**DEPARTMENT OF DEFENSE**
**DEFENSE OFFICE OF HEARINGS AND APPEALS**

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| In the matter of: | ) | |
| | ) | |
| | ) | ISCR Case No. 15-04679 |
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| Applicant for Security Clearance | ) | |

## Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

03/30/2017

## Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for access to classified information. Applicant mitigated the security concern based on his use of marijuana. He did not, however, present sufficient evidence to explain, extenuate, or mitigate the security concern stemming from his conduct indicating a preference for a foreign country. 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 January 21, 2015. This document is commonly known as a security clearance application. Just over a year later, on February 10, 2016, 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.[1] The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guidelines known as Guideline C for conduct indicating Applicant's foreign preference and Guideline H for Applicant's drug use. He answered the SOR on April 25, 2016, and admitted all factual allegations. He also requested a decision based on the written record without a hearing.

On June 10, 2016, Department Counsel submitted a file of relevant and material information (FORM) .[2] Included in the FORM were three items of evidence, which are admitted into evidence as Government Exhibits 1 through 3. The FORM was mailed to Applicant, who received it on June 21, 2016. Applicant submitted a written response to the FORM, which was received on July 14, 2016. The case was assigned to me several months later on March 10, 2017.

## Procedural Matters

Department Counsel's FORM includes Exhibit 3, which is a report of investigation (ROI) summarizing Applicant's interviews that took place during the March 2015 background investigation. The ROI is not authenticated as required under ¶ E3.1.20 of the Directive.[3] Department Counsel's written brief includes a footnote advising Applicant that the summary was not authenticated and that failure to object may constitute a waiver of the authentication requirement. Applicant's response to the FORM specifically cited that ROI by page and paragraph to support mitigation of his marijuana use. Therefore, Applicant's reliance on the ROI demonstrates that he understood the concepts of authentication, waiver, and admissibility. Accordingly, Exhibit 3 is admissible, and I have considered the information in the ROI.

## Findings of Fact

Applicant is a 29-year-old employee who requires a security clearance for his job with a defense contractor. He has worked for that contractor since 2014. This is the first time he has applied for a security clearance. He is a college graduate with bachelor's and master's degrees. He has never married and has no children.

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[1] This action was taken under Executive Order (E.O.) 10865*, Safeguarding Classified Information within Industry* (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (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).

[2] The file of relevant material consists of Department Counsel's written brief and supporting documentation, some of which are identified as evidentiary exhibits in this decision.

[3] *See generally* ISCR Case No. 12-10933 (App. Bd. Jun. 29, 2016) (In a concurring opinion, Judge Ra'anan notes the historical concern about reports of investigation in that they were considered by some to present a heightened problem in providing due process in security clearance cases. Judge Ra'anan raises a number of pertinent questions about using an unauthenticated ROI in a non-hearing case with a *pro se* applicant.).

In his January 2015 security clearance application, Applicant disclosed that he is a citizen of Italy, as well as being a natural-born U.S. citizen, and that he had a valid Italian passport. Because of the lapse of time between Applicant's response to the FORM and its assignment to me, on March 20, 2017, I re-opened the record to ascertain whether Applicant still possessed a valid Italian passport. On March 23, 2017, Applicant advised Department Counsel that he still held a valid Italian passport. In his January 2015 security clearance application, Applicant also disclosed that between 2005 and 2014, as a resident of State A, he used medically prescribed marijuana to treat insomnia.[4] In his response to the FORM, he referred to the ROI pointing out that the Government's brief was incorrect about the number of times he used marijuana in that time period (60 to 70 times as opposed to 900+ times).[5]

Under Guideline C for foreign preference, the SOR alleged that Applicant (1) sought and obtained Italian citizenship in 2011, (2) possessed a valid Italian passport and used that passport to travel to certain foreign countries in 2011 and 2012, (3) used his Italian citizenship to receive health-care benefits and "non-foreign status" while he was employed in Italy as a professional baseball player. Under Guideline H for drug use, the SOR alleged that Applicant purchased and used marijuana with varying frequency between 2005 and 2014.[6]

## Law and Policies

It is well-established law that no one has a right to a security clearance.[7] 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."[8] 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.[9] An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[10]

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[4] Exhibit 2.

[5] Exhibit 3.

[6] Exhibit 1.

[7] *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).

[8] 484 U.S. at 531.

[9] Directive, ¶ 3.2.

[10] Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[11] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[12] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[13] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[14]

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.[15] The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[16]

## Discussion

### Guideline C – Foreign Preference

Under Guideline C for foreign preference,[17] the suitability of an applicant may be questioned or put into doubt when that applicant has acted in a way to indicate a preference for the foreign country over the U.S.:

> When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she be prone to provided information or make decisions that are harmful to the interests of the United States.[18]

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

AG ¶ 10(a)(1) possession of a current foreign passport;

AG ¶ 10(a)(3) accepting…medical benefits…from a foreign country; and

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

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

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

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

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

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

[17] AG ¶¶ 9, 10 and 11 (setting forth the concern and the disqualifying and mitigating conditions).

[18] AG ¶ 9.

AG ¶ 11(d) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Under AG C the evidence supports a conclusion that Applicant obtained Italian citizenship in 2011, obtained and possesses a valid Italian passport, used that passport to travel in Europe, used his Italian citizenship to receive health care while living and working in Italy, and gained "non-foreign status" while living and working in Italy. The evidence also supports the conclusion that Applicant lived in Italy from March 2011 until August 2012 while he was employed as a professional baseball player in an Italian baseball league. Applicant needed to become an Italian citizen in order to play in that league. He also needed an Italian passport whenever his team played in European Union countries. When he played in non-EU countries, Applicant used his United States passport. He received health-care benefits while employed in Italy, but he never voted in Italy and owes no obligations to the country of Italy. It appears that gaining Italian citizenship and obtaining and using an Italian passport and receiving health care were the normal requirements and indicia of living and working in Italy. I conclude that they do not indicate Applicant's preference for the country of Italy. Nevertheless, Applicant's current possession of a valid Italian passport triggers disqualifying condition AG ¶ 10(a)(1). The only potentially applicable mitigating condition is AG ¶ 11(d) (the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated). Because the record does not show that Applicant's Italian passport has either been destroyed, surrendered, or otherwise invalidated, as required, this mitigating condition does not apply.

**Guideline H – Drug Involvement**

Under AG H for drug use,[19] 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 with laws, rules and regulations:

> Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

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

AG ¶ 25(a) any drug abuse (use of illegal drugs);

AG ¶ 25(c) illegal drug possession, including…purchase [and] sale…;

[19] AG ¶¶ 24, 25 and 26 (setting forth the concern and the disqualifying and mitigating conditions).

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) a demonstrated intent not to abuse any drugs in the future such as: (3) an appropriate period of abstinence.

Applicant admitted that he purchased and used marijuana with varying frequency from May 2005 to December 2014. His use was disclosed in his security clearance application. In that application Applicant explained that at the time of usage he was a resident of State A and had a medical prescription to use marijuana to treat occasional insomnia. He repeated that explanation in the ROI. There is no dispute that medical marijuana has been legal in State A since 1996. Nevertheless, the purchase and use of marijuana, even medical marijuana, is contrary to federal law.[20] In his security clearance application, Applicant stated that he does not intend any further use of marijuana, and he repeated that lack of intent to further use in his ROI. In addition, the last time Applicant used marijuana was in December 2014, almost two and a half years ago. I conclude that Applicant's use of marijuana is mitigated under AG ¶ 26(a) and AG ¶ 26(b)(3).

In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. Accordingly, I conclude that Applicant 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:

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| Paragraph 1, Guideline C: | Against Applicant |
| Subparagraph 1.a: | For Applicant |
| Subparagraph 1.b: | Against Applicant |
| Subparagraph 1.c: | For Applicant |
| Subparagraph 1.d: | For Applicant |
| Subparagraph 1.e: | For Applicant |
| Paragraph 2, Guideline H | For Applicant |

[20] Marijuana is a Schedule I controlled substance and its possession is regulated by the federal government under the Controlled Substances Act, 21 U.S.C. § 811 et. seq. The knowing or intentional possession of any controlled substance is unlawful and punishable by imprisonment and or a fine. See 21 U.S.C. § 844. In an October 24, 2014 memorandum, the Director of National Intelligence reaffirmed that the disregard of federal law concerning the use, sale, or manufacture of marijuana is relevant to national security determinations, regardless of changes to state laws concerning marijuana use. For more information on drug schedules, go to http://www.dea.gov/druginfo/ds.shtml.

Subparagraph 2.a: For Applicant

## Conclusion

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

Philip J. Katauskas
Administrative Judge