DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Name Redacted]	)	ISCR Case No. 20-01239
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Adrienne M. Driskill, Esq., Department Counsel
For Applicant: *Pro se*
12/03/2021

Decision

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KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. Applicant mitigated the security concern raised by his use of illegal drugs. Eligibility is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 24, 2017. The Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) on September 8, 2020, detailing security concerns under Guideline H, Drug Involvement. The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4, *National Security Adjudicative Guidelines*, effective within the DOD as of June 8, 2017.

Applicant answered the SOR on October 5, 2020, and elected a decision on the written record by an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On March 31, 2021, Department Counsel submitted the Government's file of relevant material (FORM), including documents identified as Items1 through 3 (Items). Applicant was sent the FORM on March 31, 2021, and he received the FORM on April 7,

2021. He was afforded 30 days after receiving the FORM to file objections and submit material in refutation, extenuation, or mitigation. Applicant responded to the FORM on April 29, 2021. Applicant's response included a written brief (Brief) and documents of evidence marked 2.01 through 2.18. (Evidence). Applicant's Brief and Evidence are admitted without objection. The SOR and the answer (Item 1) are the pleadings in the case. Items 2 (SCA) and 3 (Responses to Interrogatories) are admitted without objection. The case was assigned to me on July 16, 2021.

Findings of Fact

Applicant is 34 years old, and he holds a Bachelor's degree (2010) and a Master's degree (2012). He is married and has a newly born daughter (about five months old at the date of the Brief). Applicant recently purchased his home. Since 2015, he has been employed by a defense contractor. (Item 2 and Brief.)

The SOR alleged that Applicant (1) used marijuana from about January 2011 to February 2018, including after completing his SCA in August 2017; (2) used and purchased cocaine three times from May 2012 to April 2016; and (3) used hallucinogenic mushrooms once in May 2015 and once in February 2017. (Item 1.) Applicant admitted those allegations with explanations that he expanded further in his Brief. (Items 1, 3, and Brief.)

Applicant's answer and response to the FORM made the following points. First, he observed that the duration of his first and last drug usage spanned many years and those instances were "few and far between." Second, Applicant argued that his single use of marijuana during the four year clearance process was isolated and that he stopped when he realized it could affect his clearance. Third, Applicant noted that since his drug usage he has married, bought a home, and has a young child. Finally, he emphasized his community involvement and his academic accomplishments. (Brief.) Applicant submitted the following Evidence to support his claims:

Evidence 2.01 (photos of Applicant, his wife, and his daughter);

Evidence 2.02 through 2.06, and 2.15 (records of Applicant's academic and professional achievements);

Evidence 2.07 and 2.08 (records of Applicant's community workshops that he founded);

Evidence 2.09 and 2.10 (records of Applicant's volunteer work for a response shelter);

Evidence 2.11 and 2.12 (records of Applicant's volunteer work for a political candidate);

Evidence 2.13 and 2.14 (records of Applicant's volunteer work for an immigration advocacy organization);

Evidence 2.16 and 2.17 (records of Applicant's participation in middle school career day events); and

Evidence 2.18 (record of Applicant's volunteer services at a vaccination clinic).

This is Applicant's first experience with the security clearance process. (Item 2.) Applicant submitted a signed statement that comports with AG ¶ 26(b). (Item 3.)

Law and Policies

It is well-established law that no one has a right to a security clearance. 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." *Department of Navy v. Egan*, 484 U.S. 518, 528,531 (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). Under *Egan*, E.O. 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. An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information. ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004). The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted. An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven. In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence. *Egan*, 484 U.S. at 531.The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard. ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

Discussion

Guideline H – Drug Involvement and Substance Abuse

Under AG H for drug use, suitability of an applicant may be questioned or put into doubt because drug use can both impair judgment and raise questions about a person's ability or willingness to comply with laws, rules, and regulations. AG ¶¶ 24, 25 and 26 (setting forth the concern and the disqualifying and mitigating conditions).

> The illegal use of controlled substances, to include the misuse of prescription 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. Controlled substance means any "controlled substance" as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

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

> AG ¶ 25(a) any substance misuse (see above definition);
>
> AG ¶ 25(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
>
> 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 for revocation of national security eligibility.

Applicant admitted using marijuana, cocaine, and hallucinogenic mushrooms occasionally, with the most recent usage being in February 2018 Facts admitted by an applicant in an answer to a SOR or in an interview require no further proof from the Government. ISCR Case No. 94-1159 at 4 (App. Bd. Dec. 4, 1995) ("any admissions [applicant] made to the SOR allegations . . . relieve Department Counsel of its burden of proof"); ISCR Case No. 94-0569 at 4 and n.1 (App. Bd. Mar. 30, 1995) ("[a]n applicant's admissions, whether testimonial or written, can provide a legal basis for an Administrative Judge's findings").

Marijuana and cocaine are Schedule I controlled substances, and possession of them is regulated by the federal government under the Controlled Substances Act. 21 U.S.C. § 811 *et seq*. The knowing or intentional possession and use of any such substance is unlawful and punishable by imprisonment and or a fine. 21U.S.C.§844**.** In an October 25, 2014 memorandum, the Director of National Intelligence affirmed that the use of marijuana is relevant to national security determinations, regardless of changes to state laws concerning marijuana use. James R. Clapper, Director of National Intelligence, Memorandum: *Adherence to Federal Laws Prohibiting Marijuana Use* (October 25, 2014). *See also* http://www.dea.gov/druginfo/ds.shtml. AG ¶¶ 25(a) and (c) apply. The next inquiry is whether any mitigating factors apply.

I have considered mitigating factor AG ¶ 26(a). Applicant used illegal drugs with varying frequency as recently as February 2018. His behavior was neither infrequent, nor did it occur that long ago, with his last use being in February 2018, just over three years ago. I find that AG ¶ 26(a) does not apply.

I have considered mitigating factor AG ¶ 26(b). Applicant's signed written statement faithfully tracks the language of AG ¶ 26(b). Of more importance is the record evidence that Applicant's life has dramatically changed since his drug-dabbling days. He has become a husband, a father, and a homeowner. In addition to his impressive history of academic and professional accomplishments, Applicant is very active in civic and community affairs. AG ¶ 26(b) applies.

The record does not raise doubts about Applicant's reliability, trustworthiness, 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. AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6). Accordingly, I conclude that Applicant 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

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the SOR allegations:

Paragraph 1, Guideline H:	For Applicant
Subparagraphs 1.a-1.d:	For Applicant

Conclusion

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

Philip J. Katauskas
Administrative Judge