DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
XXXXXXXXXX, XXXXX	)	ISCR Case No. 08-10644
SSN: XXX-XX-XXXX	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: John B. Glendon, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

February 25, 2010

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has not mitigated security concerns pertaining to Guidelines H (drug involvement) and E (personal conduct). Eligibility for access to classified information is denied.

Statement of the Case

On August 21, 2007, Applicant completed a Questionnaire for National Security Positions (SF-86).[1] On June 2, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The revised adjudicative guidelines (AG) promulgated

[1] Applicant had previously completed a security clearance application (SF-86) on March 26, 2007, which was included with the government exhibits, and will be discussed *infra.*

by the President on December 29, 2005, are effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR through counsel on July 8, 2009, and DOHA received such answers on July 13, 2009. Department Counsel was prepared to proceed on July 22, 2009. On August 13, 2009, the case was assigned to me. On September 4, 2009, DOHA issued a notice of hearing scheduling the hearing for October 1, 2009. The hearing was held as scheduled.

The government offered Government Exhibits (GE) 1 through 5, which were received without objection. Applicant offered Applicant Exhibits (AE) A through Q, which were received without objection. DOHA received the hearing transcript (Tr.) on October 9, 2009.

Findings of Fact[2]

Applicant denied all of the SOR allegations. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Background Information

Applicant is a 51-year-old systems engineering manager, who has been employed by a defense contractor since January 1983. He has held a secret security clearance since March 1983 until it was suspended as a result of these proceedings.[3] The pending inquiry stems from Applicant seeking to upgrade his security clearance to top secret. Maintaining a security clearance is a condition of Applicant's continued employment. Tr. 22-23, 54-56, GE 1, GE 2. Applicant has never had a security violation. He does not have a police record. Tr. 30, GE 1, GE 2.

Applicant was awarded a Bachelor of Science degree in Computer Science in May 1980. He married in August 1982, and has two daughters, ages 21 and 18. Tr. 24, 56, GE 1, GE 2.

Drug Involvement

Applicant used marijuana with varying frequency between 1976 and 1983 (ages 18 to 25), and from 1998 to 2007 (ages 30 to 49). Tr. 26. (SOR ¶ 1.a.) He stated he used marijuana in the company of two individuals, a life-long friend (old friend), and a relatively recent acquaintance (new friend). He "grew up" with the old friend and he met the new friend more recently through his wife and children. Applicant and his old friend would occasionally go ocean fishing and smoke marijuana while fishing. Applicant's new

[2] Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

[3] A review of the case file reflects the Defense Security Service (DSS) suspended Applicant's security clearance on February 9, 2009. GE 4.

friend is a jeweler, whom he described as "a very artistic type person." Applicant typically would have a "hit" of marijuana when he was at his new friend's house with his wife. Applicant and his new friend smoked marijuana when they were "basically outside" and their spouses were inside. Applicant last smoked marijuana with his new friend on January 1, 2007. He stated that he no longer smokes marijuana with his old or new friends. Tr. 27-28.

During cross-examination, Applicant admitted attending numerous briefings over the years concerning prohibitions against use of illegal drugs, and he acknowledged drug use was inconsistent with holding a security clearance. Tr. 34-35. Applicant testified that he had difficulty recalling the exact number of times he used marijuana with his old and new friends. Although Applicant manifested genuine uncertainty about past marijuana use, I am satisfied that he did use marijuana with varying frequency during this timeframes alleged while holding a security clearance. Tr. 36-47. The apparent catalyst that led up to Applicant's marijuana use again in 1998 after a five-year break was the environment of being on his old friend's fishing boat. Tr. 45.

On July 8, 2009, Applicant provided a statement in accordance with AG ¶ 26(b) to demonstrate his intent not to abuse illegal drugs in the future. He provided "a signed statement of intent with automatic revocation of [his] clearance for any violation" Tr. 29, AE M.

When queried why anyone would believe him about no longer using drugs, Applicant responded:

> Well, I realize I made a mistake. I was basically in shellshock when I, I realized, when I was applying for the SCI clearance, the great mistake I made at that time. My, and, so basically, mentally, I wrote that Statement of Intent back at that time. And I'm basically, have always been a very trustworthy person. I realized I've erred. And when I have my evaluation with my psychiatrist, I came out feeling responsible for the actions that I've taken. I messed up and just would like the, you know, Court to understand that. I dedicated, you know, a good 25 years of my life to, you know, defending this country and I'd like to continue that. Tr. 30.

Applicant testified that he does not condone drug use. Tr. 30. Applicant had filled out an application to renew his security clearance in 2002, and was granted a security clearance in June 2002. As noted *supra, Applicant* has held a security clearance since 1983, and used marijuana after being granted a security clearance. Tr. 46-47, GE 5. (SOR ¶ 1.b.)

Personal Conduct

In April 2007, Applicant submitted a security clearance application (SF-86) for sensitive compartmented information (SCI) with another government agency. On his SF-86, he listed illegal drug use of "pot" a "couple" of times between January 1, 2006

and January 1, 2007 while holding a sensitive position. On May 31, 2007, he was interviewed by an adjudicator and stated that within the past 12 months, he smoked marijuana two to three times. When asked how many times he used marijuana in the past seven years, Applicant explained that his old friend went boating four times a summer. He advised that he and his old friend would "get high" by smoking a marijuana cigarette on numerous occasions. When asked if 28 times was an accurate number of uses, Applicant estimated that he "got high" about one-half of those times. He ultimately agreed to using marijuana 14 times in the past seven years. When given the opportunity to review his answers, Applicant mentioned another marijuana use around February 2006. He agreed that he may have used marijuana three to four times in 2006 instead of the two to three times as previously stated. On August 14, 2007, that government agency denied Applicant SCI access. Tr. 48-50, 52, GE 4. (SOR ¶ 2.a.)

In the SOR, Applicant was cited for submitting false or incomplete information regarding past drug use on his April 2002 SF-86 and on his March 2007 SF-86. In particular, Applicant listed past marijuana use on his March 2007 SF-86 as "a couple of times from about January 2006 to January 2007," whereas his use was from at least 2001 to January 2007. (SOR ¶¶ 2.b. – 2.c.) Applicant acknowledged the information submitted on those SF-86s is incorrect, but added it was not his intent to deliberately mislead the government. He explained:

> I, I thought about trying to answer it. I know I did it in the past. I was not trying to make myself out to be a heavy drug user, which I am not, since in all cases when I did do it, it was merely taking one or two puffs. And it's very hard to recall when, when you're doing these, what transpired, looking back into the past. During some of these years in the past, it's – I have been under a lot of stress at work because my company, we went through a merger with our competitor. And since we merged with our competitor, they've constantly been trying to kill us and our product. So I've had some very stressful times at work because I'm passionate about what we do, the product we make. That's all my witnesses that were here, today. And what I find is when you sit with an interrogator, they, they tend to do their job well and bring out, they get you to go back in memory and go through that. Tr. 51.

As noted *supra,* Applicant has had difficulty recalling with any degree of certainty details regarding his past marijuana use. Having had the chance to observe him, I noted this difficulty. This is somewhat understandable given the fact his marijuana uses covered two significant periods of time from 1976 to 1883 and from 1998 to 2007. What is clear and as noted *supra,* I do believe that Applicant used marijuana with varying frequency during these time periods. Applicant was forthcoming when questioned about past drug use such as when he was applying for SCI access with another government agency in May 2007 and when interviewed by an Office of Personnel Management (OPM) investigator in May 2008. GE 4, GE 5.

Character Evidence

Three witnesses testified on Applicant's behalf, a co-worker engineer, his operations manager, and his facility security officer. All three witnesses are long-term company employees and have held security clearances for many years. The witnesses see Applicant on a daily basis. They described Applicant as "one of the most dedicated employees," "one of the[ir] best employees," "demonstrate[s] a professional attitude," and is "very trustworthy." All of the witnesses support reinstatement of Applicant's security clearance. Tr. 13-24.

Applicant submitted at least ten favorable character reference letters from a cross section of individuals to include the three witnesses who testified on his behalf, his "old (childhood) friend," former co-workers, present co-workers, father-in-law, close family friends, and supervisory personnel. The collective sense of these letters describes Applicant in a most favorable way. They used adjectives to describe Applicant such as "upfront and honest," "reliable and totally trustworthy," "direct and straightforward," "knowledgeable and passionate [for] the company's product," "demonstrated leadership qualities," "unwavering professionalism," "compassion and honest," "very hard working," "gifted and talented engineer, and "one of the most dedicated staff members . . . in this business." His supervisory personnel described the importance of Applicant's work in support of national defense. All references fully support Applicant in retaining his security clearance. AE - G, AE I - L.

Applicant provided a four-page biography that described his childhood, family life, education, work interests, and professional accomplishments. AE A. He submitted three years of employee evaluations covering the periods January 2006 to December 2008, which reflect above average performance. AE H. His employer gave him monetary awards in recognition of his performance on four occasions in May 2003, December 2007, June 2009, and August 2009. AE P. He submitted two separate negative drug tests dated August 4, 2009 and August 18, 2009. AE N, AE O. Lastly, Applicant provided a Psychosocial Evaluation from a Board Certified Psychiatrist dated September 28, 2009. The psychiatrist provided a very favorable assessment of Applicant and described him as "a fine human being, who is dedicated to his work, ethic, principle and his family." He noted Applicant acknowledged his mistakes and had no reason to doubt his honesty and sincerity." Although the report is clearly favorable and discusses Applicant's many fine qualities, it does not provide a formal prognosis. AE Q.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id*.

at 527. The President has authorized the Secretary of Defense or his designee to grant Applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the Applicant meeting the criteria contained in the 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 over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. 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). The burden of disproving a mitigating condition never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guidelines H (drug involvement) and E (personal conduct) with respect to the allegations set forth in the SOR.

Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

> [u]se of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 25 describes eight drug-involvement-related conditions that could raise a security concern and may be disqualifying. Applicant's marijuana use discussed *supra* triggers two drug-involvement disqualifying conditions that could raise a security concern and may be disqualifying in this particular case. AG ¶ 25(a), indicates, "any drug abuse,"[4] and AG ¶ 25(c) states, "illegal drug possession," could raise a security concern and may be disqualifying in Applicant's case.

AG ¶¶ 25(a) and 25(c) apply. The other disqualifying conditions listed in AG ¶ 25 are not applicable. These disqualifying conditions apply because Applicant used and possessed marijuana.[5] He disclosed his drug abuse in his August 2007 SF-86, his interview with another government agency's adjudicators in April and May 2007, to an OPM investigator in May 2008, responses to DOHA interrogatories, and at his hearing. He possessed marijuana before he used this substance.

AG ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

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[4]AG ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

[5]AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

> (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

Schedules 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 (Sch.) I controlled substances. *See* Sch. I(c)(9). *See also Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I); *United States v. Crawford*, 449 F.3d 860, 861 (8th Cir. 2006).

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) a demonstrated intent not to abuse any drugs in the future, such as:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence; and

(4) a signed statement of intent with automatic revocation of clearance for any violation.

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Security concerns can be mitigated based on AG ¶ 26(a) by showing that the drug offenses happened so long ago, were so infrequent, or happened under such circumstances that they are unlikely to recur or do not cast doubt on the individual's current reliability, trustworthiness, or good judgment. There are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). 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."[6]

[6] ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. The Appeal Board addressed the recency of drug use, stating:

> *Compare* ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a

Applicant used marijuana with varying frequency from 1976 to 1983, a period of seven years during the ages of 18 to 25, and resumed using marijuana with varying frequency from 1998 to January 2007, a period of nine years during the ages of 40 to 49. I find it very troubling that Applicant resumed marijuana use *while holding a security clearance* (emphasis added) and knowing it was in violation of DOD policy. During Applicant's second period of marijuana use, he was a mature family man, and a well regarded employee. Applicant did not have the fortitude or common sense to resist the temptations to repeatedly use marijuana knowing the potential adverse consequences.

I am not convinced a sufficient amount of time has elapsed since Applicant's last drug use in January 2007, taking into account the two lengthy periods of time he used marijuana, and the fact that he returned to using marijuana after a five-year break. At age 51, he claims to recognize the adverse impact of his lengthy and varying marijuana use. These recent assurances are not enough to overcome Applicant's repeated breach of trust over time. AG ¶ 26(a) does not apply to his drug-related offenses.[7]

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. Applicant claims to have disassociated or distanced himself from his drug-using associates and contacts, although not enough to preclude his old friend from submitting a character letter on his behalf. AE C. He has abstained from drug abuse for approximately three years; however, as noted *supra,* Applicant's three-year abstinence is relatively short when contrasted with his drug use history. He did return to using drugs after five years of leading a drug-free life. Applicant provided "a signed statement of intent with automatic revocation of clearance for any violation." AG ¶ 26(b) partially apples.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse prescription drugs after being prescribed those drugs for an illness or injury. Marijuana was never prescribed for him. He did not satisfactorily complete a prescribed drug treatment program. Moreover, he cannot receive full credit because he did not provide "a favorable prognosis by a duly qualified medical professional, including rehabilitation and aftercare requirements."

> rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

> The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

[7]In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

In conclusion, Applicant ended his drug abuse in January 2007, about three years ago. However, given his history of returning to marijuana use for nine years while holding a security clearance after a five-year break does not provide me with the assurances required when evaluating security clearance suitability. In reaching this conclusion, I have considered the lengthy periods Applicant has used marijuana over his lifetime, his age, education, experience, family situation, and the fact he used marijuana while holding a security clearance or alternatively stated while in a position of trust and responsibility.[8] Although Applicant has not used marijuana in approximately three years, I am not convinced that he has shown or demonstrated a sufficient track record to mitigate past drug involvement.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes three conditions that could raise a security concern and may be disqualifying with respect to the alleged falsifications of documents used to process the adjudication of Applicant's security clearance in this case:

[8]The Appeal Board has reversed decisions granting a clearance because the administrative judge considered individual acts of misconduct one-by-one and determined the isolated acts were mitigated. ISCR Case No. 07-03431 at 4 (App. Bd. June 27, 2008); ISCR Case No. 06-08708 at 3-4 (App. Bd. Dec. 17, 2007); ISCR Case No. 04-07714 at 5-7 (App. Bd. Oct. 19, 2006). In ISCR Case No. 07-03431 at 4 (App. Bd. June 27, 2008), the Appeal Board explained it is the overall conduct that determines whether a clearance should be granted stating:

> The Judge's analysis of the numerous acts of misconduct in this record failed to reflect a reasonable interpretation of the record evidence as a whole. By analyzing each category of incidents separately, the Judge failed to consider the significance of the "evidence as a whole" and Applicant's pattern of conduct. *See, e.g., Raffone v. Adams*, 468 F.2d 860, 866 (2d Cir. 1972)(taken together, separate events may have a significance that is missing when each event is viewed in isolation). Under the whole person concept, a Judge must consider the totality of Applicant's conduct when deciding whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. *See, e.g.*, ISCR Case No. 98-0350 at 3 (App. Bd. Mar. 31, 1999). The Judge's piecemeal analysis of Applicant's overall conduct did not satisfy the requirements of ¶ E2.2 of the Directive.

See also ISCR Case No. 04-07714 at 5-7 (App. Bd. Oct. 19, 2006), *see* Whole Person Concept at pages 14-15, *infra*.

(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; and

(d)(3) a pattern of dishonesty or rule violations.[9]

In August 2007 Applicant was denied SCI access by another government agency due to his past drug involvement. AG ¶ 16 describes four conditions that could raise a security concern and may be disqualifying with respect to his denial of SCI access in this case:

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

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

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[9]The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

. . . (3) a pattern of dishonesty or rule violations;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group; and

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

In April 2002 and March 2007, Applicant provided SF-86s that made inquiries about past drug use. Applicant denied and understated his past drug use, respectively. AG ¶¶ 16(a), 16(b), and 16(d)(3) apply because he provided at least one SF-86 with false information about his marijuana use.

Applicant's application for SCI access with another government agency was denied because of his past marijuana use. He used marijuana while holding a DOD security clearance, which violated the conditions of his access. He associated with individuals who used marijuana. This behavior exposed Applicant to potential exploitation. It showed poor judgment and an inability to follow rules. AG ¶¶ 16(c) through 16 (f) apply. Further review is necessary.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant stated it was not his intent to deliberately falsify his security clearance applications. He was forthcoming when queried by two different investigators, and during his testimony. As noted *supra,* Applicant had difficulty in recalling the number of his marijuana uses over the years. When questioned, he admitted past use, but had difficulty recalling dates, the number of times, and when his use resumed after a minimum five-year break. His answers minimizing his past marijuana use were sufficient enough to put the government on notice that he had used marijuana in the past. Applicant acknowledged his answers were incorrect, but added that there was no intent on his part to deliberately falsify his SF-86s. That response may be sufficient when responding to questions about past drug use on his April 2002 SF-86, given the fact there was a minimum five-year gap between his two periods of marijuana use and the uncertainty about the start time of his second period of marijuana use. However, that response is not sufficient when explaining the minimized answer he gave on his March 2007 SF-86 describing his past drug use. As noted *supra,* after another government agency adjudicator questioned him in May 2007, Applicant acknowledged using marijuana 14 times in the past seven years.[10]

A statement is false when it is made deliberately. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported. He was candid and forthright at his hearing about his past marijuana use. In evaluating his testimony, I note his memory has faded over time. However, given Applicant's subsequent admitted extensive marijuana use during various inquiries, I do not find it plausible that that he honestly and reasonably believed the answer he provided when completing his March 2007 SF-86 to be truthful. Accordingly, I find Applicant purposely understated his past marijuana use when completing his March 2007 SF-86.

Applicant's character evidence supports the notion that he is an honest person. The testimony of his character witnesses and authors of his character reference letters

[10] *See* pages 3-4, *supra.*

also believe Applicant is an honest person. I conclude Applicant's alleged falsification of his April 2002 SF-86 is mitigated, however, I conclude his alleged falsification of his March 2007 SF-86 is not mitigated. Although he provided incorrect information on his April 2002 SF-86, AG ¶ 17(f) applies. The falsification allegations are not substantiated. I am satisfied he did not deliberately and intentionally fail to disclose his past marijuana use with intent to deceive with respect the SOR ¶ 1.c.[11]

The mitigating conditions outlined in AG ¶¶ 17(d) and 17(e), "the individual has acknowledged the behavior" and "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress" partially apply to mitigate his marijuana use and his falsification of SF-86s. Security officials and his employer are well aware of Applicant's problems. Applicant has taken the positive step of disclosure, eliminating any vulnerability to exploitation, manipulation or duress with respect to this misconduct. I do not believe Applicant would compromise national security to avoid public disclosure of these problems.

His denial of SCI access by another government agency in August 2007 due to drug involvement is another matter. His marijuana use and association with individuals who used marijuana while holding a security clearance in clear violation of DOD policy, which had the potential to serve as a basis for exploitation, support a whole-person assessment of questionable judgment, untrustworthiness, and an unwillingness to comply with rules and regulations. AG ¶¶ 16(c) through 16(g) apply.

Applicant deserves substantial credit in the whole person analysis for admitting his marijuana use when interviewed by an adjudicator from another government agency in May 2007, and by an OPM investigator in May 2008. He re-admitted his marijuana use at his hearing. I found Applicant's admissions about his marijuana use at his hearing to be credible. However, the personal conduct concerns pertaining to Applicant's denial of SCI access by another government agency in August 2007 cannot be mitigated at this time.

[11]The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

> (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

Whole Person Concept

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

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral change; (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.

There is some evidence supporting approval of Applicant's clearance. Applicant has worked for his employer for 27 years. His supervisors, co-workers, and performance evaluations indicate he has made significant work-related contributions to the national defense industry throughout the years. All those who testified on his behalf and submitted character reference letters on his behalf, state he is a decent individual, who is a dedicated family man. He showed he had the ability to abstain from illegal drug use for at least a five-year period. During background investigations and at his hearing, he admitted his history of illegal drug use. He knows the consequences of drug abuse. There is no evidence of disloyalty or that he would intentionally violate national security.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant used marijuana over two separate cycles -- 1976 to 1983 and 1998 to 2007. His decisions to possess and use marijuana (each time he used marijuana he made a separate decision about whether to violate the law) were knowledgeable, voluntary, and intentional. This is more than a brief youthful experimental use of marijuana. His decision to again using marijuana is further exacerbated given his age, experience, and employment in the defense industry while holding a security clearance. He was sufficiently mature to be fully responsible for his conduct. These offenses show a serious lack of judgment and a failure to abide by the law. Such judgment lapses are material in the context of security requirements. His misconduct raises a serious security concern, and a security clearance is not warranted at this time.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude Applicant has not

mitigated the security concerns pertaining to drug involvement and personal conduct with regard to being denied SCI access due to drug involvement by another government agency in 2007. For reasons discussed *supra,* personal conduct concerns regarding falsification are mitigated.

I take this position based on the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), my "careful consideration of the whole person factors"[12] and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a. to 1.b.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a. to 2.b.:	Against Applicant
Subparagraph 2.c.:	For Applicant
Subparagraph 2.d.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance at this time. Eligibility for access to classified information is denied.

_____
ROBERT J. TUIDER
Administrative Judge

[12] *See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).