



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-00262

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel

For Applicant: *Pro se*

02/15/2017

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for access to classified information. He did not present sufficient evidence to explain, extenuate, and mitigate the security concern stemming from his illegal drug involvement. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on August 4, 2014. This document is commonly known as a security clearance application. About one year later on November 30, 2015, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, 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 eligibility for access to classified information.¹ The SOR is similar to a complaint. It

¹ This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG),

detailed the factual reasons for the action under the security guideline known as Guideline H for drug involvement. He answered the SOR on January 5, 2016. He admitted the two factual allegations and requested a decision based on the written record lieu of a hearing.

On April 4, 2016, Department Counsel submitted all relevant and material information that could be adduced at a hearing.² The file of relevant material (FORM) was mailed to Applicant, who received it on April 14, 2016. He has not replied to the FORM. The case was assigned to me several months later on February 6, 2017.

Procedural Matters

Department Counsel's FORM includes Exhibit 5, which is a report of investigation (ROI) summarizing Applicant's interview that took place during the November 2014 background investigation. The ROI is not authenticated as required under ¶ E3.1.20 of the Directive.³ Furthermore, the Directive provides no exception for the authentication requirement. Although Applicant did not reply to the FORM, I am not persuaded that a *pro se* applicant's failure to respond to the FORM, which is optional, equates to a knowing and voluntary waiver of the authentication requirement. The record does not demonstrate that Applicant understood the concepts of authentication, waiver, and admissibility. It also does not demonstrate that he understood the implications of waiving an objection to the admissibility of the ROI. Accordingly, Exhibit 5 is inadmissible and I have not considered the information in the ROI.

Findings of Fact

Applicant is a 45-year-old employee who requires a security clearance for his job as a desktop-support technician for an engineering company. He has worked for this company since June 2014. Before that, he was unemployed for about two months in May-June 2014. And before that, he was had a job in computer support for a large, well-known defense contractor from July 2004 to May 2013. He applied for and obtained a security at the secret level in 2003.⁴ He has been married and divorced three times. He has one minor child.

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).

² The file of relevant material consists of Department Counsel's written brief and supporting documentation, some of which are identified as evidentiary exhibits in this decision.

³ See generally ISCR Case No. 12-10933 (App. Bd. Jun. 29, 2016) (In a concurring opinion, Judge Ra'anani notes the historical concern about reports of investigation in that they were considered by some to present a heightened problem in providing due process in security clearance cases. Judge Ra'anani raises a number of pertinent questions about using an unauthenticated ROI in a non-hearing case with a *pro se* applicant.).

⁴ Exhibit 7.

Applicant's admits engaging in drug-related criminal conduct, which took place in 2012 while he had his job with a defense contractor. In particular, he was arrested and charged with possession of marijuana (less than 20 grams) and use or possession of drug paraphernalia.⁵ He self-reported the drug-related incident to his then employer. Subsequently in 2013, he pleaded no contest, and the state court imposed a fine of \$533 and ordered him to attend a victim-awareness program.

Applicant also disclosed his drug-related behavior when he completed his 2014 security clearance application.⁶ He reported using marijuana in November 2012 while possessing a security clearance. He explained that he was under stress because he was going through a divorce; he was also undergoing an incident of credit-card fraud in the amount of \$5,000; and he was discontent over the Thanksgiving holiday. He explained that he smoked marijuana with a friend and was given the pipe. He was pulled over by the police on his drive home and the pipe formed the basis for the criminal charges. He also disclosed the details about the criminal charges and the disposition thereof. He stated that the possession of marijuana charge was *nolle prossed*, and adjudication of guilt was withheld on the use or possession of drug paraphernalia charge.

Applicant's answer to the SOR allegations was limited to an admission without further comment, explanation, or supporting documentation. Likewise, he did not reply to the FORM. As a result, the record does not contain information concerning his employment record, constructive community involvement, drug counseling or treatment, or other matters indicative of reform and rehabilitation.

Law and Policies

It is well-established law that no one has a right to a security clearance.⁷ As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁸ 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.⁹ An

⁵ Exhibit 8.

⁶ Exhibit 4.

⁷ *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 (no right to a security clearance).

⁸ 484 U.S. at 531.

⁹ Directive, ¶ 3.2.

unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁰

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹¹ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹² An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹³ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁴

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.¹⁵ The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁶

Discussion

Under Guideline H for drug involvement, the concern is that "use of an illegal drug or misuse of a prescription drug can raise questions about a [person's] reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations."¹⁷

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions or factors:

AG ¶ 25(a) any drug abuse;

AG ¶ 25(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

AG ¶ 25(g) any illegal drug abuse after being granted a security clearance;

¹⁰ Directive, ¶ 3.2.

¹¹ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹² Directive, Enclosure 3, ¶ E3.1.14.

¹³ Directive, Enclosure 3, ¶ E3.1.15.

¹⁴ Directive, Enclosure 3, ¶ E3.1.15.

¹⁵ *Egan*, 484 U.S. at 531.

¹⁶ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁷ AG ¶ 24.

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 [person's] current reliability, trustworthiness, or good judgment; and

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; (4) a signed statement of intent with automatic revocation of clearance for any violation.

I have considered the totality of Applicant's illegal drug involvement that occurred in 2012, including the resulting criminal charges and the disposition thereof. The most troubling aspect of this case is Applicant's choice to use marijuana after being granted a security clearance. That is serious misconduct, and it needs to be weighed accordingly. Other than the passage of time without evidence of recurrence, Applicant has presented scant evidence of reform and rehabilitation. Based on the written record before me, Applicant has not demonstrated that he will not abuse drugs in the future.

Applicant's history of illegal drug involvement after being granted a security clearance creates serious doubt about his reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. Accordingly, I conclude that he did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline H:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 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 access to classified information.

Michael H. Leonard
Administrative Judge