



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



In the matter of:)
)
-----) ISCR Case No. 10-01076
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Ray Gutierrez, Esq.

August 15, 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 he has a long-term history of drug abuse (primarily marijuana) during the period 1996–2009. It began as a way to self-medicate pain he experienced after a serious car accident in 1996. His marijuana use continued long after his recovery from his injuries and became a daily routine. He last used marijuana in about December 2008. He last used cocaine in about June 2009, a few months before he submitted his application for a security clearance. His employment history includes being fired, once in 2007, and again in 2009, for failing drug tests. Although the current short-term trend is favorable, given the nature, extent, and seriousness of his drug abuse, it is too soon to tell if these matters are safely in the past. He did not present sufficient evidence to mitigate the security concerns stemming from his history of drug abuse. Accordingly, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on February 10, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) explaining that it was not clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it alleged matters under Guideline H for drug involvement and Guideline E for personal conduct.

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on April 28, 2011. The hearing was scheduled for June 8, 2011, but was postponed at the request of Applicant's counsel. The hearing then took place as scheduled by video teleconference on June 29, 2011. The hearing transcript (Tr.) was received July 14, 2011.

The record was kept open until July 15, 2011, to allow Applicant to submit additional documentary evidence. Through counsel, Applicant made a timely submission and those matters are marked and admitted without objections as follows: (1) Exhibit M—affidavit; (2) Exhibit N—divorce decree; and (3) Exhibit O—state law concerning remarriage.

Findings of Fact

In his Answer to the SOR, Applicant admitted all factual allegations under Guidelines H and E. His admissions are accepted as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 35-year-old employee of a federal contractor. He is seeking to obtain a security clearance for the first time. His educational background includes an associate's degree in applied sciences earned in 2003. He has been employed by the same company from July 2009 to present. He was recently promoted from his entry-level position of telephone mechanic helper to telephone mechanic 1.² The company has a drug-free workplace policy, and he tested negative when he began his

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 contained in Enclosure 2 to the Directive.

² Exhibit C.

employment.³ In response to the SOR and at his own expense, he underwent drug testing in February 2011, and he tested negative.⁴

Applicant has a history of illegal drug involvement. He disclosed it when he completed his security clearance application in August 2009.⁵ He provided additional information during a background interview in October 2009.⁶ His undisputed history of illegal drug involvement is summarized as follows:

- He used marijuana, with varying frequency, during 1996–2008. For a period, he used marijuana on a daily basis. His last use of marijuana took place in about December 2008. He also bought marijuana.
- He used cocaine about 12 to 15 times during 2007–2009. The cocaine was provided by a supervisor, and Applicant used it at work with other employees.
- He used Ecstasy about five times during 2004. He also purchased the drug.
- He used hallucinogenic mushrooms one or two times during 2004.
- He tested positive for illegal drug use on two occasions, once in 2007 and again in 2009. On each occasion, he was terminated or fired due to failing the drug test.

His drug of choice was marijuana, and that matter is discussed further below.

Before 1996, Applicant had never used illegal drugs. In 1996, he had a car accident in which he was thrown from the vehicle and suffered multiple facial fractures and a broken neck.⁷ After two weeks in the hospital, he was released to an inpatient rehabilitation center where he was treated for about one month. That was followed by about a month of outpatient therapy. He experienced intense pain as a result of his injuries. A friend suggested he try using marijuana for the pain. He soon became a regular, if not daily, user of marijuana. His marijuana use served as a “gateway drug” for his other drug use.⁸ He last used marijuana in about December 2008, as he decided he had to quit due to his family obligations.

³ Exhibit A.

⁴ Exhibit B.

⁵ Exhibit 1.

⁶ Exhibit 2.

⁷ Exhibit I.

⁸ Tr. 49–51.

Applicant does not intend to use any illegal drugs in the future. He takes complete blame and responsibility for his drug abuse,⁹ and he appeared to be genuinely remorseful for his illegal drug involvement. He currently has a medical condition that further motivates him to refrain from illegal drug use and encourages him to engage in a healthy lifestyle (for example, diet and exercise). He also submitted an affidavit vowing not to engage in any drug abuse in the future and agreeing to automatic revocation of any clearance should he violate his promise.¹⁰

Applicant is the father of three children. His first child was born in 2006. He and the mother were never married and are living separately. The mother has custody of the child and he has visitation rights. The mother was a drug user as well and Applicant sometimes used drugs with her. He has been living with another woman since about 2008. They have two children, the first born in March 2009, and the second born in November 2010. At hearing, he explained that he intended to marry the woman, but they were waiting for her divorce case to conclude. Subsequently, the divorce was granted by the court in July 2011.¹¹

Applicant's future bride's immigration status in the United States is that of an illegal resident alien, sometimes referred to as an undocumented alien. According to Applicant, she was born in Mexico and has resided in the United States for the majority of her life. He learned about her immigration status sometime after they had formed their relationship. He denies providing her any assistance in entering the United States.¹² Upon her divorce and their marriage, Applicant's intent is to obtain legal counsel to complete and file the necessary paperwork with U.S. immigration authorities in order to adjust her status to that of a lawful resident alien.¹³

Applicant submitted multiple letters of reference in support of his application for a security clearance.¹⁴ Three of the letters are from adult family members. I found the letter from his mother and father to be particularly noteworthy. It was insightful and revealing into Applicant's car accident, the challenges he faced as a result, and his current circumstances; it also shows they are actively involved in his life.¹⁵ They live across the street from Applicant and they see him, or their grandchildren, nearly every day.

⁹ Tr. 54–55.

¹⁰ Exhibit M.

¹¹ Exhibit N.

¹² Exhibit 3.

¹³ Whether this person is subject to removal from the United States and entitled to relief therefrom is a question of law for U.S. immigration authorities, and it is not addressed in this decision.

¹⁴ Exhibit H.

¹⁵ Tr. 98–101.

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.¹⁶ 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.”¹⁷ 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.¹⁸ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁹

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁰ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²¹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²² In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²³ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁴

¹⁶ *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).

¹⁷ 484 U.S. at 531.

¹⁸ Directive, ¶ 3.2.

¹⁹ Directive, ¶ 3.2.

²⁰ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²¹ Directive, Enclosure 3, ¶ E3.1.14.

²² Directive, Enclosure 3, ¶ E3.1.15.

²³ Directive, Enclosure 3, ¶ E3.1.15.

²⁴ *Egan*, 484 U.S. at 531.

The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²⁵

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.²⁶ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

1. Drug Involvement

Under Guideline H,²⁷ the security concern is that the use of an illegal drug, or misuse of a prescription drug, raises questions about a person's judgment, reliability, and trustworthiness. In this context, the term drug abuse means "the illegal use of a drug or use of a legal drug in a manner that deviates from the approved medical direction."²⁸ The guideline also expresses a concern that drug involvement may call into question a person's ability or willingness to follow laws, rules, and regulations.

Here, the evidence is more than sufficient to establish concerns based on Applicant's history of drug abuse. The evidence shows Applicant was a long-term user of marijuana; he used cocaine more than ten times at the workplace; and he dabbled in two other illegal drugs. His last use of marijuana took place in about December 2008, and his last use of cocaine took place in about June 2009, a few months before he completed his security clearance application. He also failed two employer-administered drug tests resulting in his termination on each occasion. Based on the evidence as a whole, the following disqualifying conditions under Guideline H are raised:

AG ¶ 25(a) any drug abuse;

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

²⁵ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²⁶ Executive Order 10865, § 7.

²⁷ AG ¶¶ 24–26 (setting forth the security concern and the disqualifying and mitigating conditions).

²⁸ AG ¶ 24(b).

AG ¶ 25(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

There are several mitigating conditions to consider under Guideline H. The following mitigating conditions are most pertinent:

AG ¶ 26(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 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; or
- (4) a signed statement of intent with automatic revocation of clearance for any violation.

After considering these disqualifying and mitigating conditions, the central issue is whether Applicant presented sufficient evidence to mitigate and overcome the drug involvement security concerns. I conclude that he has not. His drug abuse began in 1996, when he started using marijuana to self-medicate intense pain from injuries sustained in the car accident. That is an extenuating circumstance, and his drug abuse could have been excused had it been limited to that circumstance. But marijuana use became part of his daily routine and went on for more than ten years, ending in late 2008. His marijuana use led to other drugs, including cocaine use during 2007–2009. It is also noteworthy that post-2005, his marijuana and cocaine use took place when he was presumably older and wiser in his 30s.

To his credit, his last use of illegal drugs took place about two years ago in June 2009, he appears to be focused on work and family, and he has a family-support system in place. These are positive signs. But compared with his long-term history of drug abuse, at this point, the positive signs can only be considered a favorable short-term trend. Given the nature, extent, and seriousness of his drug abuse, it is too soon to tell if this matter is safely in the past. In reaching this conclusion, I reviewed and considered two hearing-level cases as requested by Applicant's counsel.²⁹ Neither case

²⁹ ISCR Case No. 96-0501 (Dec. 3, 1996); and ISCR Case No. 96-0416 (Dec. 12, 1996).

constitutes binding legal authority, and neither case, in my view, is so closely aligned with the facts of this case to require a similar favorable outcome.

2. Personal Conduct

Under Guideline E for personal conduct,³⁰ 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.³¹

SOR ¶¶ 2.a and 2.b alleged Applicant's two terminations due to failing drug tests in 2007 and 2009. The positive drug tests and resulting terminations were also alleged under Guideline H, and the related security concerns were discussed above. Based on the record as a whole, these matters do not raise any independent security concerns that require additional discussion under Guideline E.

The allegation in SOR ¶ 2.c was not discussed in the findings of fact because involves a minor incident that took place at Applicant's workplace in 2004. It did not involve illegal drugs, and it may have resulted from a misunderstanding. It is mitigated by the passage of time without recurrence of a similar incident.

SOR ¶ 2.d alleged the undisputed fact that Applicant resides "in the United States with an undocumented alien." This person is the mother of his two children and he intends to marry her. Upon their marriage, he intends to seek to adjust her immigration status to that of a lawful resident alien. He denies assisting her in entering the United States, and there is no evidence that he did so. Nor is there evidence that he has engaged in unlawful or fraudulent conduct to facilitate her presence in the United States. Indeed, neither the SOR nor Department Counsel asserted that Applicant was in violation of any specific law. Nevertheless, this allegation raises a legitimate security concern based on associating with another who is engaged in illegal activity. Having considered the surrounding circumstances, including his intent to obtain lawful immigration status for his bride-to-be, I conclude that Applicant's association with her does not reflect so poorly on his judgment, reliability, and trustworthiness that it should disqualify him from access to classified information. An opposite conclusion might suggest that Applicant must end a relationship with a woman with whom he is raising

³⁰ AG ¶¶ 15–17 (setting forth the security concern and the disqualifying and mitigating conditions).

³¹ AG ¶ 15.

two young children in order to obtain a security clearance. That notion is contrary to common sense and Applicant's moral obligations to the mother of his children and his children.

3. Whole-Person Concept

I have also considered this case in light of the evidence as a whole and the nine-factor whole-person concept.³² In particular, I considered the nature, extent, and seriousness of Applicant's illegal drug involvement; the circumstances surrounding the conduct; the frequency and recency of the conduct; his age at the time of the conduct; the presence of rehabilitation and other positive changes; and the likelihood of recurrence. Given the frequency and extent of his drug abuse over a period of many years, it is simply too soon to tell if his drug abuse is safely in the past. Indeed, although his last use of an illegal drug (cocaine) was about two years ago in June 2009, it took place about a month before he began his current job and about two months before he completed his application for a security clearance. He did not present sufficient evidence of a track record of reform and rehabilitation to mitigate and overcome the security concerns. Accordingly, I conclude that Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision.

Formal Findings

The formal findings on the SOR allegations are as follows:

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

³² AG ¶ 2(a)(1)–(9).