



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



In the matter of:)
)
-----) ISCR Case No. 17-03737
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

07/16/2019

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for access to classified information. He did not present sufficient evidence to mitigate his use of marijuana during a five-year period while granted access to classified information. He also deliberately made false statements on a 2015 security clearance application when he denied using marijuana. 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 February 24, 2015. (Exhibit 1) This document is commonly known as a security clearance application. Thereafter, on February 6, 2018, 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 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.

Applicant answered the SOR on March 21, 2018, with a two-page memorandum. He admitted the SOR allegations under Guideline H with clarifications concerning when his marijuana use ended and the frequency of his marijuana use. He admitted making the false statements alleged under Guideline E. He provided brief explanations for his admissions. And he requested an in-person hearing before an administrative judge.

The case was assigned to another administrative judge on May 16, 2018, and then reassigned to me on May 22, 2018. The hearing was conducted as scheduled on September 19, 2018. Department Counsel offered documentary exhibits, which were admitted as Government Exhibits 1 and 2. Applicant did not offer any documentary exhibits, he called no witnesses, and he relied on his own testimony. The hearing transcript (Tr.) was received on September 26, 2018.

Findings of Fact

Applicant is a 45-year-old employee who is seeking to retain a security clearance last granted to him by the Defense Department in 2007. He is employed by a company working in the defense industry as a subject-matter expert in technologies and systems based on Microsoft products. He has been so employed since 2012. His annual salary is about \$133,000, and he described his employment record as "excellent." (Tr. 39) His educational background includes an associate's degree awarded in 2000, and a bachelor's degree in computer information systems awarded in 2007. His employment history includes honorable military service in the U.S. Coast Guard during 1994-1999. He served as an aviation electronics technician. He was granted a security clearance for the first time in about 1997 while in the Coast Guard.

Applicant is twice married and divorced. He married the first time in 1994 and divorced in 2003. He married the second time in 2007, separated in June 2014, and divorced in 2015. He shares two minor children with his second wife. His marijuana use, which began in 2009 and ended in about mid-2014 or so, occurred during his second marriage, as he smoked it with his spouse and another woman. Before that, he had never used marijuana. He indicated that his then spouse introduced marijuana into their marriage. (Tr. 36-37) He estimated the frequency of his marijuana use as four to five times per year, at the most. (Tr. 38) He understands or believes that his marijuana use was contrary to his employer's policy. (Tr. 33)

Applicant deliberately omitted his marijuana use during 2009-2014 when he completed his February 2015 security clearance application. In particular, he did not disclose it in response to two questions. First, he denied the use of any illegal drug or controlled substance in the last seven years. Second, he denied ever illegally using or otherwise being involved with a drug or controlled substance while possessing a security clearance. At the hearing, he explained that he omitted his marijuana use because he was concerned his employer would discover it. (Tr. 32) In addition, he failed

to disclose his marijuana use when asked about it during a 2017 background investigation. (Tr. 33; Exhibit 2) He admitted his marijuana use after he was confronted with it during the background investigation. He considered marijuana to be in his past, and disclosure might negatively affect his chances of retaining a security clearance. (Tr. 33)¹

At present, Applicant has no intention to resume using marijuana or any other controlled substance or drug. (Tr. 33-34) To that end, in his written answer to the SOR, he stated that he does not intend to illegally use any drugs in the future, and he fully understands that any future illegal use of any drugs may result in revocation of a security clearance.

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.

It is well-established law that no one has a right to a security clearance.² 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.”³ 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.⁴ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.⁵

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁶ Under the Directive, the parties have the following burdens: (1) Department Counsel has the burden of presenting evidence to establish

¹ Because this matter is not alleged in the SOR, I did not consider it for disqualification purposes, but I did consider it in assessing Applicant’s evidence in mitigation.

² *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 (10th Cir. 2002) (no right to a security clearance).

³ 484 U.S. at 531.

⁴ 484 U.S. at 531.

⁵ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

⁶ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

facts alleged in the SOR that have been controverted; (2) an applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven; and (3) an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁷

Discussion

Under Guideline H for drug involvement and substance misuse, the concern is set forth in AG ¶ 24 as follows:

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

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;

AG ¶ 25(f) any illegal drug use while granted access to classified information or holding a sensitive position;

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)

⁷ Directive, Enclosure 3, ¶¶ E3.1.14 and E.3.1.15.

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 involvement with marijuana, which began in about 2009 and ended about five years later in about mid-2014 or so. The entirety of his marijuana use occurred while he was granted access to classified information and held a security clearance. Any illegal drug use is relevant in the context of evaluating a person's security worthiness, but it is particularly egregious if it occurs while granted access to classified information. As a longtime clearance holder, Applicant knew such conduct was off limits and forbidden, but engaged in it just the same on an on-again, off-again basis. It was not a mere lapse in judgment or an isolated incident, as shown by the frequency of his use (about four times yearly) and the duration of his use (over a five-year period). More is expected of Applicant given his age, experience, and maturity during 2009-2014. With that said, his last use of marijuana occurred about four years ago, and he was credible in stating that he does not intend to use marijuana in the future. Nevertheless, the seriousness of his misconduct, illegal drug use while holding a security clearance, outweighs his evidence in mitigation.

Under Guideline E, personal conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about a person's reliability, trustworthiness, and ability to protect classified or sensitive information. The concern is stated fully in AG ¶ 15.

In analyzing the facts of this case, the following disqualifying condition applies:

AG ¶ 16(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

As set forth in the findings of fact, Applicant made deliberately false statements when he omitted his past use of marijuana in a February 2015 security clearance application. He did so out of concern that his employer would discover his illegal drug use. He acknowledged his marijuana use after he was confronted with it during the 2017 background investigation.

I have considered the mitigating conditions under AG ¶ 17, and none apply in Applicant's favor. Making deliberately false statements during the security clearance process is serious misconduct, and it is not easily explained away, excused, or otherwise mitigated. Based on the record before me, Applicant's misconduct in falsifying his 2015 security clearance application is far too serious to be mitigated.

Following *Egan* and the clearly consistent standard, I have doubts and concerns about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified or sensitive information. 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 considered the whole-person concept. I conclude that he has not 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:	Against Applicant
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Eligibility denied.

Michael H. Leonard
Administrative Judge