DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

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

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

08/14/2019

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Decision

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LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. The evidence is not sufficient to mitigate his history of financial problems. It is too soon to tell if Applicant will follow through and resolve his indebtedness. In addition, the evidence is not sufficient to mitigate his January 2017 marijuana use while holding a security clearance. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Standard Form (SF) 86, Questionnaire for National Security Positions, the official form used for personnel security investigations, on July 17, 2017. (Exhibit 1) This document is commonly known as a security clearance application. Thereafter, on March 17, 2018, 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 action under the security guidelines known as Guideline F for financial considerations and Guideline H for drug involvement and substance misuse.

Applicant answered the SOR on April 9, 2018. He admitted all the allegations. He also provided a three-page memorandum with explanations for the debts and proposed corrective actions as well as an explanation for his marijuana use. He requested a hearing before an administrative judge.

The case was assigned to another administrative judge on May 5, 2018, and then reassigned to me on September 24, 2018. The hearing took place on December 6, 2018. Applicant appeared without counsel. Department Counsel offered documentary exhibits, which were admitted as Exhibits 1-7. Applicant did not offer any documentary exhibits. Other than Applicant, no witnesses were called. The hearing transcript (Tr.) was received on December 13, 2018.

The record was kept open for approximately 30 days, until January 4, 2019, to provide Applicant an opportunity to submit documentation in support of his case. (Tr. 24, 56-57) Applicant made timely submissions, by e-mail, and those matters are admitted without objections as Exhibits A-H.

Findings of Fact

Applicant is a 37-year-old employee who is seeking to retain a security clearance, albeit it at the higher top-secret level having previously been granted a clearance at the secret level. He is a logistics engineer for a large company in the defense industry. He has been so employed since 2008. He began working for his current employer initially as a contractor in 2005, and he has worked in the defense industry since 2003. He earned about $81,000 in 2018. (Exhibit H) His formal education includes a bachelor's degree in information technology awarded in 2008.

Applicant attributed his history of financial problems to divorce and the resulting financial hardship or distress. (Answer to SOR; Tr. 28-32) He married in May 2004 and divorced in December 2016. Per the divorce decree, he is obligated to pay $1,600 monthly in child support for three minor children. (Exhibit G) He described separating from his family and his divorce as a "life-changing event" with many difficult issues to address. (Tr. 26-27)

Applicant admits a history of financial problems, which is also established by the documentary evidence. (Exhibits 1, 2, 4, 5, 6, and 7) In particular, the SOR concerns five delinquent accounts as follows: (1) a student loan account in collection for $27,189; (2) a consumer account charged off for $2,459; (3) a credit card account (stemming from a medical account) in collection for $2,256; (4) a credit card account (stemming from automobile expenses) in collection for $387; and (5) a student loan account with a past-due balance of $2,415 with a total balance of $44,652. Applicant has made some progress in resolving the delinquent accounts, and he presented supporting documentation to establish that progress. (Exhibits A-E)

Beginning with the two student loan accounts, Applicant used the proceeds of the loans to obtain his bachelor's degree. He was unable to maintain the loan payments due to his divorce and resulting financial hardship as well as the lack of any assistance granted by the lender or creditor. Both loans are no longer with the original lender, the U.S. Department of Education, and were consolidated by another creditor. (Exhibit B; Tr. 33-35) The total due for the consolidated account was $59,183 as of December 3, 2018. He entered into a loan rehabilitation program in October 2018, agreeing to a monthly repayment amount of $5 for nine months. Applicant thought $5 per month was "ridiculous" and set the monthly payment at $125. (Tr. 40)

Turning to the three delinquent consumer accounts, the $2,459 charged-off account was "settled in full" after the hearing. (Exhibit C; Tr. 34) The $2,256 collection account is no longer with the original creditor, and the new creditor turned the account over to a law firm who initiated wage garnishment without success due to Applicant's monthly child-support payment. (Exhibit D; Tr. 34-35) He had not made a payment on the debt at the time of the hearing. Post-hearing in January 2018, the law firm agreed to accept $100 per month until the entire balance of $2,564, with accrued interest, is paid in full, with the first payment due on January 10, 2019. The $387 charged-off account was resolved for a payment of about $192 in December 2018 or January 2019. (Exhibit E; Tr.34).

Concerning the illegal drug use, Applicant admitted smoking marijuana in about January 2017, when he was on vacation visiting family in a state that has decriminalized marijuana use. (Tr. 26-28) His marijuana use occurred about a month after his divorce was finalized in December 2016. He described his marijuana use "was more like a touristy thing to do" while drinking beer and hanging out. (Tr. 27) He conceded there was no justification for his conduct. (Tr. 27) He admitted that his marijuana use was contrary to his employer's zero-tolerance policy. (Tr. 50-51) He admitted that he purchased the marijuana, which was a single container with two cigarettes. (Tr. 52) He did not self-report his marijuana use when he returned to work after his vacation. (Tr. 52-54; Exhibit 3) But he disclosed his marijuana use when he completed his July 2017 security clearance application, describing it as recreational use of marijuana, and he stated that he had no intention to use in the future. (Exhibit 1) He has not used any marijuana since the January 2017 incident. (Tr. 28) Post-hearing, he submitted a signed statement wherein he pledged to abstain from all future [illegal drug] involvement and substance misuse. (Exhibit F) He also stated that recreational use of marijuana is not worth losing his career, and it was his responsibility to refrain from such activity.

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.

It is well-established law that no one has a right to a security clearance.[1] 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."[2] 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.[3] The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[4]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[5] Under the Directive, the parties have the following burdens: (1) Department Counsel has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted; (2) an applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven; and (3) an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[6]

Discussion

Under Guideline F for financial considerations, the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive indebtedness or financial problems or difficulties. The overall concern is set forth in AG ¶ 18 as follows:

> Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. . . .

The concern is broader than the possibility that a person might knowingly compromise classified or sensitive information to obtain money or something else of value. It encompasses concerns about a person's self-control, judgment, and other important qualities. A person who is financially irresponsible may also be irresponsible,

[1] *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).

[2] 484 U.S. at 531.

[3] 484 U.S. at 531.

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

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

[6] Directive, Enclosure 3, ¶¶ E3.1.14 and E3.1.15.

unconcerned, or negligent in handling and safeguarding classified or sensitive information.

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

> AG ¶ 19(a) inability to satisfy debts;
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> AG ¶ 19(c) a history of not meeting financial obligations;
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> AG ¶ 20(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce, or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances; and
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> AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

The evidence supports a conclusion that Applicant has a history of financial problems that is sufficient to raise a security concern under Guideline F. The disqualifying conditions noted above apply to this case.

Turning to the matters in mitigation, the genesis of Applicant's financial problems is his divorce, finalized in December 2016, and the resulting financial hardship or distress it created for him. Those were circumstances largely beyond his control. He acted reasonably under the circumstances by honoring his obligation to pay child support for the benefit of his three minor children. But as shown by his recent remedial actions, he probably could have done more sooner to address his delinquent debts. Given these circumstances, the mitigating condition at AG ¶ 20(b) applies, in part, and Applicant receives some credit in mitigation.

It is too soon to tell if Applicant is adhering to "a good-faith effort" to resolve the five delinquent accounts. With that said, he certainly receives credit for getting his two student loan accounts into a rehabilitation agreement. And he receives credit for settling two of the consumer accounts and entering into a payment agreement on the third. Nevertheless, both the timing of the remedial actions and the length of the remedial actions are questions of fact that are relevant in deciding if an applicant has made a good-faith effort. Here, Applicant entered into the rehabilitation agreement for the student loans about two months before the hearing and made the initial monthly payments. For the three consumer accounts, one was settled in full after the hearing, another was resolved around the time of the hearing, and the third was entered into a repayment arrangement after the hearing. Given these circumstances, the mitigating condition at AG ¶ 20(d) does not fully apply in Applicant's favor.

Under Guideline H for drug involvement and substance misuse, the overall concern is set forth in AG ¶ 24 as follows:

> [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 used 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. . . .

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(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;
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> 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
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> 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 is limited to the January 2017 incident, when he used marijuana recreationally while on a

vacation in a state that has decriminalized marijuana use. His marijuana use was about one month after his divorce was finalized. His marijuana use occurred while holding a security clearance, giving him access to classified information for his job in the defense industry. And his marijuana use was in violation of his employer's zero-tolerance policy. 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 purchase and use of marijuana in January 2017 cannot be mitigated as a youthful indiscretion. As a working engineer for a company in the defense industry, his conduct was particularly egregious. More is expected given his age, maturity, experience, and lengthy work history as a cleared employee in the defense industry.

Applicant presented a decent case in reform and rehabilitation. It is apparent that he now understands the seriousness of his marijuana use while holding a security clearance. And I have no concern or worry that he has a substance-abuse issue with marijuana. Nonetheless, I am not persuaded that he is an acceptable security risk. I reached that conclusion for a couple of reasons. First, his marijuana use was a serious lapse in good judgment. Second, it's unlikely that Applicant's January 2017 marijuana use would have come to light in the near future but for the requirement to complete the July 2017 security clearance application. Indeed, he did not self-report his marijuana use to his employer when he returned from vacation. His reluctance to self-report 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*. I also considered the whole-person concept. Although Applicant presented some favorable evidence in mitigation, it was outweighed by the unfavorable evidence. In particular, his marijuana use while holding a security clearance is serious misconduct that militates against a favorable decision. 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 F:	Against Applicant
Subparagraphs 1.a -- 1.e:	Against Applicant
Paragraph 2, Guideline H:	Against Applicant
Subparagraphs 2.a -- 2.b:	Against Applicant

Conclusion

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

Michael H. Leonard
Administrative Judge