DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 08-05204
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Alison O'Connell, Esquire, Department Counsel

For Applicant: Eric A. Eisen, Esquire

January 8, 2010

Decision

O'BRIEN, Rita C., Administrative Judge*:*

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guideline for personal conduct. Accordingly, his request for a security clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on July 20, 2007. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding[1] that it is clearly consistent with the national interest to grant Applicant's request.

[1] Required by Executive Order 10865, as amended, and DoD Directive 5220.6 (Directive), as amended.

On April 27, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) that specified the basis for its decision: security concerns addressed in the Directive under Guideline E (Personal Conduct) of the Revised Adjudicative Guidelines (AG).[2]

Applicant signed his notarized Answer on June 7, 2009, in which he admitted two allegations and denied six allegations under Guideline E. Applicant requested a hearing before an administrative judge. Department Counsel was prepared to proceed on August 3, 2009, and the case was assigned to me on August 13, 2009. DOHA issued a Notice of Hearing on September 14, 2009. I convened the hearing as scheduled on October 14, 2009. The government offered six exhibits, marked as Government Exhibits (GE) 1 through 6, which were admitted without objection. Applicant testified on his own behalf and did not present other witness testimony. He also offered three exhibits, marked as Applicant Exhibit (AE) A through C, which were admitted without objection. The record closed upon adjournment of the hearing. However, on October 15, 2009, Applicant moved to re-open the record to admit an additional character reference. I opened the record and added it to Applicant's character references exhibit, AE B. The record closed on October 15, 2009. DOHA received the transcript on October 20, 2009.

Findings of Fact

Applicant's admissions in response to the SOR are accepted as fact. After a thorough review of the pleadings, Applicant's response to the Statement of Reasons, and the record evidence, I make the following additional findings of fact.

Applicant is 46 years old. He holds a bachelor's degree in business. He also completed coursework toward a master's degree (AE C; Tr. 21). Applicant worked in the computer field in the late 1980s. From 1988 to 2001, he worked as a stunt double and body double for a movie actor (AE C). In about 1995, he began working in training films for a federal government agency (agency A) (Tr. 23-26). He received his first security clearance through agency A in approximately 1998 (Tr. 92). From 2001 to the present, he has continued to work in information technology. As of November 2008, he held the position of client sales executive for a defense contractor (GE 3). Applicant has never been married, but has been in a committed relationship since the mid-1990s. He has a nine-year-old daughter from this relationship (Tr. 26-27).

From June to August 2001, Applicant was employed by company B as a senior network engineer. Company B was a subcontractor to defense contractor C. Applicant worked on-site at defense contractor C's location, where he reported to a defense contractor C manager. Company B instructed Applicant to report on his timesheet the

[2] Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. The Revised Adjudicative Guidelines supersede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

actual hours worked on a certain defense contract. On August 9, 2001, an email to company B employees reiterated that all hours worked were required to be reported on timesheets. Applicant testified that he worked many overtime hours, but did not report them because he was told by his defense contractor C manager that he was not authorized to work overtime, and he would be terminated if he reported the extra hours. Company B told him that his on-site defense contractor manager was not the person authorized to pay for overtime hours (Tr. 54-55). Applicant testified that company B was being paid for overtime hours reported by other employees (Tr. 54). In August 2001, he was terminated by company B for falsifying his time cards. The company B president described Applicant as "technically competent, ambitious, confident, arrogant and deceitful." The company B facility security assistant found Applicant to be high-strung but goal-oriented and competent. She could not recommend him, however, because of "Subject's actions when he worked for [company B]." Applicant testified that company B was later released from the contract, but that he was retained by defense contractor C. He disclosed the termination on his 2001 and 2007 security clearance applications (GE 1, 2, 6; AE C; Tr. 50-51, 54-56).

After starting with a new employer in September 2001, Applicant completed an application for a secret clearance through the Department of Defense in December 2001 (GE 2). In response to question #27, concerning drug use in the previous seven years (1994–2001), he disclosed that he used marijuana during the month of July 1995, although he did not know the number of times (GE 2). During a follow-up interview with an agent of the Defense Security Service in May 2003, Applicant stated that he used marijuana "during my early teens and during college as well as I had some occasional use at parties up until 1995. I stopped using 'pot' after this time and I have no intention of using it in the future." (GE 5).

Applicant held a secret security clearance in the late 1990s when he performed in training films for government agency A (Tr. 53). Agency A requested that Applicant apply to upgrade his clearance to top secret (GE 1; Tr. 27).[3] During the security interview in July 2003, Applicant reported that he had not used marijuana since 1995, when he used it twice at parties (AE C). His co-workers, who were interviewed as part of this investigation, described applicant as stable, focused, and professional. None stated that they were aware of any illegal drug use by Applicant (GE 3).

[3] The evidence indicates that two investigations were ongoing simultaneously. One was initiated by agency A to upgrade Applicant's clearance to top secret. He completed a security clearance application in April 2003, and agency A interviewed Applicant and administered two polygraph examinations between 2003 and 2004, Based on the results of the July 2004 polygraph interview, agency A revoked Applicant's security clearance and issued an SOR in October 2004. Applicant appealed the decision, and a hearing was set for January 2007, but was not held. An investigation for a Department of Defense (DoD) secret security clearance was initiated with the December 2001 security clearance application. Applicant was interviewed by a DoD agent in May 2003. He received a security clearance that year. He learned in 2007 that this security clearance was revoked. He testified that he did not know the reason, and he re-applied for a security clearance in July 2007 (GE 1).

Applicant testified that he completed two polygraph examinations as part of the agency A investigation (Tr. 28). The interviewer who administered the second polygraph in July 2004 focused on the use of illegal drugs. According to the agency A SOR[4] the Applicant stated during the polygraph interview that he:

- Used marijuana from his early teens to May 2004
- Smoked marijuana daily in the late 1980s but quit using it in 1995
- Smoked sporadically from 1997 until he again quit in 2001
- Resumed smoking in 2002
- Smoked marijuana 12 to 15 times between June 2002 and June 2004
- Was concerned about work-related drug testing as he had held a security clearance during these periods
- Would find it difficult to follow an employer's drug-free policy because it would entail avoiding family and friends who used marijuana
- Gave his brother $100 to buy marijuana, which Applicant stored in his home to share with family and friends (GE 3).

Applicant denies making these statements during the polygraph interview (Tr. 60-63). However, the interviewer concluded that Applicant had provided false information about his drug use on his April 2003 security clearance application and in his July 2003 security interview (GE 3; Tr. 41-42). The agency issued an SOR in July 2004, citing concerns about Applicant's illegal drug use and personal conduct, and revoked Applicant's security clearance in October 2004.

In his response to the agency A SOR, Applicant stated that a misunderstanding occurred during the polygraph interview. Applicant testified that the interviewer asked him to share negative information of which the agency was not aware. He denied having any such information to share. The interviewer rephrased it as a hypothetical: If a foreign country were to blackmail him, what negative information about Applicant could the country provide to the agency? He said that in such a scenario, the foreign country could disclose that he had used marijuana in the past (GE 3; Tr. 41-43). Applicant testified,

[4] Agency A's SOR (GE 3) describes Applicant's statements made during the July 2004 polygraph interview. It was admitted without objection. Such documents are admissible under Federal Rules of Evidence 803(b) "to present evidence about the findings and conclusions reached by a government entity," and they should be considered as substantial evidence (ISCR Case No. 02-12299 at 4-5 (App. Bd. Aug 8, 2005).

> APPLICANT: …But then she said, “Did you smoke recently,” or “more recently?” or something of that matter, and I said, “They could say I did. I did not, but they could say I did.”

(Applicant then testified that the agent asked, “Well, why could they say you did?”)

> APPLICANT: And then we got into this whole discussion around I attended parties and there were some family events where smoking of marijuana does go on. And -- but I was very clear there's a difference between smoking of marijuana going on and me smoking. And then we got into a whole discussion of, well, how many times were these events and I was honest -- and I still can't tell you how many parties these were -- there were. (Tr. 42-44)

Applicant then told the agent that the family events occurred approximately once or twice per year, and that his family members were not consistent drug users. Applicant's counsel asked if Applicant and the agent discussed his own drug use at these events:

> APPLICANT: I -- it never -- she never asked. I'm clear that I didn't, but she never -- that was never a question that was placed on the table.
>
> MR. EISEN: And so what were you talking about, secondhand smoke?
>
> APPLICANT: At that time I was -- I was talking about secondhand smoke, and I don't know if you remember the Nineties, but especially when someone quits, they blow a lot near or at you or make fun of you. So, it was all secondhand smoke (Tr. 45-46).

It appears from Applicant’s testimony that during his interview he was concerned that associating with persons who were using marijuana at family parties and inhaling second-hand smoke might be illegal, or interpreted as illegal drug use on his part (Tr. 46-47).

The agency’s SOR alleged that Applicant answered “No” to questions on a 2003 security clearance application relating to his illegal drug use, and his use while holding a security clearance. Applicant testified that he was upset and irate when he read the SOR (Tr. 28). In his response to the agency’s SOR, he stated,

> I believe the interviewer miss-understood [*sic*] my statements during the review and/or the [*sic*] recorded some things incorrectly out of context. I believe that these miss-perceptions or errors have lead to a belief that I am un-trust worthy, dishonest and that I lack condor. I contend that all of these perceptions are incorrect.…Regarding the drug use, please note that I contend that this too is a part of what was incorrectly documented

> within the context of my discussions. I also have always expressed a willingness to under-go a drug test and I expressed that I have successfully taken drug tests.

He requested a hearing and in December 2004, the agency informed him that he would be notified when a hearing would be held (GE 3).

In November 2006, agency A notified Applicant that his hearing would take place on December 13 at 9:00 a.m. The day before the hearing, Applicant asked that it be re-scheduled to January 3 or 4, 2007. The hearing was re-set for January 4, 2007 at 9:00 a.m. He was contacted to confirm notice of the hearing, but he did not return the calls. Agency A's letter dated January 9, 2007 informed him that if he did not contact the agency, his appeal would be cancelled. Applicant did not respond, and the hearing did not take place. In March 2008, he told a DoD investigator that the appeal was not granted in a timely manner. In November 2008, Applicant stated that he could not respond timely because of work commitments (GE 3).

At the October 2009 hearing, he denied that a hearing date was scheduled at all. He denied that he failed to appear at the agency hearing, stating, "It wasn't a no-show, so I should be clear with that. It was not a case that I did not show up. It was a case that I said I was not going to have it. I did not do a no-show." (Tr. 106). When asked why he would say that, when he had submitted documents showing a scheduled hearing, he testified, "…We talked about one, but we did not schedule it. So -- but I -- so, I don't know." (GE 3; Tr. 73-74). According to his testimony, agency A called him in late 2006 and asked if he wished to continue the security clearance process. He told the agent he did not wish to continue the process with agency A. He testified that he did not understand that loss of the agency clearance could affect his DoD clearance, and that if he had known, he would have attended the agency hearing (Tr. 30-33).

In his March 2008 statement to a DoD investigator, Applicant did not disclose that his security clearance had been revoked because of illegal drug use. He wrote, "I state that I had a [agency] clearance (top secret) revoked in 2004. I could not recall the reasons." (GE 4). When asked at the hearing if he forgot why agency A revoked his clearance, Applicant testified,

> APPLICANT: "I would say "forget" as in "I don't know what happened," or "forget" as in -- as in -- what? I mean, the [agency] revoked my clearance because I didn't go on an interview, was my understanding." (Tr. 69).

In July 2007, Applicant's DoD security clearance was revoked. He testified that an SOR was not issued, and neither he nor his security officer knew why it was revoked. He submitted a new security clearance application. He listed the revocation of two security clearances, stating that he lost his security clearance because he "Failed to pass Polygraph Test and thus failed to recieve [*sic*] upgrade to Top Secret

Clearance." (GE 1). In response to questions concerning illegal drug use within the previous seven years, and illegal drug use while holding a security clearance, Applicant answered "No" to both questions (GE 1, 3; Tr. 72-73).

Applicant submitted several character references (AE B). A family friend, who has known Applicant for 12 years, stated that he is honest and trustworthy. She nominated him for the board of directors of an educational organization because he is a strong role model. Two former Navy officers, who currently manage accounts that Applicant supports, have known him for several years and are familiar with his work performance. One noted that Applicant is a man of integrity who is committed to supporting the military. The other manager commented on Applicant's honesty, trustworthiness and patriotism, and noted that granting his clearance would enhance mission effectiveness. A Navy lieutenant commander who has known Applicant for four to five years commented that Applicant is a strong and hardworking leader on work projects and is a man of integrity. Applicant's girlfriend, with whom he has lived since the mid-1990s, is a doctor of optometry. She related that Applicant is dedicated to his family, coaches their daughter's soccer team, stresses healthy living, and would not engage in drug use. She noted that Applicant is highly respected in his neighborhood, and served on his community association board of directors and as its president.

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.[5] Decisions must also reflect consideration of the "whole person" factors listed in ¶ 2(a) of the Guidelines.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline E (Personal Conduct).

A security clearance decision is intended only to resolve the questions of whether it is clearly consistent with the national interest[6] for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government

[5] Directive. 6.3.

[6] *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).

must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.[7] A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or his own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.[8]

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern about 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.

The Guideline E allegations implicate the following disqualifying conditions under AG ¶ 16:

> (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;
>
> (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,

[7] *See Egan,* 484 U.S. at 528, 531.

[8] *See Egan;* Revised Adjudicative Guidelines, ¶ 2(b).

> 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:…(3) a pattern of dishonesty or rule violations

The government alleges that Applicant deliberately falsified answers regarding his illegal drug use on security clearance applications in 2001 and 2007; and in written statements submitted to government investigators in May 2003 and March 2008. His drug use was disclosed during his polygraph interview in 2004, when he provided details showing that his marijuana use ended not in 1995, but in 2004. He provided specifics of his frequency and pattern of marijuana usage: the dates when he used it on a daily basis, when he stopped using it, when he resumed usage, when he used it sporadically, and the number of times he used in between 2002 and 2004. He also disclosed that he gave his brother money for marijuana, that he used marijuana while holding a security clearance, and discussed the difficulties presented by being employed in a drug-free workplace. Applicant denies making these statements during the interview. He claims that the interviewer posed a hypothetical scenario, and his subsequent responses to it were misunderstood. However, his explanation was not credible. His testimony about the hypothetical, about the illegality of associating with drug users, and about second-hand smoke was ambiguous, unclear, and does not explain the relation between the hypothetical and the numerous specifics he provided about his drug use. I find that the detailed disclosures during the polygraph interview are an accurate representation of the dates, times, frequency and circumstances of Applicant's illegal drug use, and that his statements on his security clearance applications and in his other interviews were falsifications.

Several other statements made by Applicant are not credible.

- He provided contradictory information about the hearing with agency A. He testified that a hearing was never scheduled when, in fact, GE 3 shows that a hearing was not only scheduled once, but was rescheduled a second time at Applicant's own request. He testified that he “was not a no-show” at the hearing, in spite of the fact that his documents show he did not appear at the hearing.

- In his 2001 security clearance application, he stated that he used marijuana in the month of July 1995. However, in 2003 he said that he used it in his teens and at college (which were both outside the scope of the pertinent question), but also occasionally at parties up until 1995. This indicates he used marijuana more often than one month in 1995.

- Applicant stated that he was irate and upset when he received the agency A SOR. Given his anger, and the threat this SOR caused to

his career, it is difficult to understand why he did not state, anywhere in his response, that the drug-use allegations were untrue; instead, he equivocated by saying his statements were misunderstood and misperceived.

- Applicant's 2008 statement that he could not remember why he received the agency A SOR is not credible, given the SOR's significance, and the anger he said it provoked.

AG ¶¶ 16(a) and 16(b) apply.

AG ¶ 16(d) is relevant to Applicant's employment termination. Applicant failed to report on his time-card the actual hours he worked, and testified that he could not satisfy the reporting requirements of both company A and defense contractor B. He chose to ignore the requirements of his employer, company A. However, other company A employees did report their overtime hours. There is no record evidence or testimony that they were reprimanded or terminated for doing so, and there is testimony that they were paid for those hours. The fact that the defense contractor may have released company A from the contract, and retained Applicant, does not mitigate the fact that Applicant falsified his time cards by not reporting his true work hours. His decision to disregard his employer's repeated instructions reflects poorly on his judgment, trustworthiness and willingness to comply with rules. AG ¶ 16(d) applies.

Under AG ¶ 17, the following mitigating conditions are relevant:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(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.

Applicant's falsifications are unmitigated. The record contains no evidence that Applicant attempted to correct his security clearance applications, or his statements in his security interviews, regarding his use of illegal drugs after 1995. His illegal conduct did not come to light until 2004, during his second security interview with agency A. Although his falsifications in 2001 and 2003 are not recent, his falsification in a 2008 interview occurred less than two years ago. Moreover, his conduct cannot be considered minor. He falsified information provided to the government numerous times. Such actions undermine the security clearance process and raise serious doubts about Applicant's reliability and judgment. AG ¶¶ 17(a) and 17(c) cannot be applied.

Whole Person Analysis

Under the whole person concept, an administrative judge must evaluate the Applicant's security eligibility by considering the totality of the Applicant's conduct and all the 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. Under the cited guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant provided specifics of his drug use after 1995 during his interview with agency A, but later denied that these detailed admissions were true. His last falsification occurred in 2008, when he was a mature adult 44 years of age. Moreover, although drug use was not alleged and is not outcome-determinative, it does go to the assessment of the whole person. Applicant's willingness to engage in criminal conduct by using illegal drugs as a mature adult, and while holding a security clearance, undermines his trustworthiness. Applicant described a hypothetical scenario posed by the interviewer, without providing a rational connection between that scenario and the detailed information he provided about his marijuana use. He falsified other information, including time-card information, for which he as terminated, and his testimony about the agency A hearing, which directly contradicted his own documents.

Overall, Applicant's falsifications raise serious doubts about his suitability for access to classified information. The record evidence fails to satisfy these doubts, which must be resolved in favor of the national security. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guideline.

Formal Findings

Paragraph 1, Guideline E	AGAINST APPLICANT
Subparagraph 1.a. – 1.h.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge