



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



In the matter of:)
)
-----) ISCR Case No. 09-07485
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Paul M. DeLaney, Esq., Department Counsel
For Applicant: *Pro se*

July 28, 2010

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance to work in the defense industry. The record evidence shows Applicant has a long-standing history of marijuana use during a period of more than 40 years. He smokes marijuana about ten times per year; he believes marijuana use should be legalized; and he plans on using marijuana in the future. He states that his marijuana use helps relieve pressure in his eyes due to a pre-glaucoma condition, and it helps him relieve stress and pressure associated with caring for his spouse who has had two strokes. Applicant did not submit any documentary information or medical records in support of his statements. 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 March 15, 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 detailed the factual basis for the action under the security guideline known as Guideline H for drug involvement. 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. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.²

On or about April 30, 2010, the Agency submitted its written case consisting of all relevant and material information that could be adduced at a hearing.³ This so-called file of relevant material (FORM) was mailed to Applicant and received by him on May 11, 2010. He then had a 30-day period to submit a response setting forth objections, rebuttal, extenuation, mitigation, or explanation. He did not reply. The case was assigned to me July 20, 2010.

Findings of Fact

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

Applicant is a 68-year-old part-time self-employed engineer. He earned a bachelor's degree in 1965. He is married and has four adult children.

Applicant completed a security clearance application in July 2009.⁴ In answering Question 23a of the application, he disclosed using illegal drugs within the last seven

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, ¶ E3.1.7.

³ The file of relevant material consists of Department Counsel's written brief and supporting documents, some of which are identified as exhibits in this decision.

⁴ Exhibit 5.

years. He reported the occasional and sporadic use of cannabis (marijuana) from about 1968 to present.

A few months later in August 2009, Applicant participated in an interview under oath to discuss his admitted use of cannabis.⁵ His admissions or acknowledgments made during the interview are highlighted as follows:

1. He has used marijuana or cannabis about ten times per year since 1968.
2. He buys the marijuana from people he knows; he does not grow it.
3. He uses marijuana to relive pressure in his eyes due to a pre-glaucoma condition.
4. He also uses marijuana to relieve stress associated with providing full-time care for his wife who has had two strokes.
5. He is not addicted to marijuana, believes he could stop using it at any time, but chooses to use it to relieve stress, relax, and make him feel better.
6. He does not intend to stop using marijuana in the future; he plans to use it about ten times per year for the rest of his life.
7. He will not stop using marijuana as a condition of holding a security clearance because using marijuana is more important to him than a security clearance.
8. He believes marijuana use should be legalized.

Applicant did not submit any documentary information or medical records in support of his statements. Likewise, the record is silent concerning Applicant's good employment record or constructive community involvement.

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.⁶ 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 side of denials."⁷ Under *Egan*, Executive Order 10865, and the Directive, any doubt

⁵ Exhibit 6.

⁶ *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).

⁷ 484 U.S. at 531.

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.⁸ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.⁹

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁰ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹¹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹² In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹³ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁴ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁵

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 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.¹⁶ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

⁸ Directive, ¶ 3.2.

⁹ Directive, ¶ 3.2.

¹⁰ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹¹ Directive, Enclosure 3, ¶ E3.1.14.

¹² Directive, Enclosure 3, ¶ E3.1.15.

¹³ Directive, Enclosure 3, ¶ E3.1.15.

¹⁴ *Egan*, 484 U.S. at 531.

¹⁵ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁶ Executive Order 10865, § 7.

Analysis

Under Guideline H for drug involvement,¹⁷ the suitability of an applicant may be questioned or put into doubt when an applicant has a history of drug abuse or other illegal drug involvement. The overall concern under Guideline H 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.¹⁸

Drug abuse means "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."¹⁹

Applicant's history of marijuana use raises obvious security concerns. He engaged in drug abuse by using marijuana during a period of more than 40 years. He buys the marijuana he smokes about ten times per year; he believes marijuana use should be legalized; and he plans on using marijuana in the future. He is unwilling to change his behavior as a condition for holding a security clearance. Taken together, these circumstances raise concerns under three disqualifying conditions.²⁰

The guideline also provides that certain conditions may mitigate security concerns.²¹ I considered all the mitigating conditions and none apply. Applicant has a long-standing history of marijuana use. He has also expressed an intent to continue his marijuana use. Given these circumstances, the likelihood of reform and rehabilitation at this point is essentially zero. Although his explanatory statements (his health and stress associated with caring for his wife) justify some empathy for his situation, they do not qualify as mitigating circumstances under Guideline H.

To conclude, Applicant's 40-year period of marijuana use, with an expressed intent to continue such use, raises questions about his ability or willingness to comply with laws, rules, and regulations. 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 concept²² and Applicant's favorable

¹⁷ AG ¶¶ 24, 25, and 26 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁸ AG ¶ 24.

¹⁹ AG ¶ 24(b).

²⁰ AG ¶¶ 25(a), (c), and (h).

²¹ AG ¶ 26(a) – (d).

²² AG ¶ 2(a)(1) – (9).

evidence. Nevertheless, Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

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