



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-08994

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

March 6, 2008

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke her 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 11, 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 based on Applicant's illegal drug involvement.

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 adjudications and other determinations where an SOR has been issued on September

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).

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 October 30, 2007, and indicated she did not wish to have a hearing. Her reply or answer consisted of her handwritten responses on the SOR and a one-page letter. Accordingly, the case will be decided based on the written record in lieu of a hearing.

On January 8, 2008, the government submitted its written case consisting of all relevant and material information that could be adduced at a hearing. This so-called file of relevant material (FORM) was mailed to Applicant January 11th and it was received by her January 21st. Applicant did not reply to the FORM within the 30-day period allowed for a reply. The case was assigned to me March 4, 2008. For the reasons discussed below, this case is decided against Applicant.

Procedural Rulings

In its FORM, the government included as an item of documentary evidence a subject interview of Applicant (Exhibit 5). The interview was part of a report of investigation (ROI) prepared by the U.S. Office of Personnel Management. The ROI indicates that the Applicant's subject interview was an unsworn declaration made in May 2007.

The general rule is that a background ROI may not be received and considered by an administrative judge.³ The exception to the general rule is "[a]n ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence."⁴

In past cases, the government has included an ROI in its FORM without an attempt to authenticate it or offer some other method of getting the evidence to the trier of fact (for example, stipulation). The ROI was excluded from consideration in those cases. Here, the government authenticated the ROI through Applicant. In particular, in September 2007, it issued an interrogatory to Applicant asking her to review the ROI and state if it accurately reflected the information she provided during the subject interview (Exhibit 5). Applicant indicated it did not so far as the start date of her marijuana use was off by one month. Otherwise, Applicant had no disagreement with the contents of the ROI. Accordingly, without objections, the ROI is admitted as a business record or a public record or both and it will be considered.

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).

³ See Directive, Enclosure 3, ¶ E3.1.20.

⁴ *Id.*

Findings of Fact

Under Guideline H, the SOR alleges Applicant was involved with marijuana, cocaine, and opium. In her response to the SOR, Applicant admitted all the factual allegations. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 27-year-old employee of a defense contractor. She is seeking to obtain a security clearance from the Defense Department for the first time.

Applicant attended college during 1999–2003. She was awarded a bachelor of arts in international studies in May 2003. From July 2003 to September 2004, she worked as an assistant manager for a business services company. From October 2004 to July 2006, she worked as a legal assistant for a law firm. She commenced her current employment as a cost analyst in July 2006. The record is silent concerning Applicant's job performance as well as her knowledge, skills, and abilities to perform her work.

In December 2006, Applicant completed a security-clearance application (Exhibit 4). In response to the relevant questions, Applicant indicated that (1) she had illegally used controlled substances within the last seven years, and (2) she had been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of controlled substances within the last seven years. In the explanation section, she provided the following information about her illegal drug involvement:

- In 2001–2006, she used marijuana occasionally starting in her sophomore year of college, but she had no intention to use it in the future.
- In 2002–2003, she sold marijuana and often made a profit.
- In 2002, she used cocaine a few times on an experimental basis.
- In 2002, she used opium a few times on an experimental basis.

In her subject interview of May 2007, she confirmed her use of marijuana, cocaine, and opium as detailed above (Exhibit 5). She indicated that she or her house mates purchased all three drugs. Concerning marijuana, she used it five times per week after class during 2001–2003, but not during the volleyball season. After college in 2004, she shared a marijuana cigarette about six times with a coworker and his spouse. And in 2005–2006, she and her house mates shared a marijuana cigarette twice a week. She quit smoking marijuana in May 2006 because it was time to grow up. Also, she stated that she had no intention to use illegal drugs in the future.

In her October 2007 reply to the SOR, she admitted to the allegations of illegal drug involvement. She stated that her past decisions were inexcusable and made without thinking of the future. She characterized her illegal drug involvement as part of her college experience, which “was a rebellious time - a time of self-destructiveness and self-indulgence,” and she acknowledges her decisions and actions were less than wise. Also, she repeated her intention to no longer use illegal 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.⁵ As noted by the Supreme Court in 1988 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.”⁶ A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁷ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.⁸ 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.⁹ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁰ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹¹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹² In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹³ The agency appellate authority has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.¹⁴

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person’s security clearance eligibility, including disqualifying conditions

⁵ *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.”).

⁶ *Egan*, 484 U.S. at 531.

⁷ Directive, ¶ 3.2.

⁸ Directive, ¶ 3.2.

⁹ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁰ Directive, Enclosure 3, ¶ E3.1.14.

¹¹ Directive, Enclosure 3, ¶ E3.1.15.

¹² Directive, Enclosure 3, ¶ E3.1.15.

¹³ *Egan*, 484 U.S. at 531.

¹⁴ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

(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.¹⁵ 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.

Analysis

Under Guideline H for drug involvement,¹⁶ the security concern is that "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."¹⁷ The definition of drug abuse is "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."¹⁸

Based on the record evidence as a whole, the following conditions raise a security concern and may be disqualifying:

- [A]ny drug abuse (see above definition); and
- [I]llegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant's history of illegal drug involvement raises a security concern because it calls into question her judgment, reliability, and trustworthiness. She was, at times, a regular marijuana user smoking it as frequently as five times per week, and she sold it for profit. In addition, her representation that her illegal drug involvement was part of her college experience is not entirely accurate. The record evidence shows that it continued after she finished college in 2003. Indeed, she continued using marijuana until approximately May 2006, a few months before starting her employment with a defense contractor.

The four mitigating conditions under Guideline H have been considered and none apply in Applicant's favor. The evidence in her favor is minimal. Given the dearth of favorable information, the record evidence is insufficient to credit her with mitigation. And the record evidence is too skimpy to conclude that she presented a convincing

¹⁵ Executive Order 10865, § 7.

¹⁶ Revised Guidelines at 17–18 (setting forth the drug involvement disqualifying and mitigating conditions).

¹⁷ Revised Guidelines at 17.

¹⁸ Revised Guidelines at 17.

case in reform and rehabilitation. Certainly, the clearly-consistent standard requires more than self-serving statements made in reply to the SOR to meet the ultimate burden of persuasion, and the evidence in Applicant's favor is not sufficient.

To conclude, Applicant did not present sufficient evidence to explain, extenuate, or mitigate the drug involvement security concern. Applicant did not meet her 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. This case is decided against Applicant.

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:

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| Paragraph 1, Guideline H: | Against Applicant |
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| Subparagraphs 1.a–1.g: | Against Applicant |
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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