DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

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

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

04/28/2015

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny her a security clearance to work in the defense industry. The security concern stemming from her illegal drug involvement (using and buying marijuana during the years of 1996–2013) 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 July 12, 2013.[1] After reviewing the application and information gathered during a background investigation, the Department of Defense (DOD),[2] on October 23, 2014, sent Applicant a statement of reasons (SOR), explaining

[1] Exhibit 4 (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.

it was unable to find that it was clearly consistent with the national interest to grant her 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 November 14, 2014. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.[4]

On January 27, 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 February 6, 2015. Applicant did not reply within 30 days from receipt of the FORM. The case was assigned to me on April 27, 2015.

Ruling on Evidence

Exhibit 5 is a report of investigation (ROI) from the background investigation of Applicant. The document is a summary of an interview of Applicant conducted on August 12, 2013. An ROI may be received and considered as evidence when it is authenticated by a witness.[6] Here, Exhibit 5 is not authenticated in any way. Although Applicant, who is representing herself, has not raised the issue via an objection, I am raising it *sua sponte*. With that said, it is evident that Department Counsel is acting in good faith, having highlighted the issue in the file of relevant material.[7] Nevertheless, Applicant's lack of response to the FORM does not amount to a knowing waiver of the rule.[8] Accordingly, Exhibit 5 is not admissible and I have not considered it.

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[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] Directive, Enclosure 3, ¶ E3.1.20; *see* ISCR Case No. 11-13999 (App. Bd. Feb. 3, 2014) (the Appeal Board restated existing caselaw that a properly authenticated report of investigation is admissible).

[7] Department Counsel Brief at 2, n. 1.

[8] Wavier means "[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage; the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." *Black's Law Dictionary*, 1717 (Bryan A. Garner ed., 9th ed., West 2009).

Findings of Fact

Applicant is a 36-year-old employee who is seeking to obtain a security clearance. Her educational background includes a bachelor's degree awarded in 2001. She has never married. She is employed as an accountant for a security monitoring company. She began that employment in January 2012.

About seven months later in July 2013, Applicant completed a security clearance application.[9] In response to questions concerning illegal drug activity, she disclosed using and purchasing marijuana during the years of 1996–2013.

Concerning the use of marijuana, Applicant stated that she used marijuana from November 1996 to June 2013. She stated that her frequency of use was chronic for several years, but was occasional (may be once or twice a month) during the last two years. She also stated that more than once during this period she would abstain for periods of one to two years. She further stated that her marijuana use never occurred before or during working hours and she never reported to work under the influence.

Concerning the purchase of marijuana, Applicant stated that she bought small amounts of marijuana from November 1996 to June 2013. She stated that she bought the marijuana, solely for her personal use, on an infrequent basis (generally every two to three months).

In her answer to the SOR, Applicant admitted using and purchasing marijuana from November 1996 to June 2013. She did not provide additional information or details about her illegal drug involvement.

Law and Policies

It is well-established law that no one has a right to a security clearance.[10] 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."[11] 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.

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[9] Exhibit 4.

[10] *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).

[11] 484 U.S. at 531.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[12] An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[13]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[14] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[15] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[16] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[17] In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.[18] The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[19]

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.[20] Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

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[12] Directive, ¶ 3.2.

[13] Directive, ¶ 3.2.

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

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

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

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

[18] *Egan*, 484 U.S. at 531.

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

[20] Executive Order 10865, § 7.

Discussion

Applicant's history of illegal drug involvement (using and purchasing marijuana) is disqualifying under Guideline H.[21] The evidence shows she engaged in drug abuse[22] by using marijuana on a periodic basis during the years of 1996–2013, a 16-year period. And she used and bought marijuana as recently as June 2013, which was about six months after beginning her job with a security monitoring company and about a month before she submitted her security clearance application. Presumably, her employer has a drug-free workplace policy, as is the regular course of business for a company doing business with the Defense Department. Her drug abuse reflects negatively on her 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.[23] I considered both, and they are not sufficient to mitigate the security concern. The mitigating condition in AG ¶ 26(a) does not apply in Applicant's favor, because her drug abuse 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 in Applicant's favor, because she did not present sufficient evidence to demonstrate an intent not to abuse marijuana in the future. For example, she did not submit evidence of negative drug tests to confirm that she has abstained from marijuana use since June 2013. And she did not submit a signed statement of intent not to abuse any drugs in the future with automatic revocation of clearance for any violation.

Applicant's last known involvement with marijuana occurred more than 18 months ago in June 2013. But that is not an appropriate period of abstinence in light of her overall record of using and buying marijuana during a 16-year period, which at times consisted of chronic use. Granted, she receives credit for disclosing her illegal drug involvement during the security clearance process. By doing so, she did what is expected of a person seeking access to classified information. Nevertheless, it is not enough to resolve the security concern.

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

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[21] AG ¶ 25(a) and ¶ 25(c). Concerning Guideline H, 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.

[22] AG ¶ 24(b).

[23] AG ¶ 26(a)–(d).

Applicant's history of illegal drug involvement justifies current doubt about her judgment, reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I considered the whole-person concept.[24] I also weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa.* Accordingly, I conclude she did not meet her ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline H:	Against Applicant
Subparagraph 1.a:	Against Applicant

Conclusion

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

Michael H. Leonard
Administrative Judge

[24] AG ¶ 2(a)(1)–(9).