



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



In the matter of: )  
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----- ) ISCR Case No. 14-03967  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Ray T. Blank Jr., Esq., Department Counsel  
For Applicant: *Pro se*

08/27/2015

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny him a security clearance to work in the defense industry. His history of drug involvement during 2006–2009 while he was a high-school student is mitigated by the passage of time without recurrence. He also has three convictions for various criminal offenses during 2009–2010, including a conviction for felony burglary for which he served 13 days in jail, and he was placed on supervised probation for five years. He twice violated probation, but it nevertheless ended a year early in 2014. His history of criminal conduct is not so far in the past in that it no longer casts doubt on his reliability, trustworthiness, or good judgment. Accordingly, this case is decided against Applicant.

**Statement of the Case**

Applicant completed and submitted a Questionnaire for National Security Positions (Standard Form 86) on May 3, 2013.<sup>1</sup> After reviewing the application and

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

information gathered during a background investigation, the Department of Defense (DOD), on November 6, 2014, 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>2</sup> The SOR is similar to a complaint.<sup>3</sup> It detailed the reasons for the action under the security guidelines known as Guideline J for criminal conduct and Guideline H for drug involvement. He answered the SOR on February 25, 2015, and requested a hearing.

The case was assigned to me on May 1, 2015. The hearing was held as scheduled on June 2, 2015. Department Counsel offered Exhibits 1–3, and they were admitted. Applicant offered Exhibit A, which was a multi-part exhibit, and it was admitted. The hearing transcript (Tr.) was received on June 10, 2015.

The record was kept open until June 16, 2015, to provide Applicant an opportunity to submit additional documentation. Exhibit B was timely submitted and it is admitted, without objections.

### **Findings of Fact**

Applicant is a 24-year-old electronics technician for a federal contractor. He is seeking to obtain a security clearance for the first time. He has worked for his current employer as a temporary part-time on-call employee since February 2013.<sup>4</sup> He is unmarried, but he has a fiancée. His educational background includes a high school diploma and attending one year of college during 2009–2010.

Applicant has a history of drug involvement, which he does not dispute. For the most part, that history consists of marijuana usage during 2006–2009. Nearly all of his drug involvement took place before he finished high school in May 2009. In addition to using marijuana, he purchased and sold marijuana. He purchased and used Ecstasy in about 2009. And he used Xanax without a valid prescription in about 2008. Applicant is certain that he has not used any illegal drugs or abused any legal drugs since about the end of 2009.<sup>5</sup>

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<sup>2</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>3</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>4</sup> Exhibit A–5.

<sup>5</sup> Tr. 68–69.

Applicant also has a history of criminal conduct, which he does not dispute. It took place during 2009–2010 after he finished high school.<sup>6</sup> The first incident took place in 2009 when he was arrested and charged with the misdemeanor offense of interfering with or threatening an educational institution. Essentially, Applicant went to a school and challenged a student to a fight. He was convicted and fined \$642.

The second incident took place in 2010 when he was arrested and charged with multiple offenses stemming from a burglary of a private residence. Applicant and two others conspired to unlawfully enter an unoccupied residence that they believed was owned by wealthy people. They did so and stole three television sets, a printer, and a sound system. Their crimes were discovered about two months later when one of Applicant's companions was arrested for another offense and disclosed their involvement in the burglary to the police. Applicant pleaded guilty to the felony offense of second-degree burglary and the other charges were dismissed. He was sentenced to 13 days in jail and placed on supervised probation for five years, which included a term that ordered him not to consume any alcohol. He was also ordered to complete a substance-abuse program, which he did in July 2010 when he successfully completed a 16-hour program on alcohol and drug abuse prevention.<sup>7</sup>

The third incident took place in 2010, early into his term of probation, when he was arrested for misdemeanor offenses involving underage consumption and possession of alcohol and failure to appear. He was convicted of one of the alcohol offenses and fined \$462, and the other charges were dismissed. This incident also constituted a probation violation and, as a result, he was sentenced to a weekend in jail.

The fourth incident took place while he was working for his current employer. This incident is not alleged in the SOR, but Applicant disclosed it during the hearing.<sup>8</sup> He explained that he was unable to keep a scheduled appointment with his probation officer due to the demands of the workday. He reported the next day and was arrested. He was then brought before a judge and ordered to spend a weekend in jail for a probation violation.

In April 2014, the state court granted Applicant's petition for early release from probation.<sup>9</sup> Applicant is current with making payments on a student loan and has worked steadily for his employer when there was available work.<sup>10</sup> He submitted

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<sup>6</sup> Exhibits 2 and 3.

<sup>7</sup> Exhibit B.

<sup>8</sup> Tr. 66–68.

<sup>9</sup> Exhibit A–2.

<sup>10</sup> Exhibits A–1 and A–3.

favorable letters of recommendation from his grandmother and his parents.<sup>11</sup> In addition, his parents were in attendance at the hearing, and his mother testified on his behalf. She believes that Applicant got mixed up with the wrong crowd after high school, but he has now separated himself from that element and is pursuing a path of responsibility and self-reliance. For his part, Applicant accepted responsibility for his actions, and he attributed his criminal conduct to being a “stupid kid”<sup>12</sup> who was not thinking.

### Law and Policies

It is well-established law that no one has a right to a security clearance.<sup>13</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>14</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>15</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>16</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>17</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>18</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>19</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>20</sup>

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<sup>11</sup> Exhibit A-4.

<sup>12</sup> Tr. 41-42.

<sup>13</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>14</sup> 484 U.S. at 531.

<sup>15</sup> Directive, ¶ 3.2.

<sup>16</sup> Directive, ¶ 3.2.

<sup>17</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>18</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>19</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>20</sup> Directive, Enclosure 3, ¶ E3.1.15.

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>21</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>22</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>23</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

The evidence here raises concerns based on Applicant's history of drug involvement.<sup>24</sup> Those concerns are lessened, however, by the fact that nearly all of Applicant's drug involvement took place while he was a high-school student during 2006–2009, and that activity had ceased by the end of 2009. That is sufficient evidence to demonstrate an intent not to abuse any drugs in the future.<sup>25</sup> Accordingly, Applicant's history of drug involvement is mitigated by the passage of time without recurrence.

The same cannot be said about Applicant's history of criminal conduct. Under Guideline J, there is substantial evidence of Applicant's involvement in criminal activity that creates doubt about his judgment, reliability, trustworthiness, and ability or willingness to be a law-abiding person.<sup>26</sup> The available evidence requires application of the following disqualifying conditions:

AG ¶ 31(a) a single serious crime or multiple lesser offenses;

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<sup>21</sup> *Egan*, 484 U.S. at 531.

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

<sup>23</sup> Executive Order 10865, § 7.

<sup>24</sup> AG ¶¶ 25(a) and (c).

<sup>25</sup> AG ¶ 26(b).

<sup>26</sup> AG ¶ 30.

AG ¶ 31(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted; and

AG ¶ 31(e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant stands thrice convicted in a period of about two years for offenses that do not bode well for his suitability for access to classified information. The second incident in 2010 was serious felony-level conduct. It involved multiple parties who came together and planned to commit felonious conduct, and then did so. Moreover, Applicant twice violated the terms of his probation, although the second violation appears to be largely inadvertent, unintentional, or situational. Taken together, Applicant's history of criminal conduct during 2009–2010 militates against a favorable decision.

I have also considered all the mitigating conditions under Guideline J,<sup>27</sup> and none, individually or in combination, is sufficient to mitigate the concerns raised by Applicant's history of criminal activity. Applicant is credited with his early release from probation as well as obtaining and maintaining gainful employment. These are certainly steps in the right direction. Nevertheless, at this point in time, there is insufficient evidence of successful reform and rehabilitation. Applicant's three criminal convictions in a period of about two years, as well as two probation violations, are not so far in the past that they no longer cast doubt on his reliability, trustworthiness, or good judgment.<sup>28</sup>

In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.<sup>29</sup> I am convinced that Applicant accepts responsibility for his actions, but I am not convinced that the risk of recurrence is acceptably low given his release from supervised probation was a little more than one year ago. Accordingly, I conclude that 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.

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<sup>27</sup> AG ¶¶ 32(a)–(e).

<sup>28</sup> It is well established in the law that a criminal conviction carries the risk of collateral consequences. These are the results of arrest, prosecution, or conviction that are not part of the sentence imposed by a court. Examples include: (1) administrative license suspensions; (2) adverse employment consequences, including suspensions and job loss; (3) revocation, suspension, or denial of professional or occupational license; (4) deportation or exclusion of non-citizens and related immigration concerns; (5) disciplinary proceedings, including suspension and expulsion hearings; and (6) loss of civil rights, including the right to vote and the right to possess firearms.

<sup>29</sup> AG ¶ 2(a)(1)–(9).

### **Formal Findings**

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline J:	Against Applicant
Subparagraphs 1.a–1.c:	Against Applicant
Paragraph 2, Guideline H:	For Applicant
Subparagraphs 2.a–2.d:	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. Eligibility is denied.

Michael H. Leonard  
Administrative Judge