DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

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

Appearances

For Government: Pamela Benson, Esq., Department Counsel
For Applicant: *Pro se*

05/27/2015

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to revoke a security clearance to work in the defense industry. The security concern stemming from his illegal drug involvement (using marijuana during 2011–2013) while possessing a security clearance 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 11, 2013.[1] After reviewing the application and information gathered during a background investigation, the Department of Defense (DOD),[2] on August 11, 2014, sent Applicant a statement of reasons (SOR), explaining it

[1] Exhibit 2 (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.

was 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 September 4, 2014. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.[4]

On March 23, 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 April 2, 2015. Applicant did not reply within 30 days from receipt of the FORM. The case was assigned to me on May 26, 2015.

Findings of Fact

Applicant is a 63-year-old employee who is seeking to retain a security clearance.[6] He married in 1977 and divorced in 1986. He has lived in cohabitation since 1995. He has worked as a senior database administrator for the same company since 1994. Before that, he served on active duty in the U.S. Army for about 20 years. He was an enlisted soldier from July 1971 to April 1974, when he was honorably discharged. He then had a break in service until July 1977, when he reenlisted and went on to serve to September 1994, when he was honorably discharged. Presumably, Applicant is eligible for retired pay based on 20 years of honorable military service.

Applicant has held a security clearance, in different capacities, for many years. In 1972, he was granted eligibility for a top-secret clearance by the Army. In 1987, he was granted eligibility for a top-secret clearance by the Army. And in 2004, in his capacity as an employee of a federal contractor, he was granted eligibility for a secret clearance.

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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] The findings of fact are based on information in Applicant's security clearance application, Exhibit 2, which is the sole documentary exhibit in this case.

In July 2013, Applicant completed a security clearance application.[7] In response to the relevant questions, he disclosed a history of illegal drug activity. He disclosed that in July 1976, during his break in service from the Army, he was arrested for the misdemeanor offense of possession of marijuana. He stated that the matter was resolved when he appeared before a magistrate, pleaded no contest, and was fined $100.

Applicant also disclosed a recent history of marijuana use. He stated that he used marijuana from September 2011 to June 2013, about one month before he completed his current security clearance application. He admitted that he used marijuana to socialize with friends on an infrequent basis, taking a single hit perhaps four or five times during the past two years. He further admitted that his marijuana use took place while he was in possession of a security clearance. He stated that he did not intend to use marijuana in the future, explaining that his marijuana use occurred while he was not actively engaged or using a security clearance, and that he had no intention of jeopardizing the information he was entrusted with.

Applicant did not provide additional information or details about his illegal drug involvement. He did not submit documentary information in response to the SOR or the FORM.

Law and Policies

It is well-established law that no one has a right to a security clearance.[8] 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."[9] 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.[10] An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[11]

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[7] Exhibit 2.

[8] *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).

[9] 484 U.S. at 531.

[10] Directive, ¶ 3.2.

[11] Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[12] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[13] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[14] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[15] In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.[16] The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[17]

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.[18] 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 illegal drug involvement (use and possession of marijuana) is disqualifying under Guideline H.[19] The evidence shows he engaged in drug abuse by using marijuana on a periodic or occasional basis during the years of 2011–2013. And his marijuana use took place while possessing a security clearance.[20] Presumably, his

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

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

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

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

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

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

[18] Executive Order 10865, § 7.

[19] 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.

[20] AG ¶ 25(g).

employer has a drug-free workplace policy, as is the regular course of business for a company doing business with the Defense Department. His illegal drug involvement 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.[21] I considered both, and they are not sufficient to mitigate the security concern. The mitigating condition in AG ¶ 26(a) does not apply because his illegal drug involvement 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 because he did not present sufficient evidence to demonstrate an intent not to abuse marijuana in the future. For example, he did not submit evidence of negative drug tests to confirm that he has abstained from marijuana use since June 2013. And he 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 about 23 months ago in June 2013. But that is not an appropriate period of abstinence in light of his overall record of using marijuana while possessing a security clearance. Granted, he receives credit for disclosing his illegal drug involvement during the security clearance process. By doing so, he did what is expected of a person seeking access to classified information. Nevertheless, it is not enough to resolve the security concern, because his marijuana use, as a mature, experienced adult who has held a security clearance for many years, is inexplicable and reeks of poor judgment.

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 rebut, extenuate, mitigate, or explain the security concern.

Applicant's history of illegal 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.[22] 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.

[21] AG ¶ 26(a)–(d).

[22] AG ¶ 2(a)(1)–(9).

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline H:	Against Applicant
Subparagraphs 1.a and 1.b:	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