DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 10-00515
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Marc G. Laverdiere, Esquire, Department Counsel
For Applicant: *Pro se*

July 13, 2011

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant abused marijuana about three dozen times from 2000 to May 2009. In August 2004, he was fined $500 at the U.S.–Canadian border after marijuana, belonging to a woman he was dating, was found in his car during a random search. He smoked marijuana about three times thereafter: in August 2004 with the former girlfriend and in July 2007 and May 2009 after job losses. Applicant now understands that prohibited drug activity is inconsistent with his responsibilities to the Government, and he does not intend to use any illicit substance in the future. Clearance granted.

Statement of the Case

On September 22, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H (Drug Involvement), which provided the basis for its preliminary decision to deny him a security clearance. DOHA took action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance*

Review Program (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR allegations on October 18, 2010, and requested a hearing. 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 January 21, 2011, I scheduled a hearing for February 16, 2011.

I convened the hearing as scheduled. Two Government exhibits (GE 1-2) and 11 Applicant exhibits (AE A-K) were entered into evidence, and Applicant testified, as reflected in a transcript (Tr.) received on February 28, 2011.

Findings of Fact

The SOR alleged that Applicant used marijuana from 2002 to at least May 2009 (SOR 1.a) and that he was fined $500 for possession of marijuana in August 2004 (SOR 1.b). In his answer to the SOR, Applicant admitted that he used marijuana from December 2002 to May 2009, although on only a couple of occasions after 2004. He indicated that his "recreational" use of marijuana was behind him and that he would be willing to submit to random drug screens to prove his abstention. Applicant's admissions are incorporated as findings of fact. After considering the pleadings, exhibits, and transcript, I make the following additional findings of fact.

Applicant is a 32-year-old senior radio frequency design engineer. He was awarded his master's degree in electrical engineering in May 2006 (GE 1; AE D; Tr. 22) and has worked for his current employer, a defense contractor, since June 2009. He seeks his first security clearance. (GE 1; Tr. 24.)

Applicant began smoking marijuana in college in 2000. He used marijuana about six times in social situations when the drug was passed to him. (Tr. 25-26.) In May 2002, Applicant earned his bachelor's degree in electrical engineering. He moved from the South to the northeastern United States for employment in the semiconductor industry in August 2002. (GE 1.) Shortly thereafter, he began socializing at a local bar, where he met people who used marijuana. In December 2002, he began smoking marijuana occasionally with them when the drug was offered. In September 2003, Applicant began graduate studies in engineering at night while continuing his full-time employment. (GE 1.) Around January 2004, Applicant's employer relocated its operations to another city, and Applicant moved closer to his new worksite. Applicant stopped socializing with the persons with whom he had smoked marijuana at the bar. (Answer.)

In July 2004, Applicant attended some highland games in Canada. He began dating a local Canadian national he had met at the games. Applicant traveled to Canada almost every weekend to see her, and they smoked marijuana together. En route home after a visit to Canada in August 2004, Applicant's vehicle was randomly searched by U.S. border officials. They found a cigarette package containing a marijuana "roach," which had been left in his vehicle by the Canadian national without his knowledge. Applicant paid a fine of

$500 at the border for possessing a small quantity of marijuana. Applicant smoked marijuana with the Canadian national one more time before they ended their relationship in late August 2004. (GE 1, 2; Answer; Tr. 26-29, 36.)

In 2004, Applicant met the woman whom he would eventually marry (hereinafter spouse). She was a recreational marijuana user (Tr. 39), although there is no evidence that Applicant smoked marijuana with her at that time. He focused on his work and graduate studies, and he used marijuana on only a couple of occasions after 2004.

While on a business trip for his then-employer in July 2007, Applicant argued with some coworkers about the company outsourcing production work overseas. His spouse was employed in production at the company, and he felt very strongly about it. (Tr. 32-33.) A fairly senior female employee tried to stop him from leaving in anger, and she fell when he pushed her aside. When Applicant returned to the office, he told his supervisor about the incident. He also sought a referral from his employer for anger management counseling. (GE 1; Tr. 45-46.) A day or two later, he was told it would be best if he left the job voluntarily, and he resigned. (Tr. 46.) Upset over the loss of his job, Applicant smoked marijuana in July 2007 with his spouse and her mother.[1] His spouse's mother provided the marijuana. She used the drug recreationally, but primarily for pain following the loss of a hand in an industrial accident. (GE 2; Tr. 39.)

In September 2007, Applicant began working as a hardware design engineer in semiconductor testing. (GE 1.) He performed well in his new job. (AE H, I.) Yet, in mid-April 2009, he was laid off in a downsizing. (Tr. 48-49.) In May 2009, Applicant smoked some marijuana while visiting a former coworker, who had also lost his job in the recent layoff. Applicant was offered the marijuana by this friend, and his use was unplanned. (GE 2; Tr. 53.)

When applying for a position with his current employer, Applicant learned that he would be required to pass a drug test. He intentionally refrained from using marijuana to ensure a clean drug screen. (GE 2; Tr. 39-40, 52.) In June 2009, he was hired as an engineering hardware manager by his present employer. On August 10, 2009, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) on which he disclosed that he used marijuana recreationally "every several months (approx. 30 times)" between December 2002 and May 2009. He also reported that he had been stopped at the Canadian border in August 2004 and "charged $500 for .2g of marijuana." (GE 1.) Applicant had not realized before the e-QIP that recreational use of marijuana would be inconsistent with a security clearance. (GE 2.)

In mid-September 2009, Applicant was interviewed by an authorized investigator for the Department of Defense about the circumstances of his job loss in July 2007 and his involvement with marijuana. Applicant reiterated that he had used marijuana about 30

[1]Applicant has repeatedly asserted that he smoked marijuana with his mother-in-law, who provided the drug. At his hearing, he was asked whether he had ever smoked marijuana with his spouse, and he responded, "She was there at the time, yes." (Tr. 37.) Apparently, he smoked marijuana on that occasion in July 2007 with his spouse and her mother.

times from December 2002 to May 2009 at random parties, with friends, or with his mother-in-law, when the drug was offered to him. Applicant appeared to be uncertain about whether he would resume his use of marijuana. He admitted that he did not consider marijuana use as criminal,[2] and he asked open-ended questions about whether resuming marijuana use would prevent him from obtaining a security clearance. (GE 2.) He had not known before the e-QIP that he could not resume his recreational use of marijuana, and he was uncertain of his employer's guidelines about illegal drug use. (Tr. 42-43.)

In July 2010, Applicant was given an opportunity to review a report of his September 2009 interview. He indicated the report was not accurate in that he had not smoked marijuana since May 2009 and that "[he had] decided not to use marijuana for recreational purposes again." (GE 2.)

In September 2010, Applicant and his spouse married. They bought a home in a family-oriented residential neighborhood. (AE D; Tr. 22, 24.) Taking on these adult responsibilities helped Applicant to realize that he had to settle down and avoid the "reckless" behavior of the past. (Tr. 50-51.) Applicant does not intend to use any marijuana or other illegal drug in the future because he wants to start a family and to lead by example. (Tr. 44, 50-52.) Applicant is not subject to random drug tests at work, but he is aware of his employer's policies against illegal drug use by employees. (Tr. 52.)

Applicant's spouse is a nursing student. (Tr. 52.) She stopped smoking marijuana before he did. She does not intend to resume her marijuana involvement. (Tr. 37.) Applicant's mother-in-law no longer uses marijuana. As of February 2011, she was in an extensive physical rehabilitation program where she was subjected to drug testing and on medications more effective than marijuana in alleviating her pain. (Tr. 38.) Applicant has informed his mother-in-law, and the former coworker with whom he had smoked marijuana in May 2009, that he does not intend to smoke marijuana in the future. (Tr. 55.)

As of February 2011, Applicant was not knowingly associating with anyone who currently used marijuana. A couple of his wedding guests ("previous friends") were known by him to be involved with marijuana. Applicant has not associated with them since his September 2010 wedding. They do not live in his area of the country. (Tr. 45.)

Applicant's longtime friends have no concerns about his personal integrity or his commitment to his work and to his family. They are aware that Applicant has made "mistakes" in the past and see in Applicant a maturation and stability of lifestyle that was not present five years ago. (AE A, B, C.) A former coworker of Applicant's from 2002 to 2007, who also pursued graduate studies in electrical engineering with Applicant at night, has no concerns about Applicant obtaining a security clearance. (AE D.) A software engineer, who worked with Applicant in 2008 and 2009, found him to be an enthusiastic, dependable worker and a team player. (AE E.)

[2]Applicant clarified at his hearing that he knew the use of marijuana was a criminal offense, but that he did not personally see it as a major problem. He felt alcohol was "probably a lot worse." (Tr. 42.)

During his first six months on the job with the defense contractor, Applicant achieved the performance objectives of his position. As a new employee, he required little oversight and quickly proved to be a valuable member of his design team. (AE G.) His year-end performance for 2010 was rated as "some exceeded." Applicant had what was described by his manager as a "very successful and productive year." He worked late hours and even weekends to meet or exceed schedule deadlines, and he took several initiatives to expand his skill set to benefit him and his group. (AE F.)

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 overall 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO

12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Drug Involvement

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

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

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

> (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens),[3] 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." As for the potentially disqualifying conditions, AG ¶ 25(a), "any drug abuse," applies because Applicant abused marijuana about three dozen times between his first use in 2000 and his last use in May 2009. AG ¶ 25(c), "illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia," has limited applicability. Applicant never purchased the drug. While he was fined $500 at the border for possession of marijuana in August 2004, the "roach" containing a trace amount of the illegal drug had been left in his car without his knowledge by the woman he was dating. Applicant otherwise had possession only when he smoked marijuana passed to him by others.

Most of Applicant's marijuana abuse occurred between December 2002 and August 2004, and it was not planned. But it is still difficult to apply 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," because of his marijuana abuse in July 2007 and again in May 2009 after lengthier (*i.e.* between August 2004 and July 2007) or similar (*i.e.* between July 2007 and May 2009) abstentions to his present 21 months.

[3]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.

Concerning whether AG ¶ 26(b), "a demonstrated intent not to abuse any drugs in the future," is established, Applicant's uncontroverted testimony is that his spouse stopped smoking marijuana before he did and that his mother-in-law is in a physical rehabilitation program contingent on her remaining free from illegal drugs. She is also on medications that are effective in alleviating her pain. Applicant cannot reasonably terminate his relationships with his spouse or his mother-in-law, but these close family members are no longer using marijuana, and they know Applicant does not intend to use any marijuana in the future. As for the two wedding guests involved with marijuana, Applicant has not socialized with these "previous friends" since September 2010, and they do not live in his area of the country. It is unclear whether Applicant has any ongoing association with the former coworker who shared marijuana with him in May 2009. Applicant testified credibly that he also informed this person that he is no longer using marijuana. Applicant's drug abuse at parties in college, with his bar room friends from December 2002 to January 2004, and with the Canadian national in July and August 2004, are safely in the past. AG ¶ 26(b)(1), "disassociation from drug-using associates and contacts," and AG ¶ 26(b)(2), "changing or avoiding the environment where drugs were used," apply.

Applicant has also committed himself in writing to abstain from all illegal drugs. When he responded to DOHA interrogatories in July 2010, Applicant denied any use of marijuana since his last use with his former coworker in 2009 and added, "I have decided not to use marijuana for recreational purposes again." (GE 2.) In his detailed, notarized response to the SOR, Applicant stated in part, "My recreational marijuana smoking days are behind me, and I look forward to settling down and starting to raise a family. I understand that this is only my word, but would be willing to take daily/monthly or even random drug tests to prove that I no longer smoke marijuana." While he has not utilized the specific language of AG ¶ 25(b)(4), "a signed statement of intent with automatic revocation of clearance for any violation," he clearly understands that any marijuana use is against DoD policy. He is willing to comply and to verify his abstention through drug testing.

Although not explicitly addressed in the mitigating factors, the random nature of his marijuana abuse, and its limited extent after 2004, are consistent with his claim that he does not have a substance abuse problem. While Applicant's past involvement with marijuana is not condoned, he now has family and financial responsibilities that are likely to reinforce his commitment to a drug-free lifestyle. The drug involvement concerns are 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).[4] Applicant's work has not suffered because of his recreational abuse of marijuana.

[4]The factors under AG ¶ 2(a) are as follows:

> (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

That being said, I have to consider Applicant's poor judgment in using illegal drugs, including twice after significant periods of abstention. Irrespective of his personal view that marijuana is less of a problem than alcohol, he had an obligation to obey the laws prohibiting marijuana abuse. As of September 2009, he exhibited some uncertainty about his future intentions concerning marijuana use, despite suspecting, if not knowing after the e-QIP, that he could not resume his use of marijuana if granted a security clearance.

To Applicant's credit, he has been candid with the Government about his illegal drug involvement. He also realized before the SOR was issued that marijuana use would be inconsistent with the family and financial responsibilities that he would be assuming within the next few months and that he planned for the future. Given the limited extent of his marijuana involvement since August 2004, he is likely to be able to abide by his commitment to a drug-free lifestyle. Based on the circumstances before me, I conclude it is clearly consistent with the national interest to grant Applicant eligibility 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	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.

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Elizabeth M. Matchinski
Administrative Judge

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.