DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-04182
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Robert E. Coacher, Esq., Department Counsel
For Applicant: Michael F. Fasanaro, Esq.

December 23, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted a security clearance application on April 18, 2006. On May 8, 2009, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines H and E. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on May 16, 2009; answered it on May 29, 2009; and requested a hearing before an administrative judge. DOHA received the request on June 1, 2009. Department Counsel was ready to proceed on July 24, 2009, and the case was assigned to me on July 28, 2009. DOHA issued a notice of hearing on August 5, 2009, scheduling the hearing for August 31, 2009. On July 31, 2009, Applicant's counsel entered his appearance and requested a continuance because of his scheduled surgery on August 24, 2009, and anticipated period of recuperation. I granted the continuance on August 12, 2009.

On September 14, 2009, DOHA issued a second notice of hearing, rescheduling the hearing for October 7, 2009. I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. DOHA received the transcript (Tr.) on October 16, 2009.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.e, and 1.f. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 27-year-old welder employed by a federal contractor. His duties involve repair work on U.S. Navy submarines (Tr. 22-23). He has worked for his current employer since October 2002. He has held a clearance since February 2004.

Applicant's senior project manager rates him as one of the most reliable, devoted, and skilled members of his team (AX B). His project manager describes him as hard-working, skilled, and dedicated (AX C). His production manager considers him very mature, exceptionally skilled, responsible, and dependable (AX D at 1). His performance evaluation for the period ending on December 15, 2008, rated him as 4.52 on a 5-point scale, with top ratings in quality of work, quantity of work, and creativity (AX D at 4-5). His most recent project performance review gives him the top rating in all categories AX D at 2).

Applicant was raised in a military family. His father retired from the U.S. Navy as a master chief petty officer (Tr. 29). Applicant was married in October 2003. He and his wife have two daughters, ages six and three (Tr. 22). His wife submitted a statement describing him as a devoted husband and father, a man of great integrity and high morals, and a person who takes great pride in what he does at work or at home (AX A).

In his response to the SOR, Applicant admitted he used marijuana about five times from approximately 1996 until 2000, when he was in high school. At the hearing, he testified he used marijuana a "couple of times" in high school (Tr. 40). When he submitted his security clearance application on April 18, 2006, he disclosed that he used marijuana once on March 29, 2006, but he did not disclose his marijuana use in high school.

During an interview with a security investigator in November 2006, Applicant stated that he had tried marijuana "in the beginning of high school," and he had taken a couple puffs of a marijuana cigarette at a family gathering in April 2006, but these were the only times he had used marijuana. He also told the investigator that he underwent a random urinalysis about a week later and it indicated a very low level of the metabolite of marijuana (GX 2 at 8).

Applicant was interviewed by another security investigator on December 21, 2007. The summary of the interview indicates that he told the investigator he used marijuana five times and his last use was during his senior year in high school (GX 5 at 3). He admitted testing positive for marijuana in a random urinalysis in March 2006, but he attributed the positive results to passive inhalation of second-hand marijuana smoke (GX 5 at 2).

In May 2008, Applicant was interviewed by a third investigator. Applicant described the same sequence of events, except that he stated they occurred in April 2005 instead of April 2006. He admitted intentional use of marijuana and did not claim passive inhalation (GX 4 at 4-5). He told the investigator he decided to stop using marijuana after April 2005 out of concern for his wife and children (GX 4 at 5).

At the hearing, Applicant testified he used marijuana in April 2006, but he denied using marijuana in 2005. He also testified he did not use marijuana between 2000 and April 2006 (Tr. 34). He testified that the interview summary reflecting marijuana use in 2005 was incorrect (Tr. 44-45). He also testified that the interview summary claiming passive inhalation was incorrect, but he admitted he did not correct the interview summary when he had the opportunity. He first testified he probably did not correct it because he did not read it thoroughly (Tr. 47-48), but he later admitted telling the investigator that he passively inhaled it (Tr. 55). He admitted that he placed his initials next to the word "inhaled" on the interview summary (Tr. 56).

When questioned by his attorney about the passive-inhalation explanation, Appellant testified: "I'm saying that I didn't disclose with [the investigator] that I had used marijuana, because I had already disclosed it with everybody else, numerous times. This was over a year later, and probably five interviews that you don't even have copies of." On further questioning by his attorney, he testified he told the false passive-inhalation story because he felt he had already told the truth to everyone (Tr. 50, 55).

Applicant was arrested and charged with possession of marijuana on February 18, 2007, while fishing with friends. He testified the police officer claimed she smelled marijuana, and he said "a couple of smart things" in reply (Tr. 32). Applicant denied using marijuana on this occasion, and there is no evidence in the record to the contrary. According to Appellant, he hired an attorney and appeared in court, but the charges were dropped for lack of evidence (GX 4 at 4; Tr. 32-33). The court records reflect that the charges were disposed of by nolle prosequi (GX 6).

Applicant was nervous and sometimes argumentative during the hearing. He confused "positive" with "negative" and could not pronounce "interrogation." He spoke in rambling, sometimes disjointed sentences. His tone and demeanor reflected dislike for being questioned. He testified he found the whole process embarrassing (Tr. 28-31, 35-36, 51, 54).

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 and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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 not necessarily a determination as to the loyalty of the applicant. 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 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. 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. 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* AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement

The SOR alleges Applicant used marijuana about five times between approximately 1996 and at least 2000 (SOR ¶ 1.a); he used marijuana once in March or April 2005 (SOR ¶ 1.b); he tested "inconclusive" for marijuana at his place of employment in April 2005 (SOR ¶ 1.c); he used marijuana once in March 2006 (SOR ¶ 1.d); he tested "inconclusive" for marijuana at his place of employment in April 2006 (SOR ¶ 1.e); and he was arrested and charged with marijuana possession on February 18, 2007 (SOR ¶ 1.f).

During his closing statement, Department Counsel conceded that Applicant's use of marijuana and "inconclusive" urinalysis did not occur in March and April of 2005 as alleged in SOR ¶¶ 1.b and 1.c, but instead they occurred in March and April of 2006. Department Counsel's concession is supported by the record. Accordingly, I find for Applicant with respect to SOR ¶¶ 1.b and 1.c.

Applicant's arrest in February 2007 appears to have been prompted by his "smart" response to a police officer's question. It is consistent with the combative attitude he demonstrated at the hearing. The ultimate disposition of the charges demonstrates that he was not guilty of marijuana use or possession in February 2007. I find for Applicant with respect to SOR ¶ 1.f.

Applicant's testimony establishes that the "inconclusive" urinalysis in April 2006 was actually a positive result, but at a low level of concentration. His use of marijuana in March 2006, while holding a security clearance, and the detection of a low level of marijuana metabolite in April 2006 are sufficient to raise 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;

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.

Since the government produced substantial evidence to raise these disqualifying conditions, the burden shifted to 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).

Security concerns under this guideline may be mitigated if "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." AG ¶ 26(a). 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 totality 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).

Applicant used marijuana in high school and then abstained until his one-time use in March 2006. He has abstained from further use. He has a reputation for being family-oriented and an outstanding employee. He has demonstrated that he is rehabilitated. Therefore, I conclude that the first prong of AG ¶ 26(a) is established.

Applicant's most recent use did not happen under circumstances making it unlikely to recur, but it was a one-time event, followed by a long period of abstinence. Under all the circumstances, it does not cast doubt on his current reliability, trustworthiness, or good judgment. I conclude AG ¶ 26(a) is established.

Security concerns also may be mitigated by "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(b). The evidence establishes AG ¶ 26(b)(3), but not AG ¶ 26(b)(1), (2), or (4).

Guideline E, Personal Conduct

SOR ¶ 2.a alleges Applicant falsified his security application by failing to disclose his use of marijuana in March or April 2005. SOR ¶ 2.b alleges he deliberately falsified material facts when he told a security investigator that he did not use marijuana in March 2006, as alleged in SOR ¶ 1.d, but he was in the presence of others using marijuana and inhaled second-hand marijuana smoke.

The concern under this guideline is set out in AG ¶ 15 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.

AG ¶ 15 further provides that an unfavorable clearance action or administrative termination of further processing will normally result from "refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination."

The following disqualifying conditions under this guideline are relevant:

> 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; and
>
> AG ¶ 16(b): deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

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 whether 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).

As noted in the above discussion of Guideline H, the marijuana use in March or April 2005, alleged in SOR ¶ 1.b, did not occur. Therefore, Applicant did not falsify his security clearance application by failing to disclose it on his security clearance application. I resolve SOR ¶ 2.a in his favor.

Applicant's denial of voluntary marijuana use in his interview with a security investigator in December 2007 is more complicated. In an earlier interview in November 2006, he had already admitted using marijuana with family members in March 2006. The passive-inhalation story occurred during his second interview. In a third interview in March 2008, he admitted his marijuana use and did not repeat his passive-inhalation explanation. His explanation at the hearing, that he had earlier told the truth, does not plausibly explain why he gave the false explanation to the investigator. The record evidence and Applicant's demeanor at the hearing suggest that Applicant was frustrated by the multiple interviews, and he gave the passive-inhalation story to the investigator for the same reason he gave the "smart" response to the police officer in February 2007. His false statement to the investigator in December 2007 raises AG ¶ 16(b).

Security concerns raised by false or misleading answers to an investigator's questions 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." AG ¶ 17(a). There is no evidence of any affirmative attempts by Applicant to correct the information he gave in December 2007. He did, however, correct the falsification in his May 2008 interview, but his truthful answers in May 2008 fall short of a prompt, good-faith attempt to correct the falsification. Thus, I conclude AG ¶ 17(a) is not established.

Security concerns based on personal conduct also may be mitigated if "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(c). Applicant's false statements to a security investigator were not "minor," regardless of his motivation for making them. They were recent and did not happen under unique circumstances.

I am not convinced that Applicant's passive-inhalation story was his only falsification during his security investigation. He was vague and inconsistent in describing the extent of his marijuana use from 1996 to 2000, admitting in his response to the SOR that he used it about five times during that period, but testifying he used it only a "couple of times" in high school. He told the investigator in November 2006 that he last used marijuana "in the beginning of high school," outside the seven-year window covered by the security clearance questionnaire, but he stated in a later interview in December 2007 that his last use was during his senior year, less than seven years before he submitted his security clearance application. He did not disclose his high school use of marijuana on his security clearance application. Because his failure to disclose his high school use of marijuana is not alleged in the SOR, I have considered it for the limited purpose of determining if the mitigating condition in AG ¶ 17(c) applies and in my whole-person analysis. *See* ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

Unlike the inconsistencies regarding his marijuana use in high school, Applicant's passive-inhalation story is a clear falsification. His decision to intentionally provide false

information to a security investigator casts doubt on his reliability, trustworthiness, and good judgment, and it falls squarely into the "refusal to provide full, frank, and truthful answers" contemplated in AG 15.

Whole Person Concept

Under 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 the 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.

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. I have incorporated my comments under Guidelines H 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 is a relatively young man with a high school education. He has worked for his current employer for more than seven years and is held in high regard. He has held a clearance from almost six years. He is deeply dedicated to his family and his job His use of marijuana in March 2006 has been mitigated, but his reaction to repeated questioning raises doubt about his reliability and good judgment. Given the demanding and sensitive nature of his work, he can expect to be questioned in the future about his work and matters affecting national security. His reaction to repeated questioning about his marijuana use raises doubt about his willingness to provide full, frank, and truthful answers.

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 concern based on his drug involvement, but he has not mitigated the security concern arising from his false statements to a security investigator. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him 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.f:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge