DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 12-09593
	)	
Applicant for Security Clearance	)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

06/12/2015

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Decision

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement), J (Criminal Conduct), and E (Personal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 15, 2012. On October 24, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H, J, and E. The DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on November 13, 2014, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on January 16, 2015, and the case was assigned to an administrative judge on January 29, 2015. It was reassigned to me on March 4, 2015, due to workload. The Defense Office of

Hearings and Appeals (DOHA) issued a notice of hearing on March 9, 2015, scheduling the hearing for March 25, 2015. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified and presented the testimony of one other witness. He did not submit any documentary evidence. I kept the record open until April 16, 2015, to enable him to submit additional evidence. He timely submitted Applicant's Exhibit (AX) A, which was admitted without objection. DOHA received the transcript (Tr.) on April 7, 2015.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR ¶¶ 1.b-1.d and 2.b. He admitted SOR ¶¶ 1.a, 2.a, and 3.a in part. He denied SOR ¶¶ 3.b and 3.c. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 51-year-old machinist employed by a federal contractor at a naval shipyard since May 2012. He began working at the shipyard shortly after graduating from high school. He has worked for federal contractors at the shipyard since October 1981. He received a security clearance in 1982. His father worked at the same shipyard for 44 years and was a supervisor.

In January 2012, Applicant was fired after testing positive for marijuana in a urinalysis test. He was hired by another federal contractor in May 2012 for a short time, and was then hired by his current employer. He disclosed his positive urinalysis and termination for drug involvement to both employers. Both employers required urinalysis tests, which were negative. (Tr. 82.).

Applicant married in August 2002 and divorced in January 2008. He has lived with a cohabitant since June 2008. He and his cohabitant have a five-year-old son.

When Applicant submitted a previous SCA in November 2003, he disclosed that he was charged with possession of a controlled substance in February 1983 and the charges were dismissed after he completed a substance-abuse program. He also disclosed that he was charged with possession of a controlled substance in December 1984, and these charges were dismissed because the marijuana was found in a friend's coat and was not Applicant's. (Tr. 56.) He also disclosed that he was charged with driving under the influence (DUI) in April 1987. (GX 2 at 5.) He disclosed the same offenses in his May 2012 SCA, adding the information that he was placed on probation for the 1983 offense and required to complete an alcohol-education program for the DUI in 1987. (GX 3 at 3, 10.)

During a personal subject interview (PSI) in June 2012, Applicant told the investigator that he began using marijuana when he was about 17 years old, smoking marijuana cigarettes three or four times a week. He stated that he stopped smoking marijuana in 1987 or 1988. He testified that he was competing in water skiing events, working long hours at the shipyard, and realized that using marijuana was "not the right thing to do." (Tr. 57.)

In January 2012, while Applicant was on temporary duty, he bumped another vehicle in a parking lot while driving a company vehicle, causing minimal damage. He was required to submit to urinalysis testing as a result of the accident, and he tested positive for marijuana. (GX 4; Tr. 67-70.) Applicant was notified of the urinalysis results about a week after being tested. He immediately notified his project manager at the work site. (Tr. 71.) His temporary duty was terminated, and he flew back to his permanent duty station the next day. He asked for a retest, but his request was denied. He submitted a written resignation, but it was refused and he was terminated. His security clearance was not revoked.

As soon as he returned home, he told his father about the positive urinalysis. (Tr. 76-77.) At the hearing, Applicant became very emotional and momentarily lost his composure when he testified about telling his father, whom he described as "the most beautiful man that I know," his hero, and his friend. (Tr. 72-73.) The June 2012 PSI also reflects that Applicant became tearful when telling the investigator about his conversation with his father after the positive urinalysis. (GX 3 at 7.)

Applicant testified that he had been on temporary duty at the same location for about 25 years. He became acquainted with an older couple, who treated him like a son. He referred to them as "Auntie" and "Uncle." Auntie and Uncle frequently hosted beach barbeque parties near their home, in which all attendees brought food. (Tr. 83-84.) Occasionally groups of guests would smoke marijuana at the beach parties, and Applicant made it practice to move away from them whenever he smelled marijuana. (Tr. 74.)

Applicant attended a beach party hosted by Auntie and Uncle on a Sunday, the day before the vehicle accident and his urinalysis. He drank enough beer to produce a slight "buzz," but left the party early, because he goes to bed around 9:00 p.m. and arises at 4:30 a.m. (Tr. 67.)

On the day Applicant was notified of the urinalysis results, he told Auntie that he had failed a urinalysis and that he did not know why he failed. Auntie told him that one of the regular guests at the barbeque occasionally brought marijuana-laced brownies, and she asked if he had eaten any brownies. Applicant remembered eating three brownies. (Tr. 66, 86-90.) After the hearing, Auntie submitted a statement recounting her conversation with Applicant about the marijuana-laced brownies.[1] (AX A.)

When Applicant submitted an SCA in November 2003, he answered "Yes" to Question 24, asking if he had ever been charged with or convicted of any offenses related to alcohol or drugs, and he disclosed his DUI arrest in 1987 and his arrests for possession of a controlled substance in 1983 and 1984. He answered "No" to Question 28, asking, "Have you EVER illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting public safety?"

[1] Applicant remained in contact with Auntie after he returned to his permanent duty station. Uncle was in poor health in January 2012 and passed away in November 2014.

When Applicant submitted his May 2012 SCA, he answered "No" to the following questions in Section 23:

> In the past seven (7) years, have you illegally used any drugs or controlled substances?
>
> Have you EVER illegally used or otherwise been involved with a drug or controlled substance while possessing a security clearance other than previously listed? And
>
> Have you EVER illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting public safety?

Applicant testified that he answered "No" to the first question because he did not knowingly use marijuana in January 2012. He answered "No" to the second question because he had listed his previous marijuana use elsewhere on the SCA. He answered "No" to the third question, which appears with identical wording on both SCAs, because he misinterpreted the question and believed it applied only to marijuana use as a law enforcement officer, prosecutor, or courtroom official. He testified that his practice is to keep a copy of a previous SCA and refer to it when submitting a new SCA. (Tr. 59-63.)

During the June 2012 PSI, Applicant was questioned about numerous mistakes and omissions in his SCA regarding addresses, contact information, and inconsistent responses. For example, in Section 13A, he disclosed that he was fired for failing a urinalysis test, but in Section 13C, he answered "No" to question whether he had been fired during the last seven years. (GX 1 at 12, 14.) At the hearing, he testified, "I'm not the smartest guy in the world when it comes to interpreting questions on paper." (Tr. 59.)

Applicant's former supervisor is a retired Navy captain with extensive experience in the personal reliability program for nuclear submariners. He was the vice-president and general manager of Applicant's employer before retiring in 2011. He testified that he worked with Applicant's father, respected his father for his integrity and personal values, and believed that Applicant had learned the same values from his father. He considers Applicant "extremely passionate about his love for the Navy [and] his love for his job. He believes that Applicant's explanation for his positive urinalysis is truthful. He testified that Applicant is a person who is incapable of lying, and that he would admit knowingly consuming marijuana-laced brownies even if it would cost him his job. He believes that Applicant's inability to lie is a product of the culture embedded in his organization and learned from his family. For Applicant, integrity is more important than his job. (Tr. 29-45.)

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 have 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance 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 that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition,

and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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* AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement

The SOR alleges that Applicant tested positive after a urinalysis test in January 2012, while employed by a federal contractor and holding a security clearance (SOR ¶ 1.a); that he used marijuana from age 17 until about 1987 or 1988, while employed as a federal contractor and holding a security clearance (SOR ¶ 1.b); that he was arrested in December 1984 for possession of a controlled substance (SOR ¶ 1.c); and that he was arrested in February 1983 for possession of a controlled substance (SOR ¶ 1.d).

The concern under this guideline is set out in AG ¶ 24: "Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations." Drugs are defined in AG ¶ 24(a)(1) as "[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)."

Applicant's admissions in his two SCAs, his PSI, and at the hearing establish the following disqualifying conditions under this guideline:

> AG ¶ 25(a): any drug abuse, defined in AG ¶ 24(b) as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction";
>
> AG ¶ 25(b): testing positive for illegal drug use;
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> AG ¶ 25(c): illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
>
> AG ¶ 25(g): any illegal drug use after being granted a security clearance.

The following mitigating conditions are potentially relevant:

> 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; and

AG ¶ 26(b): a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.

AG ¶ 26(a) is established. The first prong of AG ¶ 26(a) ("happened so long ago") focuses on whether the drug involvement was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the evidence. 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." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

I am satisfied that Applicant's ingestion of marijuana in January 2012 was not intentional and therefore not illegal. His last illegal drug involvement was in the 1980s. Thus, I conclude that his marijuana use was not "recent," and he has demonstrated that he is rehabilitated.

Applicant has repeatedly and consistently denied the allegation that he intentionally ingested marijuana in January 2012. His repeated denials are corroborated by Auntie's post-hearing statement and bolstered by the strong testimony of the vice-president and former general manager of Applicant's former employer regarding Applicant's integrity and inability to lie.

Experienced lawyers and judges are justifiably skeptical whenever any variant of the "brownie defense" is presented as a defense to illegal drug use. However, we all recognize that innocent ingestion occasionally occurs. Applicant's responses and demeanor when he was confronted with the positive urinalysis, questioned during the PSI, and questioned at the hearing were strong indicators of sincerity and candor. The strong and unequivocal testimony of a retired Navy captain with extensive experience in evaluating the reliability and trustworthiness of submariners was persuasive. The corroborative statement of Auntie further tipped the balance in Applicant's favor. I am convinced that Applicant's case is one of those rare instances when the "brownie defense" should carry the day.

AG ¶ 26(b) is established. Applicant's last intentional use of marijuana was in about 1988. He avoided contact with marijuana users at the beach parties hosted by Auntie and Uncle. He was distraught when he tested positive for marijuana. His accidental ingestion of marijuana was more than three years ago and was an isolated incident under circumstances making it unlikely to recur.

Guideline J, Criminal Conduct

The SOR cross-alleges the Guideline H conduct under this guideline (SOR ¶ 2.a). In addition, it alleges that Applicant was arrested for DUI in April 1987 (SOR 2.b).

The concern raised by criminal conduct is set out 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." Applicant's admissions establish the following disqualifying conditions under this guideline: 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").

The following mitigating conditions are potentially relevant:

> 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;
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> AG ¶ 32(c): evidence that the person did not commit the offense; and
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> 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.

All three mitigating conditions are established for the reasons set out in the above discussion of Guideline H.

Guideline E, Personal Conduct

The SOR cross-alleges the Guideline H and Guideline J conduct under this guideline (SOR ¶ 3.a). In addition, it alleges that Applicant falsified his May 2012 SCA by answering "No" to the drug-related questions in Section 23 (SOR ¶ 3.a). Finally, it alleges that Applicant falsified his Question 28 of his November 2003 SCA by failing to disclose his use of marijuana in the 1980s after receiving a security clearance in 1982 (SOR ¶ 3.a).

The concern under this guideline is set out 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 disqualifying condition relevant to Applicant's answers on his two SCAs is 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities."

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. 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. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant testified that he misunderstood the question on both SCAs about drug involvement while holding a clearance. His explanation is plausible and persuasive. He has only a high school education, and he has spent his entire career working as a machinist. During the PSI, the investigator questioned him about numerous mistakes, omissions, and contradictions in his 2012 SCA. He testified that he has difficulty interpreting questions on paper. Question 28 on the 2003 SCA and Question 23 on the 2012 SCA are difficult to read, with a long recital of circumstances separated by commas and semicolons.

Based on all the circumstances, I am satisfied that Applicant misunderstood the Question 24 on his 2003 SCA and copied the same answer onto his 2012 SCA. He plausibly and credibly testified that he did not believe that he illegally used marijuana in 2012 because his ingestion was innocent. Thus, I conclude that AG ¶ 16(a) is not established.

Applicant's admissions regarding the Guideline H and Guideline J conduct cross-alleged under this guideline are sufficient to establish the following disqualifying conditions under this guideline:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The following mitigating conditions are potentially relevant:

AG ¶ 17(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;

AG ¶ 17(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

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶¶ 17(c) and 17(d) are established for the reasons set out in the above discussions of Guidelines H and J. AG ¶ 17(e) is established by Applicant's candor about his arrests in 1983 and 1984 and the circumstances of his ingestion of marijuana in January 2012.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

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

I have incorporated my comments under Guidelines H, J, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant has worked for federal contractors and held a security clearance for all his adult life. He is intensely devoted to the Navy. He worships his father and is determined to follow in his footsteps and avoid tarnishing the family name. His positive urinalysis had a devastating effect on him.

After weighing the disqualifying and mitigating conditions under Guidelines H, J, 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, criminal conduct, and personal conduct. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant
Paragraph 2, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant
Paragraph 3, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 3.a-3.c:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to continue Applicants eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge