DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-04283
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Candace Le'I, Esq., Department Counsel
For Applicant: Charles J. Ware, Esq.

October 26, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on September 19, 2006. On March 31, 2009, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines H and E. 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) promulgated by the President on December 29, 2005.

Applicant received the SOR on April 3, 2009; answered it on April 11, 2009; and requested a hearing on the record without a hearing. DOHA received the request on April 15, 2009. Department Counsel requested a hearing (Tr. 13) and was ready to proceed on July 1, 2009. The case was assigned to me on July 7, 2009. DOHA issued a notice of hearing on July 9, 2009, scheduling the hearing for August 17, 2009. On July 31, 2009, Applicant retained counsel, and his counsel requested that the hearing be postponed because he had conflicting obligations on the scheduled hearing date. I granted the request on August 12, 2009, and on August 18, 2009, DOHA issued a second notice of hearing, rescheduling the case for September 21, 2009. I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. The record closed upon adjournment of the hearing. DOHA received the transcript (Tr.) on September 24, 2009.

Amendment of SOR

Department Counsel moved to amend the first sentence of SOR ¶ 2.a by inserting the words, "by answering 'no,'" after the words and figures, "September 10, 2006," and by amending the last sentence of SOR ¶ 2.a to read as follows: "You deliberately failed to disclose that you engaged in conduct as set forth above in 1.a through 1.b." Applicant did not object, and I granted the motion (Tr. 14-16). The amendments are handwritten on the SOR.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.d. He admitted answering "no" to the questions on his security clearance application about drug involvement, but he denied intending to deceive. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 37-year-old driver and general clerk employed by a federal contractor. He has worked for his current employer since October 2005. He attended high school through the 10th grade, received his GED high school equivalency certificate, and attended a vocational school from January through April 1990. He was married in August 1997 and has no children. He received a favorable trustworthiness determination from another federal agency in November 2001. He has never held a security clearance.

A co-worker for the past three years submitted a statement describing Applicant as a trustworthy worker who received positive feedback from his supervisor and customers (AX A). A former supervisor described him as "a joy to supervise" because of his work ethic and reliability (AX B).

When Applicant submitted his security clearance application, he answered "no" to three questions about prior drug involvement (GX 1 at 33). His wife, who is a high school graduate, helped him with the application (Tr. 34). He did not disclose that he

had purchased and used marijuana for several years. In his answer to the SOR, he stated he answered "no" to the questions because he was not using marijuana at the time he submitted his application (Answer to SOR at 2). He gave the same explanation at the hearing (Tr. 29). He denied intentionally falsifying his application (Tr. 32). However, in response to Department Counsel's cross-examination, he admitted he understood each of the three questions about controlled substances and he admitted he knew he was not answering truthfully when he answered "no" to all three questions (Tr. 42-45).

Applicant testified he had a problem with marijuana use a "few years ago," but he no longer has a problem with it (Tr. 30-31). He started using marijuana around 1991 (Tr. 52). From 1991 to 1995, he used it about every other weekend (Tr. 53). In 1995-1996, he used marijuana once every other month (Tr. 52). From 1996 to 1999, he did not use it (Tr. 54). After 1999, he used it only on special occasions (Tr. 55). He admitted he used it "a few times" after submitting his security clearance application (Tr. 29-30). He defined "a few times" as "three to four – two to three, maybe." He last used it on New Year's Day 2008 (Tr. 46-47). After he was married, he used marijuana alone on some occasions and with his family members on other occasions. He purchased marijuana from "people on the streets" on some occasions and was given marijuana on others. He denied selling or distributing marijuana (Tr. 83).

In DOHA interrogatories, Applicant was asked about his intentions regarding future marijuana use. In his response dated May 5, 2008, he stated: "It's getting better, minimum to none is my goal, as far as frequency is concerned." He stated he decided to stop using marijuana for the sake of his health and his family and to avoid further involvement with the legal system (GX 2 at 2). At the hearing, he admitted he still is attracted to marijuana (Tr. 79). He has not sought or received drug counseling (GX 2 at 3). He is unwilling to "turn [his] back" on family members and close friends of the family who use marijuana (GX 2 at 3; Tr. 70-74).

On March 24, 2007, Applicant was charged with distribution of a controlled substance, possession of marijuana, and having a handgun on his person. The two drug-related charges were disposed of by nolle prosequi. Applicant pleaded not guilty to the handgun offense, and he was placed on probation before judgment, fined $292.50, required to perform 100 hours of community service, and required to pay court costs of $57.50 (GX 6).

Applicant described his arrest on March 24, 2007, as a case of being in the wrong place at the wrong time. He and some family members were in a liquor store when there was a disturbance outside and the police arrived. Applicant was arrested and found in possession of three baggies of marijuana and an unregistered handgun. He explained that he intended to use the marijuana at a party. He denied intending to sell it. He testified he obtained the handgun for his own protection after being carjacked about a year earlier (Tr. 80-83).

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's 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 made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the

facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline H (Drug Involvement)

The SOR alleges Applicant "used marijuana with varying frequency, to include as frequently as every other weekend, for multiple years up to at least March 8, 2008 (SOR ¶ 1.a); purchased marijuana (SOR ¶ 1.b); continued to associate with illegal drug users as recently as May 2008 (SOR ¶ 1.c); and was arrested in March 2007 and charged with distribution of a controlled dangerous substance, possession of marijuana, and possession of a handgun on his person (SOR ¶ 1.d). The concern under this guideline is as follows: "Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations." AG ¶ 24.

This guideline encompasses use or misuse of "drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens). AG ¶ 24(a)(1). Disqualifying conditions under this guideline include "any drug abuse," and "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution" AG ¶¶ 25(a) and (c). Drug abuse is "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." AG ¶ 24(b).

The evidence raises these two disqualifying conditions, shifting the burden to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns raised by drug involvement may be mitigated by showing that "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." AG ¶ 26(a). The first prong of ¶ 26(a) ("happened so long ago") focuses on the recentness of drug involvement. 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 evidence. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). 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." *Id*.

Applicant testified he last used marijuana on New Year's Day 2008, almost two years ago. While this period of abstinence is "a significant period of time," it has occurred in the context of frequent use for five years, abstinence for three years, and resumption of use in 1999. He used it "a few times" after submitting his security clearance application. He continues to desire marijuana, and he has not sought or received counseling. His response to DOHA interrogatories about the likelihood of future marijuana use was ambivalent. His use did not occur under circumstances making it unlikely to recur. After considering all the evidence, I conclude AG ¶ 26(a) is not established.

Security concerns under this guideline also may be mitigated by "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; [and] (3) an appropriate period of abstinence." AG ¶ 26(b). Applicant explained in his answers to DOHA interrogatories that he cannot establish the first two prongs because his family members are marijuana users. He has not established "an appropriate period of abstinence," because he has a history of abstinence and relapse. His last period of sustained abstinence was for about three years, from 1996 to 1999, but he then relapsed and used marijuana after submitting his security clearance application. He has not sought or received drug counseling, and he has no support structure to help him abstain from drug use. I conclude AG ¶ 26(b) is not established.

Guideline E, Personal Conduct

SOR ¶ 2.a alleges Applicant falsified his security clearance application in September 2006 by answering "no" to questions about drug involvement and intentionally failing to disclose that he purchased and used marijuana. The concern under this guideline is set out in AG ¶ 15 as follows:

> 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.

The relevant disqualifying condition in this case is "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." AG ¶ 16(a). When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not prove a "deliberate omission,

concealment, or falsification of relevant facts." An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

In his answer to the SOR and on direct examination at the hearing, Applicant denied intentional falsification. He explained that he answered "no" to the questions about drug involvement because he was not using marijuana at the time he submitted his application. This explanation was implausible and unconvincing. On cross-examination, he admitted he understood the questions and knew that his answers were not truthful. I conclude AG ¶ 16(a) is raised.

Security concerns raised by false or misleading answers on a security clearance application may be mitigated by showing that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." AG ¶ 17(a). This mitigating condition is not established, because Applicant made no effort to correct the omission and persisted in his implausible explanation for his omission during his direct testimony at the hearing. He finally admitted his falsification during cross-examination.

Security concerns arising from personal conduct may be mitigated if "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." AG ¶ 17(c). Applicant's falsification was not minor because it undermined the integrity of the security clearance process. It did not occur under unique circumstances. Three years have passed, and there is no evidence of similar misconduct, but he persisted in attempting to justify his falsification until he was cross-examined at the hearing. Under all the circumstances, it casts doubt on his reliability, trustworthiness, and good judgment. AG ¶ 17(c) is not established.

Finally, security concerns based on personal conduct may be mitigated if "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." AG ¶ 17(d). Applicant eventually acknowledged his falsification during cross-examination at the hearing, but there is no evidence of counseling or "other positive steps" to prevent recurrence. I conclude AG ¶ 17(d) is not established.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guidelines H and E in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature adult, but he has spent much of his life involved with illegal drugs, and he lives in a family environment where his drug involvement is acceptable. He has made considerable strides in changing his behavior, but he has not yet accomplished his declared goal of living a drug-free life. His lack of candor on his security clearance application and his implausible explanations for his falsified application raise serious doubts about his reliability and trustworthiness.

After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on drug involvement and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge