DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

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

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

02/06/2015

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny him a security clearance to work in the defense industry. The security concern stemming from his drug involvement (using marijuana during the years of 2011–2013) 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 December 3, 2013.[1] After reviewing the application and information gathered during a background investigation, the Department of Defense (DOD),[2] on May 7, 2014, sent Applicant a statement of reasons (SOR), explaining it was

[1] Exhibit 5 (for ease of reading, it will be referred to as a security clearance application or simply an 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.

unable to find that it was clearly consistent with the national interest to grant him 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 June 9, 2014. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.[4]

On October 30, 2014, 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 November 13, 2014. Applicant has not replied to the FORM. The case was assigned to me February 4, 2014.

Rulings on Evidence and Procedure

Exhibit 6 is a report of investigation (ROI) from the background investigation of Applicant. The three-page document is a summary of an interview of Applicant conducted on February 5, 2014. An ROI may be received and considered as evidence when it is authenticated by a witness.[6] Although Applicant, who is representing himself, has not raised the issue via an objection, I am raising it *sua sponte*. With that said, it is clear that Department Counsel is acting in good faith, having highlighted the issue in the FORM.[7] Nevertheless, Exhibit 6 is not authenticated. And Applicant's failure to reply to the FORM is not a knowing waiver of the rule.[8] Accordingly, Exhibit 6 is not admissible and I have not considered it.

This case consists of two straightforward allegations. First, SOR ¶ 1.a alleges Applicant used marijuana from December 2011 to July 2013 on about ten occasions. Second, SOR ¶ 1.b alleges he continues to associate with people who use marijuana. The procedural problem is that matters alleged in SOR ¶ 1.b are improperly or

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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).

erroneously pleaded. Those matters do not fall within the meaning of any of the eight disqualifying conditions under AG ¶ 25 of Guideline H. In other words, the allegation is merely pleading proof or evidence. Moreover, the allegation is similar to language in one of the mitigating conditions, AG ¶ 26(b)(1), which recognizes that "disassociation from drug-using associates and contacts" may serve to mitigate a concern. Failure to establish a mitigating condition is not equivalent to a disqualifying condition. Accordingly, the allegation in SOR ¶ 1.b is decided for Applicant because the behavior alleged is not disqualifying under AG ¶ 25. But I will consider matters in SOR ¶ 1.b for other proper purposes, such as failure to establish a mitigating condition and the likelihood of continuation or recurrence of drug abuse.

Findings of Fact

Applicant is a 28-year-old employee who is seeking to obtain a security clearance. After completing high school in 2004, he went on to earn a bachelor's degree from a prestigious state university in 2008. He is employed as a project manager for a large and well-known defense contractor. He began that employment in August 2010.

About two years later in December 2013, Applicant completed a security clearance application.[9] In response to questions concerning illegal drug activity, he disclosed using marijuana during the years of 2011–2013, which was during his current employment with a defense contractor. He reported using marijuana beginning in about December 2011 and ending in about July 2013; he stated his usage was limited to smoking joints; he stated that he used marijuana about once a month on special occasions while socializing with friends; and he stated his total usage was about ten times. He also offered the following explanation for his marijuana use:

> Basically I just wanted to try it out for a bit and see if I liked it, and I really don't get the point. I either feel nothing or it just makes me really tired. Either way, it's not worth the possible repercussions and I have absolutely no desire to do it any more. For reference, only my current group of friends in [city] knows about this, and none of my family knows. I have also never purchased or sold or anything. I only did it when offered by someone else.[10]

In responding to the SOR, Applicant admitted using marijuana as follows:

> I admit that I used marijuana about 10 times over that period (Dec. '11 - Jul. '13). It has been almost a year since that point now, and I have not

[9] Exhibit 5.

[10] Exhibit 5 at 29.

used it since nor have I had any desire to. I do not believe it will be a problem in the future.[11]

Law and Policies

It is well-established law that no one has a right to a security clearance.[12] 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."[13] 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.[14] An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[15]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[16] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[17] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[18] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[19] In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.[20] The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[21]

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[11] Answer to SOR.

[12] *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).

[13] 484 U.S. at 531.

[14] Directive, ¶ 3.2.

[15] Directive, ¶ 3.2.

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

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

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

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

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

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

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

Discussion

Applicant's history of drug involvement (using marijuana) is disqualifying under Guideline H.[23] The evidence shows he engaged in drug abuse[24] by using marijuana on a periodic basis over a period of about 18 months during 2011–2013. His most recent use took place in about July 2013. And his use of marijuana occurred well after he began employment with a defense contractor in 2010. Presumably, his employer has a drug-free workplace policy, as is the regular course of business for a company doing business with the Defense Department. Given these circumstances, his drug abuse cannot be excused or explained away as youthful experimentation that is common among college students. Instead, his drug abuse reflects negatively on his 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.[25] I considered both, and they are not sufficient to mitigate the concern.

First, the mitigating condition in AG ¶ 26(a) applies, in part. Using marijuana ten times over 18 months is not *de minimis*, but it is relatively infrequent; by example, it is less frequent than five times per month or twice a week. But Applicant's drug abuse was not so long ago (2013) that it is no longer a concern.

Second, the mitigating condition in AG ¶ 26(b) does not apply in Applicant's favor, because he did not present sufficient evidence to demonstrate an intent not to

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[22] Executive Order 10865, § 7.

[23] AG ¶ 25(a). 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.

[24] AG ¶ 24(b).

[25] AG ¶ 26(a)–(d).

abuse marijuana in the future. The evidence on that point is limited to his statements, which are, of course, self-serving. And his statement—"I do not believe it will be a problem in the future"—is lukewarm and it is not unequivocal.

Applicant does not receive credit under AG ¶ 26(b)(1) or (2), because he continues to associate with his marijuana-using friends.[26] As noted above, his last usage took place in about July 2013, which is not an appropriate period of abstinence under AG ¶ 26(b)(3) considering his record of using marijuana in a post-college environment while employed by a defense contractor. And under AG ¶ 26(b)(4), Applicant 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 does receive credit for disclosing his drug involvement during the security clearance process. By doing so, he did what is expected of a person seeking access to classified information. But it is not enough to resolve the concern. At bottom, Applicant did not present sufficient evidence to establish that his marijuana use is safely in the past and will not recur.

In reaching this decision, I note that because Applicant chose to have his case decided without a hearing, I am unable to evaluate his demeanor. Limited to the written record, I am unable to assess Applicant's sincerity, candor, or truthfulness. He also chose not to respond to the FORM with relevant and material facts about his circumstances, which may have helped to explain, extenuate, or mitigate the concern.

Applicant's history of drug involvement justifies current doubt about his judgment, reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I considered the whole-person concept.[27] 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant

[26] Answer to SOR.

[27] AG ¶ 2(a)(1)–(9).

Conclusion

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

Michael H. Leonard
Administrative Judge