



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



In the matter of:)
)
-----) ISCR Case No. 10-03974
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn E. Hoffman, Esq., Department Counsel
For Applicant: *Pro se*

June 3, 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 history of drug abuse, which ended in late 2009, when he graduated from college. He has since abstained from drug abuse, and he does not intend to abuse any drugs in the future. He presented sufficient evidence to mitigate the drug involvement security concerns. Accordingly, this case is decided for Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on November 30, 2010, 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 endeavored to set forth Applicant's history of drug abuse under Guideline H.

Applicant timely answered the SOR and requested a hearing. The case was assigned to me February 9, 2011. The hearing took place March 29, 2011. The hearing transcript (Tr.) was received April 6, 2011.

At the close of evidence, I kept the record open until April 12, 2011, to allow Applicant to present additional documentary evidence. His timely post-hearing document was marked and admitted as Exhibit B without objections.

Findings of Fact

In response to SOR ¶¶ 1.a–1.d, Applicant admitted, without qualification, the following: (1) using cocaine, with varying frequency, from about March 2007 to about November 2009; (2) purchasing cocaine; (3) using marijuana, with varying frequency, from about July 2001 to about July 2008; and (4) using prescription drugs without a prescription in about January 2006 and April 2007. His admissions are accepted as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 24-year-old employee of a federal contractor. He is seeking to obtain a security clearance for the first time. His educational background includes a bachelor's degree in mechanical engineering technology, with a grade point average of 3.6.² He was awarded the degree in December 2009, and then relocated to his current state of residence to begin his job with a company engaged in defense contracting.

Applicant has worked as an entry-level systems engineer since January 2010. Before beginning this employment, he took and passed a drug test in about December 2009.³ His job-performance report for 2010 is highly favorable; it notes that he

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 Tr. 43.

³ Tr. 49–50.

“distinguished himself amongst his peers as an outstanding performer with a bright future.”⁴ Describing him as a valued asset and exceptional performer, the report also states that he often performed at a level above his salary grade. He has already received an increase in salary to his present level of \$58,000, and he anticipates a promotion from his entry-level position during this year. His intention is to continue working for the same company for the foreseeable future and to seek advancement opportunities, including graduate-level education.

Applicant has a history of drug abuse, as described in first paragraph of the findings of fact, which he does not dispute. He disclosed his drug abuse in some detail when he completed his security clearance application in January 2010.⁵ He provided additional information about it during a background interview in March 2010.⁶ At hearing, he explained that he was introduced to marijuana in high school, and then used cocaine periodically during 2007-2009, when he was in college. He made two small buys of cocaine for \$40 to \$60. His last incidence of drug abuse was in about November 2009, when he used cocaine. He was in the presence of cocaine in March 2010, but departed when he learned cocaine was present.

Applicant realized he was “an idiot” and was “screwing up” when confronted with the security clearance application and disclosing his drug involvement.⁷ He acknowledged his past conduct was “reckless, immature, and completely irresponsible.”⁸ He has no intention to engage in drug abuse again, he prefers a drug-free lifestyle, and he is glad he no longer has dealings with people who engage in drug abuse.⁹ His post-hearing submission is a one-page signed statement wherein he stated the following: (1) he pledged no use of any illegal substances or misuse or abuse of legal substances; (2) he pledged no involvement with the possession, cultivation, processing, manufacture, purchase, sale, or distribution of illegal drugs; and (3) he acknowledged that any violation of his statement would result in automatic revocation of any clearance granted to him.¹⁰

I found Applicant’s demeanor throughout the hearing was serious, sincere, and contrite. I found his testimony, in all respects, was credible and worthy of belief.

⁴ Exhibit A.

⁵ Exhibit 1.

⁶ Exhibit 2.

⁷ Tr. 33-34; 44.

⁸ Tr. 33.

⁹ Tr. 35–37.

¹⁰ Exhibit B.

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.¹¹ 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.”¹² 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.¹³ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁴

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁵ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁶ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁷ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁸ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁹

¹¹ *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).

¹² 484 U.S. at 531.

¹³ Directive, ¶ 3.2.

¹⁴ Directive, ¶ 3.2.

¹⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁶ Directive, Enclosure 3, ¶ E3.1.14.

¹⁷ Directive, Enclosure 3, ¶ E3.1.15.

¹⁸ Directive, Enclosure 3, ¶ E3.1.15.

¹⁹ *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.²⁰

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.²¹ 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,²² 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."²³ 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 youthful user of both marijuana and cocaine, with a few instances of misuse of prescription drugs. His last incidence of drug abuse took place in about November 2009, around the time he was finishing college and before beginning his career. Based on the evidence as a whole, the following disqualifying conditions under Guideline H are raised:

AG ¶ 25(a) any drug abuse; and

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 condition is most pertinent:

²⁰ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²¹ Executive Order 10865, § 7.

²² AG ¶¶ 24–26 (setting forth the security concern and the disqualifying and mitigating conditions).

²³ AG ¶ 24(b).

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 the relevant disqualifying and mitigating conditions, the central issue is whether Applicant presented sufficient evidence to mitigate and overcome the security concerns under the guideline. I conclude that he has done so. Indeed, the evidence shows he has satisfied all four components of ¶ 26(b), thereby demonstrating an intent not to abuse drugs in the future. Among other things, his relocation to another state a great distance away from where he attended college satisfies both subpart (1) and (2). His last incidence of drug abuse took place about 18 months ago, which is not recent and satisfies subpart (3) as an appropriate period of abstinence. His signed statement of intent pledging no further drug involvement satisfies subpart (4). Moreover, Applicant persuaded me during the hearing that he has insight into his past misconduct, and he now understands that drug abuse is incompatible with access to classified information.

I have also considered this case in light of the evidence as a whole and the nine-factor whole-person concept.²⁴ In particular, I considered the nature, extent, and seriousness of the conduct; 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.

With those factors in mind, a thoughtful balancing of the evidence persuades me that Applicant's drug abuse is safely in the past and will not recur. I reach this conclusion because the evidence shows that his drug abuse was largely a product of the youth, immaturity, and inexperience typical of high school and college students. He received a wake-up call when he completed the security clearance application for his first job with a rather large company engaged in defense contracting. He heard and understood the message, and he truthfully disclosed his drug abuse. He disclosed further detail about it during his background investigation. He has abstained from drug abuse for about 18 months and has no intention of further drug abuse. Although it was justified and proper to question his suitability in light of his past drug abuse, the evidence shows he is now on the right path to a drug-free lifestyle.

²⁴ AG ¶ 2(a)(1)-(9).

To conclude, Applicant presented sufficient evidence to mitigate and overcome the security concerns, and I am persuaded that he will exercise the required good judgment, reliability, and trustworthiness. Accordingly, I conclude that Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided for Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline H: For Applicant

Subparagraphs 1.a–1.d: For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard
Administrative Judge