DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-10955
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

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

November 26, 2010

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant used marijuana in July or August 2008, after he had been advised of his employer's drug policy prohibiting illegal drug involvement, and he is unwilling to commit to abstain from future marijuana use. He was arrested several times between 1985 and August 2006, most recently for drunk driving, and he was not completely forthcoming about his criminal record when he applied for his security clearance in July 2008. Clearance denied.

Statement of the Case

On February 3, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline G (Alcohol Consumption), Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) that 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 as of September 1, 2006.

Applicant responded to the SOR allegations on February 9, 2010, and indicated he did not want a hearing. The Government subsequently requested a hearing, and on April 30, 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 April 27, 2010, I scheduled a hearing for May 26, 2010.

I convened the hearing as scheduled. Fifteen Government exhibits (Ex. 1-15) were entered into evidence, and Applicant testified, as reflected in a transcript (Tr.) received on June 4, 2010. At the Government's request, before the introduction of any evidence, SOR 4.b was amended to correct an obvious typographical error and allege that Applicant deliberately omitted from his July 2008 Electronic Questionnaire for Investigations Processing (e-QIP) a May 1985 marijuana possession charge alleged in SOR 3.h. At the conclusion of the Government's case, Department Counsel moved to strike from the Guideline H allegations 2.a and 2.b the respective references to drug use and purchase while possessing a DoD security clearance, based on Applicant's testimony that he was unaware that he had been granted an interim clearance (*see* Tr. 45.). The Government also moved to change the date of the drug use and purchase to August 2008 based on the evidence. Applicant did not object, and I granted the amendments.

Findings of Fact

The amended SOR alleged under Guideline G, Alcohol Consumption, that Applicant was fined and ordered to attend counseling following his arrest for driving under the influence (DUI) in August 2006 (SOR 1.a); that he pleaded guilty to chemical test refusal, was fined, and ordered to attend alcohol counseling following an arrest for DUI in July 2006 (SOR 1.b); that he was convicted of chemical test refusal following an arrest for operating under the influence of liquor in April 1995 (SOR 1.c); and that he attended alcohol counseling from December 2006 to April 2007 for diagnosed alcohol abuse (SOR 1.d).

Under Guideline H, Drug Involvement, Applicant was alleged to have used and purchased marijuana in about August 2008 (SOR 2.a and 2.b); to have expressed during a September 2008 security interview that he might use marijuana in the future if he felt like it (SOR 2.c); and to have been charged with possession of marijuana in May 1985 (SOR 2.d).

The SOR alleged under Guideline J, Criminal Conduct, that Applicant pleaded no contest to leaving the scene of an accident with property damage in May 2006, and was later arrested in April 2007 for failure to pay his fines, costs, and restitution (SOR 3.a); that he was convicted of a November 2000 criminal trespass offense (SOR 3.b); that he was sentenced to probation for one year after pleading no contest to an April 1995 leaving the scene of an accident charge (SOR 3.c); that he was sentenced to one year in jail (suspended) for criminal trespass in March 1995 (SOR 3.d); that he was charged with misdemeanor refusal to post bond and improper start in May 1990 (SOR 3.e); that he

pleaded guilty to April 1990 charges of felony battery on a law enforcement officer, failure to elude a police officer, and license not carried, and was sentenced to 18 months probation for the felony battery charge (SOR 3.f); that he was charged with disorderly conduct in April 1990 (SOR 3.g); and that he was arrested in May 1985 for breach of peace, felony possession of a weapon in a motor vehicle, threatening, and possession of marijuana, and fined $35 for breach of peace (SOR 3.h). The alcohol-related offenses detailed under Guideline G were cross-alleged under Guideline J (SOR 3.i).

Under the Personal Conduct guideline (Guideline E), Applicant was alleged to have deliberately falsified his July 17, 2008 e-QIP by denying that he had ever been charged with or convicted of a felony offense (SOR 4.a), by not disclosing the July and August 2006 alcohol charges and the May 1985 marijuana possession charge in response to inquiry into any alcohol or drug related charges (SOR 4.b), and by omitting the August 2006 DUI charge and the May 2006 leaving the scene of an accident charge in response to inquiry into any other charges within the last seven years (SOR 4.c).

Applicant admitted the DUI charges but denied the diagnosis of alcohol abuse. He acknowledged that he had used marijuana "very seldom," had purchased it around September 2008, and had indicated in an interview that he might use it in the future if he felt like it. Before he presented any evidence at his hearing, he clarified that his admission was to having used and purchased marijuana but not to being involved with the drug while holding a security clearance since he had never held a security clearance. (Tr. 12-13.) Applicant admitted the criminal arrests alleged in Guideline J, but he denied any deliberate falsification of his July 2008 security clearance application. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is 63 years old, and he has been employed as a sound dampening technician by a defense contractor since December 1998. (Tr. 115.) His wages have been garnished since 2000 to pay child support for his 15-year-old son, who was born to him and his ex-wife after their divorce. (Ex. 1, 2.) Applicant seeks a Secret clearance for his duties.

Applicant served in the United States military from June 1967 to July 1973. (Ex. 1.) He began drinking alcohol at that time. (Ex. 2.) Around 1985, he began using marijuana sporadically, and he purchased it from street dealers whom he did not know. (Tr. 53-56.) His involvement with marijuana led to his arrest only once. In May 1985, Applicant was arrested for breach of peace, felony possession of a weapon in a motor vehicle, threatening, and possession of less than four ounces of marijuana, after he became involved in an altercation with a gas station attendant. He was found to be in possession of marijuana in the lid of a shaving cream can (Ex. 2, Tr. 63-65.), but he was fined only $35 for breach of peace. The other charges were not prosecuted. (Ex. 4.)

Applicant's consumption of alcohol, primarily a mixed drink ("Black Russian"), led to his arrest on several occasions starting in 1990. In early April 1990, Applicant got into an argument at a local restaurant with two vacationers. A local police officer working an off-duty detail advised Applicant not to drive because he exhibited signs of being under the influence of alcohol. Applicant refused to leave the premises in a cab, and he was arrested

for disorderly conduct and detained overnight. The case was eventually dropped. (Ex. 4, 14; Tr. 89-90, 96-98.) Three days after his arrest for disorderly conduct, Applicant was stopped for squealing his tires. He threatened the officer, attempted to flee, and then repeatedly struck the officer on being detained. Charged with felony battery on a law enforcement officer, misdemeanor fleeing or eluding an officer, and a traffic infraction (failure to exhibit an operator's license), Applicant faced a maximum sentence of five years in prison. (Ex. 12.) Applicant refused to post bond on his arrest, and pending his appearance on the more serious charges, he was fined $70 in July 1990 for not posting bond and improper start. (Ex. 12,13.) In August 1990, he pleaded no contest to the April charges pursuant to a plea agreement, and was sentenced to three days served on the fleeing/eluding charge and the traffic infraction. Adjudication was withheld on the felony battery charge, and he was placed on probation for 18 months. On Applicant's motion, his probation was terminated early in May 1991. (Ex. 4, 11, 12.) Applicant was required to abstain from alcohol and illegal drugs during his probation. (Ex. 12.) Applicant has no recall of the offense but surmises that he had to have been drunk because he would never have committed the crime otherwise. (Tr. 114.)

In March 1995, he was charged with breach of peace and misdemeanor criminal trespass at a casino. The breach of peace charge was not prosecuted, but he was sentenced to one year, suspended, for criminal trespass. (Ex. 2, 4.) He claims that he did not know that he had been banned from the premises. There were so many incidents at the casino that he cannot now recall why he was banned. (Tr. 86.) The available evidence does not clearly indicate that alcohol was involved, although Applicant testified that he has consumed alcohol at the casino while gambling, in quantity depending on how many hours he was there. (Tr. 87.) In early April 1995, he was charged with misdemeanor leaving the scene of an accident with property damage in his home town. He pleaded no contest and was placed on one year probation with court costs. (Ex. 9.) In April 1995, Applicant was arrested for operating under the influence (DUI), first offense, and chemical test refusal. In June 1995, the DUI charge was dismissed, but he was convicted of refusing to take the chemical test. (Ex. 6.)

After his DUI charge in late April 1995, he stayed out of trouble until October 26, 2000, when he was again arrested at the casino for criminal trespass. He was convicted on April 12, 2001, and sentenced to one year in jail, suspended, given a conditional discharge for two years, and ordered to stay out of the casino. (Ex. 2, 4, 8, 13.)

More recently, in May 2006, Applicant was arrested in his hometown for leaving the scene of an accident with property damage. Applicant had consumed a couple of drinks at his then girlfriend's house. En route home, he claims he just touched the back bumper of a car, but he admits he left the scene because he had been drinking. (Tr. 80-83.) He was ordered in early July 2006 to pay a $500 fine, costs, and restitution. A warrant was issued for his failure to pay, but it was withdrawn in April 2007 when he paid in full. (Ex. 2, 7.)

In early July 2006, Applicant consumed at least ten drinks of tequila over the course of nine hours while at the beach and a local strip club. Late in the evening, he was arrested for DUI, first offense, chemical test refusal, and operating an unregistered vehicle. He lost

his driver's license for three months, was fined $2,000, and was ordered to perform ten hours of community service and complete alcohol counseling for refusing to submit to a chemical test. The DUI and unregistered vehicle charges were dismissed. (Ex. 2, 4, 5; Tr. 75-.77, 112-13.) Applicant has not consumed tequila since that incident and does not intend to consume tequila in the future. (Tr. 77.) He was so drunk that day that he has no memory of the arrest. (Tr. 113-14.)

In August 2006, Applicant consumed five Black Russians at a local casino. He was escorted out of the casino by security after he got involved in an altercation with a woman. He informed security that he did not feel he should be driving because he had been drinking, but he was told he had to leave. As he drove off the property, he was arrested for DUI. The court ordered him into counseling and accepted the program he was required to attend for the July 2006 DUI. (Ex. 2; Tr. 70-73.) Applicant attended group and individual counseling from December 14, 2006 until April 11, 2007, for diagnosed alcohol abuse, although he was unaware at that time of any formal diagnosis. (Tr. 67.) At discharge, he was given a good prognosis provided he stayed out of high risk situations. Applicant informed his clinician that he had learned his lesson and would not again drink and drive. (Ex. 2.) Alcoholics Anonymous (AA) was recommended to him as a possible benefit, but he chose not to go to AA. (Tr. 68.)

Applicant did not require a security clearance when he started working for his current employer in 1998, although he was put on notice of, and agreed to abide by, his employer's policy prohibiting the use of illegal drugs. (Tr. 58.) At his employer's request, Applicant applied for a Secret security clearance on July 17, 2008. On his e-QIP, he responded "Yes" to question 23.d, concerning whether he had ever been charged or convicted of any offenses related to alcohol or drugs. He listed only the July 2006 DUI, having deliberately elected to omit his arrest for DUI in August 2006 because he felt the incident was ridiculous and he had been set up. (Ex. 2; Tr. 101, 104.) Applicant has no explanation for why he did not list his 1995 DUI other than he filled out the form in haste and did not pay as much attention as he should have when completing the form. (Ex. 2.) Applicant responded "No" to questions 23.a ("Have you ever been charged with or convicted of any felony offense?") and 23.f ("In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above?"). He did not recall ever being arrested for a felony (Tr. 99.), and had no explanation for why he did not list his May 2006 arrest for leaving the scene of an accident other than he did not take acquiring his security clearance seriously enough. (Tr. 105-06.)

The day after he executed his e-QIP in July 2008, Applicant's long-time girlfriend died unexpectedly. (Ex. 2; Tr. 47.) Applicant, who had used marijuana sporadically over the years when he felt like it (Tr. 54-61.),[1] purchased marijuana for $20 and he smoked it in about August 2008. (Ex. 2.)

[1]Applicant provided varying accounts of his involvement with marijuana between 1985 and August 2008. There is no evidence he used it on a regular basis, but it is likely he used it more often than once or twice during that period. He had told a government investigator in September 2008 that he had bought the marijuana that he used on the death of his girlfriend from an acquaintance, and that he had used not any marijuana in 15 years until then. (Ex. 2.) In response to interrogatories, Applicant indicated in January 2009

On September 16, 2008, Applicant was interviewed by a government investigator about his use of alcohol, his DUI and other criminal offenses, his alcohol counseling, and his use of marijuana after he had filled out his e-QIP. Concerning his marijuana use, Applicant reported smoking marijuana in the past but not within the past 15 years until three weeks before, when he purchased $20 worth of marijuana from an acquaintance and smoked the drug on the death of his girlfriend. He indicated he had no intent to smoke marijuana on a regular basis in the future, but that he might use it in the future despite its illegality if he felt like it. Applicant admitted he drank primarily Black Russian cocktails in no set pattern, but he indicated he was careful about not driving after drinking. Applicant persisted in denying any recollection of ever having been charged with a felony, even after being told of the assault on a police officer charge. He denied any misdemeanor charges in the last ten years other than minor traffic tickets. (Ex. 2.)

In response to DOHA interrogatories, Applicant related that he had been drinking monthly, but he stopped drinking since his girlfriend died. However, he also indicated that he might drink in the future at a dinner party or social occasion, although not like he had in the past. Concerning marijuana, he indicated that he "tried it for a short period and it just made [him] tired. It is only asking for trouble." He claimed he decided to stop using marijuana shortly after 1985 or 1986 because it wasn't for him. As for his use and purchase of marijuana, Applicant admitted his involvement when his girlfriend passed away, which he described as a "rare incident." Applicant added that he believed he was in an environment or situation where others were using drugs, he would leave. (Ex. 2.)

At his hearing, Applicant admitted he had used marijuana after 1985 or 1986 sporadically ("It may be once every two years, every five years.") and purchasing the drug more than once during that time. (Tr. 50-51.) He offered no explanation for why he did not admit to that use during his interview or in his response to interrogatories (Tr. 54-55.), but denied that he withheld the information. As for whether he intended to use marijuana in the future despite signing his employer's drug policy and applying for a security clearance, Applicant testified that many employees with red badges at his employment smoke marijuana, and that he was not going to lie and state that he would not smoke marijuana in the future. (Tr. 58-60.) He saw no problem with smoking marijuana to relax at home while watching television, but he would not use marijuana while out driving or at work. (Tr. 60.) Applicant does not intend to use marijuana regularly ("It's not as though I'm going to smoke

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that he decided to stop using marijuana "shortly after 1985-86" because it was not for him. (Ex. 2.) He described his use of marijuana on the death of his girlfriend as "a rare incident" and that he found himself in an environment where others were using drugs around him, he would leave. (Ex. 2.) At his hearing, he claimed to not recall the number of times he used or purchased it other than he bought the drug more than once, and he used it sporadically before his girlfriend's death "maybe once or twice" if he "ran into somebody, if somebody offered it to [him]." (Tr. 51-52.) He testified that he obtained the drug from persons he did not know ("maybe they were talking with somebody else, and [he] may have seen it. Maybe [he] went up to them."). (Tr. 53.) He admitted at his hearing that he enjoyed the feeling marijuana gives him "on occasions," and that he used the drug at home "on occasion." (Tr. 61-62.) He could not rule out using the drug in the future if he felt like it ("I don't agree with kids, 15-16 and whatever, smoking and doing whatever because their brain to me just can't handle it. For somebody like myself, if I'm at home and I'm watching television, and I want to do that, I can do it." (Tr. 60.)

marijuana all the time. It could happen, and then I could not use it for two years, or whatever. It's just if I feel."). (Tr. 62.)

Applicant does not believe he has ever had an alcohol problem. (Tr. 65, 112.) As of late May 2010, he was drinking between two to four or five glasses of wine or Black Russians while out at a local racetrack on Friday or Saturday nights, drinking on the higher end only if he was there for a lengthy period. He was not consuming alcohol at home or during the work week. (Tr. 68-70.) Applicant is careful not to drink and drive after drinking more than a couple of glasses of wine or Black Russians. (Tr. 78.) He enjoys his job and has not had any incidents at work related to alcohol or illegal drug use. (Tr. 115.)

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

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."

Alcohol was involved in most of Applicant's criminal offenses, including some for which he did not face an alcohol-related charge (e.g., the April 5, 1990 disorderly conduct). While he does not now recollect the circumstances of the April 8, 1990 felony battery offense, he indicates that he must have been intoxicated since the offense was out of character for him. He also admits that he had been drinking before the May 2006 leaving the scene of an accident, although there is no proof that he was intoxicated. His April 1995, July 2006, and August 2006 DUI offenses clearly implicate 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 because of his consumption of ten or so tequila drinks before his July 2006 DUI. Moreover, whereas he was diagnosed with alcohol abuse by licensed chemical dependency counselors on staff of the alcohol program he attended from December 14, 2006, to April 11, 2007, 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," also applies.

Given the long span over which Applicant allowed alcohol to negatively affect his judgment, it is difficult to apply mitigating condition 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," despite the passage of more than 3.5 years since his last DUI. Applicant's refusal to acknowledge the diagnosis of alcohol abuse does not preclude favorable consideration of 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)," where he understands his drunk driving was serious and he no longer drives after drinking to excess. Applicant's successful completion of court-ordered alcohol counseling with a good prognosis is evidence of action taken to overcome his problem. Although not entitled to the same weight in mitigation than had he volunteered for

alcohol treatment, the good prognosis shows he was receptive to counseling. As for demonstrating the pattern of responsible use required of persons with diagnosed alcohol abuse, Applicant has no more than two drinks if he is going to drive. He consumes as many as four or five "Black Russians" on occasion while gambling at the racetrack or casino, but only if he plans to stay there for an extended period. The absence of any evidence of alcohol-related impairment since August 2006 is consistent with a moderation of his consumption.

Applicant has the counseling and favorable prognosis required for mitigation under 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.

Yet he lacks affiliation with a support network like AA. Although AA was recommended to him ("They said if [he] wanted to go, it would probably be good to go") (Tr. 68.), there is no evidence that it was a required component of his aftercare. Under those circumstances, AG ¶ 23(d) applies despite his failure to attend AA or similar organization.

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),[2] 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."

[2]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 I controlled substance.

Applicant began using marijuana in 1985. When he was arrested for threatening a gas station attendant in May 1985, he had a small quantity of marijuana in his possession. He used marijuana sporadically thereafter, including in July or August 2008 after his girlfriend died. He purchased marijuana as well, at a frequency that he described as more than once. Applicant bought about $20 worth after his girlfriend died. Whether or not he purchased the marijuana from an acquaintance (Ex. 2.) or from a stranger on the street (Tr. 53.), he knew that marijuana was an illegal drug (Tr. 56.) and that it was against his employer's drug policy. (Tr. 58.) AG ¶ 25(a), "any drug abuse," and AG ¶ 25(c), "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," apply. Furthermore, when asked about his future intent, Applicant was not willing to state that he would not use marijuana again if he felt like it, even after he was reminded of his employer's policy prohibiting illegal drug use. AG ¶ 25(h), "expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use," also applies. Disregard of the law raises considerable doubts about a person's judgment, reliability, and trustworthiness.

The details of Applicant's illegal drug use are not fully known to the Government. Applicant was reluctant to estimate the extent of his marijuana use other than to indicate that it was sporadic. But he also admitted that he enjoyed the drug's relaxing effects, and that he saw no problem with using it at home while watching television. Also, if he purchased marijuana from strangers on the street, one has to question how he knew where to acquire the marijuana. His enjoyment and purchase suggest a level of marijuana involvement greater than the one or two times total between 1985 and July/August 2008. Furthermore, assuming his marijuana involvement was infrequent, 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," cannot reasonably apply when he is unwilling to commit himself to abstain from marijuana. None of the mitigating conditions are fully established.

Criminal Conduct

The security concern for criminal conduct is set out in Guideline J, AG ¶ 30: "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations."

Applicant has a long history of an inability or unwillingness to conform his behavior to the law. While the July 2006 DUI charge was dismissed, he does not dispute that he drank to excess before his arrest. He disputes the August 2006 DUI, claiming that he was set up, but the undisputed facts are that he operated a vehicle after he had too much to drink. In May 2006, he drove off after striking another car because he had been drinking. Assuming Applicant was unaware that he had been banned by the casino in March 1995, his arrest for criminal trespass should have given him reason to avoid the casino or at least determine whether he was still banned from the premises before going there in October

2000. Police and court records substantiate that Applicant hit a law enforcement officer in April 1990. While adjudication was withheld on the felony charge of battery on a law enforcement officer, AG ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted," still applies to that offense. AG ¶ 31(a), "a single serious crime or multiple lesser offenses," and AG ¶ 31(c) are also applicable.

None of the potentially mitigating conditions under AG ¶ 32 apply. Although more than three years have passed since Applicant's last arrest, his purchase and use of marijuana in July or August 2008 constitute recent illegal behavior. Moreover, given his expressed enjoyment of the illegal drug and unwillingness to commit to abstention, I cannot reasonably conclude that his criminal conduct is not likely to recur. AG ¶ 32(a), "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," is not implicated. While Applicant shows some rehabilitation of his alcohol-related offenses, most notably the successful completion of outpatient treatment, it is not enough to dispel the lingering concerns about his judgment, reliability, and trustworthiness raised by his persistent disregard for the laws prohibiting the abuse of controlled substances. Moreover, it is also difficult to apply AG ¶ 32 (d), "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement," in light of his deliberate misrepresentations on his July 2008 e-QIP (*see* Guideline E). The deliberate falsification of his e-QIP is punishable as a felony under 18 U.S.C. § 1001.[3] Although not cited in the SOR, I note Congress has recognized the importance of accurate information being provided to the government.[4]

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

[3]Title 18, Section 1001 of the United States Code provides in pertinent part:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully - (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

[4] *See* footnote 5.

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

Applicant admits that he omitted his August 2006 DUI arrest from his e-QIP because he felt the charge was not justified ("the incident was ridiculous," Ex. 2.), and he felt he had been set up. He was required to report that arrest in response to question 23.f concerning any offenses in the last seven years, if not question 23.d, asking about any charges related to alcohol or drugs. His deliberate omission implicates disqualifying condition 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.

Applicant has denied intentional concealment of his other offenses, including his May 1985 possession of marijuana, April 1990 felony battery, April 1995 DUI, and May 2006 criminal trespass. During his September 2008 interview with a Government investigator, he recalled that he was arrested about ten years ago for DUI, and that he "may have had a small amount of marijuana in the lid of a shaving cream can" during an incident at a gas station. He denied any recollection of a marijuana possession charge, of any felony charges at any time, and of any misdemeanor charges within the past ten years except for two or three minor traffic tickets. He attributed his omission of recalled offenses to having filled out his e-QIP quickly and not giving it the attention he should have. (Ex. 2.) At his hearing, he denied any concern that the Government would find out about his omitted offenses. When pressed for an explanation for the omissions, Applicant initially responded that he "maybe didn't take this red badge too seriously." He later indicated that he likely could not recall the incidents because he was drunk at the time of his arrests. (Tr. 106-07.) Given the extent of Applicant's criminal record, and the dated nature of some of the charges, I accept that he lacked full recall of some of the incidents and charges filed against him. That said, it is difficult to believe that he would not recall pleading no contest to battery on a law enforcement officer, given he could have been sentenced for up to five years in prison and he was placed on probation for 18 months for the offense. His omission of the May 2006 leaving the scene of an accident was also likely intentional, given its relative recency respective to the e-QIP and his ability to recall the specifics of the offense. AG ¶ 16(a) applies to these omissions as well.

AG ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted," is partially applicable in that Applicant "reported" during his September 2008 interview his unlisted August 2006 DUI arrest, and acknowledged that he had deliberately omitted it from his e-QIP. But I cannot fully apply this mitigating condition where he maintained during that same interview that other than the two DUIs in 2006, he had only two or three minor traffic tickets within the past ten years. The May 2006 leaving the scene of an accident cannot reasonably be described as a minor traffic ticket, especially where a warrant was issued for his arrest for failure to pay court ordered fines, costs, and restitution. Moreover, he was not completely

candid about his marijuana involvement either during his subject interview or in his January 2009 response to interrogatories. (Tr. 53-54.) He falsely claimed in January 2009 that he had tried marijuana in 1985 or 1986 but abstained thereafter until after the death of his girlfriend in 2008. His misrepresentations in response to DOHA interrogatories and during his subject interview could have been alleged under Guideline E. *See* AG ¶¶ 16(a) and 16(b) (stating, "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative"). Because the Government did not allege any falsification of Applicant's interview or interrogatories, these misrepresentations cannot provide an independent basis for denial of his security clearance However, they are relevant in assessing the extent of his reform of his e-QIP omissions.[5]

By signing the e-QIP, Applicant certified that his statements on the form were "true, complete, and correct to the best of [his] knowledge and belief and [were] made in good faith." He was put on notice that a knowing and willful false statement on the form could be punished by a fine or imprisonment or both under 18 U.S.C. § 1001. His knowing omission of the August 2006 DUI is enough to preclude me from considering 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." He shows little to no remorse for his false statements, so I also cannot apply 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." The personal conduct concerns are not completely mitigated.

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

[5]In ISCR Case No. 03-020327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered:

> (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole-person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). I have considered the non-SOR misconduct for the five above purposes and not for any other purpose.

> 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.

Applicant admits he engaged in "petty, minor, little crazy stuff" when he was younger, and that he was so drunk in July 2006 that has no memory of the arrest itself. (Tr. 113-14.) While he realized on the occasion of his August 2006 that he was too intoxicated to drive safely, he still got behind the wheel of his car after casino security told him he had to leave. To his credit, he successfully completed his alcohol counseling and has not allowed his use of alcohol to negatively affect his judgment thereafter. But he has shown little reform of his illegal drug abuse. Although it was made abundantly clear to Applicant at his hearing that he is not allowed to smoke marijuana while holding a security clearance, Applicant is unwilling to commit himself to abstention from future marijuana use. He sees little wrong with using marijuana in his own home when he wants to. Applicant has made a choice that is incompatible with the fiduciary obligations of a security clearance. Due to the drug involvement, criminal conduct, and personal conduct concerns detailed above, I cannot conclude that it is clearly consistent with the national interest to grant Applicant 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 G:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant
Paragraph 3, Guideline J:	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
Subparagraph 3.f:	Against Applicant
Subparagraph 3.g:	Against Applicant
Subparagraph 3.h:	Against Applicant
Subparagraph 3.i:	Against Applicant
Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraph 4.a:	Against Applicant
Subparagraph 4.b:	Against Applicant
Subparagraph 4.c:	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