



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



In the matter of:)
)
-----) ISCR Case No. 14-05232
)
Applicant for Security Clearance)

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: *Pro se*

02/10/2016

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny him eligibility for access to classified information via a security clearance. The security concern stemming from his illegal drug involvement is not mitigated. 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 April 28, 2014.¹ About one year later on April 5, 2015, after reviewing the application and information gathered during a background investigation, the Department of Defense (DOD)² sent Applicant a statement of reasons (SOR),

¹ Exhibit 3 (this document is commonly known as a security clearance application).

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.

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 guideline known as Guideline H for drug involvement. Applicant answered the SOR on April 27, 2015.

Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.⁴ On September 17, 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 September 28, 2015. Applicant has not replied. The case was assigned to me on February 8, 2016.

Ruling on Evidence

Department Counsel's FORM includes Exhibit 4, which is a report of investigation (ROI) summarizing Applicant's interview that took place during the May 2014 background investigation. The summary, Exhibit 4, is not authenticated as required under ¶ E3.1.20 of the Directive. Department Counsel's written brief includes a footnote advising Applicant that the summary was not authenticated and that failure to object may constitute a waiver of the authentication requirement. Nevertheless, a *pro se* applicant's failure to respond to the FORM does not equate to a waiver of the authentication requirement.⁶ The written record does not demonstrate that Applicant understood the concepts of authentication, waiver, and admissibility. It also does not establish that he understood the implications of waiving an objection to the admissibility the summary. Accordingly, Exhibit 4 is inadmissible and I have not considered it.

Findings of Fact

Applicant is a 28-year-old employee who is seeking to obtain a security clearance for the first time.⁷ He is employed as a UX designer for a technology-design company. He has had this particular job since November 2013. His educational background

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 See *Black's Law Dictionary*, 1717 (Bryan A. Garner ed., 9th ed., West 2009), for a definition of waiver.

⁷ Exhibit 3 at 30.

includes a bachelor's degree awarded in 2007. He has never married and has no children.

Applicant completed a security clearance application in April 2014.⁸ In doing so, he disclosed a history of marijuana use.⁹ He stated that he used marijuana on an occasional basis from about January 2004 to April 2014. In other words, he was using marijuana during the same period when he submitted the application. He further stated that: "THC [marijuana] needs to have its scheduling reconsidered. All the science reports its medical use. I feel the end of prohibition is coming. I do not drink because the side effects are way worse."¹⁰

In his answer to the SOR, Applicant admitted (1) using and purchasing marijuana from about January 2004 to April 2014, with varying frequency; and (2) as of May 2014, his intention was to continue using marijuana. Other than his admissions, Applicant did not provide additional information or details about his illegal drug involvement. He did not submit any documentation in response to the SOR or the FORM.

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 unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁴

⁸ Exhibit 3.

⁹ Exhibit 3 at 28.

¹⁰ Exhibit 3 at 28.

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.

¹⁴ Directive, ¶ 3.2.

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.

Discussion

Applicant's involvement with marijuana is disqualifying under Guideline H.²² In applying Guideline H to the facts of this case, I note that 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 use.

Here, the written record shows Applicant engaged in drug abuse by using marijuana on a periodic or occasional basis during the years of 2004–2014; he also

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.

²² AG ¶ 25(a) and ¶ 25(c).

purchased marijuana during the same period. Moreover, he expressed, in both his security clearance application and in his answer to the SOR, an intention to continue using marijuana.²³ His involvement with marijuana reflects negatively on his judgment, reliability, trustworthiness, and willingness to follow laws, rules, and regulations.

There are four mitigating conditions to consider under Guideline H, although only AG ¶¶ 26(a) and (b) are relevant to the facts of Applicant's case.²⁴ I considered both, and they are not sufficient to mitigate the security concern. The mitigating condition in AG ¶ 26(a) does not apply because his illegal drug involvement was not so long ago and was not so infrequent that it is no longer a concern. The mitigating condition in AG ¶ 26(b) does not apply because he did not present sufficient evidence to demonstrate an intention not to abuse marijuana in the future. For example, he did not submit evidence of negative drug tests to confirm that he has abstained from marijuana use since April 2014. And he did not submit a signed statement of intent not to abuse any drugs in the future with automatic revocation of clearance for any violation.

Because Applicant chose to have his case decided without a hearing, I am unable to evaluate his demeanor. Limited to the written record, I am unable to assess Applicant's sincerity, candor, or truthfulness. He also chose not to respond to the FORM with relevant and material facts about his circumstances, which may have helped to rebut, extenuate, mitigate, or explain the security concern.

Applicant's involvement with marijuana justifies current doubt about his judgment, reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I considered the whole-person concept.²⁵ I also weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. Accordingly, I conclude he did not meet 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:	Against Applicant
Subparagraphs 1.a–1.c:	Against Applicant

²³ AG ¶ 25(g).

²⁴ AG ¶ 26(a)–(d).

²⁵ AG ¶ 2(a)(1)–(9).

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information.

Michael H. Leonard
Administrative Judge