DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 07-16283
SSN:	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro Se*

March 23, 2009

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information is granted.

Applicant submitted his Security Clearance Application (SF 86 e-QIP), on February 14, 2007. On September 24, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines E and H. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on October 7, 2008. He submitted a written response to the SOR allegations on October 27, 2008, and requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a File of Relevant Material (FORM) and mailed Applicant a complete copy on January 27, 2009. Applicant received the FORM on February 3, 2009. He had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He submitted a written response on March 2, 2009, which is included in the record. DOHA assigned this case to me on March 12, 2009. The government submitted 12 exhibits, which have been marked as Items 1-12 and admitted into the record. Applicant's response to the SOR has been marked and admitted as Item 3.

Findings of Fact

In his Answer to the SOR, dated October 27, 2008, Applicant admitted the factual allegations in ¶¶ 1.a-1.g, and 2.a-2.b of the SOR. In his response to the FORM, Applicant denies an intent to misled.

Applicant, who is 23 years old, works as an engineer technician for a Department of Defense contractor. He began his employment two years ago. Applicant attended college, but did not graduate. He worked part-time in the school year and full-time in the summer. Applicant has two young children. (Item 4; Response to FORM)

As a freshman college student, Applicant attended parties where marijuana was available. In May 2005, he smoked, "one puff", of a marijuana cigarette. He did not like the effect marijuana had on him. He decided not to smoke it again, and has not. He recognized that marijuana use could get him in trouble. (Item 5; Response to Form)

In college, Applicant had friends who smoked marijuana. When he attended their parties, he abstained from smoking marijuana. In December 2006, Applicant drove three friends and himself to a movie. On the way to the movie, one friend smoked marijuana in his car with his knowledge. After the movie, he and his friends purchased beer to take to a party. Two beers were consumed immediately. Applicant then drove to the party. The police stopped him because he was driving 20 miles m.p.h. over the speed limit. After approaching the car, the police officer smelled marijuana and observed beer in the car. Applicant and his friends were asked to step out of the car and to sit on the sidewalk. The police searched Applicant's car and found a bag of marijuana in the console. (Item 8; Response to FORM)

During the course of the arrest, one of Applicant's friends acknowledged that the marijuana belonged to him. However, because Applicant and his friends first denied the existence of the marijuana, the police arrested all four. The police charged all four with possession of marijuana, possession of drug paraphernalia and open container in vehicle. The police also charged Applicant with speed greater than reasonable and

prudent. The police charged two friends with underage drinking and one of these friends with possession of a suspended license. (Item 8)

Applicant and the prosecutor agreed to a deferred prosecution on the charges filed against him in December 2006 upon the condition Applicant did not commit any crimes and pay a $200 fine. As part of the agreement, the prosecutor dismissed the case against Applicant in January 2007. The one friend who admitted to ownership of the marijuana was sentenced on the possession of marijuana charge only. The prosecutor did not proceed against the remaining two friends in his car in December 2006. After this incident, Applicant decided to change his behavior. He has no future intent to use drugs or smoke marijuana. (Item 9; Response to FORM)

Between October 2006 and July 2007, Applicant received six traffic violations, including the December 2006 stop. Four of the six traffic violations involved speeding. He received three speeding tickets in July 2007. Applicant states that he thought it would be "manly" to drive fast to impress his friends. He eventually learned that the "only thing speeding accomplished was me [him] paying fines and [his] my friends boycotting riding with me since it was dangerous". He now realizes the dangers of speeding. Since the birth of his children, he recognizes how important it is to follow the rules of the road and does. (Items 10, 11, 12; Response to FORM)

The traffic charge on July 16, 2007 included a charge for operating in violation of restriction. Applicant's glasses broke earlier in the day. He drove home without his glasses. He pled guilty to both charges and paid the fine of $308. (Item 11; Response to FORM)

When he completed his SF-86, Applicant answered "no" to the following question:

Section 24: Your Use of Illegal Drugs and Drug Activity

> a. Since the age of 16 or in the last 7 years, which ever 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 answered "no" to this question because he did not consider a single puff of marijuana in 2005 substantial enough to be reported as use. Applicant listed his arrest for possession of marijuana and possession of paraphernalia when asked about his criminal record. His other answers on the SF-86 are detailed and complete. He acknowledged his one time use of marijuana as a college student in his response to interrogatories. His answer is the source of the information in allegation 2.a.

Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.[1]

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[1]After any decision, the losing party has a right to appeal the case to the Defense Office of Hearings and Appeals Appeal Board. The Appeal Board's review authority is limited to determining whether three tests are met:

> E3.1.32.1. The Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge:
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> E#.a.32.2. The Administrative Judge adhered to the procedures required by E.O. 10865 (enclosure 1) and this Directive: or
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> E3.1.32.3. The Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law.

The Appeal Board does not conduct a "*de novo* determination", recognizing that its members have no opportunity to observe witnesses and make credibility determinations. The Supreme Court in *United States v. Raddatz*, 447 U.S. 667, 690 (1980) succinctly defined the phrase "*de novo* determination":

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline E, 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

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> [This legal term] has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy. Thus, in *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 23 [(1974)], the Court had occasion to define "*de novo* proceeding" as a review that was "unfettered by any prejudice from the [prior] agency proceeding and free from any claim that the [agency's] determination is supported by substantial evidence." In *United States v. First City National Bank*, 386 U.S. 361,368 [(1967)], this Court observed that "review *de novo*" means "that the court should make an independent determination of the issues" and should not give any special weight to the [prior] determination of the administrative agency.

(Internal footnotes omitted). *See* ISCR Case No. 07-10396 (App. Bd., Oct. 2, 2008) and ISCR Case No. 07-07144 (App. Bd., Oct. 7, 2008). In ISCR Case No. 05-01820 (App. Bd. Dec 14, 2006), the Appeal Board criticized the administrative judge's analysis, supporting grant of a clearance for a PRC-related Applicant, and then decided the case itself. Judge White's dissenting opinion cogently explains why credibility determinations and ultimately the decision whether to grant or deny a clearance should be left to the judge who makes witness credibility determinations. *Id*. at 5-7. *See also* ISCR Case No. 04-06386 at 10-11 (App. Bd. Aug. 25, 2006)(Harvey, J., dissenting) (discussing limitations on Appeal Board's authority to reverse hearing-level judicial decisions and recommending remand of cases to resolve material, prejudicial error) and ISCR Case No. 07-03307 (App. Bd. Sept. 29, 2008). Compliance with the Agency's rules and regulations is required. *See United States ex. rel. Acardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Lopez v. FAA*, 318 F.3d 242, 247-248 (D.C. Cir 2003); *Nickelson v. United States*, 284 F. Supp.2d 387, 390 (E.D. Va. 2003)(explaining standard of review).

and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16(a) describes conditions that could raise a security concern and may be disqualifying:

> (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and
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> (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:
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> . . .
>
> (3) a pattern of dishonesty or rule violations.

For AG ¶ 16(A) to apply, Applicant's omission must be deliberate. The government established that Applicant omitted a material fact from his SF-86 when he answered "no" to Question 24 a about one time use of marijuana. This information is material to the evaluation of Applicant's trustworthiness to hold a security clearance and to his honesty. In his response to the FORM, he denies, however, that he had an intent to hide information about his one time use of marijuana. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.[2] For DC ¶ 16 (a) to apply, the government must establish that Applicant's omission, concealment or falsification in his answer was deliberate.

When he completed his SF-86 and e-QIP, Applicant listed his criminal arrest for possession of marijuana and possession of paraphernalia, but did not acknowledge that he used marijuana. He tried marijuana once while a college student, a fact he admitted in his answers to interrogatories. His failure to acknowledge his one time use or "puff" of marijuana is not dispositive because his listed his arrest for possession of marijuana

[2] *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov.17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

and possession of paraphernalia. By admitting his arrest for drug possession, Applicant put the government on notice that marijuana use may be an issue in this case. When asked about his use of marijuana in interrogatories, he readily acknowledged his very limited use of marijuana. He has been honest in responding to all requests for information. His actions show he had no intention of concealing his very limited drug use. Allegation 1.g under Guideline E is found in favor of Applicant.[3]

Applicant's five traffic tickets in nine months is sufficient to establish a rules violation under AG ¶ 16(d)(3). Mitigation may be established under AG ¶ 17 (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;" or (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."

Applicant has not received a speeding ticket in 21 months. As he grew older, he learned the cost to him for his driving was not only financial, but the loss of trust from friends. With the birth of his children, he fully realizes the dangers of his bad driving. These factors influenced a change in his attitude, his lifestyle and driving behavior. He follows the rules of the road as he does not want to harm his children or others. There is little likelihood that he will repeat his poor driving patterns. Applicant has mitigated the government's security concerns under Guideline E.

Guideline H, Drug Involvement

AG ¶ 24 expresses 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.
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> (a) Drugs are defined as mood and behavior altering substances, and include:
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> (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
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> (2) inhalants and other similar substances;

[3]Even if I were to find the government had established disqualifying condition AG ¶ 16(a), mitigating condition AG 18(f), *the information was unsubstantiated or from a source of questionable reliability* would apply as the allegation of intentional falsification was unsubstantiated.

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

(a) any drug abuse (see above definition);

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

Applicant acknowledges one use of marijuana in 2005 and his arrest in 2006 for possession of marijuana and possession of paraphernalia. These incidents are sufficient to establish the above disqualifying conditions.

Applicant may mitigate the government's security concerns under AG ¶ 26 by showing that:

(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;

Applicant smoked marijuana once as a college student. Because he did not like the effect of the marijuana on him, he decided against smoking it in the future. His one time use does not cast doubt on his current reliability, trustworthiness or good judgment. After being arrested for his friend's drug conduct, Applicant decided he needed to change the direction of his life. He did not want to be involved with the police and drugs. It has been more than two years since his arrest and nearly three years since he experimented with marijuana. He has no intent to smoke marijuana in the future. He does not want to set a bad example for his children. Applicant's past minimal drug use is not a security concern as he has changed his focus in life to his family and compliance with laws. Guideline H is found in favor of Applicant.

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 common sense judgment based upon careful consideration of the guidelines and the whole person concept. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both good and bad. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is shown. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

The mitigating evidence under the whole person concept is substantial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's problems occurred two to three years ago and have not reoccurred. Applicant is only 23 years old, but he has grown up in the last two years. He is now the father of two young children. He recognizes his responsibility to his children and wants to set a good example for them. He has learned from his mistakes of a few years ago. He has changed his attitude and his behavior. There is little likelihood that he will ever experiment with drugs in the future. He understands now that it is important to follow the rules of the road and of society. He has done so for almost two years. Applicant's has demonstrated that he is trustworthy and honest.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his personal conduct and drug involvement.

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 E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARY E. HENRY
Administrative Judge