



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



In the matter of:)
)
 -----) ISCR Case No. 14-02479
)
 Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

04/24/2015

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for access to classified information. Applicant presented sufficient evidence of reform to mitigate the concern raised by his history of drug abuse consisting of the occasional use of marijuana, including use after being granted a security clearance in 2005. 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 March 26, 2013.¹ After reviewing the application and information gathered during a background investigation, the Department of Defense

¹ Exhibit 1 (for ease of understanding, it will be referred to as a security clearance application or simply an application).

(DOD),² on August 22, 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 his continued 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 in writing on September 12, 2014, he admitted the two allegations involving marijuana use, and he requested a hearing.

The case was assigned to another administrative judge on November 6, 2014, and then reassigned to me on December 15, 2014. The hearing was held as scheduled on January 27, 2015. The hearing transcript (Tr.) was received on February 5, 2015.

Findings of Fact

Applicant is a 31-year-old employee of a major defense contractor. He is seeking to retain a security clearance that was previously granted to him in 2005. His educational background includes a master's degree. He is employed as a financial manager for a particular business unit of the company. He had a summer internship with the company in 2004, and has been a full-time employee since 2005. His 2014 year-end performance review indicates that he consistently exceeds expectations, and his manager could not be more pleased with his performance.⁴

Applicant has been married for about four years, and he and his spouse are expecting their first child later this year. His spouse is employed by the same major defense contractor for the same period of time, and she also works as a financial manager. Together, their annual gross income is about \$200,000. About two years ago in June 2013, they both accepted promotions to management positions, a decision that required them to move from the east coast to the west coast.⁵

A few months before the move, in March 2013, when Applicant was working as a contracts representative, he completed a security clearance application in which he

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 Exhibit B.

⁵ Tr. 43.

disclosed marijuana use.⁶ He reported the following details about his marijuana use: (1) he used marijuana from about September 2001 to January 2013; (2) he described the nature of his use as rare, taking place mostly in college; (3) he admitted using marijuana while possessing a security clearance; and (4) he stated that his usage was rare as it was limited to social or medicinal purposes and it had no effect on his employment.

Applicant provided additional information about his marijuana use during the background investigation in May 2013.⁷ He stated that he smoked marijuana once a week while in college during 2001–2005. He stated that he smoked marijuana one to three times per year from 2005 to January 2013. He stated that he smoked marijuana while attending social events when it was provided by others. He denied ever buying marijuana. He stated that his last use of marijuana took place in January 2013 at a New Year's Eve party.

At the hearing, Applicant provided additional details about his marijuana use as follows: (1) he disclosed his marijuana use during 2001–2005 when he applied for a security clearance in 2005; (2) he explained that he did not use marijuana once a week during 2001–2005, as that statement was an overestimation; (3) he estimated using marijuana 20 to 30 times while in college; (4) he explained that he did not use marijuana one to three times annually during 2005–2013, as that statement was also an overestimation; (5) he estimated using marijuana five to six times during 2005–2013 while in possession of a security clearance; and (6) his last use of marijuana was in January 2013.⁸ He realized that he could no longer use marijuana in 2013 or 2014, and he decided then that his occasional marijuana use was not worth it, he does not need to use it, and he does not intend to use marijuana in the future.⁹

Also at the hearing, Applicant submitted a signed statement of intent not to abuse any drugs in the future, and he further agreed that any such violation will be grounds for automatic revocation of his eligibility.¹⁰ He further stated that since moving to the west coast in 2013, he and his wife have changed their lifestyle, he has not used marijuana, and he no longer associates with drug-using friends and acquaintances on the east coast.¹¹

Applicant's spouse confirmed that her husband's marijuana use during 2005–2013 was a lapse of judgment, it is not something she supports, and it is not

⁶ Exhibit 1.

⁷ Exhibit 2.

⁸ Tr. 50–67.

⁹ Tr. 64–65.

¹⁰ Exhibit A.

¹¹ Tr. 51.

something she expects to continue.¹² She explained that they, as a couple, now recognize that his post-2005 marijuana use was a bad decision and they would think differently, or not make the same decision again, in the future.¹³ She has never seen her husband use marijuana, and she confirmed that her husband has had no contact with the people with whom he smoked marijuana.¹⁴ She also explained that since moving in 2013 and working in management roles, their lifestyle has changed with a greater emphasis on work, and they have developed a new small group of friends with whom they socialize.¹⁵

Law and Policies

It is well-established law that no one has a right to a security clearance.¹⁶ 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.”¹⁷ 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.¹⁸ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁹

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁰ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²¹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate

¹² Tr. 47.

¹³ Tr. 47.

¹⁴ Tr. 37.

¹⁵ Tr. 38.

¹⁶ *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).

¹⁷ 484 U.S. at 531.

¹⁸ Directive, ¶ 3.2.

¹⁹ Directive, ¶ 3.2.

²⁰ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²¹ Directive, Enclosure 3, ¶ E3.1.14.

facts that have been admitted or proven.²² In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²³

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁴ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²⁵

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.²⁶ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

In analyzing this case, I have paid special attention to Applicant's credibility. During the hearing, I had an opportunity to observe his demeanor and evaluate his sincerity, candor, and truthfulness. Applicant answered questions directly and without reservation or equivocation, and I found his testimony to be credible. Any inconsistencies, between his reported marijuana use during his background investigation in May 2013 and his hearing testimony, were explained by Applicant as overestimations. His explanation was reasonable, and I have no concern that he is now understating his marijuana use. Likewise, I found the testimony of Applicant's spouse to be credible, and she was an impressive witness.

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

²² Directive, Enclosure 3, ¶ E3.1.15.

²³ Directive, Enclosure 3, ¶ E3.1.15.

²⁴ *Egan*, 484 U.S. at 531.

²⁵ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²⁶ Executive Order 10865, § 7.

willingness to follow laws, rules, and regulations.²⁷ In analyzing this case, the following disqualifying and mitigating conditions are most pertinent:

AG ¶ 25(a) any drug abuse;²⁸

AG ¶ 25(g) any illegal drug use after being granted a security clearance;
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, both while in college and during his employment years, raises a concern under Guideline H. The undisputed evidence shows he engaged in drug abuse by the occasional use of marijuana from 2001 to January 2013, a 12-year-period. His actions were in violation of federal law, and in violation of his employer's drug-free workplace policy, as is the regular course of business for a large company doing business with the Defense Department. And what's more, his occasional marijuana use, estimated at five to six times, during 2005–2013 took place while Applicant was in possession of a security clearance. Applicant knew or should have known that even occasional marijuana use was taboo and off-limits.

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 two-year period of abstinence based on his last marijuana use in January 2013, (2) his disassociation from his drug-using friends and acquaintances on the east coast, and (3) his signed statement of intent not to engage in drug abuse in the future. In addition, his promotion to a management role as well as being an expectant first-time parent show that he is progressing from a young adult in his 20s to a more mature and responsible adult. Finally, his spouse's knowledge of his past marijuana use, her participation in the hearing, and her support of her husband gives me confidence that Applicant will continue to remain drug free. For all these reasons, I am persuaded and convinced that Applicant's history of occasional marijuana use is safely in the past and will not recur.

²⁷ 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.

²⁸ 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.

In addition to the mitigating conditions under Guideline H, I have considered several additional factors.²⁹ First, Applicant receives credit in mitigation because he voluntarily reported the information about his marijuana use on both his 2005 and 2013 security clearance applications and during background investigations. Second, he receives credit because he was truthful and complete in responding to questions about his marijuana use. And third, he receives credit because he demonstrated positive changes in behavior based on his two-year-period of abstinence from marijuana use and his disassociation from drug-using friends or associates. Although his marijuana use after being granted a security clearance was grievously poor judgment, he has done the things expected of a person who is currently eligible for access to classified information.

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.³⁰ 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
Subparagraphs 1.a and 1.b:	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.

Michael H. Leonard
Administrative Judge

²⁹ AG ¶ 2(e)(1)–(6).

³⁰ AG ¶ 2(a)(1)–(9).