



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



In the matter of:)
)
-----) ISCR Case No. 09-01521
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn E. Hoffman, Esq., Department Counsel
For Applicant: Gary L. Rigney, Esq.

January 19, 2011

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for a security clearance to work in the defense industry. The evidence shows Applicant is a former federal employee who has a 30-year history of drug abuse (marijuana), much of it taking place while he held a security clearance. He made deliberately false statements in 2004, when he denied using illegal drugs in response to questions on a security clearance application. His drug abuse came to light in 2006, when he tested positive for marijuana during a routine drug test as an employee of the Defense Department. As a result, he resigned in lieu of termination. Since then, he obtained treatment and has not used marijuana since April 2006. He has not used alcohol, which he also abused, since August 2007, except for a one-time slip in 2010. He regularly attends group meetings of Alcoholics Anonymous (AA), volunteers in his community, and has a good employment record. Even though he presented substantial evidence of reform and rehabilitation, it is outweighed by his long-term history of drug abuse and making false statements during the security-clearance process. Taken together, these matters continue to undermine

his trustworthiness, reliability, and good judgment. Accordingly, as explained below, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on March 26, 2010, 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 sets forth the factual basis for the action under the security guideline known as 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 and requested a hearing. In his Answer, Applicant admitted all allegations and provided a brief explanation in mitigation. His admissions are incorporated into the findings of fact below. The case was assigned to a judge July 2, 2010. The case was reassigned to me September 7, 2010. The hearing took place September 16, 2010. The hearing transcript (Tr.) was received September 27, 2010.

Procedural Matters

At the hearing, the SOR was amended on my own motion to add a second paragraph citing Guideline H for drug involvement and subparagraph 2.a as follows: Those matters as set forth in subparagraphs 1.a, 1.b, 1.e, 1.f, 1.g, and 1.h.² I took this action because those matters are explicitly covered under the drug involvement guideline. There were no objections or requests for additional time by the parties.

Findings of Fact

Applicant is a 53-year-old former federal employee who is seeking a security clearance for a consulting job with a federal contractor. His educational background includes a bachelor's degree in business administration. He was married for more than 20 years until a recent divorce. He has two adult children, a son and a daughter, from the marriage.

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 in Enclosure 2 to the Directive.

² Directive, Enclosure 3, ¶ E3.1.17; Tr. 10–14.

Applicant's employment history includes a 25-year period working for the federal government that ended in 2006, when he resigned in lieu of termination. He worked primarily in the field of accounting, rising over the years from his initial position as a clerk typist (pay grade GS-3) to senior-level accountant position for the Defense Department (pay grade GS-15). He was a stellar employee with a record of outstanding duty performance.³ Since resigning in 2006, his employment history includes a brief period of unemployment, a job as an administrative assistant at a church,⁴ and working as a laborer for two different firms. He is currently employed as a customer-service associate for a large grocery store. His duties grant him access to large amounts of cash and other financial matters. He has a good employment record at the store as verified by the store manager.⁵ Applicant has had no absenteeism or indications of substance abuse while employed there, and the store manager considers him a trustworthy employee.

Applicant has a 30-year history of drug abuse (marijuana), much of it taking place while he held a security clearance as a federal employee. He used marijuana in social situations, with coworkers after work hours, and with his wife who was a regular user of marijuana. As such, he made deliberately false statements in 2004, when he denied using illegal drugs in response to questions on a security clearance application.⁶ His drug abuse came to light in April 2006, when he tested positive for marijuana during a routine drug test as an employee of the Defense Department. As a result, he resigned in lieu of termination.

Applicant then obtained treatment and he received a diagnosis of alcohol dependence and marijuana dependence in early remission.⁷ He has not used marijuana since April 2006. He has not used alcohol, which he also abused, since August 2007, except for a one-time slip in 2010.⁸ He regularly attends group meetings of Alcoholics Anonymous (AA) and volunteers in his community. He also has the support of family members who live in the local community. He has periodic contact and communications with his ex-wife, but he does not know if she continues to use marijuana. He no longer associates with anyone who uses marijuana.

³ Exhibits B–K; Tr. 90–102 (witness testimony).

⁴ Tr. 80–89 (testimony of minister).

⁵ Tr. 68–80.

⁶ Exhibit 2.

⁷ Exhibit 6 at 3.

⁸ Tr. 66–67.

Applicant truthfully disclosed his marijuana use in March 2008, when completing a security clearance application for the consulting job.⁹ He made the following comments to explain his marijuana use:

I have experienced a long term addiction to alcohol and marijuana which resulted in several negative consequences including: loss of security clearance in April 2006; filing of bankruptcy in July 2006; contributed to the legal separation [now divorce] of myself and my wife in July 2006 and negative health issues. I also have experienced depression/anxiety and have seen a psychiatrist and counselors to treat these illnesses. I have taken SSRI's (antidepressants) to treat these illnesses. I currently have a strong 12 step program in Alcoholics Anonymous (AA); see my psychiatrist and counselor regularly and all my illnesses are currently in remission. I have sustained my recovery and understand that I will continue in AA on a weekly basis to prevent relapse. I am stable and present no security risk.¹⁰

Applicant also provided extensive and detailed information about his marijuana use, the circumstances surrounding his resignation from federal employment, and other matters in September 2008, when he was interviewed during the background investigation.¹¹ At the hearing, Applicant continued to acknowledge and admit his long-term history of marijuana use and he did not attempt to minimize it. I found his testimony to be credible and worthy of belief.

Law and 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. 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.¹² As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the

⁹ Exhibit 1.

¹⁰ Exhibit 1 at 47 of 52.

¹¹ Exhibit 3.

¹² *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).

side of denials.”¹³ 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.¹⁴ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁵

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁶ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁷ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁸ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁹ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁰ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.²¹

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 the relevant facts and circumstances, 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.²² Instead, it

¹³ 484 U.S. at 531.

¹⁴ Directive, ¶ 3.2.

¹⁵ Directive, ¶ 3.2.

¹⁶ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁷ Directive, Enclosure 3, ¶ E3.1.14.

¹⁸ Directive, Enclosure 3, ¶ E3.1.15.

¹⁹ Directive, Enclosure 3, ¶ E3.1.15.

²⁰ *Egan*, 484 U.S. at 531.

²¹ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²² Executive Order 10865, § 7.

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

Analysis

The personal conduct and drug involvement matters are discussed together because the SOR allegations are factually interrelated or connected. Under Guideline E for personal conduct, the suitability of an applicant may be questioned or put into doubt due to false statements and credible adverse information that may not be enough to support action under any other guideline. The overall concern under Guideline E is:

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.²³

And under Guideline H for drug involvement, the overall concern is:

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 concerns about a person's ability or willingness to comply with laws, rules, and regulations.²⁴

Under both guidelines, I have considered the following disqualifying conditions:

¶ 16(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

¶ 16(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

²³ AG ¶ 15.

²⁴ AG ¶ 24.

¶ 25(a) any drug abuse;

¶ 25(b) testing positive for illegal drug use;

¶ 25(c) illegal drug possession, . . . ;

¶ 25(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence; or

¶ 25(e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member or a recognized drug treatment program; and

¶ 25(g) any illegal drug use after being granted a security clearance.

Likewise, under both guidelines, I have considered the following mitigating conditions:

¶ 17(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

¶ 17(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

¶ 26(b) 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; and

¶ 26(d) 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 has a 30-year history of drug abuse, much of it taking place while he held a security clearance as a federal employee. He made deliberately false statements in 2004, when he denied using illegal drugs in response to questions on a security

clearance application.²⁵ He has had negative consequences due to his drug abuse (marital problems, financial problems, and job loss). Since resigning from federal employment in 2006, he has done a remarkably good job at addressing his substance abuse and otherwise stabilizing his life, to include active participation in AA and steady employment in which he excels and enjoys. He appears to be well on his way to a life of abstinence from both marijuana and alcohol. For those efforts, he deserves substantial credit in mitigation.

Nevertheless, Applicant brought these problems on himself by engaging in illegal behavior (possession and use of marijuana) he knew or should have known was prohibited and at odds with federal employment and holding a security clearance.²⁶ His drug abuse was reckless and a major breach of trust. He also engaged in deceit by making false statements on his 2004 security clearance application. And he did not voluntarily report his drug abuse before his 2006 positive drug test.²⁷

Misconduct has consequences, and sometimes those consequences last a long time. That is the situation here. Even though Applicant presented substantial evidence of reform and rehabilitation, it is outweighed by his long-term history of drug abuse and making false statements during the security-clearance process. Taken together, these matters continue to undermine his trustworthiness, reliability, and good judgment in a security-clearance context.

To conclude, the evidence as a whole justifies current doubts about his judgment, reliability, and trustworthiness. Following *Egan* and the clearly-consistent standard, I resolve these doubts in favor of protecting national security. In reaching this conclusion, I gave due consideration to the whole-person concept²⁸ and Applicant's favorable evidence. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

²⁵ Exhibit 2.

²⁶ In 1986, President Ronald Reagan issued Executive Order 12564, which established a drug-free workplace for the federal government. It provided, among other things, that (1) federal employees are required to refrain from the use of illegal drugs; (2) the use of illegal drugs by federal employees, whether on or off duty, is contrary to the efficiency of the service, and (3) persons who use illegal drugs are not suitable for federal employment.

²⁷ AG ¶ 2(e)(1).

²⁸ AG ¶ 2(a)(1)–(9).

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline E:	Against Applicant
Subparagraphs 1.a–1.h:	Against Applicant
Paragraph 2, Guideline H:	Against Applicant
Subparagraph 2.a:	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