DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-07634
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

May 20, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86) on January 19, 2007. On November 27, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines H (Drug Involvement) and J (Criminal Conduct). 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR, answered it in an undated document, and requested a hearing before an administrative judge.[1] DOHA received the request on February 1, 2008. Department Counsel was prepared to proceed on February 28, 2008, and the case was assigned to me on March 7, 2008. DOHA issued

[1] The record does not indicate whether Applicant's answer to the SOR was sworn. The affidavit attached to his answer in the case file pertains to Government Exhibit (GX 18), an interview of Applicant by a security investigator.

a notice of hearing on March 24, 2008, amended on March 27, 2008, scheduling the hearing for April 23, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 18 were admitted in evidence without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. I granted Applicant's request to keep the record open until May 7, 2008, to enable him to submit additional matters. He telephonically requested an extension of time, which I granted. He timely submitted AX E, and it was admitted without objection. Department Counsel's response to AX E is attached to the record as Hearing Exhibit (HX) I. DOHA received the transcript of the hearing (Tr.) on May 1, 2008. The record closed on May 8, 2008. Eligibility for access to classified information is denied.

Procedural Ruling

At the hearing, I directed Department Counsel to submit a memorandum of law addressing the repeal of the "Smith Amendment," 10 U.S.C. § 936 in the National Defense Authorization Act for the Fiscal Year 2008, Public Law 110-181, codified in 50 U.S.C. §435c. Department Counsel submitted a memorandum of law and a motion to amend the SOR ¶ 1.i by replacing "10 U.S.C. § 936" with "50 U.S.C. § 435c." The memorandum of law and motion to amend are attached to the record as HX II.

After due consideration, I have denied the motion to amend, because to do so would cause the SOR to allege a provision of the U.S. Code that had not yet been enacted when the SOR was issued. The impact of the repeal of 10 U.S.C. § 936 and its replacement by 50 U.S.C. § 435c is discussed below in my analysis of Guideline H.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.c, 1.f, 2.g, 2.h, and 2.j. His admissions in his answer to the SOR and at the hearing are incorporated in my findings of fact. I make the following findings:

Applicant is a 58-year-old senior electrical designer employed by a defense contractor. He has worked for his current employer for about 39 years, and he has held a security clearance since 1972 (Tr. 7-8; GX 14, 15, and 16). He is married and has three adult children. He is active in community sports activities, having coached and managed Little League teams for 11 years and Pee Wee football for three years (Tr. 64).

Applicant was arrested for larceny in January 1966, and paid a $15 fine (GX 9; AX B). He was arrested in November 1969 for breaking and entering with violence. He pleaded guilty to breach of the peace. He was fined and placed on probation for one year (GX 10; GX 13; AX B). Based on a probation officer's report and his disclosure on a security application, the SOR alleges he was under the influence of LSD at the time of his arrest in November 1969 (GX 2 at 6; GX 13 at 4).

In a sworn statement to a security investigator in May 1971, Applicant admitted using marijuana "on numerous occasions" from January 1967 to January 1971. He also admitted experimenting with LSD and taking "speed" to stay awake during 1968-69 (GX 10). A report of investigation from May 2007 reflects that Applicant admitted using marijuana "throughout the 1990s" (GX 18 at 3), but he denied making that statement when asked in DOHA interrogatories to review the accuracy of the report (GX 17 at 3).

Applicant was arrested in January 1973, for breach of peace and resisting arrest. He pleaded guilty to disorderly conduct and was fined $25 (GX 7; GX 12; AX A; AX B). He was arrested in September 1975 for breach of peace and was fined $35 (GX 9; GX 11; AX B). He was arrested in July 1976 and charged with assault in the 3rd degree, but the charges were disposed of by nolle prosequi (GX 7). The reason for the decision not to prosecute is not reflected in the record.

Applicant was seriously injured on the job in February 1978. He was working on a submarine when a large light fixture fell on his head and neck, causing severe neck injuries. In 1981, he was diagnosed with thoracic outlet syndrome caused by the injury, and underwent a rib resection to remedy it. He still suffers from pain in his neck and lower back. His pain level is a 6 on a scale of 10. He has been diagnosed as having degenerative disc disease, with significant loss of range of motion. He also suffers from numbness and tingling in his arms. His doctor reports that he has about a 40% improvement in pain relief, but it lasts only for the duration of the anesthetic (AX E).

Applicant crushed his right thumb in a wood splitter in 1993. About half the thumb was amputated, followed by 13 surgical procedures to reconstruct it. He used marijuana for about a year and a half, until some time in 1995, because his prescribed medications did not control the pain (Tr. 76; AX E at 9).

Applicant was stopped by customs officials in January 1995 and cited for having illegal contraband and was fined (GX 2 at 6). In response to DOHA interrogatories in October 2007, he disclosed that the contraband was a small quantity of marijuana (GX 17 at 5), and he admitted it at the hearing (Tr. 78-80).

Applicant completed a security clearance application in March 2003. He answered "no" question 23, asking whether he had every illegally used a controlled substance while possessing a security clearance (GX 2 at 7). He testified he did not answer "yes" because he believed he would cost him his clearance (Tr. 82).

Applicant was injured in an automobile accident in September 2005. He was rear-ended by an armored car and suffered further neck injuries. He used marijuana to relieve the pain about 20 times between the car accident and March 2008 (Tr. 73-75).

Applicant was arrested in September 2006 for possession of marijuana, interfering with an officer, resisting an officer, and tampering with evidence. In an interview with a security investigator in May 2007, Applicant stated he was waiting in his car for a friend to join him when he was approached by a policeman and asked to step

out of his car. Applicant had a marijuana cigarette in his pocket, which he placed in his mouth and attempted to swallow it. When the police held him down and were choking him in their attempts to get the marijuana out of his mouth, he spit it out. Applicant hired a lawyer, and after several postponements of his case, the charges were disposed of by nolle prosequi (Tr. 71-72; GX 18 at1-2; AX D at 2). The reason for the decision not to prosecute is not reflected in the record.

Applicant completed another security clearance application in January 2007. As he did on his previous application, he falsely answered "no" to the question about using controlled substances while holding a clearance (Tr. 86-87; GX 1 at 8).

Applicant was interviewed by a security investigator in May 2007. According to the investigator's report, Applicant admitted using marijuana from about age 15, continuing "throughout the 1990s," and using cocaine and "speed during high school "and the years after that." According to the investigator, Applicant said he would continue to use marijuana as a pain reliever if his doctor cannot help him, and said he did not care if his security clearance is revoked because of his drug use (GX 18 at 3).

In response to DOHA interrogatories, Applicant stated the security investigator "had an attitude" toward him and conducted the interview in a snack bar with workers walking in and out instead of more private facilities (GX 17 at 3). On cross-examination, Applicant asked the investigator what she did before becoming an investigator, and she responded that she was in college and obtained a bachelor's degree in criminal justice. He looked at her incredulously and asked, "That's the extent of it?" He started to ask, "So you really ain't got no . . ." but was interrupted by Department Counsel's objection and terminated his cross-examination (Tr. 56). Applicant's disdain for the investigator was obvious.

Applicant testified he was upset with the investigator for questioning him in a room open to other people instead of a more private and appropriate environment. He felt he was not treated with respect (Tr. 63). He testified that what he actually told the investigator was, "[A]fter I retire, if I want to smoke marijuana, I can smoke marijuana because it's not going to affect my clearance." Tr. 62.)

Applicant also testified:

> I know I told her that yes, I don't care – but I do care about my clearance. But it's just the way she came across to me, she just upset me. I was in a bad mood that day. I was in a lot of pain and I probably said things that I – some things I probably should not have said, but I'm repeating myself, but I did. I was aggravated because I felt that she was showing no respect for me as a person, putting me in a room right next to the rotating door where the little partition [is] up and then the candy machines in there. (Tr. 65.)

At the hearing, Applicant testified he last used marijuana about a month before the hearing, in order to relieve his pain (Tr. 72). Even after multiple treatments for his

neck injury, he still suffers a lot of pain (Tr. 88-89). In his closing statement, he expressed his frustration about the conflict between his marijuana use and his clearance as follows:

> I'm not a bad person. I do things that aren't legal in the eyes of the law, but at one time marijuana was legal in this country, 1936, that's when it became illegal when you made alcohol legal which is worse for you than any marijuana could ever be, so you guys change the rules as you feel. I mean if you want to take my clearance, take it. I'll just retire. . . . People don't understand what pain does to people, but you don't know what it's like until you get into that situation where you've been in pain.

(Tr. 107-08.)

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 over-arching adjudicative goal is a fair, impartial and common sense 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 "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 cocaine and "speed" in high school and thereafter (¶ 1.g); used marijuana from 1967 through the 1990s (¶ 1.b) and from June 2006 until "at least" January 19, 2007 (¶ 1.a); and used marijuana while holding a security clearance (¶ 1.d). It also alleges he was arresting in 1969 for breaking and entering with violence and that he was under the influence of LSD at the time of the arrest (¶ 1.h); he was cited by customs official in 1995 for having marijuana in his possession (¶ 1.f); and he was arrested for possession of marijuana in September 2006 (¶ 1.c). It further alleges he told a security investigator in May 2007 he intended to continue using marijuana even if it affected his security clearance (¶ 1.e). Finally, it alleges he is disqualified from having his clearance renewed under 10 U.S.C. § 986.

The security concern relating to Guideline H is set out in AG ¶ 24 as follows: : "Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations." "Drugs" include "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). AG ¶ 24(a)(1). "Drug abuse" is "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." AG ¶ 24(b).

At the hearing, Applicant denied telling the security investigator he intended to continue using marijuana even if it affected his security clearance. Five months before the interview, he falsified his SF 86 because he was concerned about protecting his clearance. If he cared about keeping his clearance in January 2007, it's difficult to believe he no longer cared about it in May 2007. Based on his displeasure with being interviewed in a quasi-public place and his obvious disdain for the investigator, he may well have made the statement as an expression of frustration or anger rather than a lack of concern about his clearance. He made a similar expression of frustration during the hearing, i.e., "If you want to take my clearance, take it." I conclude that he probably said something similar to what is reflected in the investigator's report, and that he intended to continue using marijuana to relieve his severe plain, but I do not believe he had stopped caring about keeping his clearance.

Disqualifying conditions under this guideline include "any drug abuse," "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia, " and "any illegal drug use after being granted a security clearance." AG ¶¶ 25(a), (c), and (g). The evidence in this case establishes these three disqualifying conditions.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a), (c), and (g), the burden shifted to Applicant to produce evidence 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). Applicant admitted his marijuana use at the hearing, and he did not produce evidence establishing any of the enumerated mitigating conditions under this guideline.

Under 10 U.S.C. § 986, in effect at the time the SOR was issued, the Department of Defense was prohibited from granting or renewing a clearance for any person who was "an unlawful user of, or [was] addicted to, a controlled substance." National Defense Authorization Act for the Fiscal Year 2008, Public Law 110-181, codified in 50 U.S.C. § 435c, repealed 10 U.S.C. § 986 and replaced it with the following: "After January 1, 2008, the head of a Federal agency may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance or an addict" as defined by federal law. Neither the President nor the Department of Defense has issued any guidance for implementing this change in the law, including any instructions regarding the retroactive effect of this change.

Both 10 U.S.C. § 986(c)(2) and its replacement in 50 U.S.C. § 435c(b) use the present tense, making them applicable only if the person "is" an unlawful user or "is" an addict. *See* ISCR Case No. 03-25009 (App. Bd. Jun. 28, 2005). Based on the evidence, I conclude Applicant is disqualified as an unlawful user of marijuana. He has used it for most of his adult life, and used it regularly to control plain since his injuries in 1978, 1993, and 2005. He intentionally did not disclose his marijuana use while holding a clearance because he knew it would cost him his clearance. He told a security investigator he will continue to use it to control his pain; he used it to control pain a

month before the hearing; and he continues to be in pain, making it likely he will continue to use it. I am satisfied Applicant is a present user of marijuana within the meaning of 10 U.S. § 986 and 50 U.S.C. § 435c. I need not decide which statutory disqualification applies to Applicant, because he is disqualified from having his clearance renewed under either.

Guideline J, Criminal Conduct

The SOR cross-alleges the drug-related criminal conduct alleged in SOR ¶¶ 1.a, 1.b, 1.c, 1.f, 1.g, and 1.h. It also alleges an arrest and conviction for larceny in 1966 (¶ 2.j); an arrest for breach of peace and resisting arrest and a conviction of disorderly conduct in 1973 (¶ 2.i); an arrest and conviction for breach of the peace in 1975 (¶ 2.h); and an arrest for assault in the 3rd degree in 1976 (¶ 2.g).

The security concern under Guideline J is set out in AG ¶ 30 as follows: The concern raised by criminal conduct is that it "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." Conditions that could raise a security concern and may be disqualifying include "a single serious crime or multiple lesser offenses" and "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted." AG ¶¶ 31(a) and (c). Applicant's arrests and convictions raise these two disqualifying conditions.

It is a felony, punishable by a fine or imprisonment for not more than five years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the government of the United States. 18 U.S.C. § 1001. Security clearances are matters within the jurisdiction of the executive branch of the government of the United States. A deliberately false answer on a security clearance application is a serious crime within the meaning of Guideline J. Applicant admitted falsifying his security clearance applications on two occasions. His falsifications were not alleged in the SOR, and thus may not be the basis for denying a clearance.

However, conduct not alleged in the SOR may be considered: "(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, 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." ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). Additionally, the Appeal Board has determined that even though crucial security concerns are not alleged in the SOR, the Judge may consider those security concerns when they are relevant and factually related to a disqualifying condition that was alleged in the SOR. ISCR 05-01820 at 3 n.4 (App. Bd. Dec. 14, 2006) (citing ISCR Case No. 01-18860 at 8 (App. Bd. Mar. 17, 2003) and ISCR Case No. 02-00305 at 4 (App. Bd. Feb. 12, 2003)). I have considered Applicant's falsifications for the limited

purposes of determining whether he is a present user of marijuana, whether he has been successfully rehabilitated, and as part of my whole person analysis.

Security concerns under this guideline may be mitigated by evidence that "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." AG ¶ 32(a). The allegations cover a span from Applicant's high school days to the present. His most recent arrest was in September 2005, he falsified his security clearance application in January 2007, and he used marijuana a month before the hearing. I conclude AG ¶ 32(a) is not established.

Security concerns also can be mitigated if "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." AG ¶ 32(d). Applicant apparently has a good employment record, and he is actively involved in his community. However, his criminal conduct has continued until recently and his illegal marijuana use likely will continue. I conclude AG ¶ 32(d) is not established.

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 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant is a mature adult who has worked for a defense contractor and held a clearance for many years. He lives in almost continuous pain from multiple injuries, and he resorts to marijuana use in an effort to control his pain. He certainly deserves compassion. His illegal drug use is understandable, but impermissible and inconsistent with holding a clearance.

After weighing the disqualifying and mitigating conditions under Guidelines H and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on drug involvement and criminal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information. Even if Applicant were not statutorily disqualified from holding a clearance based on his current marijuana use, I would still conclude that continuing his clearance is not clearly consistent with the national interest, because of his criminal record and past drug abuse.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraphs 1.a-1.i:	Against Applicant
Paragraph 2, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a-2.j:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

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LeRoy F. Foreman
Administrative Judge