DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 09-01652
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Nichole Noel, Esquire, Department Counsel
For Applicant: *Pro se*

March 25, 2011

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I grant Applicant's eligibility for access to classified information.

Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application (SF-86) on October 9, 2008. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on July 6, 2010 detailing security concerns under Guideline J, Criminal Conduct, and Guideline E, Personal Conduct, that provided the basis for its preliminary decision to deny him a 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) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on July 19, 2010. He answered the SOR in writing on July 20, 2010 and requested a hearing before an administrative judge. DOHA received the request on July 23, 2010, and Department Counsel was prepared to proceed on September 28, 2010. I received the case assignment on October 4, 2010. DOHA issued a notice of hearing on October 26, 2010, and I convened the hearing as scheduled on November 17, 2010. The Government offered government exhibits (GE) 1 through 6, which were received and admitted into evidence without objection. Applicant and two witnesses testified. He did not submit any exhibits. DOHA received the transcript of the hearing (Tr.) on December 2, 2010. I held the record open until December 1, 2010, for Applicant to submit an additional document. Applicant requested an additional 10 days to obtain the requested document, and the Government did not object. By order dated December 6, 2010, I granted Applicant's request, giving him until December 16, 2010 to submit the documentation. Applicant has not provided the requested document. The record closed on December 16, 2010.

Procedural Ruling

Applicant received the hearing notice less than 15 days before the hearing. (Tr. 8.) I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice. (*Id*.)

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in the SOR.[1] His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 36 years old, works as an engineering technician for a Department of Defense contractor. He began this employment in November 2005. His job requires him to travel. He works part time for his father's contractor business and has done so since 2000.[2]

Applicant graduated from high school and later attended a technical school, where he received training in drafting design and architecture. He is married. He has a daughter, who is nine years old, and a son, who is three years old. In his spare time, Applicant, who is a also musician, plays drums for local churches.[3]

[1]Given his trial testimony, Applicant admitted the omission of the facts set forth in SOR ¶ 2.a, but he did not admit intentional falsification.

[2]GE 1; Tr. 15-16.

[3]*Id*.

On August 1, 2000, Applicant traveled from his state of residence to a state 1,000 miles away with a friend. The sole purpose of their trip was to obtain marijuana, which they intended to take home and sell for profit. They received the drugs and returned to the airport for their trip home. Applicant checked two large suitcases containing the marijuana. As he walked through the airport, local police observed his behavior, which they found suspicious. After the suitcases had been checked with the airline, police canines detected drugs. The police detained Applicant, who gave them permission to inspect the suitcases. The police found nine vacuum sealed packages containing marijuana with an approximate weight of 106 pounds. The police arrested and charged him the same day. The grand jury issued an indictment against Applicant on August 24, 2000.[4]

Applicant appeared in court on September 11, 2000 with his legal counsel. He plead guilty to the charge of possession of marijuana weighing more than 50 pounds, but less than 2000 pounds. After hearing the evidence, the court concluded the evidence substantiated the defendant's (Applicant's) guilt. With Applicant's consent, the court deferred adjudication,[5] as permitted by the state criminal code. The court declined to enter a finding of guilt, placed Applicant on community supervision for 10 years, fined him $750, plus other costs and fees, and ordered that he perform 350 hours of community service, attend drug education classes, and participate in treatment alternatives to incarceration programs. His community supervision program imposed numerous other conditions on him. The court also transferred his supervision to his home state. Applicant completed the requirements of his community supervision. On July 30, 2007, the adjudicating court discharged Applicant from further community supervision and dismissed the proceedings against Applicant. The court did not enter a finding of guilty against Applicant. He has accepted full responsibility for his conduct.[6]

On May 15, 2003, Applicant flew from his hometown to a major city about 250 miles away, intending to drive to a small city another 180 miles distant to attend a cookout and to pick up his brother for the return trip home. Mr. H, a friend whom he had known casually for four or five years and saw once or twice a year, drove to the major city airport. Applicant drove Mr. H's car to the smaller city. On the way, the police stopped him for failure to maintain lanes. During the stop, the police accused him of driving on a suspended license, and driving after drinking. Neither of the accusations were true. The police also told him they smelled marijuana and searched the car with drug detection dogs. No drugs were found, although Mr. H told the police he had a small amount of marijuana on his person. Applicant was aware of Mr. H's possession of this small amount. The search of the car also produced a firearm, belonging to Mr. H, who had a license for the firearm. The police arrested and charged Applicant with driving on a suspended license and arrested Mr. H for possession of less than one ounce of

[4]GE 2; GE 4; GE 5; Tr. 16-17.

[5]Under State law this means no adjudication of guilt. GE 5.

[6]Response to SOR; GE 5; Tr. 18-20.

marijuana. While in the holding cell, Mr. H told Applicant that the police missed the drugs in the cooler in the trunk of the car. After this conversation, Mr. H paid bail and the police released him. In the meantime, a jailhouse informant told the police about their conversation. The police searched the car again, and found 2.7 pounds of marijuana and four stolen lottery tickets. The police filed charges against Applicant for possession of marijuana and stolen lottery tickets. Applicant denied any knowledge of the lottery tickets and of the marijuana in the cooler prior to his conversation with Mr. H in the holding cell.[7]

After the grand jury issued an indictment against Applicant and Mr. H, on May 19, 2003, the local sheriff served Applicant with four criminal arrest warrants, charging him with possession of marijuana with the intent to sell, a felony; with possession of a firearm within arms reach, a felony; theft by receiving stolen property, a misdemeanor; and possession of a firearm during the commission of a crime, a felony. Applicant obtained an attorney to represent him in this matter.[8]

Applicant appeared in court on February 23, 2004. Prior to his court appearance, Applicant and his attorney discussed the charges against Applicant. They weighed the problems Applicant faced because Mr. H was not accepting responsibility for his conduct related to the lottery ticket and marijuana in the cooler. His attorney advised him that this was a "he said, he said" case and that Mr. H was trying to shift his conduct onto Applicant because of Applicant's previous arrest and ongoing probation. Applicant understood that he faced the possibility of some jail time. Upon the advice of his attorney, Applicant agreed to plead guilty to one count of possession of marijuana with the intent to sell, a felony. The prosecutor offered Applicant this plea along with a recommendation for probation and a reduced fine. The prosecutor dismissed the remaining charges, including the possession of stolen lottery tickets charge and the firearms charges.[9]

When Applicant appeared in court to enter his plea, the following colloquy took place:

> Prosecutor: Factual basis: On the date stated in the indictment, Deputy L was sitting on the interstate. He noticed this car was weaving outside of its lane, actually going down one lane, I think, riding the line for several hundred feet, maybe even a mile. He initiated a traffic stop. He smelled the odor of burnt marijuana, decided to inquire about his insurance. When Deputy L inquired as to the status of [Applicant's] license, dispatch told him it was suspended. **However, it actually wasn't suspended** [emphasis supplied] but that was what Mr. L or Deputy L was told, that it

[7]GE 3; Tr. 20-23, 26-27, 41-42.

[8]GE 6.

[9]*Id*.; Tr. 25, 44-45.

was. He therefore placed him under arrest, put him in the back of the patrol car. He went over to the passenger to find out information on the passenger. The passenger said he did have a valid driver's license; it was actually his car. Deputy L's K-9 unit alerted on the vehicle. He then searched the vehicle but didn't find anything. Mr. H [passenger] said I have a cigarette joint on me. He was placed under arrest. They were both transferred to the jail. While in jail, a confidential informant overheard some conversation they were having as to the marijuana that the officer had missed. That informant then went and told Investigator R. that there was some marijuana inside a cooler in the back trunk of the vehicle. The officer went and got a search warrant and went to search the car. It had been impounded since they were arrested. When they [police] went to go do the search, they found 2.7 pounds of marijuana in an ice chest in the trunk of their vehicle.

Your honor, those are the facts as far as to the charges, and the state is recommending in this case to [Applicant] that he have seven years' probation, a fine not to exceed $5,000. And even though there was possession of a firearm, there was a firearm, even though – as to those charges, even though they are being nolle prossed, [Applicant] will waive any rights he has to a firearm as part of the plea offer.

The Court: Is part of the plea that he testify truthfully?

Prosecutor: I'd like to ask him those questions now.

The Court: Has he been placed under oath?

Prosecutor: [Applicant], you've already pled guilty to the charge of marijuana, and it was your vehicle you were driving in; is that right?

[Applicant]: No, it was Mr. H.'s

Prosecutor: You were driving the vehicle, right?

[Applicant]: Yes, sir.

Prosecutor: You knew there was marijuana in the cooler in the back of the vehicle, did you not?

[Applicant]: Yes, sir.

Prosecutor: Did also Mr. H.?

[Applicant]: Yes sir, he did.

Prosecutor: Okay. Where did you get the marijuana?

[Applicant]: The marijuana – I didn't get the marijuana, Mr. H. did.

Prosecutor: Mr. H. got the marijuana. Was it his idea?

[Applicant]: Yes, it was.

Prosecutor: Did you see him put it in the cooler?

[Applicant]: No, I didn't.

Prosecutor: But you knew it was back there inside the cooler?

[Applicant]: Yes.

Prosecutor: Did he tell you he did it?

[Applicant]: I knew it because I knew he did it. He had it in the cooler.

Prosecutor: Where were you transporting it to?

[Applicant]: He was taking it to [city name].

Prosecutor: And you were going with him?

[Applicant]: Yeah. I was going to pick up my brother and go back.

Prosecutor: You were going to share the proceeds?

[Applicant]: No.

GE 6.

After this, the court found that Applicant's guilty plea was freely and voluntarily entered, that because of his plea, he could not own a firearm or be near a firearm, that Applicant waived his constitutional rights, and that he gave up his right to claim that Mr. H's firearm was actually Applicant's firearm.[10] The court said it would follow the recommendation of the state on the plea. Applicant testified to earning $350 to $400 a week, to living with his parents, to paying for his daughter's day care, the light bill, and the phone bill at home. He did not own a house or car, and he filed his 2003 taxes, which reflect an income of $15,000. On February 23, 2004, the court noted that it

[10]Applicant denied that the gun in the car belonged to him. At his sentencing, he acknowledged to the court that he was giving up a right to make any future claims that the gun was actually his. Given his denial of ownership, it would be no problem for Applicant to give up this right. GE 6E, p. 3, 12.

appreciated applicant's honesty and frankness, which the court stated was worth a lot. The court also asked him if he knew when he got in the car he had marijuana and Applicant answered "yes".[11] The court then fined him $3,500 and placed him on seven years of probation, which ended on February 23, 2011. The prosecutor nolle prossed the remaining charges against Applicant. The court did not sentence him as a first offender, as Applicant's home state would not accept a first offender status probation, but would accept an individual in probation status. The second arrest and sentencing did not impact Applicant's probation for his arrest in 2000.[12]

Since the day of his arrest in May 2003, Applicant has not seen or associated with his casual friend, Mr. H. He may have seen him in court in 2003 or 2004, but Applicant is not sure. Applicant has not been involved with drugs or the police since 2003. He works regularly and spends time with his family or playing music at his church. He works for his father's business when needed, and when he is available.[13]

When he completed his e-QIP, Applicant listed his two marijuana arrests and probation as the action taken. He also stated that he did not know that the illegal drugs were in the car when the police stopped the car for a traffic violation in 2003 as the car belonged to his passenger (Mr. H), the owner of the car, who had not made him aware of the marijuana in the car. When he met with the Office of Personnel Management (OPM) investigator, he reviewed the facts of his 2003 arrest. He outlined the circumstances surrounding his arrest, which correlate with the facts previously discussed in this decision. He told the investigator that the car was searched by the police, who found a gun. He denied any knowledge of the gun prior to its discovery. He acknowledged both he and Mr. H were arrested and taken into custody. He did not have any knowledge about the reasons for the release of Mr. H and the charges against Mr. H. He appeared at a court hearing the day after his arrest, where the court informed him that he was being charged with possession of marijuana and stolen lottery tickets. Applicant advised the OPM investigator that he was shocked by the charges for marijuana and stolen lottery tickets as he had no knowledge of these items being in the car. He further advised that the police asked him to contact Mr. H, but that he did not have any means to contact Mr. H. He described additional facts concerning what he knew about the discovery of the marijuana and lottery tickets and the results of his case. He told the OPM investigator that he plead guilty to possession of marijuana and that the remaining charges were dropped.[14]

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[11]The court did not inquire as to whether Applicant's knowledge of marijuana in the car related to the small amount of marijuana on his friend or the marijuana in the cooler. At the hearing on his plea, Applicant testified that he did not observe Mr. H placing the marijuana in the cooler. GE 6.

[12]*Id*. at p. 4, 12.

[13] GE 3, p. 4; Tr. 16, 45-46.

[14]GE 3.

On cross-examination, Applicant admitted pleading guilty to possession with intent to distribute as a result of his 2003 arrest, understanding that he was not pleading guilty to simple possession, and answering the questions of the court truthfully. When Department Counsel reviewed his answers to the prosecutor's questions about his knowledge, Applicant again stated that at the time of the traffic stop, he did not know there was marijuana in the car. He also admitted that he did not specifically say to the court that he learned about the marijuana in the holding cell. After Department Counsel read Applicant his answers to the court and pointed out to him that his court testimony sounded as if he had known the marijuana was in the car, Applicant stated "now I see what you're saying." He again stated that he did not know the marijuana was in the cooler until he and Mr. H talked in the holding cell.[15]

Concerning his interview with the OPM investigator and his statement that he did not know about the marijuana, Applicant testified, on cross-examination, that he was thinking about when the police stopped him and asked him if there was marijuana in the car. He misunderstood the focus of the investigator's question, as he was thinking about when he was stopped. He did not know about the marijuana at the time of the stop, but he did learn about it after the fact. He plead guilty to the charge based on his after the fact knowledge. Applicant affirmed that the statement of the investigator was correct.[16]

In his answer to interrogatories dated April 3, 2009, Applicant indicated that he last possessed marijuana in August 2000, but that he plead guilty to a marijuana charge in 2003. At the hearing, Applicant explained that he answered in this format because he had already plead guilty to the charge. Again, Applicant stated that he plead guilty to this charge, but that he did not possess the marijuana that was in the car and that he was denying responsibility for the underlying crime. He knew that Mr. H used marijuana, which was illegal, and that Mr. H sold marijuana. He knew about Mr. H's conduct because Mr. H told him. Mr. H never smoked marijuana in Applicant's presence, as Mr. H knew Applicant did not use marijuana. Mr. H never sold marijuana to Applicant.[17]

Applicant's father, a church bishop, and a friend testified on Applicant's behalf. Both know about his criminal arrests in the past. Both consider Applicant trustworthy. His friend described him as honest, dependable and reliable. Applicant is married and takes responsibility for his family. He has proven himself to them through his conduct and behavior. Applicant told his friend that he was wrong in committing crimes with drugs and has learned from his mistakes.[18]

Applicant deeply regrets his actions. His decision to purchase and sell marijuana in 2000 was out of character. He realized that his decision impacted others as well as

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[15]Tr. 34-36.

[16]*Id*. at 36-39; GE 3.

[17]GE 2; Tr. 39-42, 46-47.

[18]Tr. 49-66.

himself. He expressed regret for his actions and has taken steps to keep himself out of trouble with the police since 2003. He spends time with his family and plays drums for his church music group. He works hard.[19] Throughout the hearing, Applicant testified credibly about the facts of this case.[20]

Policies

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 used 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, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for obtaining 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 an applicant may deliberately or inadvertently fail to protect or

[19]GE 2; Tr. 16-17, 24.

[20]Under the Directive ¶ E3.1.32.1, the Appeal Board is required to give deference to the credibility determinations of an administrative judge. ISCR Case No. 04-05712 (App. Bd. Oct. 31, 2006)

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

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct: "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."

AG ¶ 31 describes conditions that could raise a security concern and the following may be disqualifying in this case:

> (a) a single serious crime or multiple lesser offenses; and
>
> (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

In 2000, Applicant flew 1,000 miles from his home with the specific intent to purchase marijuana for resale. The police arrested him and he plead guilty to possession of marijuana with intent to distribute charges in 2000. In 2003, the police arrested and charged him with a number of criminal acts after a traffic stop. Applicant plead guilty to one count of possession of marijuana with the intent to sell. Based on its allegation of falsification, the Government provided substantial evidence for its allegation of falsification in SOR ¶ 1.c. AG ¶¶ 31(a) and 31 (c) apply.

AG ¶ 32 provides conditions that could mitigate security concerns:

> (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;
>
> (c) evidence that the person did not commit the offense; and
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> (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.

Applicant's first arrest occurred more than 10 years ago, and his second and last arrest occurred nearly eight years ago. Applicant has not been arrested by the police or involved with the police since 2003. He is married and spends his free time with his wife, daughter, and son. He has worked steadily since November 2005, not only at his full-time job, but he also works part time for his father's construction business. He supports his family and pays his bills. He plays drums for his church music group; otherwise he focuses his time on work and family. He realizes the harm he caused himself and his family by his past behavior. He deeply regrets his decision in 2000. He no longer associates with people involved in criminal activity or drugs. He never used marijuana or any other illegal drug. Applicant has rehabilitated his past criminal conduct; thus he has mitigated the security concerns raised in SOR ¶¶ 1.a and 1.b under AG ¶¶ 32(a) and 32(b).

Given that I found that Applicant did not falsify his statement to the OPM investigator, SOR ¶ 1.c is found in favor of Applicant.

Guideline E, 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(b) describes a condition that could raise a security concern and may be disqualifying:

> deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

For AG ¶ 16(b) to apply, Applicant's false or misleading information to the OPM investigator must be deliberate. Proof of a false statement, standing alone, does not establish that it is deliberate. *See* ISCR Case No. 07–00196 (App. Bd. Feb. 20, 2009); ISCR Case No. 09-07551 (App. Bd. Mar. 1, 2011) In evaluating whether the Government has presented substantial evidence regarding the deliberate nature of a false statement or an omission, the Judge must examine the statement or omission in light of the record as a whole. *Id*. In making this determination, the administrative judge must determine whether there is direct or circumstantial evidence concerning an

applicant's intent or state of mind at the time the omission occurred.[21] When he met with the OPM investigator, Applicant denied the underlying conduct to which he plead guilty in court in February 2004. In his answer to the SOR, he admitted the allegation in SOR paragraph ¶ 2.a. However, in his e-QIP, in his response to interrogatories, in his statement to the investigator, and through his hearing testimony, he consistently stated that he plead guilty to possession of marijuana with intent to distribute, but denied that he actually possessed the marijuana with an intent to distribute at the time the police stopped Mr. H's vehicle for a traffic violation. He learned about the marijuana while in the holding cell and because of this knowledge, he plead guilty to knowledge that the marijuana was in the car. He denied at his court proceeding purchasing the marijuana or placing the marijuana in the cooler in the car. However, he made an ambiguious statement during the providence inquiry about knowing the marijuana was in the vehicle's trunk.

The Appeal Board has generally held that the doctrine of collateral estoppel applies in DOHA proceedings. Under this doctrine, an applicant is precluded from contending they did not engage in criminal acts for which they were convicted. *See* ISCR Case No. 04-05712 (App. Bd. Oct. 31, 2006) This concept is based upon the premise that an individual's right to administrative due process does not give him or her the right to litigate a second time matters properly adjudicated in an earlier proceeding. *Id*. In this case, Applicant plead guilty to possession of marijuana with the intent to distribute, and the court found him guilty of this criminal act in 2004, which is a conclusive finding that cannot be relitigated in this case.

In deciding whether Applicant intentionally provided false or misleading information during his interview, I must look at his state of mind when he met with the OPM investigator. Applicant, who graduated from high school and has received technical training, is not a licensed lawyer. He does not have the education or skills to understand the nuances of law, which in this case, by pleading guilty in court, he acknowledged that he committed the underlying criminal acts. *Id*. Throughout his security clearance process, Applicant readily and openly acknowledged that he was arrested in 2000 and 2003; that he plead guilty in court in both cases; and that he received probation in both cases. He also accepted full responsibility for his criminal conduct and actions in 2000. While he admitted that he plead guilty to possession of marijuana with intent to distribute in 2003, he consistently denied the actual conduct. When he completed his e-QIP and when he met with the OPM investigator, he denied any knowledge of the marijuana in the cooler at the time of his traffic stop and subsequent arrest for driving on a suspended license. Applicant's statement to the investigator does not reflect that he was providing information based on his knowledge at the time of his arrest. Rather, he talks in general terms about his understanding of the events which took place. He denied any knowledge of the drugs in the car, and he did not mention learning about the drugs in the holding cell. Applicant also told the investigator that he was "shocked" by the charges for possession of marijuana and

[21] *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov.17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

stolen lottery tickets. Given his statement that he learned about the marijuana while in the holding cell, he did not provide truthful and accurate information to the OPM investigator about the circumstances surrounding his arrest in 2003. The Government has established its case under Guideline E.

AG ¶ 17 provides conditions that could mitigate security concerns. The following mitigating conditions are relevant in this case:

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

After his arrest almost eight years, Applicant has changed his behavior and friends. He stays away from individuals engaged in criminal activity, particularly individuals who are involved with drugs. He focuses his energy on his family and his work. For more than six years, he has worked successfully with the same company. In his spare time, he plays drums at his church. He actively made a decision to stay away from his earlier acquaintances, which has changed the direction of his life. This decision shows maturity, good judgment, reliability and trustworthiness. AG ¶¶ 17(e) and 17(g) apply.

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 an applicant's conduct and all relevant 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 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. More than 10 years ago, Applicant made a bad decision when he decided to purchase a substantial quantity of marijuana to sell. When the police stopped him, he cooperated with their requests to search his suitcases, knowing that drugs would be found during their search. He appeared in court less than two months after his arrest and pleaded guilty to the criminal charges. He paid his fine. He recognized that his conduct was wrong and harmful to him and his family. Since this time, he has never purchased such large quantities of marijuana for any reason, including with the intent to sell.

In 2003, he accepted a ride with a casual friend to a cookout, not knowing the major problems which would result from this decision. A traffic stop resulted in new criminal charges for a multitude of criminal offenses stemming from actions taken by his friend. Recognizing the dilemma in which his decision placed him, Applicant relied upon the advice of his attorney and plead guilty to one count of possession of marijuana with an intent to distribute. Since his sentencing in 2004, he has not been involved in drugs or any other criminal activity. He no longer associates with this friend.

Throughout the security clearance process, Applicant has been honest and forthcoming about his two arrests and the results of these arrests. He has not made any attempt to hide his past criminal conduct, although he failed to be completely forthright with the OPM investigator about all the facts surrounding his arrest and plea.

Applicant focuses his time on his family and church. He works hard. He has held his current job for more than five years, and he has worked part-time for his father for over 10 years. He learned from his past mistakes. As a result, he changed his behavior. He is dependable and reliable. Most importantly, he recognizes that he made a serious mistake when he decided to purchase marijuana for resale in 2000 and when he chose Mr. H as a friend. For the last eight years, he has worked hard to change his attitude and behavior with great success. He has no need to be involved with criminal activity or persons involved in criminal activity.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I

conclude Applicant mitigated the security concerns arising from his personal and criminal conduct.

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 J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARY E. HENRY
Administrative Judge