id.*

section, he stated that he had used marijuana, approximately once per week, from January 2000 to October 2006.

In his background interview of June 2007, he confirmed his use of marijuana and provided additional information (Exhibit 5). In summary, Applicant described his illegal drug involvement as follows:

- He admitted trying marijuana for the first time in 1994 when he was a college student due to what he characterized as peer pressure;
- He admitted smoking marijuana about four times from 1994 to 1997;
- He admitted smoking marijuana, because he liked the effect, about twice a week beginning in June 2001 until sometime in 2002;
- He admitted that, beginning in 2002 and continuing to the present, he bought small amounts of marijuana, and he smoked it twice a week;
- He admitted that he intended to continue smoking marijuana at his current rate, frequency, and amount in the future, although he planned to stop immediately if he has children; and
- He admitted using psilocybin mushrooms once in 2003 and again in 2004; he does not intend to use this substance in the future.

In his reply to the SOR, he admitted the allegations of illegal drug involvement. In summary, he pointed out that he has been completely honest about his past and feels, "perhaps indignantly," that he is being too harshly punished for his honesty. He believes he did the right thing by disclosing his past. He indicated that he had sought drug counseling and "will provably stop using marijuana."

In his reply to the FORM, Applicant provided a letter from a drug counselor (Exhibit B). The counselor stated that Applicant was in counseling for alcohol and other drug abuse assessment, and that treatment began on March 20, 2008. She described Applicant as honest and open, and that he was subject to a drug screen that tested negative. She found Applicant to be of above-average intelligence. She noted that "[b]ecause of the short history of Cannabis usage, I would encourage random drug screens, monthly, for one year." She ended her letter opining that Applicant was "well-balanced emotionally" and would be a "stellar participant" in an organization.

Both letters of recommendation are highly favorable for Applicant (Exhibit A). Both are authored by Applicant's superiors at his company. Both describe Applicant as a professional and dependable employee. Both are impressed with Applicant's knowledge, skills, and abilities on the job.

## Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, no one has a right to a security clearance.<sup>7</sup> As noted by the Supreme Court in 1988 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>8</sup> A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>9</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>10</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.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>11</sup> The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>12</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>13</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>14</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>15</sup> The agency appellate authority has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.<sup>16</sup>

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person’s security clearance eligibility, including disqualifying conditions

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<sup>7</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) (“It is likewise plain that there is no ‘right’ to a security clearance, so that full-scale due process standards do not apply to cases such as Duane’s.”).

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

<sup>9</sup> Directive, ¶ 3.2.

<sup>10</sup> Directive, ¶ 3.2.

<sup>11</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>12</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>13</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>14</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>15</sup> *Egan*, 484 U.S. at 531.

<sup>16</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

(DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. 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>17</sup> Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

### Analysis

Under Guideline H for drug involvement,<sup>18</sup> the security concern is that "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."<sup>19</sup> The definition of drug abuse is "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."<sup>20</sup>

In addition to the normal concerns under Guideline H, at issue here is whether Applicant is disqualified, as a matter of law, from security clearance eligibility due to his illegal drug use (SOR ¶ 1.b). The pertinent law is now 50 U.S.C. § 435c, which provides, in relevant part, as follows: "After January 1, 2008, the head of a Federal agency may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance or an addict" as defined by federal law.<sup>21</sup> This prohibition uses language that is nearly identical to the previous prohibition in 10 U.S.C. § 986.<sup>22</sup>

As a starting point, 50 U.S.C. § 435c applies to Applicant because he is an employee of a federal contractor.<sup>23</sup> Second, there is no evidence to prove that Applicant is an addict. Third, there is ample evidence to prove that Applicant **was** an unlawful user of a controlled substance, as the record evidence shows that Applicant smoked

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<sup>17</sup> Executive Order 10865, § 7.

<sup>18</sup> Revised Guidelines at 17–18 (setting forth the security concern as well as the disqualifying and mitigating conditions under Guideline H).

<sup>19</sup> Revised Guidelines at 17.

<sup>20</sup> Revised Guidelines at 17.

<sup>21</sup> 50 U.S.C. § 435c(b) (2008).

<sup>22</sup> 10 U.S.C. § 986(c)(2) (2000) ("The person is an unlawful user of, or is addicted to, a controlled substance" as defined by federal law.).

<sup>23</sup> 50 U.S.C. § 435c(a)(2) (defining a covered person under the statute).

marijuana on a fairly regular basis and did so until June 2007 (Exhibit 5). But there is insufficient evidence to prove that Applicant *is* currently an unlawful user.

The statutory prohibition in 50 U.S.C. § 435c(b) , like its predecessor in 10 U.S.C. § 986(c)(2), uses the present tense, not the past tense. A plain-meaning reading of the statute cannot be stretched to apply to Applicant's marijuana use that took place about nine months ago in June 2007. To read it otherwise would result in a mandatory disqualification of a person who engaged in drug abuse 12 months ago, 3 years ago, or perhaps at any time in the past, a result inconsistent with the plain meaning of the statute. This interpretation of 50 U.S.C. § 435c(b) is consistent with Appeal Board caselaw from 2005 and 2003 when it interpreted 10 U.S.C. § 986(c)(2) in the same way.<sup>24</sup> Accordingly, SOR ¶ 1.b is decided for Applicant.

Turning next to the normal concerns under Guideline H, based on the record evidence as a whole, the following conditions raise a security concern:

- Any drug abuse (see above definition); and
- Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.<sup>25</sup>

Applicant's history of illegal drug involvement raises a security concern because it calls into question his judgment, reliability, trustworthiness, and willingness to obey the law. His drug of choice was marijuana.<sup>26</sup> He began using marijuana in 1994. Thereafter, he used it, on a periodic basis, until about June 2007. At times, he was a regular marijuana user smoking it as frequently as twice a week. In addition, his marijuana use extends well beyond his initial college years when such activity may perhaps be overlooked as youthful experimentation or rebellion or both. Instead, his marijuana use continued into adulthood, including during his current employment as a software engineer.

The four mitigating conditions under Guideline H have been considered and none apply to Applicant's marijuana use. The evidence in his favor is minimal. Although Applicant began counseling or treatment about a month ago in March 2008, it is too soon to determine how he will progress. Likewise, it is too soon to determine if his efforts are genuine or a facade. Time will tell if Applicant will be able to establish a track

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<sup>24</sup> See ISCR Case No. 03-25009 (App. Bd. Jun. 28, 2005) (10 U.S.C. § 986(c)(2) uses the present tense, not the past tense, when referring to unlawful use of, or addiction to, controlled substances; consequently, the Administrative Judge erred by concluding that Congress intended that persons who had been addicted to, or dependent on, controlled substances in the past to be forever barred from being granted a clearance); ISCR Case No. 01-20314 (App. Bd. Sep. 29, 2003) (Administrative Judge erred by applying 10 U.S.C. § 986(c)(2) to an applicant who last used marijuana about two years before the hearing).

<sup>25</sup> Revised Guidelines at 17.

<sup>26</sup> Applicant's use of mushrooms, once in 2003 and again in 2004, was situational and infrequent. Accordingly, SOR ¶ 1.c is decided for Applicant.

record of a drug-free lifestyle as a responsible adult. To sum up, the record evidence is too skimpy to conclude that he presented a convincing case in reform and rehabilitation.

To conclude, Applicant did not present sufficient evidence to explain, extenuate, or mitigate the drug involvement security concern. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept (including Applicant's honesty about his past, his record of higher education, and his good employment record) was given due consideration and that analysis does not support a favorable decision. This case is decided against Applicant.

### **Formal Findings**

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

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

### **Conclusion**

In light of all of the circumstances, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard  
Administrative Judge