



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



In the matter of:)	
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)	ISCR Case No. 14-00255
Applicant for Security Clearance)	

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

02/23/2016

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny him eligibility for access to classified information. The security concern stemming from his illegal drug use is not mitigated. Also, the security concern stemming from his falsification of a security clearance application by failing to disclose his illegal drug use is not mitigated. 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 31, 2013.¹ About two years later on July 21, 2015, after reviewing the application and information gathered during a background

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

investigation, the Department 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 guidelines known as Guideline H for drug involvement and Guideline E for personal conduct. Applicant answered the SOR on September 24, 2015.

Neither Applicant nor Department Counsel requested a hearing, and so the case will be decided on the written record.⁴ On November 10, 2015, Department Counsel submitted all relevant and material information that could be adduced at a hearing.⁵ This so-called file of relevant material (FORM) was mailed to Applicant, who received it on December 4, 2015. He did not reply. The case was assigned to me on February 17, 2016.

Findings of Fact

Applicant is a 24-year-old employee who is seeking to obtain a security clearance for his job as a laborer for a defense contractor. His educational background includes receiving a high school diploma, and he also attended college for a time. He has never married and has no children.

Applicant completed a security clearance application in July 2013.⁶ He denied any involvement, including use, with illegal drugs in Section 23 of his security clearance application.⁷ A few months later during the September 2013 background investigation, he admitted using marijuana from about 2008 to April 2013.⁸ He admitting smoking once every four months during that time frame, and he usually used marijuana with friends.

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 Exhibit 3.

⁷ Exhibit 3 at 25–26.

⁸ Exhibit 4.

He has not undergone substance-abuse counseling or treatment for his marijuana use, and he has no intention of continuing to use marijuana. He also stated that he did not report his marijuana use on his security clearance application because he did not read the questions thoroughly.

In his answer to the SOR, Applicant admitted the two allegations as follows: (1) using marijuana with varying frequency from about 2008 to April 2013; and (2) deliberately failing to disclose marijuana use in response to a question in Section 23 of the security clearance application asking about illegal drug use in the last seven years. Other than his admissions, he did not submit documentation in response to the SOR. Likewise, he did not submit a statement or documentation in response to 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 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

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.

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.

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.

Discussion

Applicant's involvement with marijuana is disqualifying under Guideline H.²⁰ Here, the written record shows Applicant engaged in drug abuse by using marijuana on a periodic basis during 2008–2013, a period of about five years. 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.²¹ 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 drug abuse 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 abuse marijuana in the future. Common sense tells us that behavior is the best predictor of behavior. That's as true here as it is anywhere else. Applicant's behavior in

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.

²⁰ AG ¶ 25(a). 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.

²¹ AG ¶ 26(a)–(d).

using marijuana from 2008 to April 2013, which was a few months before he submitted the July 2013 security clearance application, speaks volumes and militates against a favorable clearance decision. Given the circumstances, his drug abuse is not mitigated by the passage of time.

Under Guideline E for personal conduct,²² the suitability of an applicant may be questioned or put into doubt when an applicant engages in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with the rules and regulations. And “of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.”²³

Addressing the falsification allegation in SOR ¶ 2.a, Applicant denied falsifying his answer to a question concerning illegal drug use during his background investigation, but he admitted the falsification allegation in his answer to the SOR. Given these circumstances, I conclude that the falsification allegation is proven.²⁴ It is simply too difficult to accept and believe that Applicant, who had used marijuana for a period of about five years leading up to his July 2013 security clearance application, missed or overlooked a question about past illegal drug use. In mitigation, I have considered all the mitigating circumstances under Guideline E and conclude none apply. Indeed, providing deliberately false information during the security clearance process is serious misconduct that is quite difficult to extenuate, mitigate, or explain away.

Without a hearing in this case, I have not had the opportunity to observe Applicant’s demeanor and evaluate his 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 concerns.

Applicant’s involvement with marijuana, including his failure to truthfully disclose his marijuana use on his security clearance application, justifies current doubt about his judgment, reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I considered the whole-person concept.²⁵ 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.

²² AG ¶¶ 15, 16, and 17 (setting forth the concern and the disqualifying and mitigating conditions).

²³ AG ¶ 15.

²⁴ AG ¶ 16(a).

²⁵ AG ¶ 2(a)(1)–(9).

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

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