



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



In the matter of:)
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SSN: -----) ISCR Case No. 07-15624
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro Se*

June 23, 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 February 13, 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 illegal drug involvement (marijuana) and Guideline E for personal conduct. 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.

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).

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.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 March 13, 2008, and he requested a hearing. The case was assigned to me on April 10, 2008. The hearing took place as scheduled on May 15, 2008. The transcript (Tr.) was received on May 27, 2008.

Procedural Rulings

At hearing, the government moved to amend the SOR in two ways. First, it was amended to correct a typographical error by changing SOR ¶ 1.f to ¶ 1.e, thereby eliminating ¶ 1.f (Tr. 14–15). Second, it was amended to conform to the evidence of Applicant's recent marijuana use by changing SOR ¶ 1.a to read as follows: "You used marijuana from January 2001 to March 6, 2008" (Tr. 116–117). Applicant had no objections and the motions were granted.

Findings of Fact

Under Guideline H for drug involvement, the SOR, as amended, alleges: (1) Applicant used marijuana from January 2001 to about March 6, 2008; (2) that in a March 2007 interview he admitted that he currently used marijuana approximately five to seven times per week; (3) that he currently used marijuana for anxiety and planned on continuing its use; (4) that he occasionally bought marijuana; and (5) that his marijuana use took place after he was granted a security clearance in February 1992. Under Guideline E for personal conduct, the SOR alleges: (1) Applicant used marijuana after being granted a security clearance; and (2) Applicant falsified material facts on a July 2001 security-clearance application by failing to disclose his marijuana use in January 2001 as alleged under Guideline H.

In response to the SOR, Applicant admitted, with reservations, the factual allegations under Guideline H. He averred that the January 2001 start date of his marijuana use was an estimate and that he believed his use started after October 2001. Also, he stated that he no longer used or purchased marijuana and did not intend to do so in the future. Under Guideline E, he admitted using marijuana while holding a security clearance, but he denied the falsification allegation. Based on the record evidence as a whole, the following facts are established by substantial evidence.

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).

Applicant is a 48-year-old employee of a federal contractor. He has lived and worked in the same community since 1988. He has worked for his current employer since December 1991. He worked for another federal contractor from July 1988 to December 1991. His current position or job title is senior project scientist. He has held a security clearance since at least 1992. He is seeking to upgrade the security clearance from secret to the top-secret level (Tr. 6).

Applicant has been married since 1983. He and his wife have four children between the ages of 15 and 19. His educational background includes a Ph.D. in physics awarded in 1988.

To retain a security clearance, Applicant completed a security-clearance application in July 2001 (Exhibit 3). In response to three questions about illegal drugs (Questions 27, 28, and 29), Applicant replied in the negative thereby denying any illegal drug involvement.

To upgrade to a top-secret security clearance, Applicant completed a security-clearance application in December 2006 (Exhibit 1). In response to three questions about illegal drugs (Questions 24a, 24b, and 24c), Applicant admitted illegal drug use within the last seven years, he admitted using illegal drugs while possessing a security clearance, and he denied illegal drug trafficking. In explanation, he described his drug use as the occasional use of marijuana from January 2001 to December 2006. He stated that the from date was estimated, and that he occasionally used marijuana and had for the past several years.

He confirmed and provided additional information about his marijuana use in his background interview of March 2007 (Exhibit 2 at 8–11). Among other things, he stated the following about his marijuana involvement:

- He admitted that he currently used marijuana on a regular basis, about five to seven times per week.
- He admitted that his most recent usage took place the day before the interview.
- He admitted that he intended to continue using marijuana.

Several months later in November 2007, Applicant replied to interrogatories issued to him by the government (Exhibit 2). He admitted using marijuana (“cannabis”) five to seven times per week, he admitted using marijuana as recently as November 19, 2007, and he stated that his intentions for future use of marijuana were unknown. In addition, he explained his marijuana use while possessing a security clearance as follows:

My use of cannabis came about initially due to anxiety issues. I briefly investigated standard treatments for anxiety and they were ineffectual and had undesired side effects. However, the use of cannabis resolved the anxiety problems I was having and did so with minimal side effects. I have

continued its use due to both its resolving of my anxiety issues and the lack of negative side effects (Exhibit 2 at 5).

In his hearing testimony, Applicant explained that he noticed he was becoming more and more on edge in the early 2000s (Tr. 53). His anxiety was causing difficulties in his marriage and he decided to consult an physician in April 2001 (Tr. 54; Exhibit B). He was prescribed a medicine, took it for a brief period, and found the negative side effects unacceptable as it interfered with marital relations. He was uncomfortable discussing that aspect with his doctor and therefore did not disclose the negative side effects.

His symptoms continued and became worse. Applicant had used marijuana when he was a college student and thought it might help. He obtained some, used it, and experienced immediate relief, characterizing it as “a miracle drug” (Tr. 61). He recalls beginning to use marijuana in about October or November 2001, and he ties that date to an October 2001 visit to his doctor for a comprehensive physical examination (Tr. 98; Exhibit B). When he began using marijuana, he did not intend for it to be permanent, but he ended up using the drug frequently, although rarely becoming impaired, for an extended period (Tr. 62). He used marijuana for three reasons: (1) it provided effective and reliable relief for his anxiety and depression; (2) he did not fully understand or appreciate that marijuana use was considered a serious matter by the federal government; and (3) he became complacent (using marijuana was easier than changing), and he remained concerned about the negative side effects of standard treatment (Tr. 63–65).

Under cross-examination, he acknowledged having a security clearance since at least 1992 if not 1988 when he began his first job (Tr. 70). He admitted that he has abstained from marijuana since about March 6, 2008, which was the day he returned to his doctor and reported his marijuana use as an alternative treatment (Tr. 74–75; Exhibit B). Also, he admitted continuing to use marijuana after receiving the SOR in February 2008, and he admitted using it a few days before he filed his Answer in March 2008 (Tr. 75). And he agreed that his description of his marijuana use as occasional—in his December 2006 security-clearance application—was “somewhat of a mischaracterization” (Tr. 88–89).

His most current usage took place in 2007 and 2008. He used marijuana during all of 2007, never less than once a week and at most seven times a week (Tr. 100–101). For 2008, his usage continued from January until about March 6 at a frequency of about five times a week (Tr. 101–102).

He is currently under the care of his doctor who prescribed an anxiety drug and an antidepressant drug for Applicant (Tr. 103–105; Exhibit B). The combined effect of the medicines has been effective, and Applicant has obtained relief without the negative side effect previously experienced. He has had no desire to use marijuana since the end of March 2008, and he no longer has a desire to use it (Tr. 106, 113). To that end, in April 2008, he underwent a drug screen and the results were negative for all

substances of abuse, including marijuana (Tr. 112–113; Exhibit B). In addition to the drug screening, Applicant submitted a signed statement, dated March 10, 2008, wherein he declared an intent to never use illegal drugs of any sort in the future, and the statement included a clause where he consented to automatic revocation of a security clearance for any violation (Exhibit G).

Professionally, Applicant is a well-regarded employee. A senior vice president for the company verified Applicant’s good employment record dating back to 1991 (Tr. 32–45; Exhibit A). The vice president described Applicant as a person of integrity with outstanding job performance, and he has no reservations about Applicant’s trustworthiness (Tr. 36–37). In addition, Applicant submitted four letters of character reference from longtime colleagues who view Applicant as a highly capable scientist as well as a person of good character and trustworthiness (Exhibit E).

Other than his marijuana use, Applicant appears to be a law-abiding citizen. He submitted a driver’s license abstract to verify that he has no convictions (Exhibit F).

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 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

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.

⁶ Directive, ¶ 3.2.

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

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.

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

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.

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

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);
- Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- Any illegal drug use after being granted a security clearance.¹⁷

Applicant’s history of illegal drug involvement raises security concerns because it calls into question his judgment, reliability, trustworthiness, and willingness to obey the law. Beginning in October or November 2001, he used marijuana to self-medicate his anxiety and depression. He obtained the marijuana by buying it, and in doing so he associated himself with a drug dealer. He used marijuana, typically at his home, on a regular and frequent basis for several years until about March 6, 2008. His usage took place while possessing a security clearance. These circumstances show that Applicant used grossly poor judgment for several years.

The four mitigating conditions under Guideline H have been considered and none apply in Applicant’s favor. The evidence in his favor is minimal, as his use of marijuana is too frequent and too recent to be mitigated. Although he signed a statement of intent not to abuse any drugs in the future, he did so a few days after his last use of marijuana on about March 6, 2008. It is too soon to determine how he will progress and if his efforts will result in a permanent change in his behavior.

In addition, I considered Applicant’s motivation to use marijuana was an effort to treat his conditions without the negative side effect he experienced. His desire to avoid the negative side effect is completely understandable. But his chosen course of action was wrongheaded and illegal. A reasonable person in the same or similar circumstances would have returned to his physician and sought further assistance. Given his age, education, and experience, Applicant should have taken that course of action in 2001 instead of in 2008.

Applicant is now under the care of his doctor who is treating Applicant with success using prescribed medicines. Applicant has agreed to this course of treatment and has abstained from using marijuana since beginning treatment on March 6, 2008. Applicant receives credit for doing so, but it is insufficient to mitigate the security concerns. His recent corrective actions amount to the first step toward reestablishing his

¹⁵ Revised Guidelines at 17.

¹⁶ Revised Guidelines at 17.

¹⁷ Revised Guidelines at 17.

record as a law-abiding citizen, and his actions are not a substitute for an established track record of reform and rehabilitation. In short, his actions are insufficient to overcome several years of grossly poor judgment. Accordingly, Guideline H is decided against Applicant.

2. *The Personal Conduct Security Concern*

Personal conduct under Guideline E¹⁸ 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.¹⁹

A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

As alleged in SOR ¶ 2.b, the issue here is the truthfulness of Applicant's answer to Question 27 in his July 2001 security-clearance application. He denies that his negative response to Question 27 was intentionally false because his marijuana use did not begin until October or November 2001, not January 2001, as he estimated in the 2006 security-clearance application (Exhibit 1).

His contentions and explanations are credible. The time line of events establishes that his drug abuse started in late 2001 as opposed to January 2001. Indeed, Applicant stated that the January 2001 start date was an estimate when he reported his drug use (Exhibit 1). In addition, the time line is generally corroborated by the medical records and his wife's recollection of events (Exhibits B and E). Based on the record evidence as a whole, Applicant has successfully rebutted the falsification allegation.

In addition to the falsification allegation, SOR ¶ 2.a alleged the circumstance that Applicant used marijuana after being granted a security clearance. This allegation is redundant with and repetitive of the facts alleged in SOR ¶ 1.e. This circumstance was adequately covered under Guideline H—indeed, a specific DC applies to this

¹⁸ Revised Guidelines at 10–12 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁹ Revised Guidelines at 10.

circumstance—and I gave this circumstance substantial weight. Additional discussion under Guideline E would add little to the analysis, and it will make no difference in the ultimate outcome of the case. Accordingly, Guideline E is decided for Applicant.

3. *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.²⁰

I considered these nine factors, as well as Applicant's good employment record and the circumstance that Applicant voluntarily reported his marijuana involvement when he completed his security-clearance application in 2006. He deserves credit for coming forward with this adverse information. But the credit is somewhat reduced because Applicant understated or minimized his drug use when he described himself as an occasional user of marijuana, a description that was a mischaracterization (Tr. 88-89).

A core value or principle of the industrial security clearance program is that the government must have confidence that those people with access to classified information can be relied on to exercise good judgment. Based on the record evidence, Applicant remains under a cloud of doubt due to his history of marijuana involvement while possessing a security clearance, which ended a few months ago. Without an established track record of reform and rehabilitation, the record evidence is not sufficient 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:

²⁰ Revised Guidelines at 1–2.

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

Paragraph 2, Guideline E:	For Applicant
Subparagraphs 2.a–2.b:	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