



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



In the matter of:)	
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)	ISCR Case No. 15-00802
Applicant for Security Clearance)	

Appearances

For Government: Meg Foreman, Esq., Department Counsel
For Applicant: *Pro se*

03/18/2016

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny him eligibility for access to classified information. He used marijuana on a periodic basis for decades, although there were periods of abstinence or rare use. His periodic marijuana use continued after being granted a security clearance. His last use of marijuana was in August 2015. Although his recent period of abstinence is commendable, he did not meet his burden of proof to show that he has made a firm commitment to a drug-free lifestyle. 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 27, 2012.¹ About three years later on August 7, 2015, after reviewing the application and information gathered during a background

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

investigation, the Department of Defense (DOD)² 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 guideline known as Guideline H for drug involvement. Applicant answered the SOR on September 3, 2015; he admitted the three allegations of involvement with marijuana (e.g., use and purchase); and he provided a two-page memorandum to explain his admissions.

The case was assigned to me on December 1, 2015. The hearing was held as scheduled on January 8, 2016. Department Counsel offered Exhibits 1–3, and they were admitted. Applicant offered Exhibit A, and it was admitted. Other than Applicant, no witnesses were called. The hearing transcript (Tr.) was received on January 14, 2016.

Rulings on Procedure

The allegation in SOR ¶ 1.a was amended at the end of the hearing to conform to the evidence. In particular, the allegation was amended to state that Applicant's last use of marijuana took place in August 2015.⁴ In addition, Department Counsel's motion to amend the SOR, at the end of the hearing, by adding a new allegation of falsification, under Guideline E for personal conduct, was denied for the several reasons stated on the record.⁵

Findings of Fact

Applicant is a 57-year-old employee who is seeking to retain a security clearance that he has held since about 1986.⁶ He is employed as a vice president for strategic planning for a company doing business in the defense industry. His educational background includes a bachelor's degree in computer science awarded in 1982. He has

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 Tr. 58–60.

⁵ Tr. 58–65.

⁶ Tr. 29–30.

been married since 1980. He and his wife have three adult children and two grandchildren.

Applicant completed a security clearance application in August 2012.⁷ In response to questions in section 23 of the application, he disclosed a history of marijuana use. He reported occasional marijuana use from about 1975 to March 2012, and he estimated a minimal use of a couple of times per year. He reported that his marijuana use occurred while possessing a security clearance. He also indicated that he intended to use marijuana in the future. On the last point, he provided the following explanation:

Since my last arrest for driving while under the influence of alcohol in April 2003, I have completely stopped the consumption of alcohol. I find the occasional and moderate use of marijuana in vacation scenarios to be a viable substitute to the much more destructive, yet legal consumption of alcohol.⁸

Previously, in an August 2000 security clearance application, Applicant disclosed a history of occasional marijuana use from 1974 to 1996.⁹

Applicant was interviewed in an October 2012 background investigation.¹⁰ He provided the following details about his marijuana involvement: (1) he used marijuana from 1975 to 1982 on a weekly basis while socializing with friends at parties; (2) he usually would smoke a joint each time he used marijuana; (3) from 1982 to present, he used marijuana about once a month, taking one or two hits from a joint while attending parties; (4) during 2000–2005, he used marijuana about once or twice per year; (5) he purchased marijuana in the past, but has received it from friends for many years; (6) he does not associate with known drug dealers; (7) his wife is aware of his marijuana use; (8) he does not believe he is dependent on marijuana; (9) he has never had substance-abuse counseling for his marijuana use; and (10) he intends to maintain his current pattern of using marijuana once a month, although he noted it is illegal and he would stop using marijuana if required for his security clearance.

Applicant stated at the hearing that he regretted his use of marijuana, and he was not going to try to defend or justify his usage.¹¹ He also submitted a signed statement of intent pledging not to use any illegal drug, including marijuana, while in possession of a security clearance, and agreeing to revocation of that clearance if he

⁷ Exhibit 1.

⁸ Exhibit 1 at 53.

⁹ Exhibit 3.

¹⁰ Exhibit 2.

¹¹ Tr. 49.

does so.¹² He last used marijuana on August 22, 2015, shortly before he received the SOR.¹³ He conceded that his change of attitude concerning continued use of marijuana was due to the initiation of this case, although he thinks he probably would have discontinued use regardless of this proceeding.¹⁴

Applicant found it difficult to be precise when discussing the frequency of his marijuana use over a period of many years. He agreed that the frequency was periodic, meaning weekly or monthly during most of years he used marijuana.¹⁵ He also noted that there were periods of abstinence as well as periods when he rarely used marijuana.¹⁶ He estimated the frequency of his use of marijuana as “weekly” during the last five years.¹⁷ He described himself as a recreational user of marijuana.¹⁸

Applicant believes that his marijuana use started to increase in 2003, once he abstained from alcohol, and then continued to increase until he stopped in August 2015.¹⁹ In addition, he attributes his past attitude toward marijuana use to the declining social and legal stigma attached to it, although he concedes that going through the security clearance process was a “wake-up call” for him.²⁰

At the hearing, Applicant impressed me as an intelligent and capable executive, he was polite and respectful throughout, and he answered questions in a direct manner.

Law and Policies

It is well-established law that no one has a right to a security clearance.²¹ 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

¹² Exhibit A.

¹³ Tr. 24.

¹⁴ Tr. 33–34.

¹⁵ Tr. 25.

¹⁶ Tr. 48–49.

¹⁷ Tr. 45–47.

¹⁸ Tr. 47.

¹⁹ Tr. 48–49.

²⁰ Tr. 49; Answer to SOR.

²¹ *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).

side of denials.”²² 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.²³ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²⁴

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁵ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²⁶ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁷ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁸ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁹ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.³⁰

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.³¹ Instead, it

²² 484 U.S. at 531.

²³ Directive, ¶ 3.2.

²⁴ Directive, ¶ 3.2.

²⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²⁶ Directive, Enclosure 3, ¶ E3.1.14.

²⁷ Directive, Enclosure 3, ¶ E3.1.15.

²⁸ Directive, Enclosure 3, ¶ E3.1.15.

²⁹ *Egan*, 484 U.S. at 531.

³⁰ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

³¹ Executive Order 10865, § 7.

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.³² 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. In addition, I note that marijuana is a Schedule I controlled substance under federal law. According to the U.S. Drug Enforcement Agency, a Schedule I controlled substance is a drug that has no currently accepted medical use and has a high potential for abuse.³³

Here, the record shows Applicant engaged in drug abuse by using marijuana on a periodic or occasional basis for decades, during the years 1975 to 2015, a period of about 40 years. He also used marijuana after being granted a security clearance in about 1986, a period of about 30 years. In addition, he expressed an intention to continue using marijuana in his 2012 security clearance application and background investigation, although he has since stated that he has no intention to continue.

The time line here is also noteworthy. Applicant completed a security clearance application in August 2012. He next participated in a background investigation in October 2012. During those events, he disclosed his marijuana involvement, a circumstance for which he receives credit.³⁴ He certainly knew or should have known at that point in time that his marijuana use was an issue of concern in the security clearance process. Nevertheless, he continued using marijuana until August 2015. The sequence of events suggests he viewed or treated the security clearance process with glibness or impunity or both.

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.³⁵ 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 marijuana 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 use marijuana in the future.

³² AG ¶¶ 25(a), (c), (g), and (h).

³³ For more information on drug schedules, go to <http://www.dea.gov/druginfo/ds.shtml> .

³⁴ AG ¶ 2(e)(1) and (2).

³⁵ AG ¶ 26(a)–(d).

Common sense tells us that behavior is the best predictor of behavior. That's as true here as it is anywhere else. Applicant's behavior in using marijuana over a 40-year period tells us that he lacks the ability or willingness to comply with laws, rules, and regulations. In addition, his marijuana use after being granted a security clearance is considered to be serious misconduct, and it is not mitigated by the brief period of abstinence since August 2015. Although his recent period of abstinence is commendable, he did not meet his burden of proof to show that he has made a firm commitment to a drug-free lifestyle.

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.³⁶ 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

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

³⁶ AG ¶ 2(a)(1)–(9).