



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



In the matter of:)	
)	
-----)	ISCR Case No. 15-07083
)	
Applicant for Security Clearance)	

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Bruce R. Heurlin, Esq.

01/19/2017

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for access to classified information. He presented sufficient evidence to explain and mitigate the security concern stemming from his drug involvement, which consisted primarily of marijuana use. Accordingly, this case is decided for Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on February 2, 2015, for a periodic reinvestigation. This document is commonly known as a security clearance application. Thereafter, on May 8, 2016, 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

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),

complaint. It detailed the factual reasons for the action under the security guideline known as Guideline H for drug involvement. He answered the SOR with a two-page memorandum on May 27, 2016. He largely admitted the four factual allegations with a brief explanation and clarification concerning dates, and he requested a hearing.

The case was assigned to me on August 3, 2016. The hearing was held as scheduled on September 8, 2016. Department Counsel offered Exhibits 1-3, and they were admitted. Applicant testified on his own behalf and offered Exhibits A-M, and they were admitted. Applicant made a timely post-hearing submission of Exhibit N, which was admitted without objection. The transcript of hearing (Tr.) was received on September 19, 2016.

Findings of Fact

Applicant is a 35-year-old employee who requires a security clearance for his job as a senior systems engineer with a company doing business in the defense industry. He has worked for this company, initially as an intern and then a full-time employee, since December 2008. He has held a security clearance since 2009. He has a good if not excellent record of employment.² His educational background includes a bachelor's degree in engineering physics awarded in 2010. He married in 2012, and they have two young children. Outside of work, he is involved in church and scouting activities. In addition, he submitted five highly favorable letters of reference in support of his case.³ Collectively, the letters, from co-workers and others, uniformly vouch for his reliability, trustworthiness, and good judgment.

As alleged in the SOR, this case concerns Applicant's drug involvement, which consisted primarily of marijuana use. Concerning the four factual allegations in the SOR, he admits and the evidence shows the following: (1) he bought and used marijuana on a periodic basis from about October or November 2010 through January 2011, after being granted a security clearance in 2009; (2) he bought and misused the prescription drug Xanax on a periodic basis during September—November 2010, after being granted a security clearance in 2009; (3) his history of buying and using marijuana dates back to 1999, when he was a high school student, and continued on a periodic basis, with periods of abstinence, until ending in January 2011; and (4) he sold marijuana approximately five times in 2002 or 2003, while he was attending community college, to fellow users at parties; the sales consisted of transfers of user amounts of marijuana at his own cost without profit.

The majority of Applicant's drug involvement took place before he began working for his current employer in late 2008.⁴ His use of marijuana began in 1999 when he was

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 Exhibits C and D.

³ Exhibits F, G, H, I, and J.

⁴ Tr. 35-37.

in high school; he also tried or experimented with a few other drugs; and he used marijuana on an intermittent basis when he was a college student. He did not use marijuana in 2009, and he did not use marijuana for most of 2010. He resumed marijuana use on a sporadic basis in about October or November 2010 after ending a relationship with a woman and with the addition of a roommate who was a marijuana user.⁵ The frequency of his marijuana use was about once a week with periods of abstinence.⁶ He also bought a total of about ten pills of Xanax over a couple of months, and he misused it on two or three occasions.⁷

In January 2011, Applicant witnessed an alcohol-related incident of domestic violence between his roommate and his girlfriend. Applicant had had enough, he banned alcohol and drugs from his apartment, and he told them to leave the apartment, which they did in a week or two. He has not used marijuana since January 2011, and he has not used alcohol since September 2011.⁸

After ridding himself of his roommate, Applicant decided to return to his church, from which he had lapsed, in an effort to address his issues.⁹ His church teaches, among other things, sobriety and abstinence from drugs and alcohol. He met weekly to monthly with a church official to address his bad habits; he attended church services; he attended a particular church conference in October 2011 and felt he had a spiritual experience, he felt his guilt go away, and he turned himself over to God; he advanced in leadership positions in the church; and he eventually met and married his wife who is also a church member.

Moving forward to 2015, Applicant learned he would be required to complete a security clearance application, and he wanted to be honest and truthful in doing so.¹⁰ He started the process by self-reporting his drug involvement to his company's facility security officer (FSO) on February 2, 2015. The FSO's incident report describes the following circumstances about Applicant's self-report:

On Monday 02-02-2015 this office was advised that in preparation for his upcoming security clearance re-investigation [Applicant] admitted that he failed to report marijuana use during his initial security clearance investigation [in 2009]. [He] admitted to weekly marijuana use for a four month period, September 2010 through January 2011. [He] reported that his marijuana use was during his time as a [company] intern and full-time

⁵ Tr. 39-42.

⁶ Tr. 75.

⁷ Tr. 54-55, 76.

⁸ Tr. 43, 51, 62.

⁹ Tr. 44-46.

¹⁰ Tr. 52-54.

employee. [He] also reported taking prescription pain medication that was prescribed to another person. [He] reported he withheld this information during his initial security clearance investigation [in 2009].¹¹

Thereafter, he disclosed, in extensive detail, his drug involvement (both marijuana and Xanax) in his February 25, 2015 security clearance application and during his 2015 background investigation.¹²

In preparation for this case, Applicant underwent a substance-abuse evaluation in July 2016.¹³ The person who conducted the evaluation is a licensed clinical social worker and a licensed independent substance abuse counselor. Although the evaluation contains erroneous factual information,¹⁴ the ultimate conclusions are quite favorable as follows: (1) Applicant does not meet the criteria for substance abuse disorder; (2) he has good primary and social support systems; (3) his Global Assessment of Functioning or GAF score was 85-90, which is indicative of good functioning in all areas with no more than everyday problems or concerns; and (4) there is no clinical indication to recommend substance-abuse treatment.

Applicant has no intention to engage in drug abuse in the future. To that end, he submitted a signed statement that (1) he will never use marijuana or any other illegal drug; (2) he is willing to undergo random drug testing; and (3) he agrees to immediate revocation of his security clearance if marijuana or any other illegal drug is found in his system.¹⁵

Applicant made a favorable impression on me during the hearing. He was sincere, respectful, and polite. At times he was emotional and contrite when addressing his past misconduct and his efforts to overcome it. Overall, I found him credible and worthy of belief.

Law and Policies

It is well-established law that no one has a right to a security clearance.¹⁶ 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

¹¹ Exhibit 3.

¹² Exhibits 1 and 2.

¹³ Exhibits E.

¹⁴ Tr. 48-50.

¹⁵ Exhibit N.

¹⁶ *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).

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

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁰ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²¹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²² In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²³

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.²⁴ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.²⁵

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.”²⁶

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

¹⁷ 484 U.S. at 531.

¹⁸ Directive, ¶ 3.2.

¹⁹ Directive, ¶ 3.2.

²⁰ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²¹ Directive, Enclosure 3, ¶ E3.1.14.

²² Directive, Enclosure 3, ¶ E3.1.15.

²³ Directive, Enclosure 3, ¶ E3.1.15.

²⁴ *Egan*, 484 U.S. at 531.

²⁵ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²⁶ AG ¶ 24.

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

I have considered the totality of Applicant's drug involvement, before and after he was granted a security clearance in 2009. In my view, the most troubling aspect of this case is Applicant's drug involvement during the four- to five-month period in 2010—2011, when he was using drugs with his then roommate while holding a security clearance. Plainly, that is serious misconduct, and it needs to be weighed accordingly.

Applicant presented a substantial case in reform and rehabilitation. He has a highly favorable employment record, and he is involved in constructive community involvement through his church and scouting. What is most important is that he demonstrated that he will not abuse any drugs in the future. I reach that conclusion for several reasons. First, he no longer associates with the drug-using roommate he had during 2010—2011 period. He is now married with children and appears to be fully occupied at work and at home. Second, he is no longer in the same environment where he used drugs during 2010—2011. The best evidence on that point is his return to his church along with his wife and children. Together, his church and family act as a support system he lacked during 2010—2011. Third, he has not engaged in drug abuse since January 2011, a period of nearly five years when the record closed, which is an appropriate period of abstinence. And fourth, he submitted a signed statement of intent to back up his stated intention. Taken together, the totality of circumstances show that Applicant has reformed his ways and will not engage in further drug abuse.

In addition, Applicant receives credit in mitigation for the following reasons: (1) he voluntarily reported the information about his drug involvement in 2015 to his company's FSO, before completing the security clearance application and before the subsequent background investigation; (2) he was truthful and complete in responding to questions; and (3) he has demonstrated positive changes in behavior in that he has not engaged in drug abuse since January 2011, a period of nearly five years.²⁷ His willingness to self-report his misconduct is an important aspect of this case. It is certainly possible that he could have remained silent without adverse consequences. His willingness to self-report

²⁷ Directive, Enclosure 2, ¶ 2(e)(1), (2), and (5).

speaks highly for his integrity, his willingness to comply with laws, rules, and regulations, and his overall suitability for access to classified information.

Applicant's history of drug involvement no longer creates 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 met 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: For Applicant

Subparagraphs 1.a—1.d: For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant access to classified information.

Michael H. Leonard
Administrative Judge