DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 12-04379
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Robert J. Kilmartin, Esquire, Department Counsel
For Applicant: *Pro se*

02/28/2014

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant smoked marijuana about ten times between 2007 and September 2011. The drug involvement and drug-related criminal conduct concerns are mitigated because he has not used marijuana since his arrest and conviction for illegal possession of marijuana in September 2011, and he intends no future involvement. Personal conduct concerns that arise by his deliberate omission of his marijuana use from his November 2011 security clearance application are mitigated by his prompt disclosure during his subject interview in December 2011. Clearance granted.

Statement of the Case

On August 7, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant,[1] detailing the security

[1] Applicant's first and middle names were transposed in the SOR and in his security records, including the Electronic Questionnaire for Investigations Processing (e-QIP) (GE 1), which was typed by his employer from a handwritten version completed by Applicant (AE B). Applicant is known by his middle name, which may well be the source of the error. The SOR was amended at the hearing to conform to his birth name, which is

concerns under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct), and explaining why it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

Applicant submitted a detailed, written response to the SOR allegations on August 19, 2013. In response to a request by the DOD CAF, he clarified his response to SOR 3.b on August 23, 2013. Applicant requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On January 14, 2014, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for him. On January 17, 2014, I scheduled a hearing for February 11, 2014. The Notice of Hearing was timely forwarded to Applicant through his employer, and a copy was sent to his home of record.[2] Applicant did not receive the notice of hearing until February 3, 2014.

I convened the hearing as scheduled. Applicant waived the Directive's requirement that he be provided at least 15 days advance notice of the hearing. Three Government exhibits (GEs 1-3) were admitted into evidence without objection. Applicant submitted one exhibit (AE A) and testified on his behalf, as reflected in a transcript (Tr.) received on February 20, 2014.

At Applicant's request, I held the record open for two weeks for post-hearing submissions. On February 13, 2014, Applicant forwarded two documents, which were marked and admitted without objection as AEs B and C. The record closed on February 20, 2014, when Applicant confirmed he did not intend to submit any additional documents.

Findings of Fact

The SOR alleged under Guideline H that Applicant used marijuana approximately ten times between 2007 and 2011 (SOR 1.a); under Guideline J that Applicant pleaded guilty to September 2011 charges of driving without privileges and of possession of a controlled substance (marijuana) (SOR 2.a); and under Guideline E that Applicant deliberately falsified his November 12, 2011 Electronic Questionnaire for Investigations

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consistent with his signature on his documents.

[2] Applicant's case was assigned to me because his home address on record is within my area of geographic responsibility, even though in his Answer, Applicant indicated he was working in another state. On January 9, 2014, Department Counsel indicated that the Government was ready to proceed to a hearing and requested that the notice be sent to Applicant's home address. On February 3, 2014, Applicant received the Notice of Hearing sent to him through his out-of-state employer. He provided an address in the state where he works. At my request, Department Counsel contacted Applicant, who confirmed his intent to appear at the hearing as scheduled, despite the hearing location being many miles away from his present work location.

Processing (e-QIP) because he did not disclose his arrest for possession of marijuana (SOR 3.a and 3.b) or his use of marijuana (SOR 3.c).

In his Answer, Applicant admitted the use of marijuana (SOR 1.a) and his arrest for possession of the drug (SOR 2.a) as alleged. He admitted that he had not disclosed his use of marijuana on his e-QIP (SOR 3.c). In what appeared to be a contradiction, Applicant admitted that he had falsely responded "No" to whether he had been issued a summons, citation or ticket in the past seven years and to whether he had been arrested in the last seven years (SOR 3.a). Yet, he denied falsifying his e-QIP by not reporting his arrest for marijuana in response to any drug or alcohol charges or convictions in the last seven years (SOR 3.b). Applicant explained at the hearing that notwithstanding the November 2011 date on his e-QIP, he had submitted the form before his drug arrest in September 2011. He had admitted SOR 3.a because he had received a citation for an incident that involved alcohol. When it was pointed out that the allegation concerned the omission of his drug-related arrest, Applicant changed his response to a denial to SOR 3.a.

After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 25-year-old environmental safety and health technician. A high school graduate, he started working as a ship painter with his employer, a defense contractor, in February 2009. Since then, Applicant has held job assignments in various areas of the country. (GEs 1, 3; AE B.)

Applicant smoked marijuana twice in high school. After graduating in May 2007, he continued to live with his legal guardians while working for a private land maintenance business. In November 2007, he moved in with his sister and her boyfriend in another state. Applicant smoked marijuana with his sister's boyfriend on occasion. (Tr. 46.) Sometime in 2007, Applicant was cited for minor in possession of alcohol when caught with others drinking at a party held at a friend's home. He paid a $110 fine and was not required to appear in court. (GEs 1-3.)

Applicant moved to state X in February 2009 for his first job assignment with his current employer. On being hired, he was required to take a drug screen, which was apparently negative for all drugs tested. (Tr. 25.) During his year in state X, he was cited twice, in June 2009 and January 2010, for failure to stop at a stop sign. He failed to appear in court for either violation, the second time because he moved for work before his March 2010 court date. Fines of $190 were assessed for each violation. By the second violation, he had acquired a state X driver's license, and his driving privileges were suspended for nonpayment of the fines. On July 29, 2011, Applicant met the conditions of his license suspension by paying the fines. (AE C.) In January 2011, Applicant moved to state Y for a new assignment. (GE 1.)

Applicant smoked marijuana to relax on a few occasions in 2011 with a couple of friends from home, who had also been hired by his employer.[3] (Tr. 31, 47.) He obtained the

[3]Applicant testified with respect to his use in state Y, "it's legal out there, so I just tried it just to try it legally."

marijuana that he used in state Y from a friend. (Tr. 47.) Applicant did not have a security clearance at the time. (Tr. 32.)

At the request of his employer, Applicant completed by hand, and certified to the accuracy of, a Questionnaire for National Security Positions (QNSP) on July 21, 2011. In response to the police record inquiries, Applicant responded "Yes" to whether he had ever been charged with any offense related to alcohol or drugs, and explained that he had been cited for being a minor in possession of alcohol. Applicant answered "No" to whether he had illegally used any controlled substance, including marijuana, in the last seven years. Apart from a small signature loan which had been over 180 days delinquent in the past, Applicant disclosed no other issues of potential security concern. (AE B.) Applicant feared that his employer would retaliate against him in some way if he admitted that he had used illegal drugs. (Tr. 24-25.) Around August 2011, Applicant submitted the QNSP to his employer. (Tr. 28.)

While driving to visit his sister, Applicant was stopped for speeding on September 1, 2011. The officer detected the smell of marijuana in Applicant's vehicle. Applicant admitted that he had a "joint" in the car's console. Applicant was arrested for possession of marijuana (less than three grams). (Tr. 33, 45.) Applicant did not think that smoking "just one [marijuana] cigarette" would impair his driving, although he now understands that he made "a stupid decision at the time." (Tr. 46.) He was detained in the county jail for three to four hours before being released on bond. In addition to one count of illegal possession of a controlled substance, he was charged with driving without privileges. (GEs 2, 3.) Applicant attributes that charge to state X's failure to update its records to show that he had paid the fines for his traffic violations. (AE C; Tr. 48.) Applicant maintains that he had a current license at the time, and he was unaware that his license was suspended. (Tr. 49.) The citation indicates Applicant's name under driver's license number and state Y as the driver's licensing state. Yet, it also shows the class of license as "ID CARD."[4] In early January 2012, Applicant and the state stipulated to a plea agreement. In return for Applicant's guilty plea to both charges, he would be sentenced concurrently to a $1,000 fine with $700 suspended; to 365 days in jail with 364 days suspended and credit for one

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(Tr. 47.) Section 69.50.4013 of that state's law provides, in part:

> The possession, by a person twenty-one years of age or older, of useable marijuana or marijuana-infused products in amounts that do not exceed those set forth in [state code section] 69.50.360(3) is not a violation of this section, this chapter, or any other provision of [state Y] state law.

Under section 69.50.360(3), possession of one ounce or less of useable marijuana is not a criminal or civil offense. The law decriminalizing possession of minor amounts of marijuana by adults did not become effective until after Applicant smoked the marijuana.

[4] State Y provides under section 46.20.117 for the issuance of an "identicard" to persons who do not hold a valid state Y driver's license. Under section 46.20.021, new residents of state Y must obtain a valid driver's license in that state within 30 days from the date they become residents. To acquire a valid state Y license, Applicant would have had to indicate whether his license had been suspended or revoked in state X and provide the date and reason for the suspension under section 46.20.091. Applicant had been living in state Y for over eight months at the time of his arrest, although it is not clear that he intended to establish residency.

day served; and to two years of unsupervised probation with conditions that he violate no laws greater than traffic infractions and obtain a valid driver's license. Available court records show that on January 3, 2013, the judge sentenced Applicant on an amended charge of driving with an invalid license to a $300 fine, 180 days in jail with 179 suspended, and two years of unsupervised probation on that charge. (GE 2.) Available court records do not show the disposition of the marijuana possession charge.

On November 12, 2011, Applicant signed and certified to the accuracy of an Electronic Questionnaire for Investigations Processing (e-QIP). (GE 1.) Applicant testified that a project manager for the company inputted the data from his handwritten QNSP, and that he did not fully read over the form before he signed it. (Tr. 29, 42.) The e-QIP was different from his handwritten QNSP in several aspects, most notably the transposition of his first and middle names and the start date for his current employment (June 2007 on his QNSP vs. February 2009 on his e-QIP). Two of his listed references were different on the e-QIP. The e-QIP did not include the alcohol citation or the previously delinquent signature loan, which he had reported on his handwritten QNSP. Negative responses were entered on the e-QIP to the police record, drug use or drug activity, and financial record inquiries. The e-QIP contained information that had been missing from the QNSP: the address of his employer; his names and addresses of previous employers; his selective service number; the birthdates for his deceased parents; and several details concerning his guardians. (GE 1.)

Around December 4, 2011, Applicant was staying with his supervisor in state X while on a temporary assignment.[5] (GE 3.) On December 8, 2011, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM), primarily to obtain information regarding his undisclosed marijuana arrest. When asked to confirm his negative response on the recent e-QIP to the police record inquiries, Applicant volunteered that he had been cited for underage possession of alcohol in 2007. He could not explain why it was not included on his e-QIP. When the investigator inquired about any other offenses, Applicant "immediately volunteered" his arrest for possession of marijuana and speeding in September 2011. He added that the offense occurred after he completed his security clearance application. He also averred that he had smoked marijuana twice in high school in 2007, and eight times since then, to relax while listening to music. Applicant added that he knew, but did not associate with, persons who use illegal drugs. He indicated that he had no future intent to use any illegal drug. Asked to confirm his negative response to the drug use inquiry on his e-QIP, Applicant changed his answer to "Yes," and he explained that he had not listed his marijuana use on his security clearance application because he feared he might not be able to obtain a security clearance, might lose his job, or get into other trouble with his employer. Applicant denied he could be blackmailed by his drug use or arrest because his friends, family, co-workers, and employer were aware of

[5] Applicant was interviewed at his temporary worksite, which was in the same locale as his employer. (GE 3.) Applicant testified that after his arrest, he left state Y and moved in with his supervisor ("I almost lost my job at the time and then and my supervisor is like a father figure and let me move in with him. At the time, my supervisor, [he] wouldn't let me associate with anybody as far as he thought or knew that used drugs."). (Tr. 47-48.) It is unclear how long Applicant stayed there before he moved to the state that was his home of record as of June 2013.

"the usage/arrest." At the end of the interview, Applicant was informed that information about his drug arrest was developed during his background investigation. (GE 3.)

In June 2013, the DOD CAF asked Applicant to update information about his illegal drug use.[6] In response on June 25, 2013, Applicant corrected his address showing that he was no longer in state Y. Applicant indicated that he had not used any marijuana, having decided to stop after his September 2011 drug arrest because he almost lost his job and "needed to grow up and straighten out." Applicant denied any current association with persons who use illegal drugs. Concerning whether he has been in a situation where he had reason to believe illegal drugs were being used, Applicant responded:

> I didn't put myself in that situation after September of 2011. If I believed there was an activity of drug use I would leave or just not put myself in that situation period.

Applicant added that he had not had any drug or alcohol treatment or counseling. He changed his personal situation in that he "quit hanging out with friends that use drugs or controll [sic] substances after September 2011-until." About any arrests, Applicant disclosed his September 2011 marijuana possession and his 2007 underage drinking offenses. Applicant provided the DOD CAF with his plea agreement and the court's judgment for the drug offense, as requested. (GE 2.)

Around August 2013, Applicant began his latest assignment as an environmental safety and health technician at a duty location in state Z. (Tr. 38.) He is subject to random drug testing in his current position. (Tr. 35.) He denies any illegal drug use since September 2011 or association with any drug users since he left state Y. (Tr. 32, 48.) On January 24, 2014, Applicant submitted to a voluntary drug screen, which was negative for all substances tested, including marijuana. (AE A.) Applicant has not had any drug counseling, although he credits his attendance at church as a factor in him not resuming recreational drug use. (Tr. 32.) Applicant now understands the importance of reading and certifying to the accuracy of federal forms, including security clearance applications. (Tr. 37.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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,

[6] In the interrogatories, the DOD CAF inaccurately reported that Applicant had stated during his interview that he would continue to use illegal drugs.

these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall 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 to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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).

Analysis

Guideline H, Drug Involvement

The security concerns about drug involvement are articulated 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.

Under AG ¶ 24(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),[7] and

(2) inhalants and other similar substances.

Under AG ¶ 24(b), drug abuse is defined as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." Potentially disqualifying condition AG ¶ 25(a), "any drug abuse," applies because Applicant abused marijuana around ten times between 2007 and September 2011. He used marijuana at least once after he completed his handwritten QNSP for a security clearance. Although there are no allegations of purchase, Applicant admits that he bought the drug. He had marijuana in the console of his vehicle, and the odor of marijuana was in his vehicle, when he was stopped for speeding on September 1, 2011. AG ¶ 25(c), "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," also applies.

Mitigating condition 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," applies because he has not used marijuana in over two years. However, the passage of time does not necessarily guarantee against relapse, given that he used the drug to relax and after he began working for a defense contractor.

Applicant denies any intent to smoke marijuana in the future. Under AG ¶ 26(b), "a demonstrated intent not to abuse any drugs in the future," can be shown by "(1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; or (4) a signed statement of intent with automatic revocation of clearance for any violation." Applicant smoked marijuana twice in high school in 2007, a few times with his sister's boyfriend between 2007 and 2009, and then again with old friends from high school, who worked with him in state Y in 2011. He indicated during his December 2011 interview that he smoked marijuana about eight times after high school. At the time of his interview, he was living with a co-worker while working in his employer's locale. His supervisor apparently took him in after his arrest and did not allow him to associate with anyone whom he suspected of drug abuse. It is unclear whether Applicant had left state Y permanently as of December 2011, but by June 2013, he had established a home address in another part of the country. The friends with whom he smoked marijuana in 2011 still live in state Y. AG ¶ 26(b)(1) applies because there is no evidence that Applicant continues to associate with known drug users.

AG ¶ 26(b)(2) is more difficult to satisfy, given he had smoked marijuana alone, including while driving in September 2011. The change of environment to his present locale

[7]Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c).

in August 2013 does not necessarily preclude a relapse of marijuana use to relax. However, his limited involvement with marijuana weighs in his favor in determining whether his two years of present abstinence are sufficient to allay concerns of any future abuse under AG ¶ 26(b)(3). Moreover, AG ¶ 26(b)(4) is satisfied even in the absence of a separate statement expressly acknowledging that his clearance would be revoked for any violation. Applicant indicated to the OPM investigator in December 2011 and in his June 2013 response to interrogatories that he decided to stop using marijuana after his September 2011 arrest, and that he did not intend any future involvement. Only age 22 at the time of his arrest, he recognized that it was time "to grow up." Applicant's deliberate concealment of his marijuana use from his security clearance application is a negative consideration in assessing whether to accept his claim that he has put his drug abuse behind him. Nonetheless, Applicant rehabilitated his credibility by his disclosures of his drug use and drug-related offense during his OPM interview. Applicant's negative drug screen of January 24, 2014, is proof only of no drug use within the last month or so. After viewing the evidence as a whole and having assessed Applicant's credibility, Applicant has persuaded me that he is not likely to jeopardize his employment by using any illegal drug in the future. The drug involvement concerns are mitigated.

Guideline J, Criminal Conduct

The security concern about criminal conduct is articulated in AG ¶ 30:

> Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Available court records show Applicant was charged with misdemeanor driving without privileges and with possession of marijuana on September 1, 2011. The judge sentenced Applicant to a $300 fine, to 180 days in jail (179 suspended) with credit for one day served, and to two years of unsupervised probation on an amended charge of driving with an invalid license.[8] Applicant now denies culpability for the invalid license charge because he had paid the fines that led to his operating privileges being suspended by state

[8] Applicant was sentenced for violating section 49-301 of the pertinent state's laws, as follows:

> No person, except those expressly exempted by the provisions of this chapter, shall drive any motor vehicle upon a highway unless the person has a current and valid [state name omitted] driver's license. Provided however, that those persons holding a restricted school attendance driving permit may drive upon a highway pursuant to the restrictions set forth in section 49-307A, [state name omitted] Code.

A violation of that section is a misdemeanor. The original charge, driving without privileges, is also a misdemeanor offense under section 18-8001, but it requires knowledge of the suspension or revocation:

> Any person who drives or is in actual physical control of any motor vehicle upon the highways of this state with knowledge or who has received legal notice pursuant to section 49-320, [state name omitted] Code, that his driver's license, driving privileges or permit to drive is revoked, disqualified or suspended in this state or any other jurisdiction is guilty of a misdemeanor.

X. The September 2011 police citation shows that Applicant presented an "ID Card" from state Y, where he had been residing for work since January 2011. Whether or not state X should have lifted the suspension of his license, Applicant did not pay his fines until July 2011, almost two years after the first fine was assessed. Applicant did not provide sufficient evidence to overcome the legally permissible inference from his conviction that he lacked a valid license as of his arrest in September 2011. It is not clear whether Applicant maintained his permanent address in state X, which could have entitled him to maintain his license in that state despite his then nine month stay in state Y. The disposition of the marijuana possession charge is not reflected in the record, but Applicant agreed to plead guilty to the charge. The police officer smelled marijuana in Applicant's vehicle, and Applicant's admits that he had been smoking marijuana while driving. Two disqualifying conditions are established: AG ¶ 31(a), "a single serious crime or multiple lesser offenses," and AG ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted." AG ¶ 31(d), "individual is currently on parole or probation," no longer applies. Although Applicant was still on unsupervised probation as of the issuance of the SOR, his probation ended before his security clearance hearing.

Mitigating condition AG ¶ 32(a), "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," has limited applicability. More than two years have passed since the offense, but driving under the influence of marijuana is behavior that casts doubt on Applicant's judgment.

Neither AG ¶ 32(b), "the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life," nor AG ¶ 32(c), "evidence that the person did not commit the offense," are established. Applicant knowingly used and possessed marijuana. He admitted to the arresting officer that there was a small quantity of the drug in the console of his vehicle.

Applicant's cessation of his marijuana involvement is evidence of reform that makes recurrence of the criminal marijuana possession unlikely, however. AG ¶ 32(d), "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement," is also satisfied by his employment with the defense contractor. Applicant presented no information from his employer about the quality of his work, although his current position of environmental, safety, and health technician would appear to be a promotion from his previous work as a painter. Applicant's falsification of his security clearance application (*see* Guideline E) cannot serve as a basis for disqualification under Guideline J because it was not alleged under that guideline.[9] His knowing false statement about his controlled

[9] In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

> (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation,

substance abuse use bears negatively on his reform generally, and his reform is undermined to the extent that he minimizes his marijuana use by claiming that it was legal. Yet, his disclosure of his drug activity during his December 2011 interview and the absence of any recent criminal conduct mitigate the Guideline J concerns.

Guideline E, Personal Conduct

The security concerns about personal conduct are articulated in AG ¶ 15:

> 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.

The SOR alleges, in part, that Applicant falsified his November 2011 e-QIP by failing to disclose his September 2011 arrest for marijuana possession in response to the police record inquiries concerning whether he had been issued a summons, citation or ticket to appear in court in a criminal proceeding against him in the past seven years; whether he had been arrested in the past seven years; and whether he had ever been charged with or convicted of any offense related to alcohol or drugs. A reasonable inference of falsification arises from the fact that his drug-related arrest preceded the e-QIP. To rebut that inference, Applicant submitted a handwritten QNSP dated July 21, 2011, from which a co-worker typed the November 2011 e-QIP forwarded to the DOD. This QNSP is credible evidence that he submitted a security clearance application before his arrest.

Even so, Applicant had an obligation to update his police record information when he was presented the November 2011 e-QIP for his signature. The salient issue is whether he knowingly failed to disclose his arrest and falsely certified to the accuracy of the police record information on his e-QIP. Applicant presented no corroboration from his employer about the process of completing his e-QIP, which contains information not on the handwritten QNSP. Some of the information could have been obtained from personnel records, although Applicant is viewed as a likely source for other information, such as the change in personal references. When asked at his hearing whether he failed to disclose his drug **arrest** because he feared his employer might hold it against him, or alternatively, whether he failed to read the form, Applicant responded, "That would be correct and also did not read the entire form itself." (Tr. 39.) This testimony is inconsistent with his previous explanations for the omission of the arrest, *i.e.*, that it occurred after he

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> mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)).

submitted the form. However, it is unclear whether Applicant was admitting to the intentional omission of the drug **arrest** as opposed to his drug **use**, which he has not denied.[10] When he was interviewed in December 2011, Applicant reportedly "immediately volunteered" that he had been arrested for possession of marijuana in September 2011. He explained that the drug arrest occurred after he completed his security clearance application, but admitted that he had omitted his marijuana use from his security clearance application because he feared the potential negative consequences for his employment and security clearance eligibility. Applicant's candor during his interview about his motivation for not disclosing his drug use leads me to accept his explanation about the omission of his drug arrest.

[10] About the discrepancy, the Government and Applicant were focused on the omission of his drug **use** rather than the arrest, as reflected in the following exchange:

> Q Okay, because that's not consistent with what you told the OPM investigator. Let me show you on Government Exhibit 3, the Subject Interview Verification, sir, if you turn to the subject interview, page three, I'm sorry, page four of the subject interview, and it's the last full paragraph where it starts out, it says in Section 23, illegal use of drugs or drug activity, subject answered no to having illegally used any drugs or controlled substance in the last seven years. When asked to confirm the response the subject changed the answer to yes and acknowledged the drug use arrest, as previously discussed on ESI. Subject failed to list the marijuana use from 2007 to 2011 on the papers because he didn't want to get in trouble with his employer, possibly not be able to obtain a security clearance or lose his job.
>
> A As far as—this was to the investigator now, not the HR.
>
> Q I understand, but they're asking you why you didn't disclose this drug use from 2007. The OPM Investigator was asking you, where you changed your answer from no to yes, why you didn't disclose it earlier on the SF-86. And you said because you were afraid, essentially.
>
> A Correct.
>
> Q Okay. Well, that's different from saying I didn't read the thing when I signed it.
>
> A As far as reading it and signing it, I did not read it. But I did—to my project manager, I wasn't going to sit there and like, I used drugs at the time or I've used drugs.
>
> Q Okay. So let me ask it this way, [Applicant]. When you were filling out the handwritten version, did you have your HR manager with you?
>
> A No, sir.
>
> Q Well, what did you put on that handwritten version? Did you disclose it or not?
>
> A No, I did not disclose it.
>
> Q And you knew when you did not disclose it that if you did disclose it, it might be held against you.
>
> A Exactly. (Tr. 40-41.)

On the other hand, the SOR alleges and Applicant admits that he knowingly and willfully did not disclose his marijuana use on his security clearance application, as alleged in SOR 3.c. AG ¶ 16(a) applies:

> (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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Furthermore, whereas Applicant did not disclose his drug use because he feared the ramifications for his employment, AG ¶ 16(e) is also implicated:

> (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Four mitigating conditions under AG ¶ 17 apply, in whole or in part:

> (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

> (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

> (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

> (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

The OPM investigator interviewed Applicant on December 8, 2011, to obtain information regarding his previously undisclosed drug arrest. It can reasonably be gleaned from the report of subject interview that the investigator reviewed Applicant's e-QIP with him. When asked to confirm his negative responses to the police record inquiries, Applicant volunteered that he had listed his underage alcohol charge, which inexplicably had been excluded from his e-QIP. According to the OPM investigator, when Applicant was asked about any other offenses, he "immediately volunteered" his drug-related arrest in September 2011 for possession of less than three grams of marijuana. Applicant averred that his friends and supervisor were aware of the arrest. Applicant then disclosed that he had used marijuana twice in high school and eight times since 2007, with his most recent

use in September 2011. AG ¶ 17(a) applies in that Applicant's interview took place less than one month after his e-QIP was submitted, and he came forward about his marijuana involvement before he was informed by the investigator that the drug arrest information had surfaced during his background investigation.

Concerning AG ¶ 17(c), falsification of a security clearance application raises significant security concerns. The fact that Applicant's security clearance application was submitted to his employer for further processing does not excuse his knowingly false response to the drug use inquiry. AG ¶ 17(c) applies only in that Applicant's falsification occurred more than two years ago and has not been repeated.

AG ¶ 17(d) partially applies in that Applicant acknowledges the intentional concealment of his drug abuse. He has not had any drug counseling, but he has taken steps in reform of his falsification by disclosing his drug use to the OPM investigator. He has also exhibited rehabilitation of his drug activity by no longer associating with any persons known to use illegal drugs.

Applicant's disclosures of his drug use and marijuana arrest, which include providing the records of his criminal conviction to the DOD CAF, mitigate any vulnerability concerns with regard to the Government's knowledge of his drug use. Concerning his employer's knowledge of the arrest, Applicant told the DOD CAF in June 2013 that he decided to stop using marijuana after his arrest in September 2011 because he almost lost his job. There is no apparent reason, other than his drug arrest, which could explain why he was at risk of losing his job. He explained at his security clearance hearing that his supervisor took him in after his arrest, to ensure that he had no further contact with known drug users. A drug arrest certainly implies personal drug use, so even if his supervisor lacks knowledge of the details of Applicant's recreational drug use from 2007 to 2011, the vulnerability concerns under AG ¶ 17(e) are largely eliminated because Applicant's past drug use is known.

Whole-Person Concept

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(a).[11]

Applicant exercised poor judgment by continuing to engage in the recreational abuse of marijuana after he began working for a defense contractor in February 2009. His

[11]The factors under AG ¶ 2(a) are as follows:

> (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.

youth and immaturity do not fully mitigate the judgment concerns raised by his marijuana use while driving to visit his sister in September 2011 or by his failure to pay the fines for his traffic violations, which led to his license being suspended in state X. Applicant also placed his judgment, reliability, and trustworthiness in doubt when he falsely denied any drug use on his July 2011 QNSP. Applicant knew that his application for a security clearance would be based on the information provided on that form, and he made no effort to correct that falsification after he submitted the form to his employer.

To Applicant's credit, he volunteered the information about his September 2011 drug arrest and his use of marijuana from 2007 to 2011 at his first opportunity to correct the record without a co-worker being involved. After four years as a painter, he transitioned into an environmental health and safety technician position with more responsibility. While Applicant's drug abuse and falsification about that drug abuse on his security clearance application are not condoned, he appears to have put that behavior behind him as he has matured. For the reasons noted above, I conclude that it is clearly consistent with the national interest to grant Applicant a security clearance at this time.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	For Applicant
Subparagraph 3.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Elizabeth M. Matchinski
Administrative Judge