DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-12101
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Fahryn Hoffman, Esquire, Department Counsel
For Applicant: *Pro Se*

April 29, 2009

Decision

HARVEY, Mark W., Administrative Judge:

Applicant had an extensive history of marijuana use. He deliberately failed to fully disclose his marijuana use during the security clearance adjudication process on three occasions. He used marijuana twice after his security clearance was granted. He failed to mitigate security concerns arising from personal conduct. Drug involvement was mitigated because his marijuana use was not recent. Eligibility for access to classified information is denied.

Statement of the Case

On November 17, 2006, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) or security clearance application (2006 SF 86) (Government Exhibit (GE) 1). On November 10, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The revised adjudicative guidelines

(AG) promulgated by the President on December 29, 2005, are effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR alleges security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct) (GE 9). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On November 10, 2008, Applicant responded to the SOR allegations (GE 10). Department Counsel was ready to proceed on March 19, 2009, and the case was assigned to me that same day. At the hearing held on April 16, 2009, Department Counsel offered seven exhibits (GEs 1-7) (Transcript (Tr.) 27-29). There were no objections, and I admitted GEs 1-7 (Tr. 28). Applicant did not provide any exhibits (Tr. 11). I also admitted the hearing notice (GE 8), the SOR (GE 9), and Applicant's SOR response (GE 10). I received the transcript on April 23, 2009.

Findings of Fact[1]

In his response to the SOR, Applicant admitted all of the SOR allegations (GE 10). His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is a 33-year-old cost analyst for a defense contractor (Tr. 6, 39, 42).[2] He received his high school diploma in 1993 (Tr. 43). He earned a bachelor's degree in 2004 (Tr. 6, 34). He has earned some credits towards his master's degree in business administration (MBA) (Tr. 39-40). He is not married (Tr. 41). He held a security clearance previously when he was on active duty in the U.S. Marines; however, he does not currently hold a security clearance (Tr. 7). His professional goal is to complete his MBA and to become a project manager and then a program manager (Tr. 43).

Applicant served in the U.S. Marines for four and a half years (Tr. 40). He was assigned to an elite unit, Force Recon (Tr. 88). In 2002, he received field-grade level nonjudicial punishment (NJP) for dereliction of duty because he failed to prevent a subordinate Marine from driving while intoxicated or impaired by alcohol (DUI) (Tr. 89-90). Applicant and another vehicle occupant were also intoxicated (Tr. 89). He was found guilty of the offense; however, he did not receive a reduction in grade from the NJP (Tr. 90). He left active duty as a Sergeant (Tr. 41). He received several injuries while on active duty and he decided to leave active duty because he did not believe he

[1]Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

[2]Applicant's 2008 SF 86 (GE 1) is the source for the facts in this paragraph and the last paragraph in this section, unless stated otherwise.

was medically capable of completing another enlistment (Tr. 21, 90). He did not serve in combat (Tr. 22-23, 89-90).

Applicant has never been charged with any felony, firearms or explosives offense(s). He has not been arrested or charged with any minor or misdemeanor-type offenses in the last seven years, except for arrests and eventually convictions for marijuana possession in 1995 and for DUI in 2006. In the last seven years, he has not had any debts delinquent over 180 days, bankruptcy petitions, unpaid judgments, or unpaid liens.

Illegal Drug Possession and Sale and Alcohol Abuse

From about 1993 to about 1998, Applicant sometimes used marijuana on a weekly basis and at other times, it was every few months (SOR ¶ 1.a; Tr. 43-47, 79-80; GE 10). On August 18, 1995, Applicant was charged with marijuana possession (SOR ¶ 1.c; Tr. 48-49; GE 10). He was convicted of marijuana possession and fined $1,000 (SOR ¶ 1.d; Tr. 48-49; GE 10). He also attended an alcohol/drug safety action program (ASAP), which involved attendance at ten weekly classes (Tr. 50). He did not consider the ten classes to be drug therapy or counseling (Tr. 62). He was also required to provide three urine samples for drug testing (Tr. 49). The first two tests were positive for the marijuana metabolite; however, the third urinalysis test was negative for illegal substances (Tr. 49-50). After completion of his ASAP classes, he returned to using marijuana until he completed college (Tr. 50). He purchased marijuana on several occasions with his friends (drug distribution) while he was in college (SOR ¶ 1.e; Tr. 52; GE 10).

Applicant did not use marijuana while in the U.S. Marines (Tr. 53, 71). He was drug-tested about five times per year while in the Marines (Tr. 72). About four or five months after leaving the Marines (around November 2003), he started using marijuana again (Tr. 53). He used marijuana about every three months for the next three years for a total of about 12 times (time period: November 2003 to December 2006) (SOR ¶ 1.b; Tr. 54; GE 10). At least two of his employers during this period when he was using marijuana probably had a policy against use of illegal drugs; however, those two employers did not engage in random drug testing although he may have had an initial drug test at the start of the employment (Tr. 66-68).

On November 17, 2006, Applicant submitted his application for a security clearance (Tr. 55). Two days later, Applicant was arrested for DUI (Tr. 55; SOR ¶ 2.c). He pleaded guilty and was convicted (Tr. 74). He was sentenced to 180 days in jail with 175 days suspended (Tr. 74). He received a $500 fine and court costs (Tr. 74). He attended ASAP classes again as part of his DUI sentence (Tr. 63; GE 2 at 3). His driver's license was suspended for about a year (Tr. 74; GE 5). He completed six months with an alcohol interlock device in his car (Tr. 75-76; GE 5). He attended 20 hours of private, alcohol counseling (Tr. 18; GE 2 at 3). He attended two Alcoholics Anonymous sessions (GE 2 at 3). He has continued to consume alcohol; however, he has not been drunk on alcohol since his DUI, except for New Year's Day in 2007 (Tr. 18, 80; GE 2 at 3; GE 3; GE 4).

Applicant's interim Secret security clearance was approved on November 27, 2006, and he used marijuana twice in December 2006 after his security clearance was granted (SOR ¶¶ 1.c and 2.b; Tr. 56, 65; GE 10). He does not currently associate with the person(s) that provided the marijuana to him from November 2003 to December 2006, or any other known drug users (Tr. 56-58). Applicant's employer has not used urinalysis tests to verify whether or not Applicant has used illegal drugs since December 2006 (Tr. 66).

On February 10, 2007, Applicant received a citation for walking his dog without having it on a leash (SOR ¶ 2.d; Tr. 83-84). His dog was not acting aggressively towards others or breaching the peace (Tr. 83-84). This citation is too insignificant to constitute a security concern.

At his hearing, Applicant said he has not used marijuana since December 2006, and he did not intend to use marijuana in the future (Tr. 85, 87-88). He does not currently attend any Alcoholics Anonymous or Narcotics Anonymous meetings (Tr. 85).

Falsification of Security Clearance Applications

On November 17, 2006, Applicant signed his SF 86 (SOR ¶ 2.a; Tr. 59-60; GE 1). On his November 17, 2006 SF 86 he responded, "No" to Section 24a, which asks:

> **24. Your Use of Illegal Drugs and Drug Activity—Illegal Use of Drugs**
> Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?

Applicant's response to Section 24a on his November 17, 2006 SF 86 was deliberately false. He provided misleading information about his marijuana use because he was worried about keeping his employment (Tr. 60). He thought if he was truthful he would not receive a security clearance and consequently would lose his job (Tr. 61).[3]

On February 12, 2007, an Office of Personnel Management (OPM) investigator questioned Applicant about his marijuana use. Applicant did not accurately disclose his most recent marijuana use to the OPM investigator. Applicant falsely stated that his most recent marijuana use was in early 2006 (SOR ¶ 2.e).

On November 1, 2007, in response to two DOHA interrogatories about his most recent marijuana use, Applicant said he, "used experimentally in college," and it had

[3]Applicant did not disclose his 1995 attendance at ASAP or his 1995 marijuana possession conviction on his 2006 SF 86 (Tr. 63-65). The SOR does not allege that Applicant failed to disclose this information. Applicant did not disclose the ASAP attendance because he did not believe it to be therapy or counseling, and he thought there was a seven-year time limit to the requirement to disclose his 1995 conviction (Tr. 62-64; GE 3 at 6). He did not think there was a seven-year time limit on disclosing his marijuana use (Tr. 64).

been "years, can't remember" since his last marijuana use (SOR ¶ 2.f; GE 2 at 5; GE 10). As indicated previously, he was well aware that his most recent marijuana use was on two occasions in December 2006.

On July 1, 2008, in response to DOHA interrogatories, Applicant revealed his marijuana use in December 2006 and admitted he falsified his security clearance documentation out of a "survival instinct" (GE 4 at 2-3, 4). However, Applicant was not completely candid in this statement because he understated his marijuana use in college, stating his marijuana use was "a few times a year" (GE 4 at 2).

At his hearing Applicant emphasized that he was very sorry about lying to the government (Tr. 16, 106-107). He lied out of a sense of "self-preservation of [his] job and reputation" (Tr. 19). Applicant said he felt deep regret, guilt and shame because of his poor decisions (Tr. 19-21) and he explained:

> You know, I've made poor decisions, I know that, but obviously being dishonest about those things, you know, one lie begets another, you know, I've definitely, I've fallen into that bear trap obviously. I obviously can't argue [with] what's in black and white in front of me. So there's no question about that.

(Tr. 106). Applicant promised to do better in the future (Tr. 107).

Character Evidence

Applicant's supervisor (S) has known Applicant for about 30 months (Tr. 33-34). S is a Captain in the reserves and he has held a clearance for 22 years (Tr. 35). S has been a unit commander three times (Tr. 35). S described Applicant as a consummate professional (Tr. 34). Applicant is diligent, reliable, trustworthy and responsible (Tr. 34-35). When Applicant had access to classified information, he was very conscientious (Tr. 34-35). In October 2007 and February 2009, Applicant was employee of the month (Tr. 35). Applicant is an important asset to the Army and the Department of Defense (Tr. 38). He strongly recommends reinstatement of Applicant's clearance (Tr. 38). If Applicant loses his clearance, his employment will be terminated (Tr. 37).

Applicant described himself as a very hard worker, trustworthy, honorable, patriotic, dedicated and reliable with high integrity (Tr. 17, 26-27). He has a very strong work ethic (Tr. 23). He emphasized his professionalism and his desire to continue to assist in the nation's defense through supporting the Army (Tr. 23). In the last 30 months, he was only late for work once and that was because he was in a car accident (Tr. 23). He was the only employee in an office of 50 persons, who received employee of the month twice (Tr. 23). He loves his job (Tr. 23, 26). His positive relationship with his peers at work is also very important to him (Tr. 23). He is a team player. He is very proud of his contributions to the United States on active duty and subsequently as a government contractor (Tr. 26).

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 an Applicant 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 [A]pplicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. 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). The burden of disproving a mitigating condition never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is under Guidelines H (Drug Involvement) and E (Personal Conduct) with respect to the allegations set forth in the SOR.

Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

> [u]se 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.

AG ¶ 25 describes eight drug involvement-related conditions that could raise a security concern and may be disqualifying. Four drug involvement disqualifying conditions could raise a security concern and may be disqualifying in this particular case: "any drug abuse,"[4] "testing positive for illegal drug use," "illegal drug possession or sale or distribution," and "any illegal drug use after being granted a security clearance."

AG ¶¶ 25(a), 25(b), 25(c) and 25(g) apply. The other disqualifying conditions listed in AG ¶ 25 are not applicable. These disqualifying conditions apply because Applicant used, possessed, and distributed marijuana.[5] He fully disclosed his drug abuse in his SOR response and at his hearing. He possessed marijuana before he used

[4]AG ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

[5]AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

> (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), and (2) inhalants and other similar substances.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substance. *See* Sch. I (c)(9). *See also Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

it. After he was convicted of marijuana possession in 1995, he tested positive for the presence of the marijuana metabolite in his urine. Applicant's interim Secret security clearance was approved on November 27, 2006, and he used marijuana twice in December 2006 after his security clearance was granted.

AG ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

> (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;
>
> (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.
>
> (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and
>
> (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Security concerns can be mitigated based on AG ¶ 26(a) by showing that the drug offenses happened so long ago, were so infrequent, or happened under such circumstances that they are unlikely to recur or do not cast doubt on the individual's current reliability, trustworthiness, or good judgment. 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 record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. 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."[6]

Applicant's extensive marijuana use lasted approximately seven or eight years (1993 to 1998 and from November 2003 to December 2006), and involved numerous uses of marijuana. However, Applicant's last marijuana use was in December 2006, about 26 months prior to his hearing. He recognizes the adverse impact on his life of drug abuse. These actions create some certitude that he will continue to abstain from drug use. AG ¶ 26(a) applies to his marijuana-related offenses.[7]

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. He has somewhat disassociated from his drug-using associates and contacts. He has broken his patterns of drug abuse, and he has changed his life with respect to illegal drug use. He has abstained from drug abuse for about 26 months. However, he did not provide "a signed statement of intent with automatic revocation of clearance for any violation."[8] AG ¶ 26(b) does not fully apply.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse prescription drugs after being prescribed those drugs for an illness or injury. The marijuana was never prescribed for him. He receives partial credit because he

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[6] ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

> *Compare* ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

> The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

[7] In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

[8] Even though he did not provide such a statement, sufficient time has elapsed since his most recent illegal drug use, to warrant full mitigation of security concerns relating to his drug involvement.

satisfactorily completed a prescribed drug/alcohol treatment program after his DUI in 2006; however, he cannot receive full credit because he did not provide "a favorable prognosis by a duly qualified medical professional, including rehabilitation and aftercare requirements."

In conclusion, Applicant ended his drug abuse in December 2006, about 26 months ago. The motivations to stop using illegal drugs are evident. He understands the adverse results from drug abuse.[9] He has shown or demonstrated a sufficient track record of no drug abuse to eliminate drug involvement as a bar to his access to classified information.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

> 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 ¶ 16 describes three conditions that could raise a security concern and may be disqualifying with respect to the alleged falsifications of documents used to process the adjudication of Applicant's security clearance in this case:

> (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;
>
> (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and
>
> (d)(3) a pattern of dishonesty violations.[10]

[9]Approval of a security clearance, potential criminal liability for possession of drugs and adverse health, employment, and personal effects resulting from drug use are among the strong motivations for remaining drug free.

[10]The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

> (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or

Applicant failed to disclose his marijuana use from November 2003 to December 2006 on his 2006 SF 86 (SOR ¶ 1.a). On February 12, 2007, he lied to an OPM investigator, when he failed to disclose that his most recent marijuana was in December 2006 (SOR ¶ 2.e). On November 1, 2007, he provided false information in response to a DOHA interrogatory, when failed to disclose that his most recent marijuana was in December 2006 (SOR ¶ 2.f). AG ¶¶ 16(a), 16(b) and 16(d)(3) all apply.

With respect to the personal conduct concerns involving Applicant's marijuana use after being granted a clearance (SOR ¶ 2.b), 2006 DUI (SOR ¶ 2.c), and citation for walking a dog not on a leash (SOR ¶ 2.d), the pertinent disqualifying conditions are AG ¶ 16(d)(3), a pattern of rule violations and AG ¶ 16(e)(1), which states, "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." Certainly, Applicant's 2006 excessive alcohol consumption-related DUI, criminal conduct and marijuana use while holding a security clearance violate important civil and criminal rules in our society, and a history of such problems is conduct a person might wish to conceal, as it adversely affects a person's professional and community standing.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

> (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
>
> (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
>
> (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

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> circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

The mitigating condition outlined in AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress" applies to Applicant's marijuana use after being granted a clearance, 2006 DUI, and citation for walking a dog not on a leash. Applicant's supervisor and most importantly, security officials are well aware of Applicant's problems. Applicant has taken the positive step of disclosure, eliminating any vulnerability to exploitation, manipulation or duress. I do not believe Applicant would compromise national security to avoid public disclosure of these problems. Any personal conduct security concerns pertaining to his marijuana use after being granted a clearance, his 2006 DUI, and his citation for walking a dog not on a leash are dealt with more thoroughly under the specific, pertinent guidelines. For example, drug use is best addressed under the drug involvement guideline in this decision. The personal conduct concerns related to his problems are well known to the government.

Applicant deserves substantial credit in the whole person analysis for candidly admitting he falsified these documents in order to continue his employment. I found Applicant's statements at the hearing and in his SOR response about his marijuana use and his reason for falsifying his security documents to be credible. However, the personal conduct concerns pertaining to Applicant's falsification of his 2006 security clearance application (SOR ¶ 1.a); his February 12, 2007, lie to an OPM investigator (SOR ¶ 1.e); and his November 1, 2007, misleading answer to a DOHA interrogatory (SOR ¶ 2.f) about the extent and/or recency of his marijuana use; cannot be mitigated at this time because they are too serious and too recent.

Whole Person Concept

Under the whole person concept, the 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. The 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.

There is some evidence supporting approval of Applicant's clearance. Applicant was relatively young and immature when he began using marijuana. He honorably served his country as a U.S. Marine for four and a half years, rising to the rank of Sergeant. He did not use illegal drugs while serving on active duty. He then returned to using marijuana; however, he again stopped using illegal drugs in December 2006. He showed he has the ability to abstain from marijuana use for lengthy periods of time. In his SOR response and at his hearing, he frankly and candidly admitted his extensive history of marijuana use. He received some alcohol/drug counseling and therapy. He knows the consequences of drug abuse and excessive alcohol consumption. Applicant contributes to his company and the Department of Defense. There is no evidence of disloyalty or that he would intentionally violate national security. His character and good work performance show some responsibility, rehabilitation and mitigation. His supervisors evidently support him or he would not have been able to retain his employment after his security clearance was called into question. His supervisor lauds his hard work and dedication. I am satisfied that if he continues to abstain from drug use, and avoids future offenses he will eventually have future potential for access to classified information.

The evidence against approval of Applicant's clearance is more substantial. Applicant's extensive marijuana use lasted approximately seven or eight years (1993 to 1998 and 2003 to 2006), and involved numerous uses of marijuana. He had a DUI in 2006. He received some alcohol/drug counseling or treatment; however, he did not provide documentation showing a positive prognosis. His numerous decisions to possess and use marijuana and to drive while intoxicated were knowledgeable, voluntary, and intentional. Applicant failed to disclose his marijuana use from 2004 to 2006 on his 2006 SF 86. On February 12, 2007, he lied to an OPM investigator, when he failed to disclose that his most recent marijuana was in December 2006. On November 1, 2007, he provided false information in response to a DOHA interrogatory, when he failed to disclose that his most recent marijuana was in December 2006. He was sufficiently mature to be fully responsible for his conduct. These offenses show a serious lack of judgment and a failure to abide by the law. Such judgment lapses are relevant in the context of security requirements. His misconduct raises a serious security concern, and a security clearance is not warranted at this time.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude Applicant has not mitigated the security concerns pertaining to personal conduct; however, he has fully mitigated drug involvement primarily because his illegal marijuana use is not recent.

I take this position based on the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), my "careful consideration of the whole person factors"[11] and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not currently eligible for access to classified information.

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
Subparagraphs 1.a to 1.e:	For Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraphs 2.b to 2.d:	For Applicant
Subparagraphs 2.e to 2.f:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Mark W. Harvey
Administrative Judge

[11] *See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).