



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



In the matter of:)
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SSN: -----) ISCR Case No. 07-13082
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: Gary L. Rigney, Esquire

June 27, 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 January 7, 2008. 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 drug involvement. For the reasons discussed below, this case is decided against Applicant.

In addition to the Executive Order and Directive, 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

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).

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, 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's Answer to the SOR was received on January 28, 2008, and he requested a hearing. The case was assigned to me on April 10, 2008. The hearing took place as scheduled on May 16, 2008. The transcript (Tr.) was received on June 2, 2008.

Findings of Fact

Applicant admitted all the factual allegations in SOR ¶¶ 1.a–1.g. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 24-year-old employee of a federal contractor. He has worked as a software engineer for his current employer since June 2006. He married in August 2006, and he and his wife have no children. He is seeking to obtain an industrial security clearance for the first time.

He was a college student from August 2001 to May 2006, when he earned a bachelor's degree in computer engineering. He engaged in drug abuse while in college by using both illegal and prescription drugs. He admits a history of drug involvement from about September 2000 to December 2006 as follows:

- He used marijuana about 200 times from September 2000 to December 2006;
- He purchased marijuana;
- He used Lortab, without a valid prescription, about 10 times in 2002;
- He used Klonopin, without a valid prescription, about 5 times in 2002;
- He used Zanex, without a valid prescription, about 5 times in 2002;
- He used LSD about 2 times in 2002; and
- He used Ecstasy about 1 time in 2002.

He disclosed, in detail, his drug involvement when he completed a security-clearance application in March 2007 (Exhibit 1–response to Question 24a). He provided the following comments about his marijuana use:

Though I continued to use this drug occasionally throughout my college career, I only allowed myself to do so given that I was able to maintain my academic record. Given that this was somewhat of a past time with many of my college friends with whom I still interact, I continued to use it a few times after college. But, as with the other listed substances, as of my last

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).

recorded date of use, I will have no more such contact with this, or any other controlled substance (Exhibit 1 at 8).

In addition to the security-clearance application, he confirmed and provided additional information about his drug involvement in his background interview of August 2007 (Exhibit 2).

In his hearing testimony, he stated that he no longer intends to abuse any drugs or controlled substances. To that end, he took three drug tests in February and May 2008, the results of which were negative (Exhibit C). In addition to the drug tests, Applicant submitted two affidavits in which he declared an unequivocal intent to abstain from the abuse of any drugs or controlled substances in the future (Exhibits A and B). Also, his affidavits include a clause in which he consented to automatic revocation of a security clearance for any violation.

He acknowledged that his employer has a drug-free policy, and he was required to pass a drug test for his employment (Tr. 47–48). Also, he acknowledged that his marijuana use in December 2006, six months after starting work, was contrary to his employer's policy (Tr. 54). He characterized the December 2006 marijuana use as an irresponsible choice and a lapse in judgment.

In December 2006, he used marijuana, in the presence of his wife, at a holiday party with friends. His marijuana use was very upsetting to his wife, and she described his behavior as stupid (Tr. 117). Since the incident, she has communicated her attitude that drug use is not part of their marriage, she believes he understands her position, and she believes he has made a commitment to her in this regard (Tr. 117–118).

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 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

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.

⁵ Directive, ¶ 3.2.

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.

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

1. *The Drug Involvement Security Concern*

Under Guideline H for drug involvement,¹⁴ 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.”¹⁵ 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.”¹⁶

Based on the record evidence as a whole, the following conditions raise a security concern:

- Any drug abuse (see above definition); and
- Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.¹⁷

Applicant's history of drug involvement raises security concerns because it calls into question his judgment, reliability, trustworthiness, and willingness to obey the law. To start, however, the non-marijuana drug abuse took place but a few times several years ago in 2002 when he was a young college student. On that basis, these matters are decided for Applicant.

Marijuana use was the majority of his drug involvement. He used it about 200 times, which goes beyond experimentation or youthful indiscretion. Using marijuana about 200 times during a six-year period is fairly described as regular use. Aggravating the situation is his marijuana use in December 2006, which took place a few months after he started his employment in the defense industry. He used grossly poor judgment in doing so.

The four MC under Guideline H have been considered and one of the four applies in Applicant's favor. Applicant is credited with demonstrating an intent not to abuse drugs in the future.¹⁸ His intent is demonstrated by abstinence from drug abuse from December 2006 to May 16, 2008 (a period of about 17 months), and his affidavits (Exhibits A and B).

¹⁴ Revised Guidelines at 17–18 (setting forth the security concern as well as the disqualifying and mitigating conditions).

¹⁵ Revised Guidelines at 17.

¹⁶ Revised Guidelines at 17.

¹⁷ Revised Guidelines at 17.

¹⁸ Revised Guidelines at 18.

2. The Whole-Person Concept

Under the Directive, an administrative judge must evaluate an applicant's eligibility for access to classified information by considering the totality of an applicant's conduct and all the relevant facts and circumstances. This analysis includes nine adjudicative factors:

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.¹⁹

I considered all nine factors as well as the favorable testimony from Applicant's several witnesses. In particular, for the second factor, I considered the circumstance that the vast majority of Applicant's drug abuse took place while he was a college student and that is no longer the case. He is now a young adult with far more responsibilities, to include his spouse and his job. To that end, he appeared clean cut, appropriate, and serious at the hearing, in contrast to his appearance when he was abusing drugs in college (Exhibit D). And for the fourth factor, I considered Applicant's age and maturity and conclude that, for the most part, he was a young-and-dumb college student when he engaged in the drug abuse (this is especially so for the non-marijuana drug abuse in 2002).

In addition, I considered the circumstance that Applicant disclosed his drug abuse when he completed his security-clearance application and in response to interrogatories. He deserves credit for reporting this adverse information, and it comes into play for the eighth and ninth factors. His disclosure of his drug abuse reduces the potential for pressure, coercion, exploitation, or duress. Likewise, his disclosure, when combined with the other favorable evidence, reduces the likelihood of continuation or recurrence of drug abuse.

This case presents both unfavorable and favorable evidence, which requires thoughtful balancing in light of the clearly-consistent standard. I have considered the totality of facts and circumstances and conclude that the favorable evidence is not persuasive. His marijuana use during a six-year period is too frequent (200 times) and too recent (about 17 months ago) to be mitigated. Although he signed affidavits expressing an intent not to abuse any drugs in the future, it is too soon to determine if he has made a permanent change in his behavior. Based on the evidence, it is just as likely that his stated intent not to abuse drugs is situational behavior in response to this proceeding, much like his marijuana use in December 2006 was situational behavior in

¹⁹ Revised Guidelines at 1–2.

response to the holiday party. His corrective actions to date are noteworthy, but are not enough to overcome the poor judgment he demonstrated by his regular marijuana use during several years, especially his marijuana use after he started working in the defense industry in 2006. What is missing here is a long-term record of abstinence that would be persuasive evidence of his intent to permanently change his behavior.

Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the drug involvement security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance 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:

Paragraph 1, Guideline H:	Against Applicant
Subparagraphs 1.a–1.b:	Against Applicant
Subparagraphs 1.c–g:	For Applicant

Conclusion

In light of all of the circumstances, 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