



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



In the matter of:)
)
-----) ISCR Case No. 18-00598
)
Applicant for Security Clearance)

Appearances

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

07/18/2019

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for access to classified information. The evidence is sufficient to mitigate his history of drug involvement and substance misuse. He voluntarily reported the derogatory information and was truthful and complete in responding to questions during the security clearance process. His substance misuse ended nearly two years ago in late 2016, and he has no intention to engage in similar behavior in the future. Accordingly, this case is decided for Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on February 26, 2017. (Exhibit 1) This document is commonly known as a security clearance application. Thereafter, on March 16, 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 guideline known as Guideline H for drug involvement and substance misuse.

Applicant answered the SOR on April 3, 2018, with a four-page memorandum. He admitted the SOR allegations under Guideline H and provided explanatory information. He also requested a 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 18, 2018. Department Counsel offered a documentary exhibit, which was admitted as Exhibit 1. Applicant offered documentary exhibits, which were admitted as Exhibits A-F. He called one witness, and he relied on his own testimony. The hearing transcript (Tr.) was received on September 25, 2018.

The record was kept open to allow Applicant to provide an additional document; namely, a signed statement of intent to abstain from all drug involvement and substance misuse. He made a timely submission on September 19, 2018, and it is admitted without objections as Exhibit G.

Findings of Fact

Applicant is a 36-year-old employee who is seeking to obtain a security clearance for the first time. He is employed as a software engineer by a company working in the defense industry. He has been so employed since February 2017. He has a good employment record with his current employer and is held in high regard according to letters of recommendation from a supervisor and co-worker. (Exhibits C and D) His educational background includes an associate's degree in applied science awarded in 2004, and a bachelor's degree in computer science, *magna cum laude*, awarded in 2007. He has had full-time employment as a software engineer since 2007. He has no military service. He has been a homeowner since 2009. He has never married and has no children.

The SOR alleges and Applicant admits a history of drug involvement and substance misuse from about August 2009 to about July 2016. He disclosed these matters in his February 2017 security clearance application, which forms the basis for the SOR allegations. He had a five-year relationship with a woman whom he thought he would marry, and most of his drug use occurred with her. He has since severed his ties to her, separating in March 2017. (Tr. 2017) He did not list her as a cohabitant in his February 2017 security clearance application.

Applicant's drug involvement and substance misuse consist of the following:

- He used marijuana with varying frequency, about once every six months, during the 2009-2016 period. He used occasionally when friends offered it to him. He did not purchase or seek out marijuana for his use. He has not used marijuana since late 2016 (New Year's Eve). He typically used it on

occasions such as camping or climbing trips. He has no intention to use marijuana again.

- He used cocaine twice with his former girlfriend during the April 2013 to February 2016 period. He never purchased cocaine or sought it out. He was wary of it due to its addictive qualities. He was interested in cocaine for experimental use and had no intention to use it regularly. He has no intention to use cocaine again.
- He provided the prescription medication Xanax to a friend on multiple occasions during 2013-2016. His friend suffered from stress and anxiety on occasion, and he provided small amounts of Xanax about once a year during this period. He has no intention of engaging in similar behavior.
- He used a prescription muscle relaxer, not prescribed to him, with varying frequency during 2013-2016. He has a chronic back problem that causes him pain periodically. He mentioned his back problem to a friend and the friend offered the muscle relaxer to him. He later consulted a physician who prescribed the same medication for him. He has no intention of engaging in similar behavior.

Applicant knows that his employer has a drug-free workplace policy, and he was required to pass a pre-employment drug test as a condition of employment. (Tr. 52) He also knows that any substance misuse, including marijuana use, is off limits as a cleared employee regardless of the laws of any state. (Tr. 49-55) He reaffirmed his intention to abstain from all illegal drug involvement and substance misuse in his post-hearing signed statement of intent. (Exhibit G). He also acknowledged that any further drug involvement or substance misuse may be grounds for revocation of national security eligibility. (Exhibit G)

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.¹ 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

¹ *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).

side of denials.”² 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.³ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.⁴

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁵ Under the Directive, the parties have the following burdens: (1) Department Counsel has the burden of presenting evidence to establish 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.⁶

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. *Controlled substance* means any “controlled substance” as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

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

² 484 U.S. at 531.

³ 484 U.S. at 531.

⁴ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁶ Directive, Enclosure 3, ¶¶ E3.1.14 and E.3.1.15.

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(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

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) 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 drug involvement and substance misuse, which began in 2009 and ended several years later in late 2016. Most of his marijuana use and his twice-use of cocaine occurred during a long-term relationship with a former girlfriend, which ended in separation in about March 2017. His involvement with Xanax and the muscle relaxer, as described in the findings of fact, was not trivial, but I view his marijuana and cocaine use as the more serious matters. Any illegal drug use is relevant in the context of evaluating a person's security worthiness. His use of marijuana, in particular, is significant because it occurred on a periodic basis over a period of years. It was not a mere lapse in judgment or an isolated incident, as shown by the frequency and duration of his use. Moreover, Applicant was not a youthful college-aged student, as all of his substance misuse occurred when he was working as a software engineer. These matters militate against a favorable clearance decision.

Nevertheless, I am persuaded that Applicant's drug involvement and substance misuse is now safely in the past. It ended in late 2016, when he used marijuana at a New Year's Eve party, which is nearly two years before the record closed here in September 2018. In other words, his drug misconduct is not recent. He voluntarily reported the derogatory information about his drug involvement and substance misuse, and he was truthful and complete in responding to questions during the security clearance process. He has had no illegal drug involvement or substance misuse during his employment in the defense industry. He has a good employment record in the

defense industry, and he desires to continue that employment. I am satisfied that Applicant will continue to adhere to his employer's drug-free workplace policy, that he will adhere to federal law concerning marijuana use, and that he will abstain from any further illegal drug involvement or substance misuse.

Following *Egan* and the clearly consistent standard, I have no doubts or 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 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:	For Applicant
Subparagraphs 1.a – 1.d:	For Applicant

Conclusion

It is clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Eligibility granted.

Michael H. Leonard
Administrative Judge