



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



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| In the matter of: |) | |
| |) | |
| ----- |) | ISCR Case No. 08-06610 |
| SSN: ----- |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: *Pro Se*

June 29, 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 February 20, 2009. 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 and Guideline G for alcohol consumption.

Applicant's one-page response to the SOR is dated February 25, 2009. He admitted all the allegations as set forth in SOR ¶¶ 1.a–1.x and 2.a–2.h. He also stated that he did not want a hearing. Accordingly, the case will be decided based on the written record in lieu of a hearing.

On April 16, 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 April 22, 2009. He did not submit a documentary response to the FORM within the allowed 30-day period. The case was assigned to me on June 18, 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 51-year-old employee of a federal contractor. In 1979, he earned a BS in mathematics and a BS in electrical engineering from an institute of technology. He began his current employment as an engineer for a company in September 2003. He is divorced and has a daughter (born in 1985), a son (born in 1987), and a stepdaughter (born in 1977).

Applicant admitted a history of drug abuse. He used cocaine and crack cocaine, sometimes daily, for about 28 years (1977 to 2005). He used marijuana for about 31 years (1971 to 2002). And he used a variety of other illegal drugs or misused prescription drugs with varying frequency during the period 2000–2002. He was diagnosed with polysubstance dependency (crack, alcohol, XTC, etc.) and polysubstance abuse (heroin, amphetamines, tranquilizers, ketamine, nitrous oxide, marijuana) in 2002 (Exhibit 7). He was fired from his job as an engineer in 2001 due to job performance and attendance issues related to his use of drugs. Also in 2001, he was arrested and charged with possession of cannabis and possession of drug paraphernalia, to which he pleaded no contest and was placed on probation for 12 months. He received treatment for his drug usage in 2002 and again in 2004–2005. He had two accidental drug overdoses and was taken to the hospital in 2004. He used cocaine in 2005 after his period of treatment.

Applicant admitted a history of excessive alcohol consumption. He has drunk alcohol, at times to excess and to the point of intoxication, from about 1968 to about March 2008. He was twice charged with drunk driving (1975 and 1981). He was

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

diagnosed with polysubstance dependency (crack, alcohol, XTC, etc.) in 2002. He received treatment during 2004–2005 for that dependency. Previously, he had received treatment for his use of alcohol in 1992 and 1993.

Applicant was interviewed as part of the background investigation in March 2008 (Exhibit 6). He reported stopping all use of drugs in September 2005 by a combination of abstaining, attending Narcotics Anonymous, and no longer associating with people involved in drugs. He reported that he does not intend to use drugs in the future. He reported that he continues to drink alcohol (one to two drinks on rare occasion), and he stated that he never had a problem with alcohol.

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 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

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).

⁸ Directive, Enclosure 3, ¶ E3.1.14.

⁹ Directive, Enclosure 3, ¶ E3.1.15.

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 two 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

Under Guideline G for alcohol consumption,¹⁶ the security concern is that "excessive alcohol consumption often leads to the exercise of questionable judgment or

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.

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

the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness."

Based on the record evidence as a whole, this case raises serious security concerns. For example, the disqualifying information includes the following: (1) a history of drug abuse (cocaine and marijuana) over a period of decades; (2) a diagnosis of polysubstance dependency involving both cocaine and alcohol in 2002 and continued use of both substances following the diagnosis; (3) a job loss tied to his drug use; (4) a drug-related criminal case for which he served probation for 12 months; and (5) a history of excessive consumption of alcohol, to include alcohol-related incidents away from work (twice being charged with DUI).

The various mitigating conditions under the two 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 and frequency of Applicant's drug abuse. For Guideline G, the evidence is insufficient because Applicant continues to drink alcohol notwithstanding his history of problems with alcohol. Taken together, the evidence as a whole paints a picture of a 51-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,¹⁷ 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. Although it appears Applicant has made progress in dealing with his history of substance abuse, it is simply too soon to tell if Applicant's substance abuse is a thing of the past that will not recur. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

¹⁷ Revised Guidelines at 1–2.

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:

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| Paragraph 1, Guideline H: | Against Applicant |
| Subparagraphs 1.a–1.x: | Against Applicant |
| Paragraph 2, Guideline G: | Against Applicant |
| Subparagraphs 2.a–h: | 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