DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 16-01537
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

10/27/2017

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 concerns raised by his use of marijuana and cocaine and his personal conduct. 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 2, 2015. This document is commonly known as a security clearance application. On November 2, 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] 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

the action under the security guidelines known as Guideline H for drug involvement and substance misuse and Guideline E for personal conduct. Applicant answered the SOR on November 23, 2016, and requested a decision based on the written record without a hearing.

On January 11, 2017, 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 February 14, 2017.[3] Applicant did not respond to the FORM. The case was assigned to me on October 1, 2017.

Procedural Matters

Included in the FORM were 13 items of evidence, which are marked as Government Exhibits (GE) 1 through 9 and are admitted into evidence without objection.[4]

Findings of Fact

Applicant is 39 years old, a high school graduate, who has never married, and has two sons ages 11 and 2. Since February 2013, he has worked for a defense contractor.[5]

Under Guideline H, the SOR alleged that Applicant (1) was terminated by his employer in May 2011 for testing positive for cocaine; (2) used cocaine from January 2007 to May 2011; (3) used marijuana from 1991 to 1999; and (3) was arrested and charged with drug offenses three times in 1996 and once in 2007.[6] Applicant admitted those allegations.[7]

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 January 12 20-17, and Applicant's receipt is dated February 14, 2017. The DOHA transmittal letter informed Applicant that he had 30 days after receiving it to submit information.

[4] The first four items of the FORM are the SOR, the Transmittal Letter, Applicant's Receipt, and Applicant's Answer, respectively. Because the SOR and the Answer are the pleadings in this case, they are not marked as Exhibits. The Transmittal Letter and Applicant's Receipt have no substantive value and, therefore, they are not marked as exhibits. Items 5 through 13 are marked as Exhibits 1 through 9.

[5] GE 1; Answer, p. 5.

[6] SOR ¶¶ 1.a-g.

[7]Answer ¶¶ 1.a-g and pp. 4-5.

Under Guideline E, the SOR alleged that Applicant (1) deliberately failed to disclose in his June 2015 security clearance application the information alleged under Guideline H in the SOR; and (2) deliberately failed to be honest about his drug use during his background interviews in 2011 and 2015 and in his August 2016 responses to DOHA interrogatories.[8] Applicant admitted those allegations. He also admitted that he was not honest during the clearance process, because he needed a clearance in order to get the job he wanted.[9]

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]

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

[8] SOR ¶¶ 2.a-g.

[9] Answer ¶¶ 2.a-g and pp. 4-5.

[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.

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

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

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 Misuse

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 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 conditions:

> AG ¶ 25(a) any substance misuse (see above definition);
>
> AG ¶ 25(b) testing positive for an illegal drug; and,
>
> AG ¶ 25(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

[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).

In analyzing the facts of this case, I considered the following 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.

Applicant admitted his use of marijuana from 1991 to 1999, his use of cocaine from January 2007 to May 2011, and that he was terminated from his employment in May 2011 after testing positive for cocaine. He also admitted that he was arrested and charged with drug offenses in 1996 and 2007. 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 cocaine is a Schedule II controlled substance, the possession of which 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] AG ¶¶ 25(a), (b), and (c) apply.

I have considered mitigating factor AG ¶ 26(a). It is true that Applicant's illegal drug use occurred a number of years ago and ceased in May 2011. There was, however, a fairly lengthy period of time, when he was a frequent user of illegal drugs, with sufficient frequency to be arrested and charged with drug offenses. Thus, I cannot find that the behavior was infrequent. In addition, I must view the record as a whole, not in a piecemeal fashion.[24] In this case, Applicant's admitted falsifications during the clearance process, discussed below, impacts negatively on my ruling under Guideline H. 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] [24] The Appeal Board often reminds us that we should not evaluate the evidence in a piecemeal fashion. ISCR Case No. 11-01888 at 6 (App. Bd. Jun. 1, 2012). Rather, we must evaluate the record as a whole. ISCR Case No. 14-03526 at 4 (App. Bd. Dec. 31, 2015).

[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 analyzing the facts of this case, I considered the following disqualifying conditions:

> AG ¶ 16(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and,
>
> AG ¶ 16(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

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 fully disclose his marijuana and cocaine use in his security clearance application, during his background interviews, and in responses to DOHA interrogatories. In response to the SOR, Applicant admitted that he was not forthcoming with relevant, requested information, attributing his dishonesty to fear of not getting the job he wanted. This is a classic case of the motive to obtain a job driving an applicant to be dishonest during the clearance process. AG ¶¶ 16(a) and (b) apply, and there is nothing in the record mitigating Applicant's personal conduct under Guideline E.

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.[27] 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

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

[27] *See* note 26, *supra.*

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