DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
XXXXXXXXXX, XXXXX	)	ISCR Case No. 07-15402
SSN: XXX-XX-XXXX	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Jennifer I. Goldstein, Esq., Department Counsel
For Applicant: *Pro se*

June 18, 2010

Decision

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns under personal conduct, but has not mitigated security concerns pertaining to criminal conduct, alcohol consumption, and drug involvement. Clearance is denied.

Statement of the Case

On December 5, 2006, Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP). On March 24, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines J (criminal conduct), G (alcohol consumption), H (drug involvement, and E (personal 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 Adjudicative Guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on April 22, 2009. He answered the SOR on May 11, 2009, and DOHA received his answer on May 13, 2009. Department Counsel was prepared to proceed on August 25, 2009. The case was previously assigned to two other administrative judges on August 26, 2009 and September 18, 2009, respectively, before it was assigned to me on September 25, 2009. On October 20, 2009, DOHA issued a notice of hearing scheduling the case for November 18, 2009. The hearing was convened as scheduled.

The Government offered Government Exhibits (GE) 1 through 10, which were received without objection. Applicant offered Applicant Exhibits (AE) A and B, which were received without objection, and he testified on his own behalf. I held the record open until November 27, 2009, to afford Applicant the opportunity to submit additional evidence. Applicant timely submitted AE C through AE F, where were received without objection. DOHA received the hearing transcript (Tr.) on November 25, 2009. The record closed on November 27, 2009.

Findings of Fact

Applicant admitted all of the SOR allegations except for SOR ¶ 2.d., which he denied. His admissions are accepted as findings of fact. (Response to SOR, Tr. 66-68.)

Applicant is a 29-year-old artillery tester, who has been employed by a defense contractor since January 2007. He is a first-time applicant for a security clearance and testified that obtaining a security clearance is a condition of his continued employment. (GE 1, Tr. 17-19.)

Applicant was awarded his high school diploma in October 2006 and has no formal education beyond high school. (GE 1, Tr. 19-20, 22-23.) Applicant has never married. He has two sons, ages 12 and 8, from a previous relationship. Applicant has an informal support arrangement with the mother of his two children. (Tr. 20-22.)

Criminal Conduct

The SOR alleged five separate incidents spanning a ten-year period. The first incident occurred in June 1997 and the fifth and most recent incident occurred in July 2007. The five incidents are summarized below:

(1) In June 1997, at age 17, Applicant was arrested and charged with driving while intoxicated (DWI). At the time, Applicant and his cousin were drinking beer in a lettuce field. At the conclusion of the evening, Applicant drove home and passed out in his car at a stop sign near his house. A policeman discovered Applicant asleep in his car and took him to the police station. At the police station, Applicant tested positive for marijuana. In addition to underage drinking, he had been smoking marijuana earlier in the day. Applicant went to juvenile court and pled guilty to DWI and was sentenced to two days in juvenile detention and

four months supervised probation, and ordered to attend a drug and alcohol awareness program. (GE 3, Tr. 23-28.) (SOR ¶ 1.a.)

(2) In February 2004, at age 23, Applicant was charged with possession of marijuana and drug paraphernalia. Applicant and "a couple of his friends" were smoking marijuana in Applicant's apartment when the police arrived in response to a noise complaint. The police seized 29.35 grams of marijuana and drug paraphernalia from Applicant's apartment. In March 2004, Applicant pled guilty to the charges and was sentenced to six months in jail (suspended), fined $1,355, and ordered to attend drug counseling. (GE 2, GE 5, Tr. 28-34, 55.) (SOR ¶ 1.b.)

(3) In November 2004, at age 24, Applicant was arrested and charged with DWI – Extreme (BAC > .15%). Applicant was drinking at a local bar with friends and was stopped for speeding while bringing a female friend home. Applicant pled guilty to DWI and was sentenced to 30 days in jail (20 days suspended) and three years unsupervised probation, and fined $1,705. He was ordered to attend alcohol awareness classes and install an alcohol monitoring device on his vehicle for one year. He also lost his license for 90 days. He failed to attend the alcohol awareness because he "never got no information in the mail like saying, you have to go here or, you know – and I never got nothing else in the mail about it, so I just I guess left it alone and they didn't get – call me back or anything about it." He also failed to install the monitoring device because, "I didn't get no paperwork either in the mail like saying, okay, you have to go here to get that installed. So I had gone a good two years without it and then I got pulled over and they said, you need to have that in your car," discussed *infra.* (GE 2, GE 3, GE 9, Tr. 35-40.) (SOR ¶ 1.c.)

(4) In September 2006, at age 25, Applicant was cited for speeding (65 MPH in 55 MPH zone) and driving on a suspended driver's license. At the time he was pulled over, he did not have a driver's license because he failed to get his license reinstated after losing his license in November 2004. When he went to the Department of Motor Vehicles (DMV) to get his license reinstated, the DMV noted that he failed to have the monitoring device installed following his November 2004 DWI and informed him that he could not receive his license until the monitoring device was installed. In October 2006, Applicant had the monitoring device installed on his vehicle and stated the reason he did not have the device installed was because he did not want to have to go through the hassle of dealing with the device if he had been drinking. Applicant subsequently showed the court that he had the monitoring device installed and the DMV reinstated his driver's license. The court dismissed the speeding charge. (GE 2, Tr. 40-44) (SOR ¶ 1.d.)

(5) In July 2007, at age 26, Applicant was arrested and charged with possession of alcohol in a park and drinking in public. In August 2007, he pled guilty and was sentenced to 12 days in jail (suspended) and one year of probation, and fined $380. (GE 8, Tr. 44-45.) (SOR ¶ 1.e.)

Alcohol Consumption

The allegation under this concern, (SOR ¶ 2.a.), is cross-alleged under criminal conduct, (SOR ¶¶ 1.a. 1.c. and 1.e.). The facts regarding this allegation discussed *supra* are incorporated under this concern. Applicant has been drinking since he was "14 [or] 15" years old. His drinking began with friends on weekends. He testified his last drink was two days before his hearing and his drink of choice is beer. (Tr. 45-46.)

Drug Involvement

The allegation under this concern, (SOR ¶ 3.b.), is cross-alleged under criminal conduct, (SOR ¶¶ 1.a. and 1.b.). Applicant began using marijuana when he was "13 [or] 14," "in his teens" (about 1994) and continued using marijuana until October 2006. Applicant remembers that date because "that's the day I got fired and that's the day I needed to stop to get another job." (He continued smoking marijuana after his 1997 and 2004 arrests. Both arrests involved use or possession of marijuana and his sentence after both arrests included a drug awareness program or drug counseling.) (Tr. 49-51.) (SOR ¶ 3.a.)

Personal Conduct

In his December 2006 e-QIP, Applicant disclosed, in response to a question regarding past drug use, that he last used marijuana in March 2004 when in fact he had last used marijuana in October 2006. (SOR ¶ 4.a.) Applicant credibly explained that he had been using marijuana since he was a teenager and "messed up" when completing his e-QIP. He added that he corrected himself during subsequent interviews and freely offered the correct date when questioned about past drug use. He readily acknowledged the March 2004 date is incorrect and the correct date is October 2006. A review of his Office of Personnel Management (OPM) interview in July 2008 confirms this assertion. Applicant adamantly denied intentionally falsifying his e-QIP. He further stated that he "even let [his] mom proofread it or double-check it (e-QIP) because – just to make sure [he] did have everything that had happened to [him] during the past seven years." (GE 3, Tr. 50-62, 68-72.)

Applicant was terminated by his previous employer in October 2006 for dropping calls. He worked for his previous employer from March 2001 to October 2006 as a teleservice representative. (Tr. 62-63.) (SOR ¶ 4.b.)

Applicant was cited for speeding in January 2007 and August 2007. He was required to attend driving school following the first offense and the citation was dismissed. Following the second offence, he paid a $210 fine. (Tr. 63-66.) (SOR ¶¶ 4.c. and 4.d.)

Character Evidence

Applicant submitted four work-related certificates or awards documenting his superb performance since January 2007. (AE A, AE B, AE E, AE F.) Applicant's supervisor submitted a reference letter in which he described Applicant as an "excellent employee" and added that "[h]is willingness to learn [a] new task has put him above his peers." (AE D.)

Applicant's mother testified on his behalf. She is employed as a corporate executive assistant and Applicant's father is employed as a truck driver. (Tr. 80.) She described her son as a "good kind-hearted person," who was brought up with "good principles." She described their family as "very tight" and "close." She acknowledged Applicant made some bad decisions along the way, but she always tried to give him her best advice, but unfortunately some of that advice "[g]oes in one ear and out the other." (Tr. 75-75.) Applicant's mother further stated that her son "paid the consequences for his actions, for his wrong decisions." She described him as a "good person," "[n]ot just because he's my son, but [because] he is a good man." She stated that Applicant has disassociated himself from the friends he got in trouble with and now associates with a better group of friends. (Tr. 77.) She concluded that his current job has done a lot for her son and she has noticed a positive and noticeable change in him. (Tr. 81.)

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'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 and modified.

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

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible

extrapolation as to potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "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.

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).

Conclusions

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 raised under Guidelines J (criminal conduct), G (alcohol consumption), H (drug involvement), and E (personal conduct) with respect to the allegations set forth in the SOR.

Criminal Conduct

AG ¶ 30 articulates the security concern pertaining to criminal conduct:

> Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes six criminal conduct disqualifying conditions that could raise a security concern and may be disqualifying. Two of those conditions are applicable 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."

Over a nine-year period, Applicant was convicted five offenses to include alcohol, drugs, and driving-related offenses, discussed *supra*.

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 under this concern are applicable. Applicant's five skirmishes with the law began in 1997 with a DWI arrest. In 2004, he was charged with possession of marijuana and drug paraphernalia. Later in the same year, he was charged with Extreme DWI. In 2006, he was cited for speeding and driving on a suspended driver's license. In 2007, he was charged with possession of alcohol in a park and drinking in public. These arrests began when he was 17 years old and continued until he was 26 years old.

This nine-year history of arrests precludes application of any potential mitigating conditions under this concern. Applicant's past conduct clearly calls into question his ability or willingness to comply with laws, rules, and regulations, and falls short of what is expected of those entrusted with a security clearance.

Alcohol Consumption

AG ¶ 21 articulates the security concern pertaining to alcohol consumption:

> Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

AG ¶¶ 22 describes seven conditions that could raise a security concern and may be disqualifying. One of those conditions is applicable in this case: "(a) alcohol-related incidents away from work, such as driving while under the influence, fighting,

child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent."

Applicant's involvement with alcohol began as a teenager, which lead to his first DWI arrest in 1997. His second alcohol-related arrest occurred in 2004 for extreme DWI. Sentences following both arrests required him to attend an alcohol awareness program. Applicant was arrested most recently in 2007 for consuming alcohol in a park and drinking in public.[1] Applicant continues to drink; however, there have been no documented alcohol-related incidents since his 2007 arrest.

AG ¶ 23 provides four conditions that could potentially mitigate security concerns:

> (a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
>
> (b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);
>
> (c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and
>
> (d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

AG ¶ 20(a) does not define the sufficiency of the passage of time, and there is no "bright-line" definition of what constitutes "recent" conduct. Based on my evaluation of the record evidence as a whole,[2] to include Applicant's history of three alcohol-related arrests with his 2004 arrest being resolved as recently as 2006-2007 when he finally had a monitoring device instated on his vehicle, I am unable to apply AG ¶ 20(a).

[1]*See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

[2]*See* ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)).

AG ¶ 20(b) does not fully apply because Applicant does not fully acknowledge his issues of alcohol abuse. He did not offer any evidence from a qualified professional that he does not have a drinking problem. Even though he attended two alcohol awareness programs, he had a subsequent arrest for drinking alcohol in public in 2007. He continues to drink alcohol to this day.

Furthermore, Applicant did not provide sufficient corroborating evidence suggesting he has overcome his problem. Evidence of a diagnosis or prognosis from qualified medical authority would have been helpful. The fallout from past misuse of alcohol should be evident to him. His history of alcohol-related incidents, current behavior of continuing to drink alcohol, and lack of evidence demonstrating that he has overcome his past misuse of alcohol, leaves me with doubts that his alcohol consumption problems are "unlikely to recur." AG ¶¶ 23(c) and (d) are inapplicable.

Drug Involvement

AG ¶ 24 articulates the security concern pertaining to drug involvement:

> 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.

AG ¶ 25 describes eight drug involvement-related conditions that could raise a security concern and may be disqualifying. Two of those conditions are applicable in this case: "(a) any drug abuse,"[3] and "(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia."

Applicant's testing positive for marijuana following his 1997 arrest and 2004 guilty plea to possession of marijuana and drug paraphernalia[4] warrant application of AG ¶¶ 25(a) and 25(c). When arrested in 2004, he pled guilty to possession of 29.35 grams of marijuana and drug paraphernalia. He used marijuana from about 1994 to October 2006, a 12-year period.

AG ¶ 26 provides four conditions that could potentially mitigate security concerns:

[3]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."

[4]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.

(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.

Concerning AG ¶ 26(a), again 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."[5]

[5] 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 change 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).

AG ¶ 26(a) does not apply. Applicant's two drug-related arrests and 12-year marijuana use was continuing and ongoing. His last marijuana use occurred three months before completing his December 2006 e-QIP. Applicant receives partial credit for disassociating himself from drug-using associates and contacts and changing the environment where drugs were used under AG ¶ 26(b). He did not, however, submit a signed statement of intent with automatic revocation of clearance for any violation. He did not provide a prognosis from a duly qualified medical professional. The remaining mitigating conditions are inapplicable.

Personal Conduct

Under Adjudicative Guideline ¶ 15, the Government's concern is:

> 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 sets out seven personal conduct-related conditions that could raise security concerns and may be disqualifying in this case. Four of those conditions are potentially applicable:

> (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;
>
> (c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and

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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.

regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

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

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:
(2) disruptive, violent, or other inappropriate behavior in the workplace;
(3) a pattern of dishonesty or rule violations;
(4) evidence of significant misuse of Government or other employer's time or resources.

The SOR alleges that Applicant deliberately provided false information or omitted information on his 2006 e-QIP.[6]

AG ¶ 17(f) provides a condition that could mitigate security concerns in this case, stating, "the information was unsubstantiated or from a source of questionable reliability." AG ¶ 17(f) fully applies to SOR ¶ 4.a. Although he admitted preparing his e-QIP, and answering incorrectly, I am convinced that when he completed his e-QIP, he did not intend to omit information about the recency of his marijuana use.[7]

[6]Deliberate and materially false answers on a security clearance application may violate 18 U.S.C. § 1001. 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). If Applicant had provided accurate answers on his security clearance applications, his accurate answers are capable of influencing the government to deny his security clearance. His criminal offenses are sufficiently serious to potentially jeopardize approval of his security clearance. Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a $10,000 fine). In light of my ultimate decision, and the absence of an alleged violation of 18 U.S.C. § 1001 in the SOR, it is unnecessary for me to decide whether or not Applicant actually violated 18 U.S.C. § 1001.

[7] 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 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 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

Applicant freely admitted the extent of his marijuana use when later interviewed by an OPM investigator. His listed marijuana use certainly put the Government on notice of his past drug use. Having had the opportunity to listen to his testimony and observe his demeanor, his explanations as set forth in the findings of fact are accepted as credible. The evidence is not sufficient to show that he made deliberately false statements when he answered he question regarding past drug use.

Additionally, the Government established through Applicant's admissions and evidence presented that he was terminated after purposefully and repeatedly dropping customer calls and in 2007 was cited twice for speeding. The foregoing warrants application of AG ¶¶ 16(c) and 16(d).

Potential mitigating conditions listed under AG ¶ 17 are:

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

Given the length of time since Applicant was terminated for dropping calls, the fact that his current employment record is superb, and the behavior is not repetitive, AG ¶ 17(c) fully applies to SOR ¶ 4.b. The 2007 speeding tickets are minor offenses. Applicant attended driving school after the first ticket and the citation was dismissed. He paid a fine after the second ticket. AG ¶¶ 16(c) and 16(e) fully apply to SOR ¶¶ 4.c. and 4.d.

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

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> 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)).

> 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.

The comments in the Analysis section of this decision are incorporated in the Whole-Person Concept. Applicant receives credit for the turnaround in his conduct and lifestyle since 2006, which is relatively brief when contrasted with his previous lifestyle. His work performance with his employer is good and weighs in his favor. Applicant has strong family support, especially from his mother. There is some compelling evidence of his responsibility, rehabilitation, and mitigation. I am convinced that he is loyal to his company, his family and his country.

Applicant's five arrests or incidents involving criminal or vehicular misconduct spanning a nine-year period, his 12 years of marijuana use, and alcohol-related concerns are serious, recent, and not fully mitigated. His conduct requiring law enforcement involvement and admitted drug use establish a 12 year history of failure to comply with the law. Although he has purportedly turned his life around since October 2006, his past record causes lingering concern and doubt about his eligibility for a security clearance. The best indicator of future behavior is past behavior. Applicant has no one other than himself to blame for the record he has created. While I would like to give him the benefit of the doubt, further time is required to establish that he has made a turnaround warranting the granting of a security clearance.

Applicant is encouraged to continue on his current track. Time will tell whether his ability or willingness to comply with laws, rules and regulations will continue. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude that he has mitigated security concerns pertaining to personal conduct, but he has not mitigated security concerns pertaining to criminal conduct, drug involvement, and alcohol consumption.

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" and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has failed to mitigate or overcome the government's case. For the reasons stated, I conclude he is not 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 J:	AGAINST APPLICANT
Subparagraphs 1.a. through e.:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Paragraph 3, Guideline H:	AGAINST APPLICANT
Subparagraphs 3.a. through b.:	Against Applicant
Paragraph 4, Guideline E:	FOR APPLICANT
Subparagraphs 4.a. through d.:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

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ROBERT J. TUIDER
Administrative Judge