



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-03186

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel

For Applicant: *Pro se*

01/05/2018

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny him eligibility for access to classified information. He has an extensive history of illegal use of controlled substances (cocaine and marijuana) as well as the misuse of prescription and non-prescription drugs. He recently misused Xanax in November 2016. He did not present sufficient evidence to show that his drug involvement and substance misuse are safely in the past. 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 January 13, 2016.¹ This document is commonly known as a security clearance application. Thereafter, on December 7, 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 guideline known as Guideline H for drug involvement and substance misuse.

Applicant answered the SOR on January 11, 2017; he admitted the factual allegations in the SOR except for the allegations in SOR ¶¶ 1.e and 1.f; and he requested a hearing before an administrative judge. The case was assigned to me on February 16, 2017. The hearing took place as scheduled on April 26, 2017. Department Counsel called no witnesses and offered Exhibits 1 and 2. Applicant testified and offered Exhibit A. All exhibits were admitted. The hearing transcript (Tr.) was received on May 4, 2017.

Findings of Fact

Applicant is a 26-year-old technical support engineer for a federal contractor. He has worked for his current employer since November 2015. He earns an annual salary of about \$54,000. He has never married and has no children. His educational background includes an associate's degree in business awarded in 2013 and a bachelor's degree in marketing awarded in 2015. This is his first job working in the defense industry, and it is his initial application for a security clearance. He has a favorable letter of recommendation from a former employer.²

Applicant has admitted a history of illegal use of controlled substances as well as misuse of prescription and non-prescription drugs as follows: (1) he used and purchased cocaine with varying frequency during 2011-2015; (2) he used and purchased marijuana with varying frequency during 2009-2014; (3) he used hallucinogens about three times during 2012-2014, and he purchased hallucinogens once in September 2014; (4) he used Ecstasy twice during 2012-2014; (5) he misused Oxycodone, which was not prescribed to him, by using it for recreational purposes during 2012-2015; (6) he misused Xanax, which was prescribed to him, by using it for recreational purposes during 2011-2015; and (7) he sold the medication Adderall during 2013-2015.³ In addition, during the hearing he admitted misusing Xanax, which was prescribed to him, on several occasions in about November 2016. His latest misuse occurred several months after he submitted the security clearance application.⁴ He attributed the misuse to a "weak moment."⁵ He also stated that he passed a pre-employment drug test for his current job.⁶

² Exhibit A.

³ Exhibits 1 and 2; Answer to SOR.

⁴ Tr. 40-48.

⁵ Tr. 47-48.

⁶ Tr. 34,

Applicant has not undergone any type of drug-treatment or substance-abuse program. He is under the care of a psychiatrist for minor depression, anxiety, and attention deficit disorder (ADD).⁷ He explained he has not sought out drug treatment or counseling because he is a very private person and he does not want anyone else to know about his substance-abuse issues.⁸ Going forward, his intention is not to use illegal drugs or misuse legal drugs, but he conceded it is more difficult than just saying so.⁹

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, 2017.¹⁰

It is well-established law that no one has a right to a security clearance.¹¹ 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.”¹² 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.¹³ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁴

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁵ The Government has the burden of presenting

⁷ Tr. 37-39.

⁸ Tr. 49.

⁹ Tr. 52-53.

¹⁰ The 2017 AG are available at <http://ogc.osd.mil/doha>.

¹¹ *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).

¹² 484 U.S. at 531.

¹³ Directive, ¶ 3.2.

¹⁴ Directive, ¶ 3.2.

¹⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

evidence to establish facts alleged in the SOR that have been controverted.¹⁶ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁷ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁸

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.¹⁹ The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²⁰

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.²¹

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

¹⁶ Directive, Enclosure 3, ¶ E3.1.14.

¹⁷ Directive, Enclosure 3, ¶ E3.1.15.

¹⁸ Directive, Enclosure 3, ¶ E3.1.15.

¹⁹ *Egan*, 484 U.S. at 531.

²⁰ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²¹ AG ¶ 24.

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 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 abuse and misuse during 2009-2016 as reflected in the record evidence. Overall, his behavior is relatively recent with the latest misuse of Xanax occurring in November 2016. His illegal drug use and misuse of prescription drugs was not infrequent as it happened multiple times over a period of years.²² And it did not occur under circumstances that are unlikely to recur. His use of cocaine is quite serious and it was not limited to a brief period (2011-2015).²³ Although the majority of his drug abuse and misuse occurred during his years as a student, I am not persuaded that his misbehavior is safely in the past and will not recur. The best evidence on that point is twofold: (1) his misuse of Xanax in November 2016, which was several months after he submitted his security clearance application; and (2) his reluctance to undergo drug treatment or counseling.

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.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline H:	Against Applicant
Subparagraphs 1.a-1.d:	Against Applicant
Subparagraphs 1.e and 1.f:	For Applicant
Subparagraphs 1.g-1.i:	Against Applicant

²² Exhibit 2 (For example, during the background investigation he stated that he used marijuana 150 to 200 times, and he purchased marijuana 15 to 20 times).

²³ Exhibit 2 (During the background investigation he stated that he purchased cocaine 50 to 100 times, and that at one point he became dependent on cocaine).

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