DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 15-06237
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

05/09/2017

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. Accordingly, this case is decided for Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on November 13, 2014. This document is commonly known as a security clearance application. On April 15, 2016, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility 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.

[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),

It detailed the factual reasons for the action under the security guideline known as Guideline H for drug involvement. Applicant answered the SOR on May 13, 2016, and requested a decision based on the written record without a hearing.

On July 26, 2016, Department Counsel submitted a file of relevant material (FORM).[2] The FORM was mailed to Applicant on that same day. He was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. Applicant received the FORM on August 2, 2016.[3] Applicant responded to the FORM on August 9, 2016. Applicant's response to the FORM is marked as Applicant's Exhibit A. The case was assigned to me on April 7, 2017.

Procedural Matters

Included in the FORM were four items of evidence, which are marked as Government Exhibits 1 through 3.[4] Exhibits 1 through 3 are admitted into evidence. Exhibit 2 is a report of investigation (ROI) summarizing Applicant's interview that took place during the March 2015 background investigation. The ROI is not authenticated as required under ¶ E3.1.20 of the Directive.[5] 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. The footnote is prominently prefaced with a bolded, upper-case notice to Applicant and flagging for Applicant the importance of the footnote, which then explains the concepts of authentication and waiver. In a case such as this, where Applicant has responded to the FORM, it is fair to conclude that Applicant read the footnote, understood it, and chose not to object to the ROI. The ROI is, therefore, admissible.

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] The Defense Office of Hearings and Appeals' (DOHA) transmittal letter is dated July 26, 2016, and Applicant's receipt is dated August 2, 2016. The DOHA transmittal letter informed Applicant that he had 30 days after receiving it to submit information.

[4] The first item in the FORM is the SOR and Applicant's Answer. Because the SOR and the Answer are the pleadings in this case, they are not marked as Exhibits. Items 2 through 4 are marked as Exhibits 1 through 3.

[5] *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.).

Findings of Fact

Applicant is 44 years old, married with two sons ages six and eight. He holds a bachelor's and a master's degree.[6] Since April 2004, he has been employed by a defense contractor. The SOR alleges that (1) Applicant used marijuana with varying frequency from 1995 to July 2010, and (2) Applicant used marijuana after having been granted a security clearance in June 2005. Applicant admitted both allegations, however, noting as to the latter that his use occurred over ten years ago while camping. The allegation of his use of marijuana was based on Applicant's disclosure in his security clearance application and during his background investigation interview. In both places Applicant disclosed that during that time period he used marijuana about once every two years. Applicant's use of marijuana was during social occasions, not at work, and did not involve driving.[7]

During the security clearance process, the record evolved as to whether Applicant used marijuana while possessing a security clearance. First, in his November 2014 security clearance application, Applicant answered "No" to whether he used marijuana while possessing a security clearance. He also answered "No" to whether he had ever been investigated and granted a security clearance.[8] Second, in his March 2015 interview, he explained that in about 2004 or 2005 he filled out a security clearance application, because his employer planned to have him work on a project that required a clearance. That project, however, was cancelled, and Applicant was never interviewed and never received any feedback whether a clearance had been granted to him.[9] Therefore, when he filled out his security clearance application, he did not know whether he had a security clearance when he used marijuana.[10] Third, as noted, Applicant qualifiedly admitted this allegation in his answer to the SOR. Fourth, in Applicant's response to the FORM, he states: "The issue with my renewal is the fact that I used marijuana on two occasions during the 10 to 12 years that I had a secret clearance."[11] Finally, the evidence shows that Applicant was deemed to be eligible for a security clearance in June 2005.[12] The record is unambiguous that Applicant stopped using marijuana in July 2010 and never intends to use marijuana again.[13]

[6] Exhibit 1.

[7] Exhibits 1, 2, and A.

[8] Exhibit 1.

[9] Exhibit 2.

[10] Exhibit 2.

[11] Exhibit A.

[12] Exhibit 3 (a Joint Personnel Adjudication System Person Summary dated July 26, 2016).

[13] Exhibits 1, 2, and A.

Law and Policies

It is well-established law that no one has a right to a security clearance.[14] 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."[15] 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.[16] An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[17]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[18] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[19] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[20] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[21]

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.[22] The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[23]

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[14] *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 (no right to a security clearance).

[15] 484 U.S. at 531.

[16] Directive, ¶ 3.2.

[17] Directive, ¶ 3.2.

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

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

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

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

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

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

Discussion

Under AG H for drug use,[24] 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(g) any illegal drug use after being granted a security clearance;
>
> 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.

The evidence supports a conclusion that between 1995 until July 2010 Applicant used marijuana. Disqualifying condition AG ¶ 25(a) applies. As noted, the record evolved whether Applicant used marijuana while possessing a security clearance. In his security clearance application, he claimed that he had not used marijuana while possessing a security clearance. In his interview, consistent with his security clearance application, he explained he did not know whether he had been granted a clearance in 2004 or 2005. In his answer to the SOR and his response to the FORM, however, Applicant admitted that he used marijuana on two occasions during the ten to 12 years that he held a secret clearance. And Government evidence shows that Applicant was found eligible for a security clearance in June 2005. I find that the evidence supports the conclusion that Applicant did use marijuana while possessing a security clearance, thus triggering disqualifying condition AG ¶ 26(g).[25]

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

[25] *See, e.g.,* 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

The next inquiry is whether any mitigating conditions apply. The evidence is that Applicant had a history of using marijuana, from 1995 to 2010, albeit on an infrequent basis, about once every two years. His use was in a social setting, not in a work environment, and not involving driving. His use while holding a security clearance was at most on two or three occasions. He stopped using marijuana almost seven years ago. Throughout the clearance process, he has categorically stated that he has no intent to use illegal drugs in the future. I conclude that the behavior happened so long ago that it is unlikely to recur, and that Applicant has demonstrated an appropriate period of abstinence and his intent not to use illegal drugs in the future. Mitigating conditions AG ¶¶ 26(a) and (b)(3) apply.

The record does not raise doubts about Applicant's reliability, trustworthiness, good 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.[26] 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.b:	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

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").

[26] AG ¶ 2(a)(1)-(9).