



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-01047

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel

For Applicant: *Pro se*

11/07/2017

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 illegally used and purchased steroids, intermittently, beginning in 2008 to about December 2013. He has not used or purchased steroids in more than three years and he no longer associates with those that do. But in 2014 he made a series of false statements about his illegal steroid use. 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 21, 2014.¹ This document is commonly known as a security clearance application. Thereafter, on August 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

¹ Exhibit 1.

clearly consistent with the national interest to grant him eligibility for access to classified information. The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guidelines known as Guideline H for drug involvement and Guideline E for personal conduct.

Applicant answered the SOR on August 15, 2016; he admitted the factual allegations made in the SOR; and he requested a hearing before an administrative judge. The case was assigned to me December 7, 2016. The hearing took place as scheduled on January 27, 2017. The hearing transcript (Tr.) was received on February 7, 2017.

Findings of Fact

Applicant is a 30-year-old network engineer for a federal contractor. He has worked for his current employer since August 2014. He has never married and has no children. His educational background includes a bachelor's degree in information systems science. He has a good employment record based on letters of recommendation from two of his direct supervisors.²

Applicant has admitted a history of illegal use and purchase of steroids, intermittently, beginning in 2008 and ending in about 2013. His history of drug involvement and substance misuse was established during the course of a background investigation.³ He also admitted extensive use of steroids during his hearing testimony.⁴ His history includes a period of abstinence from February 2010 to about April 2012.⁵ He is uncertain about the details of his usage (e.g., specific dates), but he readily admitted the illegal use and purchase of steroids during the 2008-2013 period.⁶ He quit using steroids after concluding doing so was no longer worth it along with his desire to obtain a clearance and further his job prospects.⁷

Applicant made a series of false statements about his illegal use of steroids during the security clearance process. First, in July 2014, during an interview conducted by another governmental agency to determine his access to sensitive compartmented information (SCI), he deliberately falsified facts about his previous steroid use. Second, in August 2014, when he completed his security clearance application, he deliberately understated his usage by claiming that he took a single pill on one occasion in April 2008 in order to help him lose body fat. Third, in November 2014, during an interview

² Exhibits A and B.

³ Exhibits 1-4.

⁴ Tr. 35, 37.

⁵ Tr. 40-42.

⁶ Tr. 40-41.

⁷ Tr. 59-60.

conducted during his background investigation, he deliberately understated his usage by claiming that his illegal steroid use was limited to the single month of April 2008.

Applicant has not used or purchased illegal steroids since December 2013, a period of nearly four years. He no longer associates with people involved with the use or purchase of illegal steroids. He was unequivocal in stating that he intends to abstain from all illegal drug involvement and substance misuse.

Law and Policies

This case is adjudicated under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.⁸

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 the 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 clearance 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

⁸ The 2017 AG are available at <http://ogc.osd.mil/doha>.

⁹ *Department of the 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.

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 Court stated that the burden of proof is less than a preponderance of evidence.¹⁷ The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁸

Discussion

Under Guideline H for drug involvement and substance misuse, the concern is that:

[t]he illegal use of controlled substances, to include the misuse of prescriptions and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are use 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.¹⁹

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

AG ¶ 25(a) any substance abuse;

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

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 individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 26(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

¹⁵ Directive, Enclosure 3, ¶ E3.1.15.

¹⁶ Directive, Enclosure 3, ¶ E3.1.15.

¹⁷ *Egan*, 484 U.S. at 531.

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

¹⁹ AG ¶ 24.

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 of revocation of national security eligibility.

I have considered the totality of Applicant's drug involvement and substance misuse during 2008-2013 as reflected in the record evidence. While his steroid use was intermittent and had a period of abstinence, it was also neither minor nor trivial. Nevertheless, more than three years have passed since his last involvement with steroids in December 2013, he no longer associates with people involved with illegal steroids use or purchase, and he has persuaded me that he has no intent to engage in future substance misuse. For all these reasons, the Guideline H matter is decided for Applicant.

Under Guideline E for personal conduct, the concern is that "conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special concern is any failure to cooperate or provide truthful and candid information during national security investigative or adjudicative processes."²⁰ A statement is false if it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be disclosed.

It is undisputed that Applicant made a series of false statements about his involvement with steroids during the 2014 investigative process.²¹ Doing so is serious misconduct, and it is not easily explained away or mitigated by the passage of time. I have considered the pertinent mitigating conditions and none apply in Applicant's favor. For all these reasons, the Guideline E matter is decided against Applicant.

Following *Egan* and the clearly-consistent standard, I have doubts or concerns about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified or sensitive 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*. I also considered the whole-person concept. Accordingly, I conclude that he did not meet ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

²⁰ AG ¶ 15.

²¹ AG ¶¶ 16(a) and (b).

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline H:	For Applicant
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	For Applicant
Subparagraphs 2.b, 2.c, and 2.d	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