



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



In the matter of:)	
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)	ISCR Case No. 11-09876
Applicant for Security Clearance)	

Appearances

For Government: Kathryn D. MacKinnon, Esq., Deputy Chief Department Counsel
For Applicant: *Pro se*

05/31/2013

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 an extensive history of drug abuse (daily marijuana use) during 2000–2009. In addition to the unlawful marijuana use, he was cited for possession of marijuana in 2007. He also pleaded no contest to a firearm offense in 2009 and served 48 hours in jail and then served probation for three years, completing it in approximately September 2012. He did not present sufficient evidence to explain and mitigate the 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

On January 15, 2013, the Department of Defense (DOD) 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.¹ The SOR is similar to a complaint, and it detailed the reasons for the action under the security guidelines known as Guideline H for drug involvement and Guideline J for criminal conduct.

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on April 11, 2013. The hearing took place by video teleconference as scheduled on May 15, 2013. The record was held open to allow Applicant to submit an additional documentary exhibit, which was timely received and it is admitted without objections as Exhibit E. The transcript (Tr.) was received on May 21, 2013.

Findings of Fact

Applicant admitted the factual allegations in his answer to the SOR except for a denial of SOR ¶ 2.c. He denied that allegation, in part, explaining that he was not arrested, but instead was issued a citation to appear in court to answer for the 2009 firearm offense. 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 28-year-old employee of a federal contractor. His educational background consists of completing high school. He is currently employed as a food-service worker at a military installation in the southwest. He began working for his current employer in 2010. The available documentary information shows he has a good employment record.² It is for this position in which his company is sponsoring him for a security clearance. He submitted a security clearance application in December 2010.³

The undisputed evidence shows Applicant has a history of drug abuse and criminal conduct as follows:⁴

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 Exhibits A–C.

³ Exhibit 1.

⁴ SOR ¶ 2.d alleges Applicant was involved in a juvenile court matter in 1999, when he was 13 or 14 years old. It did not involve drugs and it was not part of a chronic pattern of juvenile misconduct. For these reasons, SOR ¶ 2.d is decided for Applicant, and it will not be discussed further herein.

1. He used marijuana on a daily basis from January 2000 through September 2009. He reported using marijuana “every day multiple times” in his security clearance application.⁵
2. He tested positive for marijuana during a random drug test in March 2007. As a result, he was fired from his job.⁶
3. He was issued a citation for possession of marijuana by a local sheriff’s office in 2007. He appeared in court and the matter was dismissed.⁷
4. While traveling to another state in June 2009, he was subject to a traffic stop by the highway patrol.⁸ During the stop, a handgun was discovered and confiscated by the officer, who issued him a citation. He appeared in court in September 2009 and pleaded no contest to a misdemeanor offense (unlawful carrying and possession of a loaded firearm in a public place). The court accepted his plea and sentenced him to 48 hours of jail and three years of summary probation. He completed probation without incident in approximately September 2012.

Applicant disclosed his history of drug abuse and criminal conduct when he completed his December 2010 security clearance application and during a December 2010 interview conducted for his background investigation.⁹ At the hearing, he explained that he is no longer a misguided youth and he has no intention of engaging in drug abuse in the future.¹⁰ In addition, he submitted a signed statement of intent with automatic revocation of clearance for any violation to demonstrate his intent not to abuse any drugs in the future.¹¹

⁵ Exhibit 1.

⁶ SOR ¶ 1.b alleges the positive drug test took place in 2009, and Applicant admitted to the same in his answer. Nevertheless, the documentary exhibits show this event took place in 2007. Exhibits 1 and 2.

⁷ Exhibit 2.

⁸ Exhibits 2 and 3.

⁹ Exhibits 1 and 2.

¹⁰ Exhibit D.

¹¹ Exhibit E.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹² 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.”¹³ 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.¹⁴ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁵

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁶ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁷ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁸ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁹ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁰ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.²¹

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

¹² *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).

¹³ 484 U.S. at 531.

¹⁴ Directive, ¶ 3.2.

¹⁵ Directive, ¶ 3.2.

¹⁶ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁷ Directive, Enclosure 3, ¶ E3.1.14.

¹⁸ Directive, Enclosure 3, ¶ E3.1.15.

¹⁹ Directive, Enclosure 3, ¶ E3.1.15.

²⁰ *Egan*, 484 U.S. at 531.

²¹ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

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.²² 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,²³ 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."²⁴ 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 sufficient to establish a security concern. The evidence shows Applicant engaged in extensive use of marijuana for nearly a decade (2000–2009). By his own account, he used marijuana every day multiple times. His drug abuse also had negative effects beyond its unlawful nature. For example, in 2007, he failed a drug test resulting in an employment termination, and he was cited for unlawful possession of marijuana. These are not trivial matters, and they show, among other things, that he continued using marijuana after those negative events. Based on the evidence, the following disqualifying conditions are most pertinent:

AG ¶ 25(a) any drug abuse;

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

AG ¶ 25(c) illegal drug possession.

His long-term pattern of drug abuse was both unlawful and troubling, which reflects poorly on his judgment, reliability, trustworthiness, and willingness to follow laws, rules, and regulations.

There are four mitigating conditions to consider under Guideline H.²⁵ Based on the evidence before me, the most pertinent here is AG ¶ 26(b), because Applicant has

²² Executive Order 10865, § 7.

²³ AG ¶¶ 24–26 (setting forth the security concern and the disqualifying and mitigating conditions).

²⁴ AG ¶ 24(b).

²⁵ AG ¶ 26(a)–(d).

presented evidence that he does not intend to abuse any drugs in the future. For example, he stated that his last use of marijuana was in September 2009, and there is no evidence to rebut or contradict his statement. He disclosed his drug abuse in 2010 during the security clearance process. In addition, his submission of the signed statement of intent is helpful evidence. Nevertheless, his evidence of reform and rehabilitation is insufficient. Given his pattern of daily marijuana use for nearly a decade, stronger evidence of reform and rehabilitation is necessary to mitigate the security concern.

Under Guideline J for criminal conduct,²⁶ the security concern is that criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

Applicant's history of criminal conduct, and the surrounding facts and circumstances, establish two disqualifying conditions under Guideline J as follows:

AG ¶ 31(a) a single serious crime or multiple lesser offenses; and

AG ¶ 31(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Guideline J also contains certain conditions that may mitigate security concerns. Based on the evidence before me, none of the mitigating conditions are sufficient to fully mitigate the security concern. With that said, Applicant receives credit for stopping his unlawful use of marijuana in 2009 and completing probation in about September 2012. These matters suggest a favorable trend. Nevertheless, the evidence in disqualification is more persuasive. The evidence shows Applicant has a history of criminal conduct that includes an extensive use of an illegal drug for nearly a decade, a citation for possession of the same illegal drug, and a misdemeanor firearm offense for which he served 48 hours in jail and three years of probation, which he completed less than one year ago. His history of criminal conduct is not petty, and it cannot be mitigated or explained away by the passage of time since his last offense.

Taken together, Applicant's history of drug abuse and criminal conduct raise serious doubt about his judgment, reliability, and trustworthiness. Following *Egan* and the clearly-consistent standard, I resolve that doubt in favor of protecting national security. 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.²⁷ Having done so, I conclude that

²⁶ AG ¶¶ 30, 31, and 32 (setting forth the security concern and the disqualifying and mitigating conditions).

²⁷ AG ¶ 2(a)(1)–(9).

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.c:	Against Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraphs 2.a–2.c:	Against Applicant
Subparagraph 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