



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of: )  
 )  
----- ) ISCR Case No. 07-15020  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

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

September 24, 2010

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant’s marijuana use and drug involvement concerns are mitigated because his marijuana use ended in 2005 and was not recent. However, Applicant intentionally omitted complete information about his marijuana use on his 2003 and 2006 security clearance applications. Personal conduct and criminal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On September 9, 2003, Applicant submitted a security clearance application (SF-86), and on December 15, 2006, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF-86). (GE 1, 5) On October 29, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended;

and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guidelines H (drug involvement), E (personal conduct), and J (criminal conduct). (Hearing Exhibit (HE) 2) 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. The SOR recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (HE 2)

On November 13, 2009, Applicant responded to the SOR. (HE 3) On April 22, 2010, Department Counsel indicated she was ready to proceed on Applicant's case. On May 3, 2010, DOHA assigned Applicant's case to me. On May 12, 2010, DOHA issued a hearing notice. (HE 1) On June 2, 2010, Applicant's hearing was held. At the hearing, Department Counsel offered five exhibits (GE 1-5) (Tr. 23), and Applicant offered 11 exhibits. (Tr. 25-27; AE A-J) There were no objections, and I admitted GE 1-5 and AE A-J. (Tr. 23, 27) Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR. (HE 1-3) On June 9, 2010, I received the transcript.

### **Procedural Issue**

Department Counsel made a motion to change the year in SOR ¶ 2.e from "2009" to "2008," because 2008 was the correct year Applicant responded to DOHA interrogatories. (Tr. 16-17; HE 3) There was no objection and I granted Department Counsel's motion. (Tr. 16-17)

At Applicant's hearing, the SOR was amended adding an allegation under SOR ¶ 2.f that Applicant intentionally failed to disclose his marijuana use on his September 9, 2003 SF-86. (Tr. 69-70) There was no objection to the SOR amendment. (Tr. 69-70) I granted the motion to amend the SOR.

### **Findings of Fact<sup>1</sup>**

Applicant's SOR response admitted the following allegations: (1) he purchased marijuana (SOR ¶ 1.b); and (2) he used marijuana after being granted a Secret security clearance (SOR ¶ 1.c). (HE 3) In regard to SOR ¶ 2.d, he admitted that he erroneously indicated that he did not use marijuana while holding a security clearance. (HE 3) He denied the remaining SOR allegations. His admissions are accepted as factual findings.

Applicant is a 31-year-old employee of a defense contractor. (Tr. 6) He graduated from high school in 1997, and in 2003, he earned a bachelor of technology

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<sup>1</sup>Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

degree with a major in commercial graphics. (Tr. 6) He married in August 2007. (Tr. 7) He has a two-year-old child, and his spouse is expecting twins. (Tr. 7, 29)

## **Drug involvement**

Applicant said he used marijuana five or six times when he was a senior in high school. (Tr. 38) He used marijuana because of peer pressure. (Tr. 36-37) When Applicant purchased marijuana, it was for personal use, and not for resale or distribution. (Tr. 42) He did not go to class or to work impaired by previous marijuana consumption. (Tr. 39-40) When he was in college, he purchased marijuana about once a month. (Tr. 43) He increased his marijuana use in college to one or two times a month. (Tr. 43)

In 2003, before Applicant started employment with his current employer, he stopped using marijuana so that he could pass any drug screenings. (Tr. 52) He stopped using marijuana from about May 2003 to about June 2004. (Tr. 93-94) In September 2003, Applicant began his employment with his current employer. (Tr. 47)

On March 19, 2005, Applicant was arrested for possession of marijuana. (Tr. 59-61; SOR ¶¶ 1.d, 3.a; GE 3) He did not remember who gave him the marijuana. (Tr. 50) He was found guilty and sentenced to 10 hours of community service, to pay a \$331 fine, and to attend ten Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) meetings. (Tr. 56; AE B, C, D) In October 2005, he completed his community service. (AE C) Applicant attended ten NA meetings. (Tr. 57; AE B) In November 2006, he disclosed his arrest to his facility security officer. (Tr. 55, 62-63) He did not report the arrest earlier because he thought it was just a ticket or citation. (Tr. 62) In December 2006, he completed all court-ordered requirements. (Tr. 63; AE B-D)

Applicant's most recent marijuana use was in March 2005. (Tr. 46) Applicant does not associate with the friends from college who used marijuana with him. (Tr. 46) However, he "may have smoked" marijuana with his younger sister. (Tr. 54) His sister no longer smokes marijuana. (Tr. 54) Applicant's spouse does not smoke marijuana. (Tr. 48) After Applicant was arrested for possession of marijuana, he informed his future spouse of the arrest. (Tr. 49) In 2005, she had a security clearance and she was shocked when he advised her of his arrest. (Tr. 49-50)

## **2003 security clearance application**

On September 9, 2003, Applicant signed his SF-86. (Tr. 66-67; SOR ¶ 2.f; GE 5) On his September 9, 2003 SF-86 he responded, "No" to Question 27, which asks:

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? (Tr. 67-68)

At his hearing, Applicant said that he did not disclose his extensive marijuana use on his 2003 SF-86 because he was ashamed of his marijuana use and did not want his employer to know about it. (Tr. 68)<sup>2</sup>

### **2006 security clearance application and August 2007 Office of Personnel Management (OPM) interview**

On December 15, 2006, Applicant signed his SF-86. (GE 1) Section 23d asks, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" Applicant responded "Yes" and explained that in March 2005 he was arrested for possession of marijuana. (GE 1) He described the court's sentence, indicated he completed all court-ordered requirements, and the charge was dismissed on December 12, 2006. (GE 1) SOR ¶ 2.b indicated Applicant provided false information because the offense was actually in February 2006. Applicant's arrest was on March 19, 2005, and he had a court date in February 2006. Accordingly, Applicant's explanation for Section 23d was actually accurate. (Tr. 71-72; SOR ¶¶ 2.b and 3.b)

Section 24 of his 2006 security clearance, asks:

#### **24. Your Use of Illegal Drugs and Drug Activity**

The following questions pertain to the illegal use of drugs or drug activity. You are required to answer the questions fully and truthfully, and your failure to do so could be grounds for an adverse employment decision or action against you, but neither your truthful responses nor information derived from your responses will be used as evidence against you in any subsequent criminal proceeding.

a. 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? (Tr. 72-73; SOR ¶¶ 2.c and 3.b; GE 1)

b. 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? (Tr. 75; SOR ¶¶ 2.d and 3.b; GE 1)

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<sup>2</sup> As indicated previously, SOR ¶ 2.f was added to the SOR. (Tr. 69-70) SOR ¶ 2.f alleged Applicant failed to disclose his marijuana use on his September 9, 2003 SF-86. (Tr. 69-70)

Applicant responded “Yes” to section 24a and “No” to section 24b. (GE 1) In the comments section, he said that he used marijuana from June 2004 to March 2005 in social settings on multiple occasions. (SOR ¶ 1.c; GE 1) Applicant did not list his earlier marijuana use because he was apprehensive and scared that he would lose his job. (Tr. 73-74) He admitted that he should have indicated he used marijuana starting in the summer of 1999, and that his answer was deliberately false. (Tr. 74-75) He was aware that on his previous SF-86 he had not disclosed his marijuana use. (Tr. 86) He emphasized that he was worried that he would lose his job. (Tr. 87) He believed a longer period of marijuana use would make him look worse, and he did not know he would be interviewed by an investigator. (Tr. 91-92) When Applicant responded to SOR ¶ 2.c, he denied that he deliberately misrepresented his marijuana usage dates. (HE 3) At his hearing, he admitted that he deliberately misrepresented his marijuana usage dates, and his SOR response denying the allegation was based on the incorrect date for his arrest in SOR ¶ 1.d. (Tr. 90-91; HE 3)

Applicant had a security clearance continuously from 2003 to December 12, 2006, and his incorrect answer to section 24b was because he failed to carefully read the question. (Tr. 75, 89-90) He thought it was limited to police officers, prosecutors, and courtroom officials, and did not notice the part about security clearance holders. (Tr. 75-76; SOR ¶ 2.d) As indicated previously, he did admit on the same SF-86 that he has used marijuana as recently as March 2005.

SOR ¶ 2.e indicated Applicant provided false information to an OPM investigator on August 16, 2007, when he indicated his most recent marijuana use was in March 2005. At the time the SOR was written, the Government erroneously believed Applicant’s arrest for marijuana possession was in February 2006, rather than on March 19, 2005. Accordingly, Applicant’s statement to the OPM investigator about his most recent marijuana use was accurate. (Tr. 76-77)

A substance abuse practitioner and assessor evaluated Applicant and determined that he was at low probability for future drug abuse. (Tr. 79-80; AE I) The assessor recommended Applicant attend 10 AA/NA meetings. (AE I) Applicant provided a statement of intent agreeing to automatic revocation of his security clearance for any future use of illegal drugs. (AE J)

### **Character references**

Applicant’s spouse describes him as gentle, dependable, trustworthy, level-headed, patient, honest, and responsible. (AE H) Before she married Applicant, he told her about his drug-related arrest. (AE H) He is a loving father and excellent role model to their children. (AE H)

Applicant’s friend and former supervisor, who has known Applicant for 18 years, describes him as having high-moral character and being dependable, reliable, honest, and trustworthy. (AE G) Applicant has strong integrity and ethics.

Applicant facility security officer has known Applicant for seven years. (AE E) He lauds Applicant's responsibility, integrity, reliability, and good character. (AE D) Applicant is an asset to the company. (AE E)

### **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 applicant's 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 revised adjudicative guidelines. 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 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 "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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. 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 about 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 (4<sup>th</sup> 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 concerns are under Guidelines H (drug involvement), E (personal conduct), and J (criminal 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.

Three drug involvement disqualifying conditions in AG ¶¶ 25(a), 25(c), and 25(g) could raise a security concern and may be disqualifying in this case: "any drug abuse,"<sup>3</sup> "illegal drug possession or sale or distribution," and "any illegal drug use after being granted a security clearance." These three disqualifying conditions apply because Applicant used and possessed marijuana.<sup>4</sup> He fully disclosed his drug abuse at his hearing. He possessed marijuana before he used it. Applicant's Secret security

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<sup>3</sup>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."

<sup>4</sup>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).

clearance was approved in 2003, and he used marijuana on multiple occasions from July 2004 to March 2005.

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.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no "bright line" rules for determining when such 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."<sup>5</sup>

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<sup>5</sup> 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:



Applicant's extensive marijuana use lasted several years. He stopped using marijuana from about May 2003 to June 2004. Then he resumed his marijuana use until his arrest on March 19, 2005 for marijuana possession. Applicant's most recent marijuana use was in March 2005, more than five years prior to his hearing. He recognizes the adverse impact on his life of drug abuse. He received some therapy, and attended 10 NA meetings. He is now married and has three children. These actions create some certitude that he will continue to abstain from drug use. AG ¶ 26(a) applies to his marijuana-related offenses.<sup>6</sup>

Applicant demonstrated his intent not to abuse illegal drugs in the future. He has 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 more than five years. He provided "a signed statement of intent with automatic revocation of clearance for any violation." AG ¶ 26(b) applies.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse prescription drugs. Marijuana was never prescribed for him. He receives partial credit because he attended 10 weeks of NA meetings, and he received a prognosis of low probability of recurrence of drug abuse. He does not receive full credit under AG ¶ 26(d) because he did not provide sufficient evidence of the qualifications of the person who provided the prognosis. More detail about the drug-treatment program he completed is necessary to assess its validity.

In conclusion, Applicant ended his drug abuse in March 2005, more than five years ago. The motivations to stop using illegal drugs are evident. He understands the

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*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.

<sup>6</sup>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.

adverse results from marijuana use.<sup>7</sup> 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.<sup>8</sup>

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<sup>7</sup>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.

<sup>8</sup>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 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)).

Applicant intentionally provided false information on his September 9, 2003 SF-86 when he denied use of illegal drugs in the last seven years. He did not disclose his marijuana use for several years and continuing to May 2003 (SOR ¶ 2.f). When he completed his December 15, 2006 SF-86, he intentionally understated the duration of his marijuana use when he stated in the comments section that he used marijuana from June 2004 to March 2005 in social settings on multiple occasions. He did not disclose his marijuana use from 1999 to May 2003. (SOR ¶ 2.c) AG ¶¶ 16(a), 16(b) and 16(d)(3) all apply.

SOR ¶ 2.d alleges Applicant failed to disclose his marijuana use while holding a security clearance on his December 15, 2006 SF-86. Applicant's statement that he inadvertently failed to disclose this information is credible. He disclosed his marijuana use and his marijuana arrest on March 19, 2005, and the Government was well aware that Applicant held a security clearance in March 2005. Applicant has successfully refuted SOR ¶ 2.d.

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 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.

Applicant deserves substantial credit in the whole-person analysis for candidly admitting he falsified the 2003 and 2006 SF-86s 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 SF-86 about the duration of his marijuana use (SOR ¶ 2.d), and his falsification of his 2003 SF-86 when he denied any marijuana use in the last seven years (SOR ¶ 2.f) cannot be mitigated at this time because they are too serious and too recent.

### **Criminal Conduct**

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations." AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying in this case:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant possessed marijuana on March 19, 2005. (SOR ¶ 3.a) He also intentionally failed to disclose the duration of his marijuana use on his 2006 SF-86 as discussed in the Personal Conduct section. (SOR ¶ 3.b) For a violation of 18 U.S.C. § 1001 to occur, the false statement to the Government must be material. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995), as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." See also *United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004).

As indicated previously, I found that Applicant intentionally failed to disclose information about the duration of his marijuana use on his 2006 SF-86. If Applicant had provided an accurate answer on his 2006 SF-86 about the extent of his marijuana use, his accurate answer would be capable of influencing the government to deny his security clearance because he would have disclosed that he provided false information on his 2003 SF-86. It was sufficiently serious<sup>9</sup> to jeopardize approval of his security clearance. Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony

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<sup>9</sup> In Applicant's case, this includes aspects such as, the seriousness of the misconduct, and the number of violations of the law, regardless of whether the misconduct resulted in an arrest or conviction.

(the maximum potential sentence includes confinement for five years and a \$10,000 fine). In sum, AG ¶¶ 31(a) and 31(c) apply because the allegations in SOR ¶¶ 3.a and 3.b are established.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

(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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(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.

None of the mitigating conditions fully apply to all of the offenses. AG ¶¶ 32(b) and 32(c) do not apply because Applicant admitted the offenses and no one pressured him into committing the offenses. AG ¶¶ 32(a) and 32(d) are similar and applicable to his possession of marijuana offense. Applicant's marijuana possession in March 2005 is a misdemeanor, and Applicant completed all court-ordered requirements. On December 12, 2006, the marijuana possession charge was dismissed. The marijuana possession offense is mitigated by the passage of time (SOR ¶ 3.a).

Applicant's deliberate falsification of his December 15, 2006 SF-86 is more problematic. He deliberately and intentionally falsified his 2006 SF-86 by not disclosing the duration of his marijuana use because he wanted to deceive the Government into allowing him to retain his employment.

More progress is necessary to assure Applicant has the reliability, trustworthiness, and good judgment necessary to safeguard classified information. His failure to be fully candid and forthright shows poor judgment and militates against approval of a security clearance.

### **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, E, and J 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 served his country as an employee of a Government contractor. He stopped using marijuana from May 2003 to June 2004, and again after March 19, 2005. 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 drug counseling and therapy. He knows the consequences of marijuana use. 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. A former supervisor, his spouse, and his facility security officer laud his hard work, loyalty, trustworthiness, and dedication. I am satisfied that if he continues to abstain from marijuana 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 failed to disclose his marijuana use on his 2003 SF-86, and he failed to fully disclose his marijuana use on 2006 SF-86. He was sufficiently mature to be fully responsible for his conduct. These offenses show a lack of judgment and a failure to abide by the law. Such judgment lapses are especially relevant because they were made in the context of security requirements. His falsifications of two SF-86s raise a serious security concern, and a security clearance is not warranted at this time.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude drug involvement concerns are fully mitigated; however, personal conduct and criminal conduct concerns, relating to falsifications of two SF-86s, are not mitigated at this time. 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.d:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	For Applicant
Subparagraph 2.c:	Against Applicant
Subparagraphs 2.d and 2.e:	For Applicant
Subparagraph 2.f:	Against Applicant
Paragraph 3, Guideline J:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	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.

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Mark Harvey  
Administrative Judge