



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



In the matter of:)	
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SSN: -----)	ISCR Case No. 07-14490
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert E. Coacher, Esquire, Department Counsel
For Applicant: James E. Watson, Personal Representative

July 14, 2009

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 February 17, 2009, and then amended it on April 15, 2009. The amendment to the SOR adds a security guideline as SOR ¶ 2, and in SOR ¶ 2.a it refers to the information previously alleged in SOR ¶¶ 1.a–1.d. The

¹ This case is adjudicated under 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). In addition to the Executive Order and Directive, this case is adjudicated 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, 2006, or thereafter. The Directive is pending revision or amendment.

SOR, as amended, is equivalent to an administrative complaint and it details the factual basis for the action. The issues here fall under Guideline E for personal conduct and Guideline H for drug involvement.

Applicant replied to the SOR on March 17, 2009, and then to the amendment on May 1, 2009. She requested a hearing, which took place on June 3, 2009. The transcript (Tr.) was received on June 11, 2009. For the reasons discussed below, this case is decided against Applicant.

Findings of Fact

Applicant replied to the SOR, as amended, as follows: (1) she admitted a 1983 state criminal conviction for theft of property of a value of more than \$100 but less than \$250; (2) she admitted a 1992 state criminal conviction for possession of cocaine; (3) she admitted using cocaine and marijuana in May 1992; and (4) she admitted termination from employment due to failing a random drug test in April 2006 when she tested positive for cocaine, but she maintained it was due to a false positive. 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 federal contractor. Hired in 2007 to work as a custodian, she was recently promoted to a material specialist (Exhibit D). She has lived in the same community for 45 years and at the same address since 1988. She has been married to her current spouse since 1997. She is seeking to obtain a security clearance for her employment with a company engaged in defense contracting.

In March 1983, a state court convicted Applicant of theft of property of more than \$100 but less than \$250, which stemmed from her November 1982 arrest for second-degree burglary, theft over \$1,000, and theft over \$100. She was sentenced to probation for two years. In September 1984, the state court set aside the conviction and judgment, released her from all penalties, and restored her civil rights under state law (Exhibit A).²

In September 1992, a state court convicted Applicant of possession of narcotics (cocaine), which stemmed from her May 1992 arrest for possession of narcotics and driving under the influence of alcohol. She had approximately 132 milligrams of cocaine in her possession (Exhibit 3 at 2). She was sentenced to probation for two years and ordered to pay a sizable fine. Besides alcohol, Applicant had used cocaine and marijuana before her arrest. She completed her probation, and in March 2000 the state court set aside the conviction and judgment, released her from all penalties, and restored her civil rights under state law (Exhibit B).

Applicant was working as a maintenance technician in April 2006 when she was required to submit to random drug testing (Exhibits 2 and C). She tested positive for

² Exhibit 5 is a copy of the state statute addressing setting aside a judgment of a convicted person.

cocaine metabolites. Based on the positive test result, her employer terminated Applicant effective April 12, 2006, due to violating company policy. In turn, Applicant informed the company that she doubted the result and believed it was a false positive based on over-the-counter medications she was then taking. In a letter dated April 25, 2006, the company's human-resources manager informed Applicant of the following: (1) that the termination decision stood; (2) that Applicant failed to inform the company or the sample-collection provider in advance of any medications that could result in a positive drug test; and (3) a certified scientist/toxicologist at the lab reviewed the list of medicines Applicant claimed she was taking and confirmed that they would not cause a positive test result. Thereafter, Applicant did not contest the matter because she did not have the means to do so. Instead, she elected to move on with her life. After a short period of unemployment and a job working as kitchen help, she began her current employment about one year later.

Before starting her new job, she completed a security-clearance application in March 2007 (Exhibit 1). In it, she disclosed her record of criminal conduct as well as her job termination due to the positive drug test. Also, she noted that her request for a second test was denied, and she asserted that the positive drug test was due to using over-the-counter drugs. In addition to the security-clearance application, Applicant was required to undergo pre-employment drug screening, and the results were negative.

Applicant described herself as a recovering alcoholic (Tr. at 60). She maintains she has not used illegal drugs since May 1992, and she has abstained from alcohol since August 1995 (Exhibit 3 at 4). Alcohol was her chief problem, and her illegal drug use stemmed from poor judgment when she was using alcohol.

Applicant presented several letters from individuals vouching for her good character (Exhibits E, F, and G).

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 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

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.

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.¹³ 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.¹⁴ 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 The nine factors of the whole-person concept are set forth in the Revised Guidelines at 1–2.

¹⁴ Executive Order 10865, § 7.

Analysis

Except for the 1983 theft conviction in SOR ¶ 1.e—which is decided for Applicant due to passage of time without recurrence—the SOR allegations are the same under each guideline. But before addressing the security concerns under the guidelines, it is necessary to decide a threshold issue.

The central or overarching issue is Applicant's claim that her 2006 positive drug test was due to a false positive. After careful review of the documentary evidence and having had an opportunity to listen to Applicant's testimony and observe her demeanor, that claim is decided against Applicant due to lack of proof. She did not present credible and reliable evidence to rebut or explain the 2006 positive drug test. For example, she did not present evidence from a certified scientist, toxicologist, or other qualified individual to support her false-positive claim. Likewise, she did not present persuasive evidence that her sample's collection or testing or both were faulty. Also, her false-positive claim is undermined by her admitted past possession and use of cocaine.

Taken together, Applicant's use of marijuana and cocaine, her drug-related criminal conduct, and her job termination due to testing positive for cocaine raise security concerns under both guidelines and call into question her judgment, reliability, and trustworthiness. The particular concerns are set forth below.

1. *The Personal Conduct Security Concern*

Personal conduct under Guideline E¹⁵ includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. In particular, a security concern may arise due to:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.¹⁶

The pertinent DC under the guideline is as follows:

Credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability,

¹⁵ Revised Guidelines at 10–12 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁶ Revised Guidelines at 10.

lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.¹⁷

This DC applies against Applicant because her use of marijuana and cocaine, her drug-related criminal conduct, and her job termination due to testing positive for cocaine, as alleged in SOR ¶¶ 1.a–1.d, support a whole-person concept of questionable judgment, untrustworthiness, unreliability, and unwillingness to comply with rules and regulations. I reviewed and considered the MC under the guideline, but conclude that none apply. Specifically, given that I rejected her false-positive claim as an explanation for the 2006 positive drug test, I cannot accept as true Applicant’s contention that she no longer engages in drug abuse.¹⁸ Accordingly, Guideline E is decided against Applicant.

2. The Drug Involvement Security Concern

Under Guideline H for drug involvement,¹⁹ 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.”²⁰ 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.”²¹

The pertinent DCs are drug abuse, testing positive for illegal drug use, and illegal drug possession.²² I reviewed and considered the MC under the guideline, but conclude that none apply. Specifically, given that I rejected her false-positive claim as an explanation for the 2006 positive drug test, I cannot accept as true Applicant’s contention that she no longer engages in drug abuse.²³ Accordingly, Guideline H is decided against Applicant.

¹⁷ Revised Guidelines at 10.

¹⁸ Under the whole-person concept, it is proper to consider, among other things, (1) the presence or absence of rehabilitation and other permanent behavioral changes, and (2) the likelihood of continuation or recurrence.

¹⁹ Revised Guidelines at 17–18 (setting forth the security concern as well as the disqualifying and mitigating conditions).

²⁰ Revised Guidelines at 17.

²¹ Revised Guidelines at 17.

²² Revised Guidelines at 17.

²³ Under the whole-person concept, it is proper to consider, among other things, (1) the presence or absence of rehabilitation and other permanent behavioral changes, and (2) the likelihood of continuation or recurrence.

To conclude, Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns under Guidelines E and H. Applicant did not meet her ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept (to include her favorable character evidence) was given due consideration and it 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:

Paragraph 1, Guideline E:	Against Applicant
Subparagraphs 1.a–1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Paragraph 2, Guideline H:	Against Applicant
Subparagraph 2.a:	Against 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