



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-04390
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: E. Shane Holloway, Esquire

February 26, 2008

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on October 16, 2007. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The issues in this case fall under Guideline H for drug involvement and Guideline J for criminal conduct based on two drug-related offenses.

In addition, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all

¹ Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive).

adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.² The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

Applicant replied to the SOR on November 2, 2007, and requested a hearing. The hearing took place as scheduled on January 31, 2008, and the transcript (Tr.) was received on February 11, 2008.

The record was left open until February 8, 2008, to allow Applicant an opportunity to submit an additional documentary exhibit. It was timely submitted and department counsel had no objections to it. The post-hearing matter is marked and admitted as Exhibit F—Affidavit of Applicant. For the reasons discussed below, this case is decided against Applicant.

Findings of Fact

Under Guideline H, the SOR alleges Applicant was arrested, charged, and convicted of drug-related offenses in 2005 and 1988. Under Guideline J, the SOR repeats the two drug-related offenses and adds a driving while intoxicated (DWI) offense to the 1988 incident. In his Answer, Applicant admits all the factual allegations. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 49-year-old employee of a defense contractor. He works as a photo support technician. He has worked for his current employer since November 2002. He has worked in the same field at the same general location since about 1982. He has held a security clearance as an employee of a federal contractor since about 1983.

To retain a security clearance, Applicant completed a security-clearance application in February 2006. In response to the relevant question about alcohol- or drug-related offenses, Applicant disclosed the 1988 and 2005 incidents that form the basis for the SOR allegations. In response to a question about drug use, Applicant denied any illegal use of a controlled substance within the relevant periods.

Concerning the 1988 incident, Applicant admits that he was arrested, charged, and convicted of the misdemeanor offense of possession of marijuana; he was also convicted of DWI. This incident arose when Applicant and his cousin were stopped by police at a drunk-driving checkpoint (Tr. 86–90). Applicant admitted to the police that he had been drinking. When the police searched his car, they found a roach (a marijuana butt) in the ashtray located between the front seats of Applicant's car, which he was driving.

² See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

Concerning the 2005 incident, Applicant admits that he was arrested, charged, and convicted of the misdemeanor offense of possession of drug paraphernalia. This incident arose when Applicant and a group of county jail inmates on a work-release program were stopped by police (Tr. 90–98; Exhibits 2, 3). Applicant was transporting the inmates to the county jail after they worked at a local community center. When the police searched Applicant, they found a box used to smoke marijuana.

With the assistance of counsel, Applicant entered a plea agreement wherein he pleaded guilty to the paraphernalia offense (Exhibit 4). The state court imposed a sentence that included: (1) a fine of \$500 plus court costs of \$310; (2) 180 days in the county jail, all of which was suspended; (3) probation for 24 months until about April 20, 2007; and (4) completion of a court-referral program. The court records indicate that Applicant's guilty plea was a "best interest plea" (Exhibit 4). He completed all court-referral program requirements in December 2005 (Exhibit 4 at 3; Exhibit B). He completed his probation without a violation.

Applicant has taken and passed random drug tests for his employment (Exhibits A, C, and D). He passed a drug screen in May 2002 as well as a pre-employment drug screen in November 2002. He recently passed a random drug screen in July 2007.

In his post-hearing affidavit, Applicant gave his consent for the Defense Department to revoke any security clearance that he may hold if in the future he receives any alcohol- or drug-related charges or fails any drug tests that he might be required to take through his employer (Exhibit F). Also, he consented to not oppose a revocation of the security clearance and waive any rights to a hearing.

Concerning his job performance, Applicant is a knowledgeable photographer who produces work that is both high in quality and quantity (Exhibit E). The site supervisor for the company describes Applicant as a professional and reliable employee. A government employee who has worked with Applicant for 20 years also has praise for Applicant's work abilities. In addition, he has seen nothing to suggest that Applicant has a problem with alcohol or drugs.

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, no one has a right to a security clearance.³ As noted by the Supreme Court in 1988 in the case of *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁴ A favorable decision establishes eligibility of an

³ *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) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.").

⁴ *Egan*, 484 U.S. at 531.

applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁵ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.⁶ 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.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁷ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁸ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁰ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹¹ The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹²

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. 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.¹³ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

⁵ Directive, ¶ 3.2.

⁶ Directive, ¶ 3.2.

⁷ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁸ Directive, Enclosure 3, ¶ E3.1.14.

⁹ Directive, Enclosure 3, ¶ E3.1.15.

¹⁰ Directive, Enclosure 3, ¶ E3.1.15.

¹¹ *Egan*, 484 U.S. at 531.

¹² ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹³ Executive Order 10865, § 7.

Analysis

The two security guidelines will be discussed together because the SOR allegations are factually related or connected to each other. Under Guideline H for drug involvement,¹⁴ the concern is that the “use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.”¹⁵ Under Guideline J for criminal conduct,¹⁶ the concern is that “criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.”¹⁷

Before addressing the disqualifying and mitigating conditions of the security guidelines, it is necessary to decide a key factual dispute, which is Applicant’s culpability or guilt for the two drug-related offenses. Applicant maintains his innocence in this proceeding notwithstanding his convictions in state court. If his explanations are accepted as genuine and true, all that remains is a 20-year-old DWI conviction. If his explanations are viewed as dubious or incredible, the security concerns are self-evident.

For the 1988 incident, Applicant contends that he did not know that the marijuana butt was in his car. He believes that his cousin or another man or both put it in the ashtray when they borrowed his car earlier in the evening.

For the 2005 incident, Applicant contends that he did not possess the paraphernalia with the intent to use it, which is an element of the offense (Exhibit 4 at 6). Instead, he offered an explanation—supported by his son’s testimony—that the item belonged to his son who left it in the truck the previous night. When stopped by the police, Applicant saw the item, knew it didn’t belong in his truck, and put it in his pocket where it was found by the police. This is similar to the explanation he gave the police at the scene when he said he did not know what the box was and disclaimed ownership of it (Exhibit 3 at 4).

Applicant’s innocent explanations for the two drug-related incidents, although not completely far-fetched, are dubious and not credible. It is simply too difficult to believe that Applicant, a security-clearance holder since about 1983, had such bad luck, not once, but twice. Although the 1988 and 2005 incidents are separated in time and are not identical, it is highly improbable that Applicant could be the victim of accidental circumstances on two occasions that resulted in drug-related charges and convictions. In reaching this conclusion, consideration was given to testimony of Applicant’s son who

¹⁴ Revised Guidelines at 17-18 (setting forth the disqualifying and mitigating conditions).

¹⁵ Revised Guidelines at 17.

¹⁶ Revised Guidelines at 21–22 (setting forth the disqualifying and mitigating conditions).

¹⁷ Revised Guidelines at 21.

took the blame for the drug paraphernalia in the 2005 incident. The son's testimony was discounted, however, due to his bias for his father and his own legal troubles (Tr. 78–81).

Turning to the disqualifying conditions, DC 3¹⁸ of Guideline H applies against Applicant based on the two possession offenses. Under Guideline J for criminal conduct, both DC 1¹⁹ and DC 3²⁰ apply based on 1988 and 2005 arrests, charges, and convictions. The totality of the disqualifying information calls into question Applicant's judgment as well as his ability or willingness to comply with laws, rules, and regulations.

All of the mitigating conditions under both guidelines have been considered and none apply in Applicant's favor. Applicant's dubious and incredible hearing testimony militates against any credit in mitigation.

To conclude, I have considered the record evidence as a whole, both favorable and unfavorable, and the record evidence raises doubt about Applicant's suitability for a security clearance. Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept was given due consideration and that analysis does not support a favorable decision.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	Against Applicant
Subparagraphs 1.a–1.b	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraphs 2.a–2.b	Against Applicant

¹⁸ DC 3 is "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia."

¹⁹ DC 1 is "a single serious crime or multiple lesser offenses."

²⁰ DC 3 is "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

Conclusion

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

Michael H. Leonard
Administrative Judge