



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



In the matter of:)	
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)	ISCR Case No. 10-09014
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

08/15/2012

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for a security clearance to work in the defense industry. The evidence shows Applicant engaged in drug abuse (by using marijuana) while holding a security clearance from 2009 to June 2010, when he tested positive for marijuana during a random drug test given by his employer. He presented sufficient evidence of reform and rehabilitation to mitigate the serious concerns about his fitness and suitability to hold a security clearance. For the reasons discussed below, this case is decided for Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on November 24, 2011, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him access to classified information. The SOR is similar to a complaint, and it detailed the reasons for the action under the security guideline known as Guideline H for drug involvement.

Applicant timely answered the SOR. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.²

On April 2, 2012, Department Counsel submitted 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, who then replied with a written submission consisting of a four-page brief and six proposed documentary exhibits. These matters are admitted without objection as Exhibit A, and may be referred to as Exhibit A-1, A-2, etc., as necessary to identify the particular part of the exhibit. The case was assigned to another judge on June 26, 2012, before it was assigned to me on August 9, 2012.

Findings of Fact

The SOR alleged that Applicant: (1) used marijuana with varying frequency from 2009 to about June 2010; (2) tested positive for marijuana and amphetamines during a random drug test given by his employer on June 14, 2010; and (3) used marijuana after being granted a security clearance. In his answer to the SOR, he admitted the allegations without explanations. His admissions are accepted and adopted and incorporated as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 31-year-old employee of a federal contractor. His educational background includes a bachelor's degree in business awarded in 2005, which is the same year he married. He and his wife have no children. He has worked continuously as a cost-schedule analyst since 2005. He has worked for his current employer, a major defense contractor, since 2007.

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 here. 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 may be identified as exhibits in this decision.

Applicant completed a security clearance application for his current job in May 2007.⁴ In doing so, he was required to answer multiple questions about his background and personal history, including questions about use of illegal drugs and drug activity. He answered the drug questions in the negative, thereby denying any drug involvement.⁵ He was granted a security clearance at the secret level in January 2008.⁶

On or about June 14, 2010, Applicant tested positive for marijuana and amphetamines during a random drug test given by his employer.⁷ Concerning amphetamines, he has tested positive for amphetamines on several drug tests because he takes a prescription drug for a medical condition. He presented reliable documentary evidence to verify the drug use was lawful,⁸ and this matter will not be discussed further.

Applicant was notified of the positive drug test for marijuana on June 18, 2010, and he was suspended from work without pay for a week. His employer referred him to its employee assistance program (EAP), which directed him to attend three assessment sessions with a counselor, and he attended those sessions during his suspension. In addition, his employer placed him on a two-year mandatory expedited random drug testing schedule and gave him a last-chance letter stating that a second positive drug test would terminate his employment. His employer also filed an incident report notifying the Defense Department of the positive drug test.⁹

A few months later in August 2010, Applicant was interviewed to obtain additional information about his positive drug test for marijuana and his use of marijuana.¹⁰ Subsequently, as part of this case, Applicant agreed with and adopted a summary of the interview as an accurate reflection of the interview with no corrections or additions.¹¹ In the interview, he admitted using marijuana and stated, in relevant part, the following about his marijuana use:

- He admitted using marijuana with friends the day before the June 2010 random drug test.

⁴ Exhibit 5.

⁵ Exhibit 5 (Questions 24(a)–(c)).

⁶ Exhibit 7.

⁷ Exhibit 8.

⁸ Exhibit A-1, A-5, and A-6.

⁹ Exhibit 7.

¹⁰ Exhibit 6 (amphetamines are not mentioned in the interview).

¹¹ Exhibit 6.

- He admitted receiving a suspension from work without pay for one week based on the positive drug test.
- He admitted using marijuana from June 2009 to June 2010, with his usage increasing over time to two to three times weekly.
- He admitted using marijuana with friends who usually supplied the marijuana.
- He stated that he had come to realize through counseling that he may have been using marijuana to self-medicate for irritable bowel syndrome, lower back issues, stress, and anxiety.
- He stated that the positive drug test made him feel very ashamed and guilty.
- He stated that he does not intend to use marijuana in the future.
- He stated that he no longer associates with the friends with whom he smoked marijuana.

Applicant underwent a course of counseling, which he successfully completed in February 2011.¹² The counseling consisted of 23 outpatient treatment sessions and 12 Narcotics Anonymous (NA) meetings.¹³ As part of the counseling program, he tested negative via a urinalysis for the presence of any substances in November 2010.¹⁴ Since the June 2010 positive drug test, he has had random drug tests given by his employer in July 2010, July 2011, November 2011, February 2012, and April 2012; the results were all certified as negative.¹⁵ In addition to these matters, Applicant states that he relies on a support network consisting of his wife, parents, and supervisors at work, all of whom are aware of his past marijuana use and his efforts to overcome it.¹⁶

Law and Policies

It is well-established law that no one has a right to a security clearance.¹⁷ 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

¹² Exhibit A-3 and A-4.

¹³ Exhibit A-3.

¹⁴ Exhibit A-3.

¹⁵ Exhibit A-1.

¹⁶ Exhibit A.

¹⁷ *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.”¹⁸ 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.¹⁹ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²⁰

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²¹ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²² An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²³ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁴ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁵ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.²⁶

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.²⁷ Instead, it

¹⁸ 484 U.S. at 531.

¹⁹ Directive, ¶ 3.2.

²⁰ Directive, ¶ 3.2.

²¹ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²² Directive, Enclosure 3, ¶ E3.1.14.

²³ Directive, Enclosure 3, ¶ E3.1.15.

²⁴ Directive, Enclosure 3, ¶ E3.1.15.

²⁵ *Egan*, 484 U.S. at 531.

²⁶ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²⁷ 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.

Discussion

Under Guideline H,²⁸ 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."²⁹ 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 security concerns based on Applicant's history of drug abuse.³⁰ The evidence shows he engaged in drug abuse from 2009 to June 2010, when a random drug test at work detected his marijuana use.³¹ His drug abuse also took place while he held a security clearance, which is something I consider to be both serious and troubling.³² And his drug abuse amounts to illegal conduct (possession and use of marijuana),³³ which reflects poorly on his judgment, reliability, trustworthiness, and willingness to follow laws, rules, and regulations.

There are several mitigating conditions to consider under Guideline H. Based on the record before me, the following mitigating condition is most pertinent:

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.

²⁸ AG ¶¶ 24–26 (setting forth the security concern and the disqualifying and mitigating conditions).

²⁹ AG ¶ 24(b).

³⁰ AG ¶ 25(a).

³¹ AG ¶ 25(b).

³² AG ¶ 25(g).

³³ AG ¶ 25(c).

After considering the disqualifying and mitigating conditions, the central issue is whether Applicant presented sufficient evidence to mitigate and overcome the serious security concerns raised by his history of drug abuse while holding a security clearance. I conclude that he has done so. He presented sufficient evidence of reform and rehabilitation to persuade me that his use of marijuana is safely in the past. It is noteworthy that the evidence consists of reliable documentary information showing the following key facts. First, he established that he has not used marijuana or any other illegal drug since the June 2010 positive drug test. This was established by the multiple drug tests given between July 2010 and April 2012, all of which had negative results.³⁴ Second, he established that he successfully completed a counseling program that required more than 20 counseling sessions and a dozen NA meetings.³⁵ Taken together, these matters demonstrate his intent not to abuse drugs in the future. Indeed, my reading of Applicant's reply to the FORM is that he knows that he made a serious blunder by using marijuana while holding a security clearance, he knows that he disappointed multiple people, and he knows that he will lose his job if he engages in further drug abuse. It also appears that he has learned a hard but valuable lesson from this episode. In light of all the facts and circumstances surrounding Applicant's drug abuse, I am satisfied that his drug abuse will not recur and there are no questions that remain unanswered.

Following *Egan* and the clearly-consistent standard, I have no doubts or concerns about Applicant's fitness or suitability for a security clearance to work in the defense industry. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.³⁶ Having done so, I conclude that Applicant met 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:	For Applicant
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Subparagraphs 1.a–1.d:	For Applicant
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³⁴ Exhibit A-1.

³⁵ Exhibit A-3 and A-4.

³⁶ AG ¶ 2(a)(1)–(9).

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