



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



In the matter of:)
)
-----) ISCR Case No. 15-03114
)
Applicant for Security Clearance)

Appearances

For Government: Mary M. Foreman, Esq., Department Counsel
For Applicant: *Pro se*

05/23/2016

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny him eligibility for access to classified information via a security clearance. Applicant used marijuana for more than a decade until January 2014, which was a few months before he applied for a security clearance. He did not meet his burden of proof to show that he has made a firm commitment to a drug-free lifestyle. 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 July 25, 2014.¹ On October 30, 2015, after reviewing the application and information gathered during a background investigation, the Department

¹ Exhibit 3 (this document is commonly known as a security clearance application).

of Defense (DOD)² 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.³ The SOR is similar to a complaint. It detailed the reasons for the action under the security guideline known as Guideline H for drug involvement. Applicant answered the SOR on November 20, 2015.

Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.⁴ On January 27, 2016, Department Counsel submitted all relevant and material information that could be adduced at a hearing.⁵ The file of relevant material (FORM) was mailed to Applicant, who received it on February 8, 2016. Applicant has not replied. The case was assigned to me on May 10, 2016.

Ruling on Evidence

Department Counsel's FORM includes Exhibit 4, which is a report of investigation (ROI) summarizing Applicant's interview that took place during the September 2014 background investigation. The summary, Exhibit 4, is not authenticated as required under ¶ E3.1.20 of the Directive. Department Counsel's written brief includes a footnote advising Applicant that the summary was not authenticated and that failure to object may constitute a waiver of the authentication requirement. Nevertheless, a *pro se* applicant's failure to respond to the FORM does not equate to a knowing and voluntary waiver of the authentication requirement.⁶ The written record does not demonstrate that Applicant understood the concepts of authentication, waiver, and admissibility. It also does not establish that he understood the implications of waiving an objection to the admissibility the summary. Accordingly, Exhibit 4 is inadmissible and I have not considered it.

² 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.

³ 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.

⁴ Directive, Enclosure 3, ¶ E3.1.7.

⁵ The file of relevant material consists of Department Counsel's written brief and supporting documents, some of which are identified as evidentiary exhibits in this decision.

⁶ See *Black's Law Dictionary*, 1717 (Bryan A. Garner ed., 9th ed., West 2009), for a definition of waiver.

Findings of Fact

Applicant is a 31-year-old employee who is seeking to obtain a security clearance for the first time.⁷ He is employed as a senior estimator for an industrial company. He has had this job since May 2014. His employment history does not include service in the U.S. military. His educational background includes a high school diploma awarded in 2002. He married in 2012.

Applicant completed a security clearance application in July 2014.⁸ In doing so, he disclosed a history of illegal drug involvement consisting of use of marijuana over a period of years and an isolated occurrence of misusing a prescription drug.

Concerning marijuana, Applicant disclosed using it from September 2001 to January 2014. He stated the following about the nature and frequency of his marijuana use: "I used marijuana off and on during this time for recreational purposes. When I was younger I did it more frequently. As I grew older I did it less frequently. 100 times would be an estimated guess." He further stated that he did not intend to use marijuana in the future because he had no use for it in his life.

Concerning the prescription drug, Applicant disclosed using Adderall without a prescription in October 2013. He stated that he misused the drug three times as an experiment to experience its effect on him. He further stated that he did not intend to misuse Adderall in the future because he did not like it.

In his answer to the SOR, Applicant admitted (1) using and purchasing marijuana from about September 2001 to January 2014, with varying frequency; and (2) during this period, he would go a year or more without using marijuana. He also admitted misusing Adderall on a few occasions out of curiosity. He stated that he takes the responsibility of holding a security clearance seriously. Other than his admissions, he did not submit any documentation in response to the SOR or the FORM.

Law and Policies

It is well-established law that no one has a right to a security clearance.⁹ 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."¹⁰ Under *Egan*, Executive Order 10865, and the Directive, any doubt

⁷ Exhibit 3 at 30.

⁸ Exhibit 3.

⁹ *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 (10th Cir. 2002) (no right to a security clearance).

¹⁰ 484 U.S. at 531.

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.¹¹ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹²

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹³ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁴ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁵ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁶ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁷ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁸

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.¹⁹ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

¹¹ Directive, ¶ 3.2.

¹² Directive, ¶ 3.2.

¹³ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁴ Directive, Enclosure 3, ¶ E3.1.14.

¹⁵ Directive, Enclosure 3, ¶ E3.1.15.

¹⁶ Directive, Enclosure 3, ¶ E3.1.15.

¹⁷ *Egan*, 484 U.S. at 531.

¹⁸ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁹ Executive Order 10865, § 7.

Discussion

Applicant's involvement with marijuana is disqualifying under Guideline H.²⁰ 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. Marijuana is a Schedule I controlled substance under federal law, which means it is a drug that has no currently accepted medical use and has a high potential for abuse.²¹

Here, the written record shows Applicant engaged in drug abuse by using marijuana on a periodic basis during the years of 2001–2014. He also purchased marijuana during the same period. His reported marijuana use ended in January 2014, which was a few months before he applied for a security clearance. His regular involvement with marijuana over a period of years reflects negatively on his judgment, reliability, trustworthiness, and willingness to follow laws, rules, and regulations.

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.²² 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 involvement with marijuana 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. For example, he did not submit evidence of negative drug tests to confirm that he has abstained from marijuana use since January 2014. Nor did he submit a signed statement of intent not to abuse any drugs in the future with automatic revocation of clearance for any violation. Given these circumstances, he did not meet his burden of proof to establish that he has made a firm commitment to a drug-free lifestyle.

Because Applicant chose to have his case decided without a hearing, I am unable to evaluate his demeanor. Limited to the written record, I am unable to assess Applicant's sincerity, candor, or truthfulness. He also chose not to respond to the FORM with relevant and material facts about his circumstances, which may have helped to rebut, extenuate, mitigate, or explain the security concern.

Applicant's involvement with marijuana justifies current doubt about his judgment, reliability, trustworthiness, and ability to protect classified information. In reaching this

²⁰ AG ¶ 25(a) and ¶ 25(c). His misuse of Adderall in October 2013 is mitigated under AG ¶ 26(a), and it will not be discussed further.

²¹ For more information on drug schedules, go to <http://www.dea.gov/druginfo/ds.shtml>.

²² AG ¶ 26(a)–(d).

conclusion, I considered the whole-person concept.²³ 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.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

²³ AG ¶ 2(a)(1)–(9).