



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



In the matter of:)	
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)	ISCR Case No. 14-02060
Applicant for Security Clearance)	

Appearances

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

06/23/2015

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for access to classified information. He presented sufficient evidence to explain and mitigate the concern raised by his occasional use of marijuana over a period of many years. 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 January 30, 2014.¹ After reviewing the application and information gathered during a background investigation, the Department of Defense

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

(DOD),² on March 18, 2015, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant his 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. He answered the SOR on March 27, 2015, he admitted the single allegation of marijuana use and provided a detailed two-page memorandum in explanation. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.⁴

On May 19, 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 June 3, 2015. Applicant replied to the FORM in an one-page memorandum, dated June 3, 2015, and it is made part of the record as Exhibit A. The case was assigned to me on June 18, 2015.

Findings of Fact⁶

Applicant is a 61-year-old employee of a federal contractor. He is seeking to obtain a security clearance for the first time. He has worked for his current company as an information-technology consultant since 2013. Before that, he worked for his current company's predecessor in interest during 2009–2013. And before that, he worked for an information-technology company from 1973 to 2009. He has been married since 1979, and he has two adult children.

Applicant completed a security clearance application in January 2014.⁷ In response to questions about illegal drug use or drug activity, he disclosed using marijuana in the last seven years. He explained it was occasional use while attending New Year's Eve parties, and that it took place from about December 1975 to about

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).

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 The findings of fact are based on Applicant's security clearance application, his answer to the SOR, and his response to the FORM. There are no other evidentiary documents before me.

⁷ Exhibit 3.

December 2011. He further explained he will no longer use marijuana if doing so will affect a security clearance and other requirements for his work with a federal contractor.

Applicant provided additional information about his marijuana use in his March 27, 2015 answer to the SOR. First, he clarified the time frame and frequency of his marijuana use. He stated that he used marijuana “a handful of times” with the last usage taking place in 2007 or 2008, not 2011, as he verified his last usage with his family. He stated that his marijuana use took place when his family gathered on New Year’s Eve, which occurred every four to five years. He also stated that his usage consisted of taking a couple of puffs of a marijuana cigarette at the stroke of midnight.

Second, he stated that he has no desire to use marijuana, and that the risks and consequences to his career and family are not worth it. He explained how further marijuana use might affect his wife’s career. He also explained how further marijuana use might affect and embarrass his adult children.

Third, he explained how he has recently been exposed to people using marijuana and that he refused to participate.

Fourth, he stated that he is truly upset with himself that his past behavior and poor judgment have put him in jeopardy. He stated that he sincerely regrets his poor judgment by using marijuana and averred that it will not occur again.

Applicant provided further information about his marijuana use in his June 3, 2015 response to the FORM⁸ as follows: (1) he described his past marijuana use as recreational and sporadic; (2) his last usage was in December 2008; (3) his past marijuana use was roughly eight occasions over 35 years; (4) about six and a half years have passed since his last usage, and he has no intention of using marijuana now or in the future under any circumstances; (5) he is not addicted to or dependent on marijuana; (6) he fully understands the laws governing controlled substances and the risks and impacts that using illegal drugs may have on a security clearance, and he will continue to abide by those laws; and (7) his intentions and commitment to the discontinued use of marijuana are clear and consistent.

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

⁸ Exhibit A.

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).

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 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

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.

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).

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

Under Guideline H, the concern is that illegal drug use, or misuse of a legal drug, can raise questions about a person's reliability, trustworthiness, and judgment, because it may impair a person's judgment, and because it calls into question a person's willingness to follow laws, rules, and regulations.²⁰ In analyzing this case, the following disqualifying conditions (AG ¶ 25) and mitigating conditions (AG ¶ 26) are most pertinent:

AG ¶ 25(a) any drug abuse;²¹

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 [person's] current reliability, trustworthiness, or good judgment; and

AG ¶ 26(b) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's history of marijuana use raises a concern under Guideline H. The undisputed evidence shows he engaged in drug abuse by the occasional or sporadic use of marijuana during a period of more than 30 years. His marijuana use was infrequent, estimated as roughly eight occasions at family gatherings to celebrate the New Year holiday. Although infrequent, the concern is still valid because his marijuana use went well beyond what could fairly be described as youthful experimentation or indiscretion. He knowingly used marijuana as a mature adult, the last time when he was in his 50s.

Nevertheless, I am satisfied that Applicant now fully understands and appreciates the gravity of his misconduct. I am also satisfied that he presented sufficient evidence of reform based on (1) his lengthy period of abstinence (about six and a half years) based

¹⁹ Executive Order 10865, § 7.

²⁰ AG ¶ 24. Concerning Guideline H, 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 Drug abuse, as defined in AG ¶ 24(b), means the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

on his last marijuana use in December 2008, (2) his stated recent refusal to participate in marijuana use when it was offered to him, and (3) his now unequivocal statement and commitment to not engage in marijuana use in the future. I am persuaded that he, as a first-time applicant for a security clearance, has learned by going through this process that any further illegal drug use is off limits. And I am also persuaded and convinced that his history of occasional marijuana use is safely in the past and will not recur.

In addition to the mitigating conditions under Guideline H, I considered that this case is based solely on information provided by Applicant. He receives credit in mitigation because he voluntarily reported marijuana use on his 2014 security clearance application. Although using marijuana as a mature adult shows poor judgment, he did the right thing by disclosing his history of occasional marijuana use, which is exactly what is expected of a person who is seeking eligibility for access to classified information. His willingness to reveal such unfavorable information and be transparent about it bodes well for his fitness or suitability for a security clearance.

Applicant met his burden to present sufficient evidence to explain and mitigate the drug involvement security concern stemming from his occasional marijuana use. I have no doubts about his reliability, trustworthiness, and good judgment. 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 gave due consideration to the whole-person concept.²² Accordingly, I conclude that he has 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 as follows:

Paragraph 1, Guideline H:	For Applicant
Subparagraph 1.a:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Eligibility is granted.

Michael H. Leonard
Administrative Judge

²² AG ¶ 2(a)(1)–(9).