



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



In the matter of:)	
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)	ISCR Case No. 14-02468
Applicant for Security Clearance)	

Appearances

For Government: Gregg 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 him a security clearance to work in the defense industry. He did not mitigate the security concerns stemming from his (1) history of periodic marijuana use from about 1985 to about December 2010, (2) drug-related criminal conduct that resulted in serving probation for ten years during 2002–2012, (3) testing positive for marijuana while on probation, and (4) falsely understating his history of marijuana use on a 2008 security clearance application. 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 February 28, 2008.¹ The process terminated without a decision in 2008 when he failed to respond to a request for further information. He completed and submitted another security clearance application on November 15,

¹ Exhibit 2 (this document is commonly known as a security clearance application).

2013.² After reviewing the application and information gathered during a background investigation, the Department of Defense (DOD),³ on July 17, 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 information.⁴ 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 August 7, 2014, and September 1, 2014, and requested a hearing.

The case was assigned to another administrative judge on January 8, 2015, and a hearing was scheduled for February 12, 2015. At Appellant's request, the hearing was postponed due to previously scheduled business travel. The case was reassigned to me February 11, 2015. The hearing was held as scheduled on March 23, 2015. Department Counsel offered Exhibits 1–4, and they were admitted. Applicant offered Exhibits A–E, and they were admitted. Applicant called two character witnesses and testified on his own behalf. The hearing transcript (Tr.) was received on March 31, 2015.

The record was kept open to April 23, 2015, to allow Applicant to submit additional documentation. He did so in a timely manner, and those matters are admitted without objections as Exhibits F and G.

Ruling on Procedure

SOR ¶ 1.d alleges that Applicant was required to twice attend marijuana-related treatment. This allegation, which Applicant admits, is a relevant fact, but it does not amount to a disqualifying condition under Guideline H. Likewise, the allegation in SOR ¶ 1.e alleges that Applicant used marijuana after he applied for a DOD security clearance in 2008. It is also a relevant fact that Applicant admits, but it too does not amount to a disqualifying condition under Guideline H. On that basis, SOR ¶¶ 1.d and 1.e are decided for Applicant.

² Exhibit 1.

³ 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.

⁴ 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.

Findings of Fact

Taken together, Applicant's answers to the SOR constitute admissions to the allegations under Guidelines H and E. His admissions are accepted and incorporated herein as findings of fact.

Applicant is a 42-year-old married man who is seeking to obtain a security clearance. He married for the first time in 2011, he has a 18-year-old daughter from a previous relationship as well as three stepchildren from his marriage. His wife is employed outside the home as an administrative clerk for a local school. His educational background includes a 1998 associate's degree in applied science.

Applicant has worked as a manufacturing technician for the same company since 2011. Before that, he worked as a subcontractor in the same capacity during 2007–2011. And before that, he worked as an assembly technician for another company during 2002–2007. He has a good if not outstanding employment record with his current employer.⁵ For example, he was promoted and given an 8.57% pay increase in February 2015.⁶

In February 2002, he was arrested for and charged with a felony offense for possession of marijuana and the offense of evading arrest or detention with a vehicle.⁷ The charges stemmed from an incident where Applicant, who was alone, was driving a relative's car when the police attempted a traffic stop. Applicant panicked and attempted to flee, first by car and then on foot for a short distance, when he noticed a large trash bag on the floor of the car that contained about 11 pounds of marijuana, which he claims he had no previous knowledge. He was jailed for a day before he was bonded out and given a court date. He lacked funds to pay a bail payment and an arrest warrant was issued, which was executed about three months later.

After his arrest, Applicant was held in jail for about three months, and then he agreed to a plea deal wherein he pleaded guilty to the felony drug offense and the other charge was dismissed, adjudication was deferred by the court (namely, the court did not find him guilty), and he was placed on community supervision or probation for ten years. He was also required to pay a large fine and abide by other terms and conditions such as no further drug use during his probationary period.

In February 2008, Applicant completed a security clearance application.⁸ In response to the relevant questions, he disclosed relevant derogatory information as follows: (1) that in February 2002, he was arrested for and charged with the felony

⁵ Exhibits A–E; Tr. 28–44 (testimony of two character witnesses).

⁶ Exhibit A.

⁷ Exhibits 3 and 4.

⁸ Exhibit 2.

offense of possession of marijuana that resulted in a deferred adjudication with 10 years of probation; and (2) that in that last seven years he had used marijuana twice in 2007.

Applicant provided additional information about his drug-related criminal conduct and marijuana use during the 2008 background investigation.⁹ He stated that he used marijuana twice in 2007 to treat pain and nausea associated with a serious dental condition. He also stated that he used marijuana while on probation for about four years (2002–2006) about 17 times. He stated that his frequency of use during 2002–2006 was on weekends only. He further stated that he had not used marijuana since 2007 and had no intention to do so in the future.

In November 2013, Applicant completed another security clearance application.¹⁰ In response to the relevant questions, he disclosed relevant derogatory information as follows: (1) the 2002 felony possession of marijuana offense mentioned above; and (2) that he had used marijuana from about January 1985 to about December 2010, and some of the use was to treat his serious dental problem.

Applicant provided additional information about his drug-related criminal conduct and marijuana use during the 2013 background investigation.¹¹ He admitted using marijuana from about October 1985 to December 2010. His initial use was in 1985 as a teenager, and he did not use again until about 1994 when he used it at a social event. Between 1994–2002, he smoked marijuana five to six days weekly, typically one to two joints at a time. He stated that he stopped using marijuana after his arrest in 2002, and then remained abstinent until sometime in 2006, when he experienced the serious dental condition, as using marijuana provided relief and the prescribed medications did not. During this time, 2006–2007, he tested positive for marijuana on multiple drug tests, and probation officials twice required him to take drug education or counseling courses. His dental condition continued to worsen during this period and he had additional teeth removed, by a dentist or by himself.¹² A dentist removed his last six remaining teeth in August 2012 due to advanced periodontal disease, and he now has a full set of dentures.¹³

Applicant last used marijuana sometime in 2010, and he stated that he has no intention to use marijuana in the future. He submitted a signed statement of intent to that effect.¹⁴

⁹ Exhibit 3.

¹⁰ Exhibit 1.

¹¹ Exhibit 4.

¹² Tr. 54–56 (Applicant describes his dental problem and how he pulled his own teeth).

¹³ Exhibit F.

¹⁴ Exhibit G.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹⁵ 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.”¹⁶ 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.¹⁷ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁸

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁹ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²⁰ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²¹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²² In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²³ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.²⁴

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

¹⁵ *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).

¹⁶ 484 U.S. at 531.

¹⁷ Directive, ¶ 3.2.

¹⁸ Directive, ¶ 3.2.

¹⁹ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²⁰ Directive, Enclosure 3, ¶ E3.1.14.

²¹ Directive, Enclosure 3, ¶ E3.1.15.

²² Directive, Enclosure 3, ¶ E3.1.15.

²³ *Egan*, 484 U.S. at 531.

²⁴ 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.²⁵ 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 is disqualifying under Guideline H.²⁶ The evidence shows he engaged in drug abuse²⁷ by using marijuana on a periodic basis during a 25-year period beginning in 1985 and ending in 2010. At times his marijuana use was infrequent, at other times it was frequent, and at times he used it as a means to treat a serious dental condition. His marijuana use continued after he submitted his 2008 security clearance application, which should have put him on clear notice that further marijuana use was off limits. Moreover, given his somewhat conflicting or differing accounts reflected in the background investigations, I am not certain that I know the full extent of his marijuana use.

In addition to using marijuana, his drug involvement includes the 2002 incident where he was arrested, charged, and pleaded guilty to a felony drug offense for possession of about 11 pounds of marijuana found in the car he was driving. Adjudication of guilt was deferred by the state court, and he then served community supervision or probation for ten years. He violated the terms of his probation by using marijuana, which was confirmed by multiple positive drug tests.²⁸ As a result, he was twice required to attend drug counseling or treatment sessions. Taken together, the totality of his drug involvement 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.²⁹ I considered both, and they are not sufficient to mitigate the security concern. I reach that conclusion

²⁵ Executive Order 10865, § 7.

²⁶ AG ¶¶ 25(a), (b), and (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.

²⁷ Under AG ¶ 24(b), drug abuse means "the illegal use of a drug or the use of a legal drug in a manner that deviates from approved medical direction."

²⁸ There is no evidence that the state court determined that he violated his probation.

²⁹ AG ¶ 26(a)–(d).

based on the totality of his drug involvement, which is simply too much and far too serious to be mitigated.

Applicant's falsification of his 2008 security clearance application is disqualifying under Guideline E.³⁰ The evidence shows he knowingly and willfully made a deliberately false statement when he stated that his marijuana use was limited to two occasions in 2007 during the last seven years. His statement grossly understated his marijuana use, and he knew then it was false statement. Making a false statement during the security clearance process is serious misconduct, and it is not easily explained away, excused, extenuated, or mitigated. Other than the passage of time and his fuller disclosure of his marijuana use on his 2013 security clearance application, there is little to mitigate the concern. I have considered all of the mitigating conditions under Guideline E, and none, individually or together, are sufficient to mitigate the concern.

Applicant's history of drug involvement along with the falsification of his 2008 security clearance application justify current doubt about his judgment, reliability, trustworthiness, and ability to protect classified information. Indeed, the fact that I am less than certain about the full extent of his marijuana use gives me pause and militates against a favorable decision. In reaching this conclusion, I considered the whole-person concept.³¹ I also weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. The favorable evidence includes Applicant's record of good employment since 2011, which suggests he is on the right track. Nevertheless, 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
Subparagraph 1.d and 1.e:	For Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraphs 2.a and 2.b:	Against Applicant ³²

³⁰ AG ¶ 16(a).

³¹ AG ¶ 2(a)(1)–(9).

³² The allegation in SOR ¶ 2.a is a cross-allegations to the matters alleged in SOR ¶ 1, and it is decided against Applicant under the same rationale without further discussion.

Conclusion

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

Michael H. Leonard
Administrative Judge