DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Name Redacted]	)	ISCR Case No. 15-01554
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Tovah Minster, Esquire, Department Counsel
For Applicant: *Pro se*

02/24/2016

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Decision

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HOGAN, Erin C., Administrative Judge:

Applicant submitted an application for a security clearance (e-QIP) on June 3, 2014. On September 1, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H, Drug Involvement. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented within the Department of Defense on September 1, 2006.

On October 1, 2015, Applicant answered the SOR and requested his case be decided on the written record. Department Counsel prepared a File of Relevant Material (FORM) on November 29, 2015. The FORM was forwarded to Applicant on November 30, 2015. Applicant received the FORM on December 10, 2015. He had 30 days to submit a response to the FORM. He timely submitted a Response to the FORM which is admitted as Item 4. Department Counsel had no objection. (Item 5) On January 21, 2016, the FORM was forwarded to the Hearing Office and was assigned to me on January 22, 2016.

On January 27, 2016, I sent both parties an e-mail informing them that I was taking administrative notice of a 2006 state statute in the state where Applicant resides

which legalized medical marijuana. I also took administrative notice of the policy memorandum from the Director of National Intelligence, *Adherence to Federal Laws Prohibiting Marijuana Use*, dated October 25, 2014. I gave the parties an opportunity to comment on my proposed administrative notice documents by February 5, 2016. No comments were received by either party. A copy of the e-mail is marked as Administrative Exhibit (Admin Ex) I.

Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Rulings on Evidence

Item 3 of the FORM is a portion of the Report of Investigation (ROI) from the background investigation of Applicant. The eight-page document is a summary of an interview of Applicant on July 24, 2014, in conjunction with his background investigation. DODD 5220.6, enclosure 2, ¶ E3.1.20 states, "An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence." (*See* ISCR Case No. 11-13999 (App. Bd., February 3, 2014)). Item 4 is not authenticated. Department Counsel noted in footnote 1 that Applicant may object to this requirement without citing ¶ E3.1.20 of the Directive.

Although Applicant, who is representing himself, has not raised the issue via an objection, I am raising it *sua sponte.* Applicant's failure to mention this issue in a response to the FORM is not a knowing waiver of the rule. Waiver means "the 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, 9th ed., West 2009).

While the Government attempted to explain why Applicant could object to the admissibility of Item 3, I cannot conclude Applicant was expressly informed of the requirement in ¶ E3.1.20 of the Directive because it was explained in a footnote. It is not unusual for Applicants to forego reading footnotes in a FORM. I cannot conclude Applicant expressly waived this rule because he did not mention it in his response to the FORM. There is no way to conclude that Applicant was aware of the requirement in ¶ E3.1.20. I find Item 3 is not admissible and will not be considered in this decision.

Findings of Fact

In his answer to the SOR, Applicant admits to all of the allegations in the SOR. (Item 1) His admissions are incorporated into the Findings of Fact.

Applicant is a 29-year-old employee of a Department of Defense contractor. He has worked for this employer since May 2014. This is his first time applying for a security clearance. He is a high school graduate and has some college credit. He is single and has no children. (Item 2)

In response to section 26 – Illegal Use of Drugs or Drug Activity, on his security clearance application dated, June 3, 2014, Applicant admits to using and purchasing marijuana from December 2003 to May 2014. In 2003, he used marijuana three to four times per week. From June 2003 to June 2004, he underwent drug treatment related to his marijuana use. As of May 2014, he used marijuana daily for medical reasons. He indicated the marijuana was medically prescribed to him. (Item 2, section 23)

In his Response to the FORM, Applicant provided a letter from his doctor indicating that he is prescribed marijuana. The doctor notes:

> [Applicant] has been prescribed medicinal marijuana for treatment of his medical conditions. He has been fully instructed in proper usage of this medication to keep himself and others safe, and is competent not to endanger anyone. (Item 4)

The state where Applicant resides recognized medical marijuana in 2006. I have taken administrative notice of several documents citing to the state's medical marijuana laws which are marked as HE III.

Under federal law, use of marijuana remains unlawful. On October 25, 2014, the Director of National Intelligence issued a policy memorandum titled, *Adherence to Federal Laws Prohibiting Marijuana Use*. The memo cites guidance from the Department of Justice that makes clear "no state can authorize violations of federal law, including violations of the Controlled Substance Act." The memorandum also refers to the Intelligence Reform and Terrorism Prevention Act (IRTPA), as amended, 50 U.S.C. 3343 (2008), which prohibits a federal agency from granting or renewing a clearance to an unlawful user of a controlled substance or an addict. (HE II)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over arching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this

decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Guideline H, Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

> 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.
>
> (a) Drugs are defined as mood and behavior altering substances, and include:
>
> (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended, (E.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and
>
> (2) inhalants and other similar substances;
>
> (b) Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

The guideline notes several disqualifying conditions that could raise security concerns. I find the following drug involvement disqualifying conditions may apply to Applicant's case.

AG ¶ 25(a) any drug abuse; and

AG ¶ 25(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant used marijuana recreationally in 2003 at least 3-4 times a week. He has been using medical marijuana on a daily basis since May 2014. AG ¶ 25(a) and AG ¶ 25(c) apply.

While the state where Applicant resides recognizes medical marijuana, it remains illegal under federal law as outlined in the October 25, 2014, Director of National Intelligence policy memorandum titled, *Adherence to Federal Laws Prohibiting Marijuana Use.* The memo cites guidance from the Department of Justice that makes clear "no state can authorize violations of federal law, including violations of the Controlled Substance Act." (Admin Ex II)

The Intelligence Reform and Terrorism Prevention Act (IRTPA), as amended, 50 U.S.C. 3343 (2008) prohibits a federal agency from granting or renewing a clearance to an unlawful user of a controlled substance or an addict, and under federal law, use of marijuana remains unlawful. For the above reasons, AG ¶ 25(h) applies, because even though Applicant is legally prescribed medicinal marijuana under state law, his use of marijuana remains illegal under federal law.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline H, Drug Involvement. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (*See* ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions potentially apply to the Applicant's case:

AG ¶ 26(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and 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: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an

appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.

None of these mitigating conditions apply. Applicant began using marijuana recreationally in 2003. It resulted in him attending drug treatment from June 2003 to June 2004. Since May 2014, Applicant has been prescribed marijuana for medicinal reasons by his doctor. While the state where he resides recognized medical marijuana in 2006, it was not legally recognized back in 2003 when he first used marijuana. Even though medicinal marijuana is legal under state law, the use of marijuana remains unlawful under federal law. Applicant uses marijuana on a daily basis. There is no indication that he will discontinue the use of marijuana in the future.

Applicant did not meet his burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant disclosed his marijuana use on his security clearance application and has been forthcoming about the extent of his marijuana use. Although legal under state law, the use of marijuana remains a violation of federal law. For this reason, Applicant did not mitigate the drug involvement security concern.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

ERIN C. HOGAN
Administrative Judge