DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

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

Appearances

For Government: Charles Hale, Esq., Department Counsel
For Applicant: *Pro se*

06/20/2017

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, but he did mitigate the allegation that he deliberately failed to disclose his marijuana use in his security clearance application. 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 June 19, 2015. This document is commonly known as a security clearance application. On April 29, 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 his 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, Security Executive Agent Directive (SEAD) 4, *National Security Adjudication Guidelines* (AG),

in a civil court case. It detailed the factual reasons for the action under the security guidelines known as Guideline H for drug involvement and substance abuse and Guideline E for personal conduct. Applicant answered the SOR on May 17, 2016, and requested a decision based on the written record without a hearing.

On June 27, 2016, Department Counsel submitted a file of relevant material (FORM).[2] The FORM was mailed to Applicant on the next 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 July 5, 2016.[3] Applicant did not respond to the FORM. The case was assigned to me on May 4, 2017.

Procedural Matters

Included in the FORM were 12 items of evidence, which are marked as Government Exhibits 1 through 10.[4] Exhibits 1, and 3 through 10 are admitted into evidence. Exhibit 2 is a report of investigation (ROI) summarizing Applicant's interview that took place during the August 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. Nevertheless, I am not persuaded that a *pro se* applicant's failure to respond to the FORM, which response is optional, equates to a knowing and voluntary waiver of the authentication requirement. The record does not demonstrate that Applicant understood the concepts of authentication, waiver, and admissibility. It also does not demonstrate that he understood the implications of waiving an objection to the admissibility of the ROI. Accordingly, Exhibit 2 is inadmissible, and I have not considered the information in the ROI.

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 Adjudicative Guidelines effective within the Defense Department on September 1, 2006. My Decision and Formal Findings under the revised Guidelines H and E would not be different under the 2006 Guidelines.

[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 June 28, 2016, and Applicant's receipt is dated July 5, 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 the second item is Applicant's Answer. Because the SOR and the Answer are the pleadings in this case, they are not marked as Exhibits. Items 3 through 12 are marked as Exhibits 1 through 10.

[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 22 years old, a high school graduate with some college credits. He has never been married and has no children. Since June 2015, he has worked for a defense contractor. This was Applicant's first application for a security clearance.[6]

The SOR alleged that (1) Applicant used marijuana with varying frequency from 2009 until September 2015, (2) in 2015 he tested positive for marijuana during his employer's testing program, and (3) he falsified his security clearance application by failing to disclose that usage.[7] Applicant admitted the drug usage but explained that from December 2013 until September 2015, he was enrolled in a state medical marijuana program to treat symptoms of chronic pain. He also explained that before his drug test, he told his employer that it would come back positive. He admitted that his answer in his security clearance application about drug usage was inaccurate.[8] Applicant's Answer included a letter from his immediate supervisor praising the quality of Applicant's work and his work ethic.[9] The medical use of marijuana is legal in the state where Applicant lives.

Law and Policies

It is well-established law that no one has a right to a security clearance.[10] 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."[11] 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.[12] An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[13]

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[6] Exhibit 1.

[7] SOR ¶¶ 1 & 2.

[8] Answer, p. 1.

[9] Answer, p. 2.

[10] *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).

[11] 484 U.S. at 531.

[12] Directive, ¶ 3.2.

[13] Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[14] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[15] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[16] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[17]

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.[18] The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[19]

Discussion

Guideline H – Drug Involvement and Substance Abuse

Under AG H for drug use,[20] 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:

> 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:

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

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

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

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

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

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

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

AG ¶ 25(a) any substance misuse (see above definition);

AG ¶ 25(b) testing positive for an illegal drug; and,

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.

Applicant admitted his use of marijuana from 2009 until September 2015 and that he tested positive for the use of marijuana in September 2015, as alleged in the SOR. Facts admitted by an applicant in an answer to a Statement of Reasons require no further proof by the Government.[21] Marijuana is a Schedule I controlled substance, and its possession is regulated by the federal government under the Controlled Substances Act.[22] The knowing or intentional possession and use of any controlled substance is unlawful and punishable by imprisonment and or a fine.[23] 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.[24] AG ¶¶ 25(a) and (b) apply.

I have considered mitigating factor AG ¶ 26(a). Applicant's marijuana use occurred with varying frequency from sometime in 2009 until September 2015. His behavior was neither infrequent, nor did it occur long ago, with his last use being less than two years ago. AG ¶ 26(a) does not apply.

Guideline E – Personal Conduct

Under Guideline E for personal conduct, the concern is that "[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information."[25] A statement is false or dishonest when it is made deliberately (knowingly and willfully). An omission of relevant and material

[21] 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").

[22] 21 U.S.C. § 811 *et seq*.

[23] 21 U.S.C. § 844.

[24] 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.

[25] AG ¶ 15.

information is not deliberate if, for example, the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, reasonably did not know the information, or genuinely thought the information did not need to be reported.

In assessing an allegation of deliberate falsification, I consider not only the allegation and applicant's answer but all relevant circumstances.[26] Here, the SOR alleged that Applicant "deliberately failed to disclose" his marijuana use in his security clearance application. His answer to the SOR was that his response to the security clearance application question was "inaccurate," not that he deliberately falsified his response. I take that as a denial of the allegation, which leaves the burden of proof with the Government.

When Applicant completed his security clearance application, he was 21 years old and had been enrolled in his state's medical marijuana program since December 2013 for chronic pain symptoms. I take administrative notice that the state where Applicant lives has a statutory medical marijuana program and that one of the qualifying conditions is chronic pain.[27] This was Applicant's first foray into the security clearance process. Because Applicant was enrolled in a statutory medical marijuana program, it is fair to conclude that when he filled out his application, he reasonably did not know, or genuinely thought that his marijuana use did not need to be reported, because it was legal in his state. Under these circumstances, I find that the Government did not carry its burden of proving that Applicant deliberately falsified his security clearance application.

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.[28] 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.[29]

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

[26] AG ¶¶ 2(a) and (d)(1)-(9) (explaining the "whole-person" concept and factors).

[27] The Government contends, correctly, that 23 states and the District of Columbia have passed laws allowing the use of marijuana under varying circumstances, including for medical use. Government Brief, p. 5, note 11.

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

Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2, Guideline E:	For Applicant
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