



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



In the matter of:)
)
) ISCR Case No. 08-06697
)
)
Applicant for Security Clearance)

Appearances

For Government: Candace L. Garcia, Esquire, Department Counsel
For Applicant: *Pro se*

April 8, 2011

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant abused marijuana, LSD, and methamphetamines during his late teens and early twenties. He ceased his illegal drug use in 1981 only to resume smoking marijuana around 1999 or 2000. In 2003, he began abusing Xanax without a prescription. He abused both drugs, for the most part weekly and while he held a security clearance, until his arrest on felony and misdemeanor drug charges in January 2007. He abused marijuana in September 2007 pending his sentencing on those drug charges. Applicant also abused alcohol, but he limited his drinking after an August 2003 drunk driving offense. He denied any illegal drug use on his initial application for a security clearance, and concealed his latest abuse when he reapplied for his clearance. Drug Involvement and Personal Conduct are not mitigated. Clearance denied.

Statement of the Case

On June 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H (Drug Involvement), Guideline G (Alcohol Consumption), and Guideline E (Personal

Conduct), which provided the basis for its preliminary decision to revoke his security clearance. 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 responded to the SOR allegations on July 17, 2009. On August 31, 2009, he indicated that he did not want a hearing. In September 2009, the Government requested a hearing, and on May 11, 2010, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On September 30, 2010, I scheduled a hearing for November 3, 2010.¹

I convened the hearing as scheduled. Nine Government exhibits (Ex. 1-9) and six Applicant exhibits (Ex. A-F) were entered into evidence. Applicant testified, as reflected in a transcript (Tr.) received on November 12, 2010. The SOR was also amended at the Government's motion.

Procedural Rulings

At the hearing, before the introduction of any evidence, the Government moved to amend the SOR to allege under Guideline H in a new subparagraph 1.h that Applicant received court-ordered substance abuse treatment from February 2008 to December 2008 as set forth in SOR 2.c of Guideline G. Since Applicant had prior notice of the alleged security concern, albeit under Guideline G only, and he did not object, I granted the amendment.

Then, after the evidence had been submitted, the Government moved to amend the SOR to add a new allegation 3.e under Guideline E, Personal Conduct, based on Applicant's admission that he did not list his marijuana use on his September 2001 security clearance application because he did not want to jeopardize his job. Applicant did not object. Accordingly, the SOR was amended to include a new allegation as follows:

3.e. You falsified your September 25, 2001, security clearance application in response to question 27, "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?," by failing to disclose that you had used marijuana in approximately 1999 and 2000.

¹ It is unclear what delayed assignment of the case for a hearing. The hearing was scheduled to maximize the Government's travel to this region.

Summary of SOR Allegations

The amended SOR alleged under Guideline H, Drug Involvement, that Applicant used marijuana with varying frequency from his late teens to at least September 2007 (SOR 1.a), non-prescribed Xanax (SOR 1.b) and Oxycontin (SOR 1.c) from about 1970 to at least January 2007, LSD (SOR 1.d), and methamphetamine (SOR 1.e). Applicant was also alleged to have used the marijuana, Xanax, and Oxycontin after he had been granted a security clearance in about November 2001 (SOR 1.f); to have been arrested and convicted of January 2007 drug possession and driving under the influence of alcohol or drugs charges (SOR 1.g); and to have received court-ordered substance abuse treatment from February 2008 to December 2008 (SOR 1.h).

The January 2007 driving under the influence of alcohol or drugs offense and substance abuse treatment were also alleged under Guideline G, Alcohol Consumption (SOR 2.b and 2.c). Also under Guideline G, Applicant was allegedly arrested and convicted of an August 2003 driving while intoxicated charge (SOR 2.a).

Applicant's use of marijuana, Xanax, and Oxycontin after he had been granted a security clearance was cross-alleged under Guideline E, Personal Conduct (SOR 3.a). Furthermore, he was alleged under Guideline E to have deliberately falsified his January 2008 Questionnaire for National Security Positions (QNSP) by omitting his August 2003 DWI in response to question 23 concerning his police record (SOR 3.b) and by misrepresenting the extent of his drug use in response to question 24 concerning any illegal drug use in the last seven years (SOR 3.d). Applicant also allegedly falsified material facts during his March 2008 interview with an authorized investigator by denying that he had used any illegal drugs after January 2007 when he had used marijuana in September 2007 (SOR 3.c). Furthermore, Applicant was alleged to have falsified his September 2001 (SF 86) security clearance application by denying any illegal drug use within the preceding seven years (SOR 3.e).

Findings of Fact

In his Answer, Applicant admitted that he had used marijuana from his late teens to at least September 2007, and LSD and methamphetamine in the early 1970s. He also admitted that he had used marijuana, Xanax, and Oxycontin after he had been granted a security clearance, although he denied that he had used Xanax or Oxycontin to the extent alleged. Applicant acknowledged his arrests for drug and drunken driving offenses, as well as his court-ordered substance abuse treatment. He denied that he had deliberately falsified his QNSP or his subject interview. In response to the recent amendment, Applicant admitted that he had lied about his drug use on his initial SF 86. His admissions are incorporated as findings of fact. After considering the pleadings, exhibits, and transcript, I make the following additional findings of fact.

Applicant is 57 years old, and he has been employed as an assembler by a defense contractor since November 1982, but for around a year following a layoff in 2002. (Tr. 29.) Applicant has been married to his spouse since September 1982. They have two

daughters, who are in their late twenties, unmarried, and have five children between them. The daughters and grandchildren live with Applicant and his spouse. (Ex. 1; 5; A.) Applicant's spouse is disabled and has a disability benefit. (Tr. 30.)

Applicant began smoking marijuana around age 16. He smoked it once weekly and purchased it from street dealers until about May 1981, when his first daughter was born. (Tr. 27-28.) During his late teens and early twenties, he used and purchased LSD on five occasions that he can specifically recall. For about a year in his early twenties, he ingested \$5 worth of crystal methamphetamine once a week, which he purchased. He apparently also used cocaine.² (Tr. 38-39.)

Applicant used no illegal drugs from about May 1981 to 1999 or 2000, when he resumed smoking marijuana about once a week, to deal with the stress of a potential job layoff. (Tr. 28-29.) On January 12, 2001, Applicant's father died in an accident. (Tr. 41.) On September 25, 2001, Applicant applied for a Confidential security clearance for his job. He completed a security clearance application (SF 86) on which he responded "No" to question 27 concerning any illegal drug use in the last seven years. (Ex. 2.) Applicant did not indicate on his SF 86 that he had resumed his marijuana use because he was not proud of it and thought it would jeopardize his job. (Tr. 79.) He was apparently granted a Confidential security clearance around November 2001³ (Ex. 1; 2.), but was laid off around 2002 for a little over a year. During his layoff, he supported his family with his unemployment compensation. (Tr. 29.) He enjoyed marijuana's relaxing effects, and continued to smoke the illegal drug occasionally, up to once weekly at times. He bought the marijuana from street dealers. (Tr. 30.) Applicant, who had been a weekend drinker, began consuming alcohol during the week as well, and "it snowballed from there." (Tr. 73.)

In June 2002, Applicant left the scene of an accident involving property damage without notifying the police or property owner. Three days after the accident, he was questioned by police. He led the officer to believe that another driver had been involved. On July 16, 2002, he appeared in court on charges of leaving the scene of an accident and filing a false report to law enforcement. He pleaded guilty to both charges and was sentenced to fines and assessments totaling \$600 for leaving the scene and \$1,250 (\$250 suspended) for filing a false report. (Ex. 8.) There is no indication that Applicant was under the influence of a controlled substance or alcohol before the incident, although he was drinking alcohol and smoking marijuana at that time of his life. He drank beer, vodka, or tequila, usually at home, in quantities varying from two to ten drinks per occasion. (Ex. 3; Tr. 72.)

² During his February 2008 evaluation for court-ordered counseling, Applicant apparently admitted to a history of substance use which included cocaine. (Ex. 5.) Applicant was not asked about any cocaine use, and it was not raised as an issue in the SOR.

³ Applicant indicated on his January 2008 QNSP (pages 6 through 27 of his Electronic Questionnaire for Investigations Processing (e-QIP)), that his background was investigated for a Confidential security clearance around November 2000. (Ex. 1.) Applicant's employer certified a request for a Confidential security clearance for him in conjunction with a security clearance application signed on September 25, 2001. (Ex. 2.) So it would appear that Applicant's background was investigated in 2001 rather than 2000.

In August 2003, Applicant was charged with operating under the influence of alcohol (OUI), first offense.⁴ He had consumed six alcohol drinks (“Smirnoff Ices”) over a three-hour period and had smoked marijuana at a card game before his arrest. (Tr. 50-51.) In October 2003, he appeared in court without counsel and pleaded guilty. Applicant was sentenced to fines and assessments totaling \$420 and he lost his license for 90 days. (Ex. 7.) He also completed a mandatory driving while intoxicated course and three follow-up counseling sessions. (Ex. 5.)

For the most part, Applicant stopped drinking alcohol after the OUI⁵ (Tr. 34.), but he continued to smoke marijuana up to once a week. (Tr. 30.) He also began to take an anti-depressant (Xanax) without a prescription to relieve “the pressures of the job and the pressures of life” (Tr. 33.), including depression over his father’s death. (Tr. 42.) He abused Xanax three days a week; on Fridays, Saturdays, and Sundays. (Tr. 34.) Applicant obtained the Xanax from his cousin, who himself did not have a prescription for the drug. (Tr. 35.) Applicant continued to abuse marijuana and Xanax, for the most part weekly, until January 2007. (Tr. 30, 35.)

On January 11, 2007, Applicant took some non-prescribed Oxycontin offered to him by his cousin. They were playing cards and Applicant complained of neck pain. (Tr. 36.) The next day, Applicant drank an ounce of vodka at his father’s gravesite as he did every year on the anniversary of his father’s death. Applicant then went to friend’s home to play cards, where he smoked marijuana that he had purchased from a street dealer and he also ingested four Xanax. (Tr. 43-44.) En route home, Applicant fell asleep and crashed his vehicle. He tested positive for controlled substances (marijuana, Xanax, and Oxycontin) at the hospital (Ex. 3.), and he had in his possession 85 Xanax pills and 1.5 ounces of marijuana. (Tr. 44.) Applicant was arrested for driving under the influence of alcohol or a controlled drug (DUI/drug), possession of a controlled drug, and felony possession of a narcotic. On January 13, 2007, he was released on \$800 personal recognizance bail conditioned on refraining from alcohol abuse, any use of a narcotic or controlled drug, and not operating a motor vehicle until his license was restored. (Ex. 3; 6.)

On September 4, 2007, Applicant smoked a marijuana cigarette to deal with the pressure of his court appearance scheduled for the next day. (Tr. 31.) Applicant bought the drug from a street dealer. (Tr. 82.) Applicant denies he was ordered to refrain from illegal

⁴ The SOR alleges that Applicant was charged with driving while intoxicated. Available court records indicate that the charge was operating under the influence, first offense.

⁵ When discussing his January 12, 2007, arrest with an Office of Personnel Management (OPM) investigator on March 11, 2008, Applicant indicated that as he did every year on the anniversary of his father’s death, he brought two nips containing one ounce of vodka. He dumped one on his father’s grave and drank the other. (Ex. 3.) At his hearing, he testified that he had not consumed any alcohol from his 2003 OUI until January 12, 2007. When asked whether he brought vodka with him to his father’s gravesite before 2007, Applicant responded, “No. Well, yeah, I did. I did bring vodka and I poured it on his grave.” He denied he took a drink on those other occasions, but he had no explanation for what then prompted him to drink the vodka in January 2007. (Tr. 43.) His admission during his interview is considered more credible.

drug involvement before his sentencing (Tr. 53.), although court records show a condition of his release on bail was that he not abuse any controlled substance. (Ex. 6.) On September 5, 2007, Applicant pleaded guilty to all charges. For the felony drug possession, he was sentenced to 12 months in the house of corrections (suspended), two years probation, \$350 fine and assessments, evaluation by a licensed alcohol and drug counselor (LADC), and completion of any counseling or treatment as directed by correctional or probation authority. He was sentenced on the misdemeanor marijuana possession charge to a six-month concurrent jail term (suspended), and \$350 fine and penalty assessment (suspended for two years). For the DUI/drug offense, he was given a consecutive sentence of 12 months in jail, all but 60 days suspended to commence November 23, 2007; seven days in a multiple DWI offender intervention detention center immediately on release from the house of corrections; two years probation; three years loss of license; a \$750 fine and penalty assessment; and a substance abuse evaluation with completion of any treatment or counseling directed by the department of corrections. (Ex. 6.)

Applicant completed the multiple offender program on December 13, 2007. (Ex. 5; F.) He was referred to outpatient counseling for a minimum of 12 months, to commence immediately. (Ex. 5.) Applicant was credited with good time served and released early from confinement on January 9, 2008. (Ex. 6.)

On January 15, 2008, Applicant signed a QNSP incorporated within an e-QIP. He disclosed his January 2007 drug possession, marijuana possession, and DUI/drug charges, in response to the police record inquiries. He also responded affirmatively to the illegal drug and drug activity inquiries under section 24, including whether he had used a controlled substance while possessing a security clearance. Applicant indicated that he used marijuana and “zannex” [sic] from March 2005 to January 2007 “100 occasional” times. He made his “best guess” about the extent of his marijuana use in the preceding seven years. (Tr. 69.) Applicant did not disclose his August 2003 OUI offense on his QNSP, but he listed counseling from October 2003 to November 2003 in response to question 25, “In the last 7 years, has your use of alcoholic beverages (such as liquor, beer, wine) resulted in any alcohol-related treatment or counseling (such as for alcohol abuse or alcoholism)?” (Ex. 1.) When asked at his November 2010 hearing on his security clearance eligibility about his failure to list his 2003 OUI, Applicant responded, “The only thing I can come up with is that I was depressed at the time. I thought that what I put on the report was enough to have my security clearance pulled and I didn’t think it would go any further than that.” (Tr. 65-66.) He also attributed the omission to a right to privacy, although then admitted that he did not want to lose his job. (Tr. 66-67.) He had no explanation for listing the program he attended because of the OUI but not the OUI offense itself (Tr. 67.), but he denied any intentional concealment. (Tr. 71-72.)

Around February 21, 2008, Applicant had an intake evaluation for his court-ordered 12 months of outpatient counseling. Applicant reported a last use of Xanax and Oxycontin “after his accident,” and a last use of cannabis in September 2007. He denied any triggers, cravings, or withdrawal symptoms, and was considered to be open to counseling. From March 2008 through January 2009, Applicant attended monthly outpatient individual

counseling sessions with a licensed alcohol and drug counselor (LADC), who is a licensed social worker, for diagnosed sedative, hypnotic, or anxiolytic abuse. (Ex. 5; A.) Applicant had thoughts of taking Xanax while coping with the stress of his stepfather's Alzheimer's disease and his mother moving in with his family in mid-2008, but there is no evidence that he turned to alcohol or drugs. (Ex. 5; Tr. 80-81.)

On March 11, 2008, Applicant told an OPM investigator that he had smoked marijuana and taken a Xanax pill before his arrest in January 2007. He indicated that the Xanax was given to him by a cousin, but he had purchased the marijuana from an unknown dealer. Applicant acknowledged that he had 85 Xanax pills and 1.5 ounces of marijuana in his possession when he was arrested. Applicant indicated that he had been completely abstinent from alcohol and drugs since his arrest in January 2007 and he had no intent to use alcohol or any drug illegally again. (Ex. 3.) At his hearing, he admitted that he had not disclosed his September 2007 use of marijuana to the investigator, but he indicated it was because he had forgotten about it and was very nervous during the interview. (Tr. 63.)

Applicant was released from his probation on July 15, 2009, after completing 21 months of a 24-month sentence. He had completed all requirements of his probation, including testing negative for substance abuse in the three or four drug screens that were administered (Tr. 74.), remaining gainfully employed, paying all fines, and completing the multiple offender program. (Ex. F.)

Applicant became eligible to regain his driver's license in early September 2010, but he needed an evaluation showing he was at low risk to reoffend. (Tr. 43, 46-47.) On October 5, 2010, he returned to the counseling center for a substance use evaluation. Applicant reported that he had experienced some stressors since he completed his counseling in January 2009, most notably serious health issues involving his wife, mother, and his stepfather. He denied any legal history since his 2007 DUI/drug arrest, but also denied that he had ever been on probation. Applicant informed the LADC that he was now taking prescribed Wellbutrin to manage symptoms of depression and anxiety with good effect. He reported no substance abuse since January 2007 and no cravings or thoughts of using illegal drugs. The LADC found Applicant to be at low risk to reoffend, and he recommended no further treatment. In his opinion, Applicant had identified "a supportive family, stable employment, and a wide variety of coping skills that have helped him to maintain abstinence." He gave Applicant a diagnosis of anxiolytic dependence without physiological dependence in sustained full remission by history, cannabis abuse by history, and alcohol abuse by history. (Ex. A.) The LADC's evaluation was pending review by the multiple offender program as of Applicant's hearing on his security clearance eligibility. (Tr. 47.)

When confronted at his November 2010 security clearance hearing about his reported denials in October 2010 of any substance abuse since January 2007 and of ever having been on probation, Applicant acknowledged that the reference to no probation was "a mistake" that he did not know was in the LADC's report. He asserted that he had discussed his probation with the LADC during his year-long counseling with him. (Tr. 56-

57.) Available records of Applicant's previous counseling sessions (Ex. 5.) do not confirm any discussion about his probationary status, although they reveal that Applicant had discussed his jail stay with the LADC. Applicant also testified that he informed the LADC in October 2010 about his marijuana use in September 2007, but when then asked what he told the LADC, Applicant responded, "I don't think I said—it didn't even come up." (Tr. 60.)

Applicant denies that he has socialized with the friends or his cousin since the incident in January 2007 (Tr. 43, 85.), and there is no evidence in the record to the contrary. He learned through his counseling to "take things as they come." (Tr. 48.) His biggest fear is the loss of his clearance eligibility. (Tr. 49.) Applicant does not intend to drink alcohol or to abuse any drug in the future. He has been taking Wellbutrin for about a year to deal with his anxiety and depression. (Tr. 75.) There is no indication that he took the drug other than prescribed.

The three coworkers who submitted references on his behalf have known Applicant for some time. Applicant has shown himself to be a hard worker, reliable, and trustworthy. (Ex. B; C; D.) Applicant testified that these coworkers and his supervisors are aware of his past drug abuse (Tr. 75.), although none of the coworkers commented about his drug abuse. A friend of Applicant's for the last 30 years believes that Applicant has accepted responsibility "for his past errors in judgment." (Ex. E.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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 overarching adjudicative goal is a fair, impartial and commonsense 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. 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 to obtain a favorable security decision.

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 that 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

Drug Involvement

The security concern for drug involvement is set out in AG ¶ 24: “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.”

Under AG ¶ 24(a), drugs are defined as “mood and behavior altering substances,” and include:

- (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),⁶ and
- (2) inhalants and other similar substances.

Under AG ¶ 24(b), drug abuse is defined as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” Several disqualifying conditions under AG ¶ 25 are implicated.

AG ¶ 25(a), “any drug abuse,” applies because of Applicant’s abuse during his late teens and early twenties of marijuana, LSD, crystal methamphetamines, and perhaps even cocaine; his abuse of marijuana, for the most part weekly, from 1999 or 2000 through January 12, 2007, and on September 4, 2007; his abuse of Xanax without a prescription on the weekends from 2003 through January 12, 2007; and his abuse of non-prescribed

⁶Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule I controlled substance.

Oxycontin on January 11, 2007. AG ¶ 25(b), “testing positive for illegal drug use,” has limited applicability in that Applicant apparently tested positive for Xanax and marijuana in the hospital following his January 12, 2007 accident. AG ¶ 25(c), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” is established by Applicant’s years of purchase of marijuana from street dealers. He also bought the LSD and methamphetamine that he used as a youth. Applicant had possession of Oxycontin when he used it on January 11, 2007, although it is unclear whether he paid his cousin for the drug. Applicant paid his cousin for the Xanax, apparently including the 85 pills that he had in his possession on January 12, 2007.

AG ¶ 25(e), “evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized treatment program,” is also pertinent. The licensed social worker/LADC, with whom Applicant completed his court-ordered counseling, diagnosed Applicant with sedative, hypnotic, or anxiolytic abuse in February 2008. Applicant was recently reevaluated by the LADC in October 2010, and diagnosed in part with anxiolytic dependence without physiological dependence in sustained full remission by history and with cannabis abuse by history.

The Government’s case for AG ¶ 25(g), “any illegal drug use after being granted a security clearance,” is based on Applicant’s admission that he abused marijuana, Xanax, and Oxycontin after he had been granted a Confidential security clearance. The Government presented no independent evidence to confirm the date the clearance was granted, although JPAS entry shows Applicant’s background was investigated from September 27, 2001 to November 20, 2001. So presumably sometime around November 2001, Applicant was granted his security clearance. Applicant abused marijuana and Xanax frequently, if not regularly, thereafter, and he abused Oxycontin at least once.

Applicant satisfies several components of the relevant mitigating conditions AG ¶¶ 26(a), 26(b), and 26(d). He has not abused LSD, methamphetamine, or any cocaine for over 30 years, so his abuse of those drugs would fall within AG ¶ 26(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.” The evidence is sufficient to establish only the one-time use of Oxycontin, which he abused on January 11, 2007. It cannot be inferred from Applicant’s admission to the LADC of “a history of substance use including alcohol, marijuana, LSD, crystal meth, cocaine, Oxycontin, and Xanax [sic],” that he used Oxycontin more frequently, or from 1970 to January 2007 as alleged in the SOR. However, Applicant’s dated drug abuse as a youth, and his more recent but infrequent use of Oxycontin, cannot be evaluated in isolation from his frequent, if not regular, abuse of marijuana and Xanax. Although more than three years have passed since his last uses of marijuana and Xanax, his illegal drug abuse was not “so long ago,” especially in light of his relapse into weekly marijuana use after 18 years of abstinence, and his resort to Xanax to deal with the pressures of life.

AG ¶ 26(b), “a demonstrated intent not to abuse any drugs in the future,” applies in part in that Applicant’s un rebutted testimony is that he has not associated since January 2007 with the friends with whom he abused drugs while playing cards. He also denies that he has seen the cousin who supplied him the Xanax. But Applicant’s marijuana use was not dependent on his friends or a relative. Applicant purchased marijuana from street dealers and he used the drug alone at his home, including in September 2007. So while AG ¶ 26(b)(1), “disassociation from drug-using associates and contacts,” applies, it does not mitigate fully the concerns where Applicant sought out marijuana himself time and time again from persons unknown to him. For that same reason, AG ¶ 26(b)(2), “changing or avoiding the environment where drugs were used,” is not applicable. As for whether Applicant has shown “an appropriate period of abstinence” required under AG ¶ 26(b)(3), his present three years of abstinence is alone insufficient to mitigate the drug concerns in light of his relapse history.

Some consideration must be afforded AG ¶ 26(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.” Applicant completed a court-mandated multiple offender program in December 2007 and attended required aftercare counseling with the LADC from March 2008 to January 2009. These programs were sufficient for the court to release Applicant from probation early. On October 5, 2010, Applicant had another substance abuse evaluation by the LADC, who determined Applicant was at low risk to reoffend; that his anxiolytic dependence was in sustained, full remission. This LADC is not a duly qualified medical professional, which is defined in AG 25(d) as a “physician, clinical psychologist, or psychiatrist.” That said, the LADC is recognized by the court to provide substance abuse counseling, presumably because of his experience and expertise in that area. But his recent evaluation report has been shown to be inaccurate in some important aspects (“[Applicant] reports that his last DWI charge resulted in serving some jail time; however, he has never been on probation or parole;” “[Applicant] denies any problems with substance use since that incident and reports that he has maintained abstinence since his arrest. His last reported use of any substance was in January 2007 and he reports no cravings or thoughts of using. . . .”). The evidence shows that Applicant had acknowledged to the LADC during their February 2008 session that his last use of cannabis was in September 2007. However, nowhere in his October 2010 evaluation does the LADC address this significant discrepancy concerning Applicant’s last reported abuse of a controlled substance.

The weight to be afforded the LADC’s recent assessment is undermined to the extent it may be based on inaccurate reports from Applicant in October 2010 about his drug abuse, or on the clinician’s failure to fully review his previous counseling records. Applicant testified at his hearing that he did not recall what he told the LADC about his last use of marijuana, even though the evaluation was only the month before his hearing. He claimed to not recall if the subject was broached, although the matter was clearly discussed, as Applicant told the LADC that he had been abstinent since his arrest. Not knowing whether the LADC’s assessment would change if he knew Applicant had not been fully candid with him, I cannot give controlling weight to the LADC’s favorable prognosis or

fully apply AG ¶ 26(d). Moreover, Applicant's reform is undermined to the extent that he justifies his use of marijuana in September 2007 on the basis that he had not been ordered to stay away from the drug until his hearing on September 5, 2007. His release on bail was conditioned on avoiding all use of illegal drugs. The Drug Involvement concerns are not sufficiently mitigated.

Alcohol Consumption

The concern for alcohol consumption is set out in AG ¶ 21: "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."

Applicant abused alcohol at times until his arrest for drunk driving in August 2003. He drank from two to ten alcohol drinks (beer, vodka, or tequila) per occasion, initially on weekends and then during the week. Three disqualifying conditions under AG ¶ 22 are established. His August 2003 OUI implicates AG ¶ 22(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." AG ¶ 22(c), "habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent," applies to those occasions (albeit the dates and frequency are not clearly delineated in the record other than the August 2003 OUI) where he drank five or more alcohol drinks at a sitting. AG ¶ 22(e), "evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program," is implicated because the LADC diagnosed Applicant with alcohol abuse, by history, in October 2010.

At his hearing, Applicant denied consuming any alcohol between his August 2003 OUI and January 2007, when he drank an ounce of vodka at his father's gravesite. There is other evidence to substantiate that he drank vodka on each anniversary of his father's death. (Ex. 3.) Even so, his drinking was limited and not to abusive levels after his August 2003 OUI. The January 2007 incident involved illegal drug use, not alcohol abuse. AG ¶ 23(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," is established by no evidence of alcohol abuse since August 2003. His counseling for substance abuse from March 2008 to January 2009 was not voluntary, but Applicant has committed himself to an alcohol-free lifestyle. AG ¶ 23(b), "the individual acknowledges his or her alcoholism or issues of 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)," applies. While he has not been involved in Alcoholics Anonymous or similar organization that could support him in his efforts to abstain completely from alcohol, he did complete a court-mandated alcohol education program after his OUI. AG ¶ 23(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”) is satisfied only in part, but the Alcohol Consumption concerns are mitigated by his commitment to sobriety for a sustained period sufficient to guarantee against relapse.

Personal Conduct

The security concern for personal conduct is set out in Guideline E, AG ¶ 15:

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.

Applicant’s frequent abuse of marijuana and Xanax, and on one occasion Oxycontin, after he had been granted a security clearance (SOR 3.a), raises the Personal Conduct security concerns identified in AG ¶ 15. Even if he was unaware that illicit drug involvement was prohibited for those persons holding positions of trust, he knew that his conduct was illegal. Furthermore, Applicant responded “No” to question 27 concerning any illegal drug use in the last seven years when he completed his September 2001 SF 86 (SOR 3.e) because he feared the loss of his job if his ongoing marijuana use was known. Applicant’s false response to the drug inquiry on his SF 86 implicates 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.”

On his January 2008 QNSP, Applicant revealed his felony drug conviction in response to the police record inquiries. Yet, he omitted his August 2003 OUI (SOR 3.a) while reporting in the alcohol use section that he had received alcohol counseling from October 2003 to November 2003. Concerning his failure to list the OUI, Applicant initially testified, “The only thing I can come up with is that I was depressed at the time. I thought that what I put on the report was enough to have my security clearance pulled and I didn’t think it would go any further than that.” (Tr. 65-66.) He subsequently acknowledged that he did not disclose the offense out of concern for his job (Tr. 66-67.), albeit he continues to deny intentional concealment. (Tr. 71-72.) Applicant had an obligation to disclose a known offense, even if the Government would likely have found out about the OUI through the listed counseling. AG ¶ 16(a) also applies to the omission of the August 2003 OUI from his QNSP.

Concerning his response to the QNSP’s drug questions, Applicant indicates he signed releases, completed forms as required, and did not intend to conceal any

information. As for his disclosure only of “occasional” Xanax and marijuana use 100 times from March 2005 to January 2007, Applicant maintains it was only an estimate, that he didn’t think much about his use of marijuana before 2005, and that he did not remember things (“I’m not a lawyer. I have a 12th grade education. I get very nervous talking around people. If I didn’t remember things, that’s me”). (Tr. 71.) Even if I accept that Applicant was uncertain about when he started abusing Xanax, it is difficult to believe that he did not recall in January 2008 that he smoked marijuana in September 2007 to deal with the stress of his imminent sentencing in part for a felony drug offense. He had no trouble recalling his use of marijuana in September 2007 when he was evaluated by the LADC in February 2008. (Ex. 5.) Yet, when he was interviewed in March 2008, he denied any substance abuse after his January 2007 arrest. Not only was his marijuana use in September 2007 too recent to be easily forgotten, but the omission of that abuse from his security clearance application and then his interview show a pattern of intentional concealment, especially when he was able to recall that abuse in the interim in a context unrelated to his background investigation for his clearance. AG ¶ 16(a) applies to his QNSP omissions. AG ¶ 16(d), “deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative,” applies to his failure to disclose his September 2007 marijuana use during his subject interview (SOR 3.c).

Applicant presented no evidence of any effort by him to correct his September 2001 SF 86 falsification until January 2008, when he made a partial disclosure of his drug involvement on his QNSP. His misrepresentation on his SF 86 is not mitigated by AG ¶ 17(a), “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” Furthermore, given Applicant’s omission of his August 2003 OUI charge and his September 2007 marijuana abuse from his January 2008 QNSP, and his false statement during his subject interview about when he last used a controlled substance, AG ¶ 17(a) and 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,” are not mitigating of the Personal Conduct concerns.

Reform considerations addressed in AG ¶ 17(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,” are not firmly established. Applicant has a track record of concealing his September 2007 marijuana use, and that conduct likely extends to his October 2010 evaluation. The LADC indicated in his report that Applicant had not used any illegal drug since January 2007, and that Applicant had never been on probation. In the absence of credible evidence showing Applicant was not the source of the false information, I remain concerned about Applicant’s candor and whether he can be counted on to fulfill the fiduciary obligations of a security clearance.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of his conduct and all relevant circumstances in light of 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.

A coworker described Applicant as "a very good family man" (Ex. D.), and that is borne out in part. He put his drug abuse behind him for about 18 years while he and his spouse raised their daughters. Applicant opened his home to his two daughters and their children. It was concern over a possible layoff, and the loss of income needed to support his family, that led him to resume marijuana use in 1999 or 2000. But concerns about his job do not justify his years of drug abuse or his concealment of his drug involvement from the Government. His enjoyment of marijuana took precedence over his good judgment and his fiduciary obligations as a cleared employee. He sought out marijuana from street dealers, even while facing serious drug charges. He abused Xanax, which he obtained from a cousin, until his arrest for felony narcotic possession. He hid his illegal drug abuse from the Government in September 2001, and was not fully candid on a reapplication for his clearance in January 2008, or during his subject interview in March 2008. Applicant does not intend to abuse any illegal drug or alcohol in the future, and he has been a good worker for his employer. But he has not fully mitigated the judgment, reliability, and trustworthiness concerns raised by his serious drug abuse history and his lack of full candor during the investigation and adjudication of his security clearance eligibility.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the amended SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant

Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	Against Applicant
Subparagraph 3.c:	Against Applicant
Subparagraph 3.d:	Against Applicant
Subparagraph 3.e:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

Elizabeth M. Matchinski
Administrative Judge