



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



In the matter of:)	
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)	ISCR Case No. 12-11426
Applicant for Security Clearance)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

12/31/2014

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his security clearance to work in the defense industry. The security concerns stemming from his illegal drug involvement (by example, using marijuana and cocaine in 2011 while possessing a security clearance) are not mitigated. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted an application for a security clearance on June 13, 2012.¹ After reviewing the application and information gathered during a background investigation, the Department of Defense (DOD), on August 4, 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 access to classified

¹ Exhibit 4.

information.² 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 August 19, 2014. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.³

On October 9, 2014, Department Counsel submitted all relevant and material information that could be adduced at a hearing.⁴ This so-called file of relevant material (FORM) was mailed to Applicant, who received it October 20, 2014. Applicant did not reply or submit any information in response to the FORM. The case was assigned to me December 5, 2014.

Findings of Fact

Applicant is a 32-year-old employee who is seeking to retain a security clearance. In 2005, he earned a bachelor's degree in computer science. He has been employed since 2006 by a large corporation that operates as an aerospace and defense company worldwide. He is currently working as a senior software engineer. He married in 2009. His spouse is employed by the same company.⁵

The DOD granted Applicant a secret-level security clearance in 2006.⁶ In doing so, the DOD presumably considered Applicant's use of marijuana on about eight occasions during 2003–2005, which he disclosed in a 2006 security clearance application.⁷ During his 2006 background investigation, he stated that he last used marijuana in 2005, and he decided to stop because he was going to graduate from college and obtain employment, and he knew that he should not use marijuana.⁸ About

² 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.

³ Directive, Enclosure 3, ¶ E3.1.7.

⁴ 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.

⁵ Exhibit 5 at 9 (interrogatories).

⁶ Exhibit 7 (this document from the Joint Personnel Adjudication System (JPAS) is admissible as a business record or official record or both).

⁷ Exhibit 6 (security clearance application).

⁸ Exhibit 5 at 11 (interrogatories).

six years later in May 2012, the DOD received information from another governmental agency that Applicant was currently using marijuana a couple of times annually.⁹

In his June 2012 security clearance application,¹⁰ Applicant disclosed the following information about his illegal drug use:

- That he used marijuana about eight times between June 2003 and August 2005.
- That he used marijuana in June 2011 while possessing a security clearance.
- That he used cocaine in September 2011 while possessing a security clearance.
- That he did not intend to use marijuana or cocaine in the future.

During his 2012 background investigation, Applicant provided additional detail about his use of marijuana and cocaine in 2011.¹¹ He explained that he used marijuana on a camping trip with friends. He did so when a pipe was passed to him on five occasions and he smoked it each time. He also explained that he used cocaine while at a bachelor party. He did so by snorting four two-inch lines of cocaine. He further stated that he did not intend to use illegal drugs in the future.

In his answer to the SOR, Applicant admitted the illegal drug use and provided the following explanation:

I have disclosed these facts during the initial application and during the reapplication process. I do regret that the events have occurred and take full responsibility for my actions as they pertain to my security clearance. That said I do wish to keep my clearance and assure you these actions will not be repeated. I view them as isolated incidents that I have learned from and will not repeat. Now that I am a father and have gained some more maturity, I know these violations will not happen again. I appreciate your time on the matter. I do not wish to have a hearing before an Administrative Judge.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹² 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

⁹ Exhibit 8 (this document from the JPAS is admissible as a business record or official record or both).

¹⁰ Exhibit 4 (security clearance application).

¹¹ Exhibit 5 at 10 (interrogatories).

¹² *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).

side of denials.”¹³ 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.¹⁴ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁵

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁶ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁷ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁸ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁹ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁰ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.²¹

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.²² Instead, it

¹³ 484 U.S. at 531.

¹⁴ Directive, ¶ 3.2.

¹⁵ Directive, ¶ 3.2.

¹⁶ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁷ Directive, Enclosure 3, ¶ E3.1.14.

¹⁸ Directive, Enclosure 3, ¶ E3.1.15.

¹⁹ Directive, Enclosure 3, ¶ E3.1.15.

²⁰ *Egan*, 484 U.S. at 531.

²¹ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²² Executive Order 10865, § 7.

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

Discussion

Applicant's history of illegal drug involvement (use of marijuana and cocaine) is disqualifying under Guideline H.²³ The evidence shows he engaged in drug abuse²⁴ by using marijuana on a periodic basis during 2003–2005 and 2011 and by using cocaine in 2011. And he used marijuana and cocaine after the DOD granted him a security clearance, which is serious misconduct and a breach of trust.²⁵ His drug abuse 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.²⁶ I have considered each, and they are not sufficient to mitigate the security concerns stemming from Applicant's drug abuse.

When Applicant was granted a security clearance in 2006, he knew or should have known that any future illegal drug use would result in scrutiny and the probability of adverse consequences. And when he used marijuana and cocaine in 2011, he was no longer a freshly-minted college graduate who was likely to engage in unwise behavior due to youth and immaturity. Instead, he was a married man with a five-year record of employment with a major defense contractor while in possession of a security clearance. Those facts are simply too much to overlook or explain away by situational circumstances, immaturity, or a lapse of judgment. In addition, given that he resumed drug abuse in 2011 after several years of abstinence, it is too soon to conclude that his drug abuse is now safely in the past and will not recur. Granted, he receives credit for disclosing his drug abuse in his 2006 and 2012 security clearance applications and during the security clearance process. By doing so, he did what is expected of a person seeking access to classified information. Nevertheless, it is not enough to mitigate his serious misconduct and breach of trust.

In reaching this decision, I note that 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 meaningfully assess Applicant's sincerity, candidness, or

²³ AG ¶ 25(a). Concerning Guideline H, in an October 24, 2014 memorandum, the Director of National Intelligence reaffirmed that an individual's 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.

²⁴ AG ¶ 24(b).

²⁵ AG ¶ 25(g).

²⁶ AG ¶ 26(a)–(d).

truthfulness. He also chose not to respond to the FORM with relevant and material facts about his circumstances, which may have helped to explain, extenuate, or mitigate the security concerns.

Applicant's history of illegal drug involvement justifies current doubt about his judgment, reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I considered the whole-person concept.²⁷ 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.c:	Against Applicant

Conclusion

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

Michael H. Leonard
Administrative Judge

²⁷ AG ¶ 2(a)(1)–(9).