



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



In the matter of:)
)
-----) ISCR Case No. 11-06098
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

09/21/2012

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 in August 2010, while holding a security clearance. He did not present 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 against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on May 3, 2012, 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 or about July 5, 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 received it July 11, 2012, but did not reply within the 30-day period allowed under the Directive. The case was assigned to me September 7, 2012.

Findings of Fact

The SOR alleged that Applicant used marijuana on multiple occasions in August 2010, while holding a security clearance. In his answer to the SOR, he admitted the allegations with explanations. His admissions and explanations 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 55-year-old employee of a federal contractor. His educational background includes a bachelor's degree and a master's degree. He has been married since 1981, and he and his wife have one adult child. He has worked as a senior engineer for his current employer since 2008. He first applied for and obtained a

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. This includes numerous documents that are not relevant to the SOR allegations. Given the lack of relevance, the documentary evidence concerning Applicant's past alcohol abuse and his 2006 conviction for drunk driving are given no weight in this decision.

security clearance from the Defense Department in 1983, and he then reapplied and obtained a clearance in 1999.⁴

Applicant completed his most recent security clearance application in January 2011.⁵ 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 three of the drug questions in the affirmative and disclosed that he smoked marijuana on August 13, 14, and 20, 2010. He explained that he smoked it to relax, taking one to three inhalations each time. He also explained that he sincerely regretted his actions and had not smoked marijuana since August 20, 2010.

A month or so later in February 2011, Applicant was interviewed to obtain additional information about his use of marijuana.⁶ 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.⁷ In the interview, he admitted using marijuana and explained, in relevant part, the following about his marijuana use:

- He admitted using marijuana in August 2010 while on a car trip with his son and two other men.
- He explained that he used the marijuana when a joint was passed to him during the drive, and he used it to help him relax and get some sleep.
- He recalled smoking marijuana a couple of more times during the trip, but did not recall the number.
- He used marijuana to help him relax, and he does not believe he is dependent on the drug.
- He stopped using marijuana because he decided it was no longer for him, he did not really enjoy it, and he has no intention of using any illegal drugs in the future.

In his answer to the SOR, Applicant explained that his marijuana use was limited to a two-week period in August 2010, that he has no desire to use marijuana in the future, and that he did not report his marijuana use to his company's security officer.

The August 2010 marijuana use was not the first time Applicant used marijuana. He disclosed that he used marijuana on a periodic basis from about 1973 to 1979, when

⁴ Exhibits 3, 4, and 5.

⁵ Exhibit 3.

⁶ Exhibit 6 (subject interview of February 11, 2011).

⁷ Exhibit 6.

he first applied for a security clearance in 1983.⁸ His frequency of use varied, but at times he used marijuana on a weekly basis. He drug involvement in the 1970s also included an arrest for possession of drugs (marijuana and amphetamines).

Law and Policies

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

⁸ Exhibit 7. The 1970s drug use by Applicant was not alleged in the SOR. But consistent with Appeal Board caselaw, a judge may nevertheless consider uncharged matters for certain limited purposes. See, e.g., ISCR Case No. 08-09232 at 3-4 (App. Bd. Sep. 9, 2010), which cited ISCR Case No. 03-20327 at 4 (App. Bd. Oct 26, 2006). Here, I considered the 1970s drug use when evaluating Applicant’s evidence in mitigation and considering the extent to which he has demonstration reform or rehabilitation.

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.

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 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.¹⁹ Instead, it 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,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 security concerns based on Applicant's history of drug abuse.²² The evidence shows he engaged in drug abuse in August 2010. His drug abuse also took place while he held a security clearance, which is something I consider to be both serious and troubling.²³ And his drug abuse amounts to illegal conduct (possession and use of marijuana),²⁴ which reflects poorly on his judgment, reliability, trustworthiness, and willingness to follow laws, rules, and regulations.

¹⁷ *Egan*, 484 U.S. at 531.

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

¹⁹ Executive Order 10865, § 7.

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

²¹ AG ¶ 24(b).

²² AG ¶ 25(a).

²³ AG ¶ 25(g).

²⁴ AG ¶ 25(c).

There are several mitigating conditions to consider under Guideline H.²⁵ Based on the record before me, none of the mitigating conditions apply fully to Applicant's case. With that said, the central issue here 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 not done so. He did not present sufficient evidence of reform and rehabilitation to persuade me that his use of marijuana is safely in the past. What is missing here is reliable documentary information confirming that he has not used marijuana or any other illegal drug since August 2010. By way of example, this could have been confirmed by paperwork showing Applicant took and passed one or more drug tests. Or this could have been confirmed by paperwork showing Applicant obtained and successfully completed a drug-education or drug-counseling program. Given the lack of reliable documentary information to support his claims, Applicant has not demonstrated an intent not to abuse any drugs in the future. This is especially so when considering his August 2010 marijuana use in light of his periodic use of marijuana in the 1970s.

Following *Egan* and the clearly-consistent standard, I have 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.²⁶ Having done so, 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.b:	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

²⁵ AG ¶ 26(a)–(d).

²⁶ AG ¶ 2(a)(1)–(9).