KEYWORD: Drugs

DIGEST: Applicant began using marijuana in high school and used it daily for nine years. He reduced his marijuana use in September 1991 after a serious discussion with his father, and stopped altogether about three years ago. He did not fully disclose the frequency and duration of his marijuana use on his security clearance application and did not disclose regular use of ecstacy for a three-month period. Security concerns arising from his drug use have been mitigated, but his falsification of his security clearance application was not refuted or mitigated. Clearance is denied.

CASENO: 06-20521.h1

DATE: 05/21/2007

DATE: May 21, 2007

In re:	)	
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----------	)	ISCR Case No. 06-20521
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT
Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT
Jeffrey A. Daxe

SYNOPSIS

Applicant began using marijuana in high school and used it daily for nine years. He reduced his marijuana use in September 1991 after a serious discussion with his father, and stopped altogether about three years ago. He did not fully disclose the frequency and duration of his marijuana use on his security clearance application and did not disclose regular use of ecstacy for a three-month period. Security concerns arising from his drug use have been mitigated, but his falsification of his security clearance application was not refuted or mitigated. Clearance is denied.

STATEMENT OF THE CASE

On November 29, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive), and the revised adjudicative guidelines approved by the President on December 29, 2005, and implemented effective September 1, 2006 (Guidelines). The SOR alleged security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct).

Applicant answered the SOR in writing on December 14, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on February 21, 2007, and heard on April 24, 2007, as scheduled. DOHA received the hearing transcript (Tr.) on April 30, 2007.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 29-year-old network data communications analyst employed by a defense contractor. He is a college graduate and has a master's degree in network management (Tr. 51-52). He has worked for his current employer since December 2002. He has never held a permanent security clearance.

Applicant executed a security clearance application (SF 86) on May 6, 2004 (Government Exhibit (GX) 1). In response to question 27, asking about use of any controlled substance, he disclosed using marijuana "10+" times between January 1, 1996, and February 20, 2003. In the remarks section, he stated, "drug was marijuana." He also explained, "I can't recall the amount of times this has happened between the specified dates . . . my guess would be 10+ times."

On February 22, 2006, Applicant executed an Electronic Questionnaire for Investigations Processing (e-QIP), and he made substantially the same disclosures in response to the questions in Section 24, asking about illegal use of controlled substances (GX 2 at 27). He testified he copied the information on the SF 86 onto the e-QIP, except for one of the remarks at the end, with a few edits regarding previous residences (Tr. 55, 75-79). He did not copy his previous explanatory remark about drug use onto the e-QIP.

Applicant was interviewed by a security investigator on April 24, 2006, about his drug involvement (GX 3). He told the investigator under oath that he first used marijuana when he was 14 or 15 years old, in 1991 or 1992, while on a trip to an amusement park. He stated he took a "draw" on a marijuana cigarette that was being passed around. He stated he used marijuana daily from 1991 or 1992 until October 1998, when he stopped using it at the urging of his parents. He stated he resumed using marijuana in October 1999 and used it at least weekly until December 2002, when he began working for his current employer and decided to decrease or discontinue using it.

He told the investigator he used marijuana three to five times in both 2003 and 2004 and last used marijuana in the fall of 2004.

Applicant also told the investigator he used ecstasy for the first time in May 2000 while attending a concert with friends. It made him sick the first time he used it, but it gave him a feeling of euphoria thereafter. He admitted using ecstasy two or three times a month until July 2000. He told the investigator he spent about $10 to $20 per pill, but never sold or distributed them.

Applicant acknowledged to the investigator that his security clearance applications did not accurately reflect his drug use. He also acknowledged that he failed to list several residences on his applications.

The investigator testified that Applicant initially was vague about the frequency of his marijuana use. He testified "we had to go at it a little while" before Applicant would be more specific. When Applicant said he used marijuana "numerous times," the investigator continued to probe. Finally, the investigator gave Applicant a piece of paper and told him to draw a time line showing first use, high school use, college use, and frequency of use. Even after drawing the time line, Applicant described his frequency as "numerous" or "several." When the investigator again told him he needed more specificity, Applicant disclosed daily use during high school. The same kinds of multiple questions were required to determine his use in college (Tr. 30-33).

The investigator testified Applicant was not certain when he last used marijuana, but after some questioning admitted it was after he was hired by his current employer (Tr. 33). When the investigator told Applicant he needed to be more specific and reminded him he was under oath, Applicant said his last use was in the fall of 2004 (Tr. 34).

The investigator asked Applicant if he had used any other drugs in addition to marijuana. Initially, Applicant answered "no." Only after being asked several times did Applicant admit using ecstasy. The investigator did not have the impression that Applicant's memory of using ecstasy was triggered by the mention of other drugs. His impression was that Applicant was hesitant to make full disclosure of his drug use and that it was necessary to draw out the information by repeated questions (Tr. 47-50). Applicant told the investigator he filed out his application with the intention of making full disclosure during a follow-up interview with an investigator, but he could not recall the precise extent of his marijuana use and was afraid to list an "exorbitant" number on his application (GX 3 at 2).

In his answer to the SOR, he admitted a one-time use of marijuana in 1991, but he stated that he purchased it rather than taking a draw of a cigarette being circulated among friends, as he had earlier told the security investigator. He admitted daily use of marijuana from 1996 to 1998, deviating from his earlier statement to the security investigator that his daily use began in 1991 or 1992. He admitted weekly use from 1999 to 2002. He admitted using marijuana 3-5 times in 2003, but did not mention using marijuana in 2004. He specifically denied using marijuana after he executed his security clearance application in May 2004, and attributed his admission of using marijuana up to the fall of 2004 to a suggestion by the interviewer. Consistent with his statement to the investigator, he admitted using ecstasy 2-3 times a month from May to July 2000. He denied falsifying his two security clearance applications, attributing his omission of the 1991 marijuana use and his three-month period of ecstasy use to an oversight.

Applicant testified that he realized his current job offered a potential career about two months after he was hired (Tr. 52). In early 2003, he began working on his security clearance application. He was unsure how to answer question 27, regarding his drug use, and he sought advice from a security clearance specialist at his company. He testified he had numerous conversations with the specialist and may have e-mailed her once or twice. According to Applicant, he told the specialist he had used marijuana "a lot." She asked him, "how many times is a lot, 10 or more?" He said "yeah," and she said, "then that should be sufficient." Applicant testified he told the security investigator he had sought advice about answering the question, even though it does not appear in the investigator's report (Tr. 71-72).

Applicant admitted the dates of his marijuana use listed on his two applications were guesses and were inaccurate (Tr. 73-74). He testified he knew there would be a follow-up interview after he submitted his application, and he believed he would have an opportunity to provide the details of his marijuana use at that interview (Tr. 55).

Applicant admitted he started using marijuana daily in 1994 or 1995, not 1996 as indicated on his security clearance application. He graduated from high school in 1996, and continued his daily use until around September 2001. His use then "tapered off" to weekly use until some time in 2002, when it went down to monthly use (Tr. 68-70).

Applicant testified he incorrectly told the security investigator that he last used marijuana in the fall of 2004. He testified he knew he stopped smoking marijuana before he submitted his SF 86 in May 2004, but he forgot that he started working on his application in the spring of 2003 and had already stopped smoking marijuana by that time. He testified he went to a New Year's party in 2003 and had some marijuana left over from the party, which he consumed in February 2003 (Tr. 70). He testified he did not know why he neglected to copy the explanatory remark about his drug use when he copied the other information from the SF 86 to the e-QIP (Tr. 79).

Applicant testified he neglected to disclose his use of ecstasy on his SF 86 and the e-QIP because he "completely forgot" about it (Tr. 57). He admitted the security investigator asked him multiple times if he had used other drugs, but asserted he did not remember using ecstasy until the investigator recited examples of other drugs and specifically mentioned ecstasy (Tr. 58, 85). He testified his memory of using ecstasy "basically came back" after he admitted using it (Tr. 86). He remembered that his first use was at a concert with friends and that it made him sick enough to vomit in front of his friends (Tr. 88).

Applicant testified that he stopped using marijuana because he did not want to risk his career. He moved away from his old neighborhood, bought a house, starting focusing on his work, and stopped associating with his marijuana-using acquaintances, except for one lifelong friend who also decided to stop using marijuana at about the same time (Tr. 61-62). He now socializes with his co-workers and supervisors (Tr. 64-66).

One of Applicant's supervisors has noticed his increasing maturity and growth over the last year and a half, and he believes Applicant's character and work ethic are impeccable (AX A). A lifelong friend believes he has relegated his drug use to the past, and there is nothing else in his past that would raise questions about his trustworthiness, honest, or reliability (AX B). Another supervisor who has known Applicant from the beginning of his current employment testified that

Applicant is frugal, very hard-working, and mature. He recommended Applicant for transfer to a classified position because he admired his integrity, morals, character, and honesty (Tr. 95-97).

Applicant's father is an Air Force veteran and a successful businessman who has been married to Applicant's mother for almost 38 years. He testified that he and Applicant had a serious discussion in September 2001 about the direction of Applicant's life. The discussion covered Applicant's misgivings about his upcoming marriage, his drug use, his excessive credit card debt, and his substandard academic performance. They talked, prayed together, and agreed on a plan to redirect Applicant's life. Applicant terminated his engagement to be married. His father lent him about $20,000 to get out of debt, which Applicant repaid within three years. Applicant began attending church again. When Applicant decided to apply for a security clearance, his father told him, "they're going to ask you about everything," and he advised Applicant to leave nothing out and not to "sugarcoat" his answers (Tr. 101-106).

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the Guidelines. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, the disqualifying conditions and mitigating conditions under each specific guideline, and the factors listed in the Guidelines ¶¶ 2(a)(1)-(9).

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The Guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶

E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Guidelines ¶ 2(b).

CONCLUSIONS

Guideline H (Drug Involvement)

The concern under this guideline is as follows: "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." Guidelines ¶ 24. "Drugs" include "[d]rugs, 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)." Guidelines ¶ 24(a)(1). Drug abuse is "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." Guidelines ¶ 24(b).

Disqualifying conditions under this guideline include "any drug abuse" and "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia." Guidelines ¶ 25(a) and (c). The evidence in this case establishes these two disqualifying conditions.

Since the government produced substantial evidence to raise ¶¶ 25(a) and (c), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns raised by drug involvement may be mitigated by showing that "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." Guidelines ¶ 26(a). The first clause of ¶ 26(a) ("happened so long ago") focuses on the recency of drug involvement. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the evidence. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.* Although the evidence is conflicting on when Applicant last used marijuana, it is clear his last use was no later than the fall of 2004, almost three years ago. There is no evidence of physical or psychological addiction. His significant changes in lifestyle strongly suggest reform or rehabilitation. I conclude this mitigating condition is established.

Security concerns under this guideline also may be mitigated by evidence of "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; [or] (3) an appropriate period of abstinence." Guidelines ¶ 26(b)(1)-(3). During his interview with the security investigator,

Applicant asserted his intention to abstain from drugs in the future. He has demonstrated that intent by moving to a new neighborhood, cutting off his association with drug users, and abstaining from drugs for a significant period. He is employed in a position that offers him a rewarding career, and his abstinence from drugs is motivated by his desire to not put his career at risk. I conclude this mitigating condition is established.

Guideline E (Personal Conduct)

The concern under this guideline is as follows: "Conduct 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process." Guidelines ¶ 15. The relevant disqualifying condition in this case is "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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities." Guidelines ¶ 16(a).

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission or misstatement, standing alone, does not prove an applicant's state of mind when it occurred. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission or misstatement. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

There are two aspects of Applicant's drug use at issue under this guideline. The first is his failure to accurately describe the frequency and duration of his drug use, and the second is his failure to disclose his use of ecstasy.

Applicant's failure to disclose his first use of marijuana in 1991 on either of his two applications does not raise a security concern because it occurred more than seven years before he executed his applications and before he was 16 years old, making it outside the scope of question 27. Similarly, his statement on both applications that his marijuana use began in January 1996 is explainable by reference to the seven-year limit for question 27. However, his conflicting descriptions of his first use and the duration of his daily use are relevant to evaluating his credibility.

There are numerous conflicts in his descriptions of his marijuana use. He told the security investigator his daily use of marijuana began in 1991 or 1992, but he stated in his answer to the SOR that it began in 1996, and he testified at the hearing that it began in 1994 or 1995, while he was still in high school. He told the investigator his daily use ended in October 1998, and he provided the same end date in his answer to the SOR, but he testified at the hearing that his daily use continued until 2002. Finally, he stated on both his applications that he last used marijuana in February 2003, but he told the investigator his last use was in the fall of 2004. At the hearing, he repudiated his statement to the investigator setting the ending date in the fall of 2004, and insisted his last use was in February 2003.

Applicant's statement to the investigator and his answer to the SOR suggest an effort to understate the duration of his daily use and make it more remote in time. His statement on the application that he used marijuana "10+" times may have been numerically true, but it was not candid. It did not come close to disclosing daily use for nine years. Applicant is intelligent and well educated. He knew his marijuana use was an obstacle to his career plans. He undoubtedly knew that daily use for nine years was a much greater obstacle to obtaining a clearance than "10+" uses over a seven-year period. He knew that the "remarks" section of the application would allow him to clarify or expand an answer, and he used the remarks section on both applications, but he made no effort to explain his "10+" answer. It was only after persistent and repeated questioning by an experienced investigator that Applicant reluctantly admitted daily use.

Applicant's testimony at the hearing was articulate and responsive. He did not appear timid or easily intimidated. To the contrary, he briefly questioned Department Counsel's knowledge of the security clearance application process during her cross-examination (Tr. 77-78). I find his assertion that he did not know how to articulate the frequency of his marijuana use disingenuous, in light of his level of education, obvious intelligence, and demeanor during his testimony. I conclude that Applicant's answer to question 27 was intentionally deceptive regarding the duration and frequency of his marijuana use.

Applicant's failure to disclose his use of ecstasy must be evaluated in the context of his contradictory statements and reluctance to admit the full extent of his drug use. I find his claim of faulty memory implausible and unbelievable. His explanation that his memory was triggered by the investigator's litany of other drugs does not take into account that question 27 lists numerous other drugs. The specificity of his description of the venue and circumstances of his use, the price he paid for the pills, and his nauseous reaction to the drug belies a faulty memory. The fact that his first use was embarrassing, causing him to vomit in the presence of his friends at a public concert, makes his claim of faulty memory implausible. I conclude Applicant intentionally failed to disclose his use of ecstasy in response to question 27. Based on the above considerations, I conclude the disqualifying condition in Guidelines ¶ 16(a) is raised, shifting the burden to Applicant to rebut, explain, extenuate, or mitigate the facts.

Security concerns raised by false or misleading answers on a security clearance application may be mitigated by showing that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." Guidelines ¶ 17(a). Applicant's efforts to correct his omission and misleading answers were neither prompt nor entirely in good faith. He executed his SF 86 in May 2004, repeated his answers in his e-QIP in February 2006, and made no effort to correct the information until he was interviewed in April 2006. Even then, he provided correct information only after repeated prodding and cajoling by the investigator. The mitigating condition in Guidelines ¶ 17(a) is not established.

Security concerns based on false or misleading answers also may be mitigated by showing that "the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully." Guidelines ¶ 17(b). Applicant claimed his disclosure of "10+" instances of using marijuana was based on advice from a security clearance specialist. His claim is uncorroborated by

testimony, statements, or affidavits, even though he was aware of and utilized affidavits as a substitute for live testimony. Even if such advice was given, it would have been the product of faulty and misleading information provided by Applicant. There is no evidence he told the specialist he used marijuana daily. He only told her he used it "a lot," and ten uses of marijuana would, in ordinary parlance, be "a lot." He is well-educated, intelligent, and very articulate, and he admitted at the hearing that his disclosure of using marijuana more than ten times in a seven-year period did not accurately describe daily use for nine years. His explanation that he knew he would have an opportunity to clarify his answer in a follow-up interview is belied by the reluctance and evasiveness he displayed during that interview. I conclude that Guidelines ¶ 17(b) is not established.

Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered: (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 applicant'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. Guidelines ¶¶ 2(a)(1)-(9). Several of these factors were incorporated in the above discussions of Guidelines H and E, but some merit additional comment.

Applicant engaged in serious lawbreaking for a substantial portion of his life, starting as an adolescent and continuing past college. The turning point in his life appears to have been the heart-to-heart discussion with his father in September 2001, because he started reducing his drug use shortly thereafter. His motivation for cessation of his drug use does not appear to be based on health reasons or a newly-discovered respect for the law, but fear of losing his job. Now that he has finally made full disclosure of his drug use, the potential for coercion, exploitation, or duress is nil. He appears to be content with his "clean" life, making the likelihood of recurrence low.

Applicant's deceptive security clearance applications are another matter. Absolute honesty and candor are expected of persons entrusted with classified materials. Willingness and a predisposition to self-report breaches of security, even at the risk of detriment to reputation and career, are essential. Applicant's lack of candor is a serious disqualification.

After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on drug involvement, but he has not mitigated the concerns based on personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him a security clearance.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline H: FOR APPLICANT

Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2. Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman
Administrative Judge