



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



In the matter of:)
)
-----) ISCR Case No. 08-05791
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro Se*

June 22, 2009

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, DoD Directive, and Revised Guidelines,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on November 14, 2008. The SOR is equivalent to an administrative complaint and it details the factual basis for 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 also 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. The Revised Guidelines apply here because the SOR is dated after the effective date.

action. The issues in this case fall under Guideline H for drug involvement, Guideline G for alcohol consumption, Guideline J for criminal conduct, and Guideline E for personal conduct.

Applicant's four-page response to the SOR is dated December 5, 2008, and he elected a decision without a hearing. Accordingly, the case will be decided based on the written record in lieu of a hearing.

On January 21, 2009, 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)² was mailed to Applicant and received by him on January 28, 2009. He did not submit a documentary response to the FORM within the allowed 30-day period. The case was assigned to me May 1, 2009. For the reasons discussed below, this case is decided against Applicant.

Findings of Fact

Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 26-year-old employee of a federal contractor. He graduated from high school in 2002 and thereafter entered college. He appears to have completed a joint-degree program as he was awarded both a BSBA and MBA in May 2007. He began his current employment as a cost-schedule analyst for a major defense contractor in June 2007. He has not married and has no children.

Applicant admitted a history of drug abuse. He used marijuana with varying frequency during the period January 1998 to March 2007. He estimates using marijuana approximately 100 times. He also purchased marijuana a number of times during the same period. In addition to marijuana use, he used the following illegal drugs: (1) ecstasy about three times during 2006–2007; (2) mushrooms about two times during 2006–2007; (3) cocaine about three times during 2004–2006; and (4) methamphetamine once in 2001. His most recent illegal drug use was in 2007 when he used ecstasy in about August 2007, marijuana in about March 2007, and mushrooms in January 2007 (Exhibit 6 at 4–5). In 2003, he was stopped by the police for speeding and was found to be in possession of marijuana. Arrested for driving under the influence of both alcohol and drugs, he later pleaded guilty to driving while ability impaired (DWA).

Applicant admitted a history of excessive alcohol consumption since about 1998. His history includes two arrests and convictions for minor in possession of alcohol and the DWA offense mentioned above. In addition, he received treatment from a behavioral healthcare facility during 2000–2002 for a condition diagnosed as alcohol abuse. The treatment was not continuous, as he was enrolled twice in two different

² The government's brief includes several attachments referred to as items. They are referred to as exhibits herein.

programs for different durations. His history includes binge drinking as recently as July 2008 when he drank 12 beers and 2 mixed drinks during a 12-hour period at a daylong party (Exhibit 6 at 2).

Applicant admitted a history of criminal conduct. It consists mainly of his drug-related conduct (use and possession of illegal drugs) and alcohol-related offenses mentioned above. In addition to those matters, he was arrested for the felony offense of burglary in 2001. He accepted a plea bargain wherein he pleaded guilty and was sentenced to probation for two years, community service for 80 hours, house arrest for one month, and he was required to undergo a mental-health evaluation. This incident stemmed from Applicant's decision to engage in self-help by entering a home and stealing property from a person who had stolen a stereo system from his auto.

Applicant admitted a history of rule violations. In total, he has had eight traffic violations (e.g., speeding) during the period 2001–2008. In addition, he was fired from his employment with Walmart when he violated a store policy by pushing too many carts at once (the maximum was six and he had ten).

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 and retention of any existing security clearance.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

The SOR here alleges four security guidelines, which are described below.

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." 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."¹⁵

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).

¹⁵ Revised Guidelines at 17.

Under Guideline G for alcohol consumption,¹⁶ the security concern is that “excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness.”

Under Guideline J for criminal conduct,¹⁷ the security 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.”

Under Guideline E for personal conduct,¹⁸ the security concern addresses “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.”

Based on the record evidence as a whole, this case raises multiple security concerns. For example, the disqualifying information includes the following: (1) a history of illegal drug abuse starting in about 1998 and ending in about in 2007; (2) a history of excessive consumption of alcohol, to include alcohol-related incidents away from work and binge consumption; (3) a history of criminal conduct, to include a single serious crime and multiple lesser offenses; and (4) a history of questionable personal conduct as shown by the multiple traffic violations establishing a pattern of unwillingness to comply with rules or regulations. Aggravating the situation is that Applicant’s use of ecstasy in August 2007 occurred but a few months after he began working for his employer, a major defense contractor, which presumably has a drug-free workforce policy as all major defense contractors do.

The various mitigating conditions under the four guidelines have been reviewed and considered in light of the record evidence as a whole, and the evidence is not sufficient to mitigate and overcome the security concerns. For Guideline H, the evidence is insufficient due to the length of Applicant’s drug abuse (1998 to 2007), the frequency of his drug abuse (using marijuana about 100 times), and the recency of his drug abuse (as recently as August 2007). For Guideline G, the evidence is insufficient because Applicant continues to drink alcohol to excess as evidenced by his July 2008 binge-drinking episode when he drank 12 beers and 2 mixed drinks at a party. For Guideline J, the evidence is insufficient because, given that Applicant continues to drink alcohol

¹⁶ Revised Guidelines at 15–16 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁷ Revised Guidelines at 21–22 (setting forth the security concern as well as the disqualifying and mitigating conditions).

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

to excess, additional alcohol-related criminal conduct cannot be ruled out. In reaching this conclusion on Guideline J, I took into account that some of his criminal conduct took place when he as a juvenile (under the age of 18). For Guideline E, the evidence is insufficient as well. The multiple traffic offenses, the most recent of which took place in 2008, standing alone are not too serious. But when combined with the other derogatory evidence in the case, the evidence as a whole paints a picture of a 26-year-old man who has demonstrated a long-term pattern of questionable judgment, untrustworthiness, and unreliability. These circumstances raise questions and doubts about his suitability for access to classified information.

Under the whole-person concept,¹⁹ an administrative judge must evaluate a person's eligibility for a security clearance by considering the totality of the person's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed in the Revised Guidelines as follows: (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) 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.

After weighing the record evidence as a whole and giving it due consideration under the whole-person concept, Applicant did not present sufficient evidence to explain, extenuate, or mitigate the security concerns. At this point in time, it is simply too soon to tell if Applicant's history of misbehavior involving drug abuse, alcohol abuse, criminal conduct, and traffic offenses is a thing of the past or if his history is a harbinger of things to come. 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 section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	Against Applicant
Subparagraphs 1.a–1.g:	Against Applicant
Paragraph 2, Guideline G:	Against Applicant
Subparagraphs 2.a, c–f:	Against Applicant
Subparagraph 2.b:	For Applicant ²⁰

¹⁹ Revised Guidelines at 1–2.

²⁰ This allegation is decided for Applicant because taking several alcohol-related classes does not raise a DC under the guideline.

Paragraph 3, Guideline J: Subparagraphs 3a.–3c:	Against Applicant Against Applicant
Paragraph 4, Guideline E: Subparagraphs 4.a–4.g: Subparagraph 4.h: Subparagraphs i–j:	Against Applicant Against Applicant For Applicant ²¹ Against Applicant

Conclusion

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

Michael H. Leonard
Administrative Judge

²¹ This allegation is decided for Applicant because I cannot hold it against him that he pushed too many carts at Walmart when he was 18 years old.