



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-00994

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel

For Applicant: Bruce R. Heurlin, Esq.

08/28/2018

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. He presented sufficient evidence to mitigate his infrequent use of marijuana. 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 August 12, 2016.¹ This document is commonly known as a security clearance application. Thereafter, on May 22, 2017, 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. The SOR is similar to a complaint. It detailed the factual reasons for the

¹ Exhibit 1.

action under the security guideline known as Guideline H for drug involvement and substance misuse based on the following: (1) use of marijuana with varying frequency from about November 2009 to December 2015; and (2) use of marijuana as noted above after being granted a security clearance in February 2012.

With assistance of counsel, Applicant answered the SOR on July 5, 2017. He admitted the two SOR allegations; he also provided an extensive explanation as outlined in an 11-page memorandum, to include Exhibits A-V; and he requested a hearing before an administrative judge.

The case was assigned to me on October 5, 2017. The hearing scheduled for January 24, 2018, was postponed due to a pending government shutdown. The hearing was conducted as rescheduled on April 11, 2018. Both Department Counsel and Applicant offered documentary exhibits, which were admitted as Government Exhibits 1-2 and Applicant's Exhibits A-X. The hearing transcript was received on April 25, 2018.

Findings of Fact

Applicant is a 29-year-old employee who requires a security clearance per an offer of employment with a large company doing business in the defense industry.² He is currently employed as an engineer for an aerospace company, but he is not required to hold a security clearance for that job, and he does not have access to classified information.³ He graduated *magna cum laude* with a 3.842/4.0 GPA, with a bachelor's degree in aerospace engineering in 2011. While working full time during 2012-2015, he attended graduate school (via a distance education network). He earned a master's degree in astronautical engineering with a 3.73/4.0 GPA; he concentrated his studies in spacecraft dynamics.⁴ He has never married and has no children. He has been in a cohabitant relationship since January 2017, she works for his prospective employer, and she holds a security clearance for that employment.⁵

After receiving his bachelor's degree, Applicant's first job was as a civilian employee for the Department of the Air Force. He worked as an aerospace engineer from November 2011 to January 2014. The Defense Department granted him a security clearance during 2012 after considering the results of a background investigation, which included his self-report of marijuana use during 2009-2011. He left the job with the Air Force for a job as a senior advanced systems engineer with a subcontractor to an aerospace company. He was so employed from February 2014 to May 2015, when he was hired directly by his current employer. He was required to submit to and pass a drug test for each position noted above.

² Tr. 6-7.

³ Tr. 26, 61-62.

⁴ Tr. 37-38; Exhibit O.

⁵ Tr. 55-58.

Applicant has a history of marijuana use, which he does not dispute. He disclosed his marijuana use throughout the security clearance process; first, in his August 2016 security clearance application; second, during the 2016 background investigation; and third, during his hearing testimony, which I found to be credible and worthy of belief.⁶ He admitted using marijuana beginning in about November 2009 and ending in December 2015. Altogether, he used marijuana seven times as follows: (1) four times while in college during 2009-2010; and (2) three times during 2014-2015, which was after he stopped working for the Air Force and he no longer had an active security clearance. His seven instances of marijuana use took place in November 2009, September 2010, July 2014, March or August 2015, and December 2015.⁷ He never purchased marijuana, he used it when it was provided to him, and his possession of marijuana was always incidental to usage. He attributed his marijuana use to lapses in judgment due to curiosity and the social environments he found himself in while in college and after his employment with the Air Force.

Applicant stated in his security clearance application that he did not use nor did he consider using marijuana while he held an active security clearance for his job with the Air Force.⁸ He also stated that he decided to stop using marijuana based on personal health and legal reasons about eight to nine months ago (which would have been about December 2015 or January 2016). To that end, at the hearing he submitted a signed statement of intent to abstain from all drug involvement and substance misuse in the future, and he understands that any future involvement is grounds for revocation of eligibility.⁹ He further stated that he will resist and decline any offers to use marijuana in the future.¹⁰ He understands and was able to articulate the security concern associated with marijuana use or other substance abuse¹¹

In addition to the pre-employment drug tests noted above, Applicant voluntarily took a drug test in September 2017, and he tested negative for all tested substances, including THC, the active ingredient in marijuana.¹² He also voluntarily submitted to a substance-abuse evaluation in September 2017, conducted by a licensed clinical social worker (LCSW) and a licensed independent substance abuse counselor (LISAC), who is employed as the counseling director for a community counseling agency.¹³ The evaluation of Applicant reached a diagnostic assessment of substance use disorder not

⁶ Exhibits 1 and 2.

⁷ Exhibits 1 and 2; Tr. 34.

⁸ Exhibit 1.

⁹ Exhibit V; Tr. 43-44, 65-68.

¹⁰ Tr. 55.

¹¹ Tr. 45-46.

¹² Exhibit W.

¹³ Exhibit X.

present; he did not meet any criteria for drug abuse or drug dependence; he did not meet any criteria for substance use related disorder; no treatment was recommended; and the prognosis for him to maintain complete abstinence was assessed as very good.

Applicant presented extensive documentary evidence in mitigation.¹⁴ The documentation consists of high school academic awards and certificates, high school athletic awards and certificates, high school academic records, scholarship records and nominations for scholarships records, college certificates for various activities, performance reviews and awards from the Air Force, performance reviews and awards from his current employer, and several highly favorable letters of recommendation. Taken together, the documentary evidence shows that Applicant has excelled and had success in both education (as an athlete and student) and employment. He is known for his seriousness, diligence, good judgment, dedication, and work ethic. The performance reviews and awards, both from the Air Force and his current employer, establish that he has a good if not excellent employment record.

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, 2017.¹⁵

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 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. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.¹⁸ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.¹⁹

¹⁴ Exhibits A-U.

¹⁵ The 2017 AG are available at <http://ogc.osd.mil/doha>.

¹⁶ *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).

¹⁷ 484 U.S. at 531.

¹⁸ 484 U.S. at 531.

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

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.²⁰ An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²¹

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²² The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²³ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁴ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁵

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. . .²⁶

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state laws (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

²⁰ Directive, ¶ 3.2.

²¹ Directive, ¶ 3.2.

²² ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²³ Directive, Enclosure 3, ¶ E3.1.14.

²⁴ Directive, Enclosure 3, ¶ E3.1.15.

²⁵ Directive, Enclosure 3, ¶ E3.1.15.

²⁶ AG ¶ 24.

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

AG ¶ 25(a) any substance abuse;

AG ¶ 25(f) any illegal drug use while granted access to classified information or holding a sensitive position;

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 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 substance abuse by using marijuana seven times beginning in November 2009 and ending in December 2015. Any illegal drug use is relevant in the context of evaluating a person's security worthiness, but it is particularly egregious if it occurs while granted access to classified information. Applicant's marijuana use during 2009-2010 is easily mitigated as a youthful indiscretion that is common among college-age people. The fact that he was granted a security clearance in 2012 bears this point out. The same cannot be said for his marijuana use during 2014-2015 as a young professional working in the aerospace industry.²⁷ More is expected. And Applicant should have known better in light of his employment with the Air Force, going through the security clearance process in 2012, and the multiple pre-employment drug tests.

With that said, it is important to acknowledge that Applicant's marijuana use during 2014-2015 did not occur while he was granted access to classified information within the meaning of the disqualifying condition at AG ¶ 25(f). Although he was granted a security clearance in 2012 while working for the Air Force, since February 2014 he has not had access to classified information, he testified affirmatively that his current job does not require him to hold a security clearance, and there is no evidence to the contrary. Although the disqualifying condition at AG ¶ 25(f) does not apply, I have still considered the undisputed fact that Applicant resumed marijuana use on three more

²⁷ Although not alleged in the SOR, it is probable that Applicant's marijuana use during this time violated his employer's drug-free workplace policy. I note that the Drug-Free Workplace Act, 41 U.S. Code § 8101-8106, requires federal contractors with a contract over \$100,000 to establish certain drug-free workplace policies. See ISCR Case No. 16-00578 at 2 (App. Bd. Sep. 26, 2017).

occasions during 2014-2015 after going through the security clearance process and being granted a clearance in 2012. I considered it for a limited purpose; namely, as an aggravating circumstance or factor that increases the seriousness of his marijuana use.

In mitigation, Applicant provided sufficient evidence in reform and rehabilitation to persuade me that he is an acceptable security risk. I reached that conclusion for the following seven reasons: (1) his marijuana use was infrequent, occurring seven times over a period of about six years; (2) he stopped using marijuana in 2015, which was about two and a half years before the record closed in April 2018, and so his marijuana use is considered to be not recent; (3) he self-reported and fully disclosed his marijuana use throughout the security clearance process; (4) he gave full, frank, and candid answers to all questions asked during the hearing, and he expressed a good understanding of the security concern associated with substance abuse; (5) he presented affirmative evidence that he is no longer using marijuana and does not have a substance-abuse problem (the September 2017 drug test along with the highly favorable substance-abuse evaluation); (6) he pledged in a signed statement of intent that he will no longer engage in substance abuse and he understands the consequences should he violate his pledge, and (7) his record of success in higher education, a good if not excellent employment record, and the highly favorable letters of recommendation also speak well for him.

In particular, I was impressed by Applicant's candidness and willingness to self-report his marijuana use. His willingness to do so strongly suggests he will report any potential security infraction or violation committed by himself or his co-workers, which is exactly what is expected of every applicant. Overall, I am persuaded that Applicant is no longer curious about marijuana, that his infrequent marijuana use is safely in the past, and that he adhere to a drug-free lifestyle in the foreseeable future.

Following *Egan* and the clearly-consistent standard, I have no doubts or concerns about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified or sensitive information. In reaching this conclusion, I weighted 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. I conclude that he has 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.b:	For Applicant

Conclusion

It is clearly consistent with the national interest to grant Applicant access to classified information. Eligibility is granted.

Michael H. Leonard
Administrative Judge