



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



In the matter of:)
)
-----) ISCR Case No. 15-00744
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Strzelczyk, Esq., Department Counsel
For Applicant: *Pro se*

02/03/2016

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke a security clearance to work in the defense industry, which he has held since 2007. In 2014, he self-reported two instances of marijuana use, the first in 2011 and the second in 2014. He presented sufficient evidence to explain and mitigate the security concerns stemming from illegal drug involvement. 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 July 31, 2014.¹ After reviewing the application and information gathered during a background investigation, the Department of Defense

¹ Exhibit 2 (this document is commonly known as a security clearance application).

(DOD),² on July 29, 2015, 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.³ The SOR is similar to a complaint. It detailed the 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 in a September 8, 2015 response consisting of a two-page memorandum.

Neither Applicant nor Department Counsel requested a hearing, and so the case will be decided on the written record.⁴ On October 26, 2015, Department Counsel submitted all relevant and material information that could be adduced at a hearing.⁵ This so-called file of relevant material (FORM) was mailed to Applicant, who received it on November 4, 2015. Applicant replied in a timely manner and his response consisted of the following: (1) a single-page memorandum; (2) a 2011 employee performance evaluation; (3) a 2014 employee performance evaluation; and (4) a summary of his academic and work history. Those matters are admitted without objections as Exhibits A–D. The case was assigned to me on December 21, 2015.

Findings of Fact

Applicant is a 33-year-old employee who is seeking to retain a security clearance previously granted to him in 2007.⁶ His educational background includes a bachelor's degree and a master's degree, both in mechanical engineering. He has been employed by a large defense company since 2007, and he has a good record of employment.⁷ He has never married and has no children.

² The SOR was issued by the DOD Consolidated Adjudications Facility, Fort Meade, Maryland. It is a separate and distinct organization from the Defense Office of Hearings and Appeals, which is part of the Defense Legal Services Agency, with headquarters in Arlington, Virginia.

³ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), 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). The AG replace the guidelines in Enclosure 2 to the Directive.

⁴ Directive, Enclosure 3, ¶ E3.1.7.

⁵ The file of relevant material consists of Department Counsel's written brief and supporting documents, some of which are identified as evidentiary exhibits in this decision.

⁶ Exhibit 2.

⁷ Exhibits B, C, and D.

Applicant completed and submitted a security clearance application in 2014.⁸ In doing so, he disclosed two instances of using marijuana in the last seven years, the first in August 2011, and the second in June 2014. He also noted that “pot” did not do much for him and his usage was not a positive experience. He provided additional details about the two instances of using marijuana during the 2014 background investigation.⁹ He again noted that it was not a positive experience for him, and that he did not intend to use marijuana again.

Applicant reiterated his dislike for marijuana in his answer to the SOR, when he stated the following:

Although marijuana use has become increasingly mainstream in society and in the culture of my generation, I personally continue to avoid it as well as peers that are users. I avoid it just as much out of respect for my [security] clearance as well as my dislike of both the experience and the environment. I frankly find the smell of marijuana distasteful and achieve zero satisfaction in using it. Regardless of my dislike of the drug, I have no intention of ever using it [in] the future to protect my [security] clearance and my well-being.

And in his response to the FORM, he stated that the two instances of using marijuana were anomalies in his life, and he has no intention of future use.¹⁰

Law and Policies

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 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

⁸ Exhibit 2.

⁹ Exhibit 3.

¹⁰ Exhibit A.

¹¹ *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).

¹² 484 U.S. at 531.

¹³ Directive, ¶ 3.2.

unfavorable 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 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 the evidence.¹⁹ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²⁰

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.²¹ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

¹⁴ Directive, ¶ 3.2.

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

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 Executive Order 10865, § 7.

Discussion

The security concerns under both Guidelines H and E are discussed together because they are based on the same set of facts.²² Applicant's use of marijuana in 2011 and 2014 after being granted a security clearance in 2007 raises obvious concerns under both guidelines.²³ The Defense Department was rightly concerned when it issued the SOR to Applicant. Nevertheless, I am not persuaded that Applicant's drug abuse, based on two instances of marijuana use that took place three years apart from each other, rises to a level that is sufficient to justify revoking his security clearance. In reaching that conclusion, I have considered the following mitigating conditions:

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 [person's] current reliability, trustworthiness, or good judgment;

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

AG ¶ 17(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the [person's] reliability, trustworthiness, or good judgment.

There are several reasons, taken together, that explain and mitigate the security concerns. First, his marijuana use is relatively minor and infrequent, taking place on two occasions about three years apart. In that regard, his description of his two instances of using marijuana as an aberration or anomaly is largely on target. Of course, that is balanced against the undisputed fact that his drug abuse took place while he held a security clearance, conduct he knew or should have known is forbidden. Second, he demonstrated an intention not to engage in further marijuana use by affirmatively stating—during his background investigation, in his answer to the SOR, and in his response to the FORM—that he has zero intention of future use. Third, his marijuana use is not recent, with the last usage taking place in June 2014, about 18 months ago. That is an appropriate period of abstinence given that his drug abuse is limited to two occasions about three years apart, which is not indicative of a pattern of misconduct. Fourth, he voluntarily reported the information about his drug abuse and was truthful

²² Concerning Guideline H, in an October 24, 2014 memorandum, the Director of National Intelligence reaffirmed that the disregard of federal law concerning use, sale, or manufacture of marijuana is relevant in national security determinations regardless of changes to state laws concerning marijuana.

²³ AG ¶¶ 25(a) and (g) under Guideline H, and AG ¶¶ (c) and (g) under Guideline E. I did not apply AG ¶ 25(c) because the evidence shows any illegal drug possession was incidental to Applicant's usage.

and complete in responding to questions.²⁴ On those points, he receives substantial credit because he did exactly what is expected of a person who is currently eligible for access to classified information. By disclosing information that was contrary to his own self-interest, Applicant demonstrated that he possesses the maturity and good judgment necessary to properly handle and safeguard classified information, especially in situations where he may be called upon to self-report, or report on others, security infractions, security violations, or mishandling of classified information.

Given the totality of circumstances, I have no concerns or doubts about Applicant's 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*. I also gave due consideration to the whole-person concept.²⁵ 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
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraph 2.a:	For Applicant

Conclusion

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

Michael H. Leonard
Administrative Judge

²⁴ AG ¶ 2(e)(1) and (2).

²⁵ AG ¶ 2(a)(1)–(9).