



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



In the matter of:)
)
) ISCR Case No. 15-07789
)
Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Donna Price, Esq.

11/07/2017

Decision

CERVI, Gregg A., Administrative Judge:

Applicant mitigated the drug involvement and substance misuse security concerns. Eligibility for access to classified information is granted.

Statement of the Case

Applicant completed a Questionnaire for National Security Positions (SF 86)¹ on October 28, 2014. On May 12, 2016, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, Drug Involvement and Substance Misuse.²

¹ Also known as a Security Clearance Application (SCA).

² The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DoD on September 1, 2006.

Applicant responded to the SOR on June 1, 2016, and requested a hearing before an administrative judge. The case was assigned to me on December 5, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 9, 2017, scheduling the hearing for April 5, 2017. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 6 were admitted into evidence without objection. Applicant Exhibits (AE) A through F were admitted into evidence despite an objection from Department Counsel. Applicant and four witnesses on his behalf, testified at the hearing. DOHA received the hearing transcript (Tr.) on April 13, 2017. Applicant's counsel submitted post-hearing spelling corrections to the transcript.

Findings of Fact

The SOR alleges Applicant used marijuana from approximately February 2011 to May 2014; purchased marijuana from December 2013 to April 2014; and used and purchased marijuana after being granted a DOD security clearance in November 2013. In his answer to the SOR, Applicant admitted to using marijuana twice in college, around February 2011, and not again until December 2013. He admitted the remaining SOR allegations.

Applicant is a 26-year-old systems engineer for a defense contractor, employed since January 2013. He was previously employed as an intern with another defense contractor from June 2012 to January 2013. He earned a bachelor's degree in May 2013. He is unmarried. He was granted a final security clearance in November 2013. As a result of self-reporting marijuana use in May 2014, his special access program clearance was suspended.

Applicant first reported his marijuana use in a security clearance application completed in January 2013, when he worked as an intern for a defense contractor while attending college. He disclosed his use of marijuana on three occasions while in college. He noted in his SCA that he did not intend to smoke marijuana again because it is illegal and not worth losing everything he worked so hard to achieve. He said it is not worth the risk, and his job is more important to him. He reported being granted a security clearance while in this position.

After graduating from college in May 2013, he moved-in with a person Applicant knew was a drug user. Applicant used marijuana again during a ski trip in December 2013 "because it was legal in the state," but Applicant knew it was illegal federally and prohibited as a holder of a DOD security clearance. He reasoned that he had a top secret clearance already, so believed he was done with the investigation, drug tests and interviews for a while. In the following months, he continued to use marijuana at home, about one time every two weeks, and progressed in 2014 to averaging about five times per week. He purchased the marijuana through his roommate. He described living in "constant fear," "paranoid" of a random drug test and miserable.

In approximately May 2014, Applicant was on a work-related conference call while at home and accidentally discussed purchasing marijuana with his roommate while the

phone was on speaker mode. He also reported passing-out twice while using marijuana, the last time resulting in a hospitalization. As a result of the apparent health concerns, Applicant stopped using marijuana. While at work, suffering a panic attack because of an inquiry regarding the conference call where he feared he was overheard purchasing marijuana, he reported his use to his supervisor. He later admitted his drug use to his co-workers as he was removed from the workspace. His roommate moved from their home in June or July, 2014, and his new roommate does not use marijuana.

Applicant's father, friends, and a co-worker testified positively on his behalf. His co-worker testified that when Applicant told his work group about his drug use, he was ashamed and cried. He likewise disclosed his marijuana use to his parents, friends and church group. Applicant submitted several letters in support, along with excellent college transcripts and work evaluations, and several months of voluntary drug tests showing negative results. He also submitted a written statement of intent to refrain from any further drug use with the understanding it could result in a revocation of his security clearance.

Law and Policies

The Director of National Intelligence (DNI) issued revised adjudicative guidelines (AG) in a Security Executive Agent Directive, effective on June 8, 2017. These AGs are applicable to this decision.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security clearance decision.³

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan.27, 1995).

In *Department of Navy v. Egan*⁴, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.⁵

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” It is well-established law that no one has a right to a security clearance. As noted by the Supreme Court in *Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.” 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.⁶

The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive and classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive or classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive or classified information.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H: Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. Controlled substance means any “controlled substance” as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in

⁴ *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).

⁵ *Egan*, 484 U.S. at 531.

⁶ *Egan*, 484 U.S. at 531.

this guideline to describe any of the behaviors listed above.

The guideline notes conditions that could raise security concerns under AG ¶ 25. The disqualifying condition potentially applicable in this case includes:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant has a history of illegal drug use, particularly from February 2011 to May 2014, and purchased and possessed marijuana from December 2013 to April 2014. Additionally, he used illegal drugs after being granted a DOD security clearance in November 2013. Disqualifying conditions under AG ¶¶ 25 (a), (c), and (f) are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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 individual's current reliability, trustworthiness, or good judgment;
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used; and
 - (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant has now sincerely acknowledged his past drug involvement, despite his past representations. Since May 2014, he has abstained from all use of illegal drugs, changed his environment and disassociated from his friends that use drugs, and signed a statement of intent. He has won the support of his colleagues, family and friends, and has shown a renewed maturity and understanding of the consequences of illegal drug use. He showed he can stay drug free from a series of voluntary drug tests conducted after he disclosed his use. Applicant showed he now has the requisite understanding and

intent to refrain from any further drug use, and appears dedicated to live a drug-free lifestyle going forward. I believe he has the clear intent to leave his past drug-use behind. Overall, the record evidence leaves me without questions or doubts as to his eligibility and suitability for a security clearance. I conclude Applicant mitigated the substantive security concerns. AG ¶¶ 26(a) and (b) apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered all of the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated the evidence, my findings of fact and comments under Guideline H in this whole-person analysis.

Overall, Applicant has sincerely acknowledged his past drug involvement and has shown that he no longer finds a lifestyle involving illegal drugs compatible with his values and career goals. He has immersed himself in his work, changed his environment, and disclosed his past drug use to his co-workers, family and friends.

After this opportunity to show mitigation of his past drug use, he will not likely be considered youthful and immature again, but will be held to the high standards expected of a professional holding a government security clearance. I am convinced of Applicant's renewed sincerity in his promise to abstain from all future use of illegal drugs, and I believe he now fully understands the seriousness of this issue and future consequences should another violation occur.

Based on the record as discussed above, Applicant's history of drug involvement no longer casts doubts on his reliability, trustworthiness, and good judgment.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	For Applicant
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Subparagraphs 1.a – 1.c:	For Applicant
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Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Gregg A. Cervi
Administrative Judge