



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



In the matter of: )  
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----- ) ISCR Case No. 14-07013  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Ross Hyams, Esq., Department Counsel  
For Applicant: *Pro se*

02/22/2016

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny him eligibility for access to classified information. He did not deliberately falsify relevant facts about his future intentions concerning marijuana use in a June 2012 security clearance application. But the security concern stemming from his marijuana involvement, which includes a September 2012 police incident, is not mitigated. Accordingly, this case is decided against Applicant.

**Statement of the Case**

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 Format) on June 27, 2012.<sup>1</sup> About three years later on June 6, 2015, after reviewing the application and information gathered during a background

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<sup>1</sup> Exhibit 1 (this document is commonly known as a security clearance application).

investigation, the Department of Defense (DOD)<sup>2</sup> 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 information.<sup>3</sup> The SOR is similar to a complaint. It detailed the reasons for the action under the security guidelines known as Guideline H for drug involvement and Guideline E for personal conduct. Applicant answered the SOR on June 26, 2015.

The case was assigned to me on September 18, 2015. The hearing was held as scheduled on November 10, 2015. Department Counsel offered Exhibits 1–3, and they were admitted. Applicant offered Exhibits A and B, and they were admitted. No witnesses other than Applicant were called. The hearing transcript (Tr.) was received on November 18, 2015.

### **Findings of Fact**

Applicant is a 25-year-old employee who is seeking to obtain a security clearance for the first time. He is employed as a software engineer for a technology company working in the defense and aerospace industries. His educational background includes a bachelor's degree in computer science awarded in May 2013. He has never married and has no children, although he is engaged to be married this year.

Applicant completed a security clearance application in June 2012.<sup>4</sup> He was then a college student working for the predecessor-in-interest to his present employer. In completing the application, he disclosed a history of marijuana use.<sup>5</sup> He stated that he used marijuana from July 2011 to June 2012 on an infrequent, every now and then basis. He also stated that his participation in collegiate athletics subjected him to drug testing, which he had passed. In response to a particular question, he stated that he did not intend to use marijuana in the future due to the requirements of holding a security clearance.

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<sup>2</sup> The SOR was issued by the DOD Consolidated Adjudications Facility, Fort Meade, Maryland. It is a separate and distinct organization from the Defense Office of Hearings and Appeals, which is part of the Defense Legal Services Agency, with headquarters in Arlington, Virginia.

<sup>3</sup> This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

<sup>4</sup> Exhibit 1.

<sup>5</sup> Exhibit 1 at 23–24.

Applicant was interviewed in an August 2012 background investigation.<sup>6</sup> He provided the following details about his marijuana involvement: (1) he used marijuana two times per month from July 2011 to July 2012; (2) he did not use marijuana from August 2011 to May 2012 due to his participation in collegiate athletics; (3) he obtained marijuana from friends, and he had also bought it several times, each time buying a single marijuana cigarette for \$10; and (4) he stated that he would continue to use marijuana if he knew he could do so while holding his job and a security clearance.

About a month later in September 2012, Applicant was charged with possession of marijuana and possession of drug paraphernalia, both misdemeanor offenses under state law.<sup>7</sup> In 2013, the criminal case was resolved by Applicant's completion of a diversion program (24 hours of community service), and the charges were *nolle prosequi*. Applicant then applied for and received an order for expungement, which was completed in January 2014.

Applicant provided additional information about his marijuana involvement in response to interrogatories in November 2014.<sup>8</sup> He stated that he had used marijuana, beginning in July 2011 and ending in September 2012, approximately two to three times weekly. He further stated that he did not intend to use marijuana again. He explained that he decided to stop using marijuana when he realized the negative effect it was having on him. He stated that the September 2012 police incident was a wake-up call, and that he needed to clean up his life. He denied current possession of any illegal drugs or paraphernalia, and he denied associating with drug users as well as frequenting places where illegal drugs are used. He also stated that his lifestyle had moved away from his past marijuana involvement, as he had developed a closer relationship with this girlfriend.

At the hearing, Applicant accepted responsibility for his marijuana involvement when he stated, "I know I messed up. I'm not saying I didn't. But, you know, I left that in the past, and I'm just trying to do better, and just move on with my life in the best way I can do so."<sup>9</sup> He explained that he stopped using marijuana after the September 2012 police incident because he was shook by the incident, "it became real at that point," and he grew up and left it behind.<sup>10</sup> He stated that he has no intention of using marijuana again and he takes the matter seriously.<sup>11</sup>

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<sup>6</sup> Exhibit 3.

<sup>7</sup> Exhibit 2 (see court records), and Exhibits A and B.

<sup>8</sup> Exhibit 2.

<sup>9</sup> Tr. 27.

<sup>10</sup> Tr. 32–33.

<sup>11</sup> Tr. 57.

Applicant also stated that he was being truthful when he completed the security clearance application in June 2012, and his intention then was not to continue using marijuana.<sup>12</sup> Concerning his two drug-using associates, he described them as his “greatest friends,” although one moved to another state and stopped using marijuana while the other lives nearby.<sup>13</sup> He recalls passing a drug test in 2013, when he accepted a full-time offer from his current employer.<sup>14</sup> He now spends most of his time working or with his fiancée.<sup>15</sup> He described his fiancée as “super opposed” to marijuana use.<sup>16</sup> He said that he had a difficult conversation with her after the September 2012 police incident, she was very disappointed in him, and he understands their relationship requires that he abstain from marijuana involvement.<sup>17</sup>

### Law and Policies

It is well-established law that no one has a right to a security clearance.<sup>18</sup> As noted by the Supreme Court 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>19</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.

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>20</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>21</sup>

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<sup>12</sup> Tr. 42.

<sup>13</sup> Tr. 38–39.

<sup>14</sup> Tr. 55.

<sup>15</sup> Tr. 49–50.

<sup>16</sup> Tr. 57–58.

<sup>17</sup> Tr. 57–59.

<sup>18</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>19</sup> 484 U.S. at 531.

<sup>20</sup> Directive, ¶ 3.2.

<sup>21</sup> Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>22</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>23</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>24</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>25</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>26</sup> The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>27</sup>

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

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>28</sup> Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

## Discussion

### 1. *Personal Conduct*

Under Guideline E for personal conduct,<sup>29</sup> the suitability of an applicant may be questioned or put into doubt when an applicant engages in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with the rules and regulations. And "of special interest is any failure to provide truthful and

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<sup>22</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>23</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>24</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>25</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>26</sup> *Egan*, 484 U.S. at 531.

<sup>27</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>28</sup> Executive Order 10865, § 7.

<sup>29</sup> AG ¶¶ 15, 16, and 17 (setting forth the concern and the disqualifying and mitigating conditions).

candid answers during the security clearance process or any other failure to cooperate with the security clearance process.”<sup>30</sup>

Addressing the falsification allegation in SOR ¶ 2.a, Applicant denies falsifying his answer to a question concerning his future intentions concerning marijuana use. The evidence in support of the allegation is the September 2012 police incident, which followed the June 2012 security clearance application. But one does not necessarily beget the other. Instead, I am persuaded this is a case of a then 22-year-old man who was truthful and honest when he completed the security clearance application, but then fell back into his past practice or habit of using marijuana. Accordingly, this allegation is decided for Applicant.

Addressing the “associating with drug-users” allegation in SOR ¶ 2.b,<sup>31</sup> the evidence here is in conflict. Applicant usually used marijuana with two others whom he has described as good friends. But the evidence is thin concerning the current frequency of association and whether the two others continue to use marijuana. Although Applicant’s association with his two friends has not ceased, it is not occurring under circumstances that are unacceptable. Accordingly, this allegation is decided for Applicant.

## **2. Drug Involvement**

Applicant’s involvement with marijuana is disqualifying under Guideline H.<sup>32</sup> In applying Guideline H to the facts of this case, I note that in an October 24, 2014 memorandum, the Director of National Intelligence reaffirmed that the disregard of federal law concerning use, sale, or manufacture of marijuana is relevant in national security determinations regardless of changes to state laws concerning marijuana use.

Here, the record shows Applicant engaged in drug abuse by using marijuana on a periodic or occasional basis during the years of 2011–2012. He also purchased marijuana during the same period. Moreover, he expressed an intention to continue using marijuana during his background investigation, although his intention was conditional or equivocal, and he has since clarified that he has no intention to continue using marijuana.

The time line here is also troubling. Applicant completed a security clearance application in June 2012, and he participated in a background investigation in August 2012. During those events, he disclosed his marijuana involvement. He certainly knew or should have known at that point in time that his marijuana involvement was an issue of concern in the security clearance process. Nevertheless, he resumed smoking

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<sup>30</sup> AG ¶ 15.

<sup>31</sup> AG ¶ 16(g).

<sup>32</sup> AG ¶¶ 25(a), (c), and (h).

marijuana a short time later in September 2012, which resulted in criminal charges. The sequence of events suggests he viewed or treated the security clearance process with glibness or impunity or both.

There are four mitigating conditions to consider under Guideline H, although only AG ¶¶ 26(a) and (b) are relevant to the facts of Applicant's case.<sup>33</sup> I considered both, and they are not sufficient to mitigate the security concern. The mitigating condition in AG ¶ 26(a) does not apply because his marijuana involvement was not so long ago and was not so infrequent that it is no longer a concern. The mitigating condition in AG ¶ 26(b) does not apply because he did not present sufficient evidence to demonstrate an intention not to use marijuana in the future. Common sense tells us that behavior is the best predictor of behavior. That's as true here as it is anywhere else. Applicant's behavior during 2011–2012 militates against a favorable clearance decision. Given the seriousness of his behavior, it is not mitigated by the passage of time.

Applicant's involvement with marijuana justifies current doubt about his judgment, reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I considered the whole-person concept.<sup>34</sup> I also weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. Accordingly, I conclude he did not meet 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:	Against Applicant
Subparagraphs 1.a & 1.b:	Against Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraphs 2.a & 2.b:	For Applicant

### **Conclusion**

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information.

Michael H. Leonard  
Administrative Judge

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<sup>33</sup> AG ¶ 26(a)–(d).

<sup>34</sup> AG ¶ 2(a)(1)–(9).