



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



In the matter of:)
)
-----) ISCR Case No. 14-02216
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

02/05/2015

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny him a security clearance to work in the defense industry. The security concern stemming from his drug involvement (using and buying marijuana during the years of 1996–2013) is not mitigated. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted an application for a security clearance (known as an e-QIP) on November 29, 2013.¹ After reviewing the application and information gathered during a background investigation, the Department of Defense (DOD),² on July 11, 2014, sent Applicant a statement of reasons (SOR), explaining it

¹ Exhibit 3.

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.

was unable to find that it was clearly consistent with the national interest to grant him 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. Applicant answered the SOR on July 23, 2014. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.⁴

On December 2, 2014, 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 December 11, 2014. Applicant has not replied to the FORM. The case was assigned to me February 3, 2014.

Ruling on Evidence

Exhibit 4 is a report of investigation (ROI) from the background investigation of Applicant. The two-page document is a summary of an interview of Applicant conducted on January 31, 2014. The law provides that an ROI may be received and considered as evidence when it is authenticated by a witness.⁶ Although Applicant, who is representing himself, has not raised the issue via an objection, I am raising it *sua sponte*. With that said, it is evident that Department Counsel is acting in good faith, having highlighted the issue in the file of relevant material.⁷ Nevertheless, Exhibit 4 is not authenticated in any way. And Applicant's failure to object does not amount to a knowing waiver of the rule.⁸ Accordingly, Exhibit 4 is not admissible and I have not considered it.

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 Directive, Enclosure 3, ¶ E3.1.20; see ISCR Case No. 11-13999 (App. Bd. Feb. 3, 2014) (the Appeal Board restated existing caselaw that a properly authenticated report of investigation is admissible).

⁷ Department Counsel Brief at 2, n. 1.

⁸ *Wavier* means "[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage; the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." *Black's Law Dictionary*, 1717 (Bryan A. Garner ed., 9th ed., West 2009).

Findings of Fact

Applicant is a 38-year-old employee who is seeking to obtain a security clearance. His educational background includes a bachelor's degree awarded in 2000. He married for the first time in 2013. He is employed as a network communications engineer for a shipbuilding company. He began that employment in October 2012.

About one year later in November 2013, Applicant completed an application for a security clearance.⁹ In response to questions concerning illegal drug activity, he disclosed using and purchasing marijuana during the years of 1996–2013.

Concerning marijuana use, he estimated using marijuana on a casual basis from January 1996 to September 2013. He described the frequency of his use over the last several years as periodic, perhaps monthly or every couple of months, and sometimes a couple of days in a row. He further described the frequency of his usage as declining or decreasing over the years.

Concerning the purchase of marijuana, he estimated buying it from March 1996 to August 2013. He described the nature and frequency as making purchases for his personal use on approximately six to eight times per year.

In his answer to the SOR, Applicant admitted using and purchasing marijuana during the years 1996–2013 and provided the following explanation:

I do admit to using and purchasing marijuana for my personal use truthfully as stated above [in the SOR allegations]. There are no excuses for me doing so. As I have grown older and taken on more responsibilities, I came to the realization that this is something that wasn't having a positive effect on my life. I did not want to lose the things that I have worked hard for in life to achieve, and those things that life has been so gracious to grant me. I have a wonderful and proud job supporting the Navy, Coast Guard, and my fellow Ship Builders. I was married last year to a wonderful wife, and I continue to work toward and achieve my goals. These are positive outcomes in my [life] that helped me quit the use of marijuana for good. There is no defense I can present about my past actions of the use of this substance. It was a poor decision by me to do so. However my goals, career, and family I hold dearest to my heart and do not want to lose that. So I will continue to charge ahead in life, with this lesson learned, free of this substance.¹⁰

⁹ Exhibit 3.

¹⁰ Answer to SOR.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹¹ 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.”¹² 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.¹³ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁴

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁵ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁶ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁷ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁸ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁹ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.²⁰

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

¹¹ *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).

¹² 484 U.S. at 531.

¹³ Directive, ¶ 3.2.

¹⁴ Directive, ¶ 3.2.

¹⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁶ Directive, Enclosure 3, ¶ E3.1.14.

¹⁷ Directive, Enclosure 3, ¶ E3.1.15.

¹⁸ Directive, Enclosure 3, ¶ E3.1.15.

¹⁹ *Egan*, 484 U.S. at 531.

²⁰ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

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.²¹ 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 history of drug involvement (using and purchasing marijuana) is disqualifying under Guideline H.²² The evidence shows he engaged in drug abuse²³ by using marijuana on a periodic basis during the years of 1996–2013, a 16-year period. And he used and bought marijuana as recently as September 2013, which was nearly a year after beginning his job with a shipbuilding company. Presumably, his employer has a drug-free workplace policy, as is the regular course of business for a company doing business with the Defense Department. 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.²⁴ I considered both, and they are not sufficient to mitigate the security concern. The mitigating condition in AG ¶ 26(a) does not apply in Applicant's favor, 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 in Applicant's favor, because he did not present sufficient evidence to demonstrate an intent not to abuse marijuana in the future. The evidence on that point is limited to his statements, which are, of course, self-serving. In addition, under AG ¶ 26(b)(4), Applicant did not submit a signed statement of intent not to abuse any drugs in the future with automatic revocation of clearance for any violation. Also, his last known involvement with marijuana occurred more than a year ago in September 2013. But that is not an appropriate period of abstinence in light of his overall record of using and buying marijuana during a 16-year period. Granted, he receives credit for disclosing his drug involvement during the security clearance process. By doing so, he

²¹ Executive Order 10865, § 7.

²² AG ¶ 25(a) and ¶ 25(c). 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.

²³ AG ¶ 24(b).

²⁴ AG ¶ 26(a)–(d).

did what is expected of a person seeking access to classified information. Nevertheless, it is not enough to resolve the security concern.

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 assess Applicant's 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 explain, extenuate, or mitigate the security concern.

Applicant's history of 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.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.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline H:	Against Applicant
Subparagraphs 1.a and 1.b:	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

²⁵ AG ¶ 2(a)(1)-(9).