DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

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

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

01/02/2018

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. Applicant failed to mitigate the security concern raised by his use of marijuana.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on December 7, 2015. This document is commonly known as a security clearance application. On May 30, 2017, 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 his eligibility for access to classified information.[1] It detailed the factual reasons for

[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, Security Executive Agent Directive (SEAD) 4, *National Security Adjudication Guidelines* (AG), effective within the Defense Department on June 8, 2017, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2016). In this case, the SOR was issued under

the action under the security guideline known as Guideline H for drug involvement and substance misuse. Applicant answered the SOR on June 21, 2017, and requested a decision based on the written record without a hearing.

On August 1, 2017, Department Counsel submitted a file of relevant material (FORM).[2] The FORM was mailed to Applicant on August 3, 2017. 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 10, 2017. Applicant did not respond to the FORM. The case was assigned to me on December 7, 2017.

Procedural Matters

Included in the FORM were six items of evidence, which are marked as Government Exhibits (GE) 1 through 6. These exhibits
are admitted into evidence without objection.

Findings of Fact

Applicant is 61 years old, a high school graduate, married, and has two adult daughters. Since September 1984, he has worked for a defense contractor.[3]

The SOR alleged that Applicant (1) used marijuana weekly from about June 2013 to October 2015; (2) purchased marijuana with varying frequency from about June 2013 to October 2015; (3) used marijuana after being granted a clearance in February 1985; (4) tested positive for marijuana in October 2015; and (5) was diagnosed with cannabis use disorder and alcohol use disorder in October 2015.[4] Applicant admits those allegations.[5]

Applicant used marijuana three to six times a week, between about June 2013 and October 2015. On October 21, 2015, he was involved in an accident while driving a company vehicle. As a result, he was given a drug/alcohol test, which tested positive for marijuana.[6] In about June 2013, Applicant began using marijuana on weekends with friends and family members at social gatherings. He claims he used marijuana as a substitute for alcohol, after he stopped drinking following a 2007 driving under the

Adjudicative Guidelines effective within the Defense Department on September 1, 2006. My decision and formal findings under the revised Guideline H would not be different under the 2006 Guidelines.

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

[3] GE 3 and 4.

[4] GE 1.

[5] GE 2.

[6] GE 3, 5, and 6.

influence arrest.[7] After his positive urinalysis, Applicant's employer required that he complete an employee assistance program and submit to mandatory testing for a year. During his treatment, he was diagnosed with cannabis use disorder and alcohol use disorder, and he was successfully discharged in December 2015. Despite claims that he has no future intent to use marijuana, he continues to associate with friends and family who use marijuana, because he does not want to isolate himself from family and friends.[8]

Law and Policies

It is well-established law that no one has a right to a security clearance.[9] 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."[10] Under *Egan*, E.O. 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.[11] An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[12]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[13] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[14] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[15] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[16]

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[7] GE 3 and 6.

[8] GE 6.

[9] *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).

[10] 484 U.S. at 531.

[11] Directive, ¶ 3.2.

[12] Directive, ¶ 3.2.

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

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

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

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

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.[17] The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[18]

Discussion

Guideline H – Drug Involvement and Substance Abuse

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 comply with laws, rules, and regulations:

> The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Controlled substance means any "controlled substance" as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

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

> AG ¶ 25(a) any substance misuse (see above definition);
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> AG ¶ 25(b) testing positive for an illegal drug;
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> AG ¶ 25(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
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> AG ¶ 25(d) diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of substance use disorder;

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

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

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

AG ¶ 25(f) any illegal drug use while granted access to classified information or holding a sensitive position;

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) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used; and,

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant admitted using marijuana three to six times a week between about June 2013 and October 2015 while holding a security clearance. Facts admitted by an applicant in an answer to a SOR or in an interview require no further proof.[20] Marijuana is a Schedule I controlled substance, and its possession is regulated by the federal government under the Controlled Substances Act.[21] The knowing or intentional possession and use of any controlled substance is unlawful and punishable by imprisonment and or a fine.[22] In an October 25, 2014 memorandum, the Director of National Intelligence reaffirmed that the use of marijuana is relevant to national security determinations, regardless of changes to state laws concerning marijuana use.[23] AG ¶¶ 25(a) through (d), and (f) apply. The next inquiry is whether any mitigating factors apply.

I have considered mitigating factor AG ¶ 26(a). Applicant used marijuana between three to six times per week from June 2013 to October 2015. His behavior was neither

[20] 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 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").

[21] 21 U.S.C. § 811 *et seq*.

[22] 21 U.S.C. § 844.

[23] James R. Clapper, Director of National Intelligence, Memorandum: *Adherence to Federal Laws Prohibiting Marijuana Use* (October 25, 2014). *See also* http://www.dea.gov/druginfo/ds.shtml.

infrequent, nor did it occur long ago, with his last use being in October 2015, just over two years ago. AG ¶ 26(a) does not apply.

I also considered mitigating factor AG ¶ 26(b). Applicant has acknowledged his drug involvement and successfully completed a treatment program.[24] He has also expressed his intent not to use drugs in the future. The troubling aspects of this case are two-fold. First, it appears that Applicant is reluctant to disassociate himself from drug-using friends and family members and to avoid the environment where drugs are used. His explanation is reasonable – he does not wish to isolate himself from friends and family, some of whom openly use marijuana. Nevertheless, Applicant needs to develop a strategy for dealing with those gatherings where marijuana might be used. Second, he needs to show an "established pattern of abstinence." Applicant used marijuana frequently from June 2013 to October 2015, almost two and one-half years. It seems prudent that Applicant be required to show an established period of abstinence that at minimum exceeds his two years and one-half years of drug usage. AG ¶ 26(b) does not apply.

The record raises doubts about Applicant's reliability, trustworthiness, 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.[25] 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

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:	Against Applicant
Subparagraphs 1.a-1.e:	Against Applicant

[24] This acknowledgement was unavoidable, since Applicant was involved in an accident with a company car, which resulted in a mandated urinalysis that came back positive. Nonetheless, he successfully completed his course of treatment, and we have no reason to doubt that he has remained drug-free since October 2015. For this he is to be given credit.

[25] AG ¶¶ 2(d)(1)-(9) and 2(f)(1)-(6). I took into positive account the complimentary character reference letter submitted by Applicant's manager.

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