



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



In the matter of:)
)
-----) ISCR Case No. 08-10285
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Michael Lyles, Esq., Department Counsel
For Applicant: *Pro se*

June 22, 2010

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for a security clearance to work in the defense industry. The record evidence shows Applicant has a history of drug abuse during the period of 1985–2006, when he used crack cocaine and marijuana, although his drug of choice was crack cocaine. Some of his drug abuse took place while he held a security clearance. Due to his cocaine use, he went through drug treatment programs twice, the first time in 1985 and the second in 2006. He has not used cocaine since completing the program in 2006. Applicant did not provide full, frank, and candid answers to questions about his drug abuse during the security clearance process. There is insufficient evidence to explain, extenuate, or mitigate the security concerns. Accordingly, as explained in further detail below, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on October 9, 2009, the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) explaining it was unable to find it is clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the factual basis for the action under the security guidelines known as Guideline H for drug involvement and Guideline E for personal conduct. The SOR also recommended that the case be submitted to an administrative judge to decide whether to deny or revoke Applicant's security clearance.

Applicant answered the SOR in a timely fashion and requested a hearing. The case was assigned to me February 22, 2019. The hearing took place April 5, 2010. The hearing transcript (Tr.) was received April 13, 2010.

Findings of Fact

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

Applicant is a 72-year-old employee of a federal contractor. He has been married to the same woman for more than 50 years, and he has five children (all adults) and eight grandchildren. There are no minor children living in his household.

Applicant's employment history includes a 23-year period when he worked for a tire manufacturing company, for which he is entitled to a pension.² More recently, he has worked as a security guard or access control specialist from 1998 to present. His recent job performance has been good.³ He is seeking to retain a security clearance previously granted to him in 2004 or sooner.

Applicant has a history of drug abuse. He used both crack cocaine and marijuana, although his drug of choice was crack cocaine. Some of his drug abuse took place while he held a security clearance. Due to his cocaine use, he went through drug treatment programs twice, the first time in 1985 and the second in 2006. He has not used any illegal drugs since he completed the program in 2006. After completing

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines published in Enclosure 2 to the Directive.

² Exhibit C.

³ Exhibits A and B.

treatment, he attended Narcotics Anonymous (NA) on a regular basis for about two years. Since about mid-2008, he has not attended NA, but is actively involved with his church where his spouse is quite active as well.

The best evidence of Applicant's drug abuse is likely the records from the drug treatment program he attended in 2006.⁴ Those records, which are based on information he provided at that time, show he was admitted and discharged with a diagnosis of cocaine dependence. The records show Applicant was seeking help for his crack cocaine use problem. And the records show he reported the following about his past drug use: (1) he first used crack cocaine about 20 years ago; (2) he abstained for about three years after going through a 21-day inpatient program in 1985; (3) he typically binged in a pattern of \$200 to \$300 worth of crack cocaine over two to three days, and then he might go for two to three months without using; (4) his last use of crack cocaine was about one week before admission; and (5) he smoked marijuana for a period of four years about ten years ago, but had not used any in six years.

Applicant completed security clearance applications on at least two occasions.⁵ He first completed an application in November 1997.⁶ In response to Question 24a, Applicant answered in the negative thereby denying the use of any illegal drug (to include marijuana and cocaine) within the last seven years.

He completed the second application in June 2008.⁷ In response to 24a, Applicant answered in the affirmative and reported the occasional use of crack cocaine during the estimated period of June 2000 to June 2006. He also reported the successful completion of the drug treatment program in 2006. He did not, however, answer in the affirmative in response to Question 24b, which asks about illegal drug use while possessing a security clearance.

Applicant was interviewed by a governmental investigator in July 2008. The results of that interview were summarized by the investigator and included in a report of investigation.⁸ The summary of the interview indicates Applicant began using crack cocaine in June 2000, when he started experimenting with the drug at the suggestion of a friend. There is no indication in the summary that he mentioned any cocaine use taking place before 2000.

⁴ Exhibit 3.

⁵ Exhibits 1 and 2.

⁶ Exhibit 2.

⁷ Exhibit 1.

⁸ Exhibit 3.

The Agency required Applicant to respond to interrogatories about his past drug use.⁹ In response to Question 1, which asked Applicant to disclose if he had used any narcotic, depressant, stimulant, hallucinogen, and cannabis (to include marijuana and hashish) except as prescribed by a medical doctor, Applicant responded in the affirmative and reported the occasional use of crack cocaine, the last of which took place in June 2006. He did not report any marijuana use.

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information. Moreover, the Department of Defense takes the handling and safeguarding of classified information seriously because it affects our national security, the lives of our servicemembers, and our operations abroad.

It is well-established law that no one has a right to a security clearance.¹⁰ 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.”¹¹ 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.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹² An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹³

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁴ Department Counsel has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁵ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate

⁹ Exhibit 4.

¹⁰ *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) (no right to a security clearance).

¹¹ 484 U.S. at 531.

¹² Directive, ¶ 3.2.

¹³ Directive, ¶ 3.2.

¹⁴ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁵ Directive, Enclosure 3, ¶ E3.1.14.

facts that have been admitted or proven.¹⁶ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁷ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁸ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁹

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

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.²⁰ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

Under Guideline H,²¹ the security concern for drug involvement is as follows:

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.²²

Drug abuse means "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."²³

Applicant's lengthy history of drug abuse raises serious security concerns. He engaged in drug abuse when he used marijuana and crack cocaine over a 20-year

¹⁶ Directive, Enclosure 3, ¶ E3.1.15.

¹⁷ Directive, Enclosure 3, ¶ E3.1.15.

¹⁸ *Egan*, 484 U.S. at 531.

¹⁹ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²⁰ Executive Order 10865, § 7.

²¹ AG ¶¶ 24, 25, and 26 (setting forth the security concern and the disqualifying and mitigating conditions).

²² AG ¶ 24.

²³ AG ¶ 24(b).

period (1985–2006), although his drug of choice was crack cocaine. He twice sought treatment for his dependency, the first in 1985, which was successful for about three years, and the second in 2006, which has been successful to date. Some of his drug abuse took place while he held a security clearance granted to him by the Defense Department. Taken together, these circumstances raise security concerns under several disqualifying conditions.²⁴

The guideline also provides that certain conditions may mitigate security concerns.²⁵ I considered all the mitigating conditions and the most pertinent here are:

- A demonstrated intent not to abuse any drugs in the future, such as:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence;
 - (4) a signed statement of intent with automatic revocation of clearance for any violation.
- Satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant receives credit under both of these conditions. It appears that the drug treatment program in 2006 was successful and it is unlikely that Applicant will relapse at this point in time. On balance, however, Applicant's evidence in mitigation is insufficient to prevail. In reaching this conclusion, I gave substantial weight to the nature, extent, and seriousness of his drug abuse over a 20-year period and the concomitant security concerns. Using crack cocaine while in possession of a security clearance raises serious questions and doubts about Applicant's reliability, trustworthiness, and good judgment, and it reflects poorly on his fitness and suitability for access to classified information. In addition, his falsifications, as discussed below, undermine his evidence of reform and rehabilitation. Accordingly, Guideline H is decided against Applicant.

Turning to personal conduct under Guideline E,²⁶ it includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. The overall concern is:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] raise

²⁴ AG ¶¶ 25(a), (c), (d), and (g).

²⁵ AG ¶ 26(a) – (d).

²⁶ AG ¶¶ 15, 16, and 17 (setting forth the security concerns and the disqualifying and mitigating conditions).

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.²⁷

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.

The issue here is the truthfulness of Applicant's answers to questions about his drug abuse. I am not persuaded that Applicant gave a deliberately false answer to Question 24b on his June 2008 security clearance application (after all, he gave an affirmative response to Question 24a, the immediate preceding question). But the record does support a conclusion that Applicant did not give full, frank, and candid answers about his drug abuse when he completed his November 1997 security clearance application, during an interview in July 2008, and when answering interrogatories in December 2008. Applicant's explanations to the contrary are not credible.

The established falsifications support application of two disqualifying conditions that address the deliberate falsification of relevant facts during the security clearance process.²⁸ I reviewed all the potential mitigating conditions under the guideline and conclude none apply. Making false or misleading statements to the federal government during the security clearance process is serious misconduct. It is not easily explained away, excused, or mitigated. Accordingly, Guideline E is decided against Applicant.

To conclude, the facts and circumstances surrounding Applicant's drug abuse and his falsifications justify current doubts about his judgment, reliability, and trustworthiness. He did not present sufficient evidence to explain, extenuate, or mitigate the security concerns. In reaching this conclusion, I gave due consideration to the whole-person concept²⁹ and I considered all of Applicant's favorable evidence, which was not insubstantial. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

²⁷ AG ¶ 15.

²⁸ AG ¶¶ 16(a) and (b).

²⁹ AG ¶ 2(a)(1) – (9).

Formal Findings

The formal findings on the SOR allegations are as follows:

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

Conclusion

In light of the record as a whole, 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