



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



In the matter of:)
)
-----) ISCR Case No. 10-04357
)
Applicant for Security Clearance)

Appearances

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

July 13, 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 (marijuana), some of which was directly related to self-medicating the side effects from cancer treatment during 1998–2001. His marijuana use continued after 2001 on a periodic basis; his most recent use took place at a 2009 New Year’s Eve party, less than two months before he completed his application of a security clearance. He did not present sufficient evidence to mitigate the drug involvement security concerns. Accordingly, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on October 28, 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 alleged matters under Guideline H for drug involvement.

Applicant timely answered the SOR and requested a hearing. The case was assigned to me February 9, 2011. The hearing took place March 30, 2011. The hearing transcript (Tr.) was received April 7, 2011.

Findings of Fact

In response to SOR ¶¶ 1.a and 1.b, Applicant admitted the following: (1) using marijuana from at least 1998 to at least January 2010; and (2) a 1992 arrest and charges for unlawfully carrying a weapon and marijuana possession. His admissions are accepted as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 41-year-old employee of a federal contractor. He is seeking to obtain a security clearance for the first time. He has been employed as an aircraft mechanic for the same company from 1997 to present. His primary duties involve painting and blasting, working on metal structures, and metal fatigue improvement.² That company has a drug-free workplace policy, and Applicant has never tested positive for illegal drugs during his period of employment. He recently married for the first time and has a two-year-old son.

Applicant has a history of drug abuse, as described in the first paragraph of the findings of fact, which he does not dispute. He disclosed his arrest and marijuana use when he completed his security clearance application in February 2010.³ He provided additional information during a background interview in April 2010.⁴ At hearing, he explained that he grew up in an environment where illegal drug use was widespread, and that he was introduced to marijuana when he was less than ten years old. 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. 41.

³ Exhibit 1.

⁴ Exhibit 3.

continued using marijuana as a teenager, and then used it until his arrest as a young adult.

He was arrested in December 1992, when police found a knife and marijuana in the back of his pickup truck.⁵ As a result, he was charged with unlawfully carrying a weapon and possession of marijuana. The drug charge was not prosecuted, but he pleaded guilty to the weapon charge. He described the knife as a large hunting knife, essentially a showpiece, that was stored in a toolbox in the back of his truck. The court deferred adjudication, imposed a fine of \$450 plus court costs of \$122, and placed him on probation for six months. Also as a result of the arrest, he stopped using marijuana. In his hearing testimony, he acknowledged that there may have been minimal use (once or twice) of marijuana between 1992 and 1998, but he could not recall it with specificity.⁶

Applicant resumed marijuana use in about 1998, when he was diagnosed with cancer (a brain tumor). Unable to keep any food down and losing weight rapidly, he used marijuana to self-medicate the treatment's side effects, which he described as "unbearable."⁷ He stated that the marijuana use helped with the nausea and increased his appetite. He smoked marijuana daily from 1998 to 2001, when his cancer treatment ended in success.

Applicant's marijuana use did not end with his cancer treatment. He engaged in periodic use of marijuana from about February 2002 to January 2010. He estimated using marijuana about six to ten times during this period.⁸ His last use took place at a New Year's Eve party on December 31, 2009, or January 1, 2010, less than two months before he completed his application for a security clearance. He stated that he does not intend to use any illegal drugs in the future. He also stated that marijuana use should be legalized.

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.

⁵ Exhibit 4.

⁶ Tr. 48.

⁷ Tr. 50.

⁸ Tr. 52; Exhibit 3.

It is well-established law that no one has a right to a security clearance.⁹ 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.”¹⁰ 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.¹¹ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹²

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹³ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁴ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁵ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁶ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁷ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.¹⁸

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.

⁹ *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).

¹⁰ 484 U.S. at 531.

¹¹ Directive, ¶ 3.2.

¹² Directive, ¶ 3.2.

¹³ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁴ Directive, Enclosure 3, ¶ E3.1.14.

¹⁵ Directive, Enclosure 3, ¶ E3.1.15.

¹⁶ Directive, Enclosure 3, ¶ E3.1.15.

¹⁷ *Egan*, 484 U.S. at 531.

¹⁸ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

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.¹⁹ 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,²⁰ 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."²¹ 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 and had a drug-related arrest in 1992. His last use of marijuana took place in about December 2009, less than two months before he completed his security clearance application and while he was employed by a federal contractor as an aircraft mechanic. 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 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:

¹⁹ Executive Order 10865, § 7.

²⁰ AG ¶¶ 24–26 (setting forth the security concern and the disqualifying and mitigating conditions).

²¹ AG ¶ 24(b).

- (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. I conclude that he has not. Applicant's illegal drug involvement can be viewed in three relatively distinct periods: the first began in his pre-teen years and ended with his arrest in 1992; the second was 1998–2001 during his treatment for cancer; and the third was from about February 2002 to January 2010. I have no current concerns about the first two periods, which include Applicant's pre-2002 marijuana use and his 1992 arrest for marijuana possession. His most frequent marijuana use, which was daily during 1998–2001, took place under the unusual circumstances of Applicant using marijuana to self-medicate the side effects from cancer treatment. Indeed, I have empathy for anyone going through such debilitating medical treatment. Moreover, the totality of his pre-2002 drug involvement took place so long ago that it longer reflects on his current reliability, trustworthiness, or good judgment.

But the same cannot be said for his periodic marijuana use during 2002–2010. During this time, he was no longer undergoing cancer treatment, he was employed by a federal contractor in a responsible position subject to drug testing, and he was presumably older and wiser in his 30s. Nevertheless, he used marijuana when the opportunity presented itself, which appears to be consistent with his permissive attitude concerning marijuana use. Given these circumstances, I cannot conclude that Applicant has established a demonstrated intent not to engage in drug abuse in the future.

I have also considered this case in light of the evidence as a whole and the nine-factor whole-person concept.²² 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 not safely in the past. I reach this conclusion because the evidence shows that his marijuana use from 2002 to 2010 was not a product of youth, immaturity, or inexperience in the ways of the world. Based on this record, I am not persuaded that he is committed to a drug-free lifestyle, which is the standard for eligibility for access to classified information.

²² AG ¶ 2(a)(1)–(9).

To conclude, Applicant did not present sufficient evidence 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. This case is decided against Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline H:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	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