DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
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	)	
Applicant for Security Clearance	)	

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

05/10/2019

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Decision

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LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. He did not present sufficient evidence to mitigate his involvement with marijuana. The most recent incident occurred in January 2017, when he knowingly used marijuana at a New Year's Day party while holding a security clearance. 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 June 15, 2016.[1] This document is commonly known as a security clearance application. Thereafter, on July 28, 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

[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 guidelines known as Guideline H for drug involvement and substance misuse and Guideline E for personal conduct. The sole allegation under Guideline E is simply a cross-allegation of the matters alleged under Guideline H.

Applicant answered the SOR on August 16, 2017. He admitted the SOR allegations under Guideline H while not addressing the Guideline E allegation. He provided brief explanations for his admissions. And he requested an in-person hearing before an administrative judge.

The case was assigned to me on December 13, 2017. The hearing was conducted as scheduled on April 19, 2018. Both Department Counsel and Applicant offered documentary exhibits, which were admitted as Government Exhibits 1-4 and Applicant's Exhibits A-Q. The record closed on April 23, 2018, when Applicant submitted a post-hearing exhibit, which was admitted without objections as Exhibit R. The hearing transcript was received on May 3, 2018.

Findings of Fact

Applicant is a 48-year-old employee who is seeking to retain a security clearance previously granted to him by the Defense Department in 2006. He has worked as an engineer technician for a company in the defense industry since about 2005. His formal education includes some college in 2008. His employment history does not include military service. His first marriage ended in divorce in 2006. He married his current spouse in 2010. He has an adult child from a previous relationship, a minor child from his first marriage, and two minor stepchildren from his current marriage. The three minor children live with Applicant and his spouse. His spouse is employed outside the home as a human-resources manager for a private company.

Applicant has a history of involvement with marijuana going back to the early 1990s, which he does not dispute. The SOR is concerned about three particular incidents in 1992, 1995, and 2017. Each is discussed below.

Applicant was arrested for possession of drug paraphernalia, a marijuana pipe or bong, in March 1992. The arrest stemmed from a police investigation of a domestic disturbance at the home where Applicant was living at the time. The county attorney declined to prosecute the case due to possible problems with the search, resulting in insufficient evidence to ensure a reasonable likelihood of conviction.[2]

Applicant was arrested about three years later in June 1995 for the misdemeanor offenses of possession of marijuana and driving on a suspended license.[3] At the time,

[2] Exhibit A.

[3] Exhibit B.

he was using marijuana once or twice a week.[4] His arrest stemmed from a traffic stop due to an expired registration. The vehicle was searched and a small amount of marijuana in a container was discovered. He subsequently pleaded guilty and the court imposed a fine, which he was supposed to pay over time. He failed to make timely payment and ended up serving about 40 days in jail in lieu of the fine.[5]

The third incident occurred on January 1, 2017, when he smoke marijuana (three to four puffs off a joint) while attending a New Year's Day party unaccompanied by his spouse.[6] He tested positive for marijuana on a random drug screening test on January 26, 2017. His employer was notified of the positive test on January 31, 2017, and he was suspended without pay. He had not reported the marijuana use before the positive drug test result. Subsequently, his employer decided that his continued employment was contingent upon successful completion of an approved substance-abuse program and a negative drug test result. He completed the approved substance-abuse program with no further services recommended on March 23, 2017. He had drug testing on March 27, 2017, which produced a negative test result, and he returned to work the following day under a last-chance agreement with his employer.[7]

At the hearing, Applicant attributed his January 2017 marijuana use to a lapse in good judgment.[8] He described the incident as "a weak, stupid moment," "a stupid move on [his] part," and he deeply regrets it.[9] He stated that he had not used marijuana since his arrest in 1995.[10] He has no intention of using marijuana or any other illegal drug in the future. He submitted a signed statement of intent setting forth his intention to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.[11]

In addition to the signed statement of intent, Applicant submitted a number of documents in support of his case.[12] The documents include highly favorable letters of recommendation from two co-workers as well as a letter of reference from the senior minister of his church.[13] He submitted proof of his attendance at multiple sessions of

[4] Tr. 45.

[5] Tr. 44-45.

[6] Exhibits 2, G, and I; Tr. 37-40.

[7] Tr. 57-58.

[8] Tr. 47-48.

[9] Tr. 39-40.

[10] Tr. 45.

[11] Exhibit R.

[12] Exhibits C – Q.

[13] Exhibits C, D, and E.

Narcotics Anonymous (NA). And he submitted multiple documents as evidence of his good employment record and job-related training.

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.[14]

It is well-established law that no one has a right to a security clearance.[15] 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."[16] 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.[17] The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[18]

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[19] An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[20]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[21] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[22] An

[14] The 2017 AG are available at http://ogc.osd.mil/doha.

[15] *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).

[16] 484 U.S. at 531.

[17] 484 U.S. at 531.

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

[19] Directive, ¶ 3.2.

[20] Directive, ¶ 3.2.

[21] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[22] Directive, Enclosure 3, ¶ E3.1.14.

Applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[23] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[24]

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. . . .[25]

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.

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

> AG ¶ 25(a) any substance abuse;
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> AG ¶ 25(b) testing positive for an illegal drug;
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> AG ¶ 25(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
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> AG ¶ 25(f) any illegal drug use while granted access to classified information or holding a sensitive position;

[23] Directive, Enclosure 3, ¶ E3.1.15.

[24] Directive, Enclosure 3, ¶ E3.1.15.

[25] AG ¶ 24.

> 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 involvement with marijuana, which includes two arrests, one conviction resulting in some jail time, and the recent January 2017 marijuana use while holding a security clearance. Indeed, his January 2017 marijuana use was about six months after he submitted his June 2016 security clearance application. 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 involvement with marijuana during the early 1990s is easily mitigated as youthful indiscretions that are common among some people in their early 20s. The fact that he was granted a security clearance in 2006 bears this point out. The same cannot be said for his marijuana use in January 2017 as a working engineer technician for a company in the defense industry. More is expected given his age and maturity in January 2017. And Applicant should have known better in light of his decade of employment with a defense contractor while holding a security clearance and being subject to random drug tests.

Applicant presented a good case in reform and rehabilitation. It is apparent that he now understands the seriousness of his January 2017 marijuana use while holding a security clearance. Nonetheless, I am not persuaded that he is an acceptable security risk. I reached that conclusion for a couple of reasons. First, his January 2017 marijuana use was clearly forbidden conduct that he chose to engage in despite knowing the potential negative consequences. In addition to being a serious lapse in good judgment, his marijuana use demonstrated a willingness to engage in high-risk behavior, which does not make him a good candidate for a security clearance. Second, I doubt Applicant's January 2017 marijuana use would have come to light but for the random drug test. He did not report his January 2017 marijuana use to his employer, but instead hoped to avoid detection by having the substance pass through his system before the next random drug test. His reluctance to voluntarily self-report such adverse information further undermines his suitability for a security clearance.

Following *Egan* and the clearly consistent standard, I have doubts and 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*. In particular, I considered the fact that Applicant's employer elected to continue his employment after his January 2017 marijuana use. I also considered the whole-person concept. I conclude that he has not 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:	Against Applicant
Subparagraphs 1.a – 1.b:	Against Applicant
Subparagraphs 1.c – 1.d:	For Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant[26]

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information.

Michael H. Leonard
Administrative Judge

[26] The SOR cross-allegation under Guideline E for personal conduct, which concerns Applicant's questionable judgment, is decided against Applicant under the rationale discussed above under Guideline H. Any further discussion under Guideline E is redundant.