DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 10-04182
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: David F. Hayes, Esquire, Department Counsel
For Applicant: *Pro se*

04/17/2012

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant was arrested on drug-related charges on three occasions between May 2006 and March 2008, and he smoked marijuana in 2008. He owes about $29,529 in delinquent debt that is primarily medical, after having satisfied or settled most of his past-due consumer credit balances. Applicant has inquired about a debt management plan, but without knowing whether his medical debt is covered under the plan or whether he can afford the payments, it is premature to conclude that his financial problems are behind him. Applicant's lack of candor about his criminal drug activity and his past-due accounts raises concerns about his judgment and trustworthiness, and it undermines his reform of the criminal conduct concerns. Clearance denied.

Statement of the Case

On October 26, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline J (Criminal Conduct), Guideline H (Drug Involvement), Guideline F

(Financial Considerations), and Guideline E (Personal Conduct) why it was unable to find that it is clearly consistent with the national interest to grant him a security clearance. DOHA took the 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 November 11, 2011. His response was notarized on November 16, 2011. On December 12, 2011, Applicant submitted additional information, and he requested a hearing. On February 7, 2012, the case was assigned to me to conduct a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On February 14, 2012, I scheduled a hearing for March 14, 2012.

I convened the hearing as scheduled. Fifteen Government exhibits (GEs 1-15) and 11 Applicant exhibits (AEs A-K) were admitted without objection. Applicant also testified, as reflected in a transcript (Tr.) received on March 22, 2012.

I held the record open for two weeks after the hearing for Applicant to submit additional documentation. On March 28, 2012, Department Counsel forwarded email correspondence received from Applicant dated March 26, 2012 (AE L), with a character reference letter (AE M) and an email from a debt management firm (AE N) attached. The documents were admitted as exhibits without objection.

Findings of Fact

The SOR alleges under Guideline J that Applicant was arrested in May 2006 on charges of felony possession of cocaine and possession of drug paraphernalia that were dismissed (SOR 1.a); in May 2007 for failure to appear, which was not prosecuted (SOR 1.b); and in March 2008 for possession of marijuana, to which he pled nolo contendere and adjudication was withheld (SOR 1.c). Applicant is alleged under Guideline H to have used marijuana in 2008 (SOR 2.a). Guideline F concerns involve delinquent debt of $39,025 to nine creditors (SOR 3.a-3.i). Applicant's drug arrests are cross-alleged under Guideline H (SOR 2.b) and Guideline E (SOR 4.e). Also under Guideline E, Applicant allegedly deliberately falsified his February 2009 Questionnaire for National Security Positions by not disclosing his May 2006 and May 2007 arrests in response to pertinent police record inquiries (SOR 4.a-4.c), and by denying that he was currently over 90 days delinquent on any debts (SOR 4.d). In addition, Applicant allegedly violated state traffic laws on numerous occasions from 2002 to 2008 (SOR 4.f).

In his Answer, Applicant admitted his criminal arrests, but he denied that he used marijuana in 2008. Applicant indicated that the fitness debt of $1,832 (SOR 3.h) was not his debt. He otherwise admitted the debts, although he indicated that the accounts in SOR 3.e and 3.f had been paid in full. Applicant denied that he deliberately withheld his

arrests from his security clearance application, as he had been told by his attorney that he need not list them. Applicant explained that his negative response to the financial record inquiry was "a mistake." He admitted his violations of state traffic laws.

Applicant's admissions to his arrests, indebtedness, and traffic violations are incorporated as findings of fact. After considering the pleadings, exhibits, and transcript, I make the following additional findings of fact.

Applicant is a 26-year-old naturalized U.S. citizen, who came to the United States when he was an infant. From January 2009 until February 2010, Applicant was employed as a gate guard at a U.S. military installation. He held an interim secret security clearance for his duties. In early March 2010, he began working as a civilian contractor providing force protection and security services for U.S. military and government employees in a conflict zone. After two months, he accepted a guard position with another defense contractor, where he served as a shift supervisor in theater until November 2011. (Answer; GE 1; AE J; Tr. 32.)

After high school, Applicant moved away from home around September 2002 to attend college on a full soccer scholarship. (GE 1; Tr. 51.) He found it difficult being separated from his friends and family, and moved back home by February 2004. While working in the family's construction business as a roofer, he incurred delinquent debt on some retail charge accounts opened in 2004. (GE 11.)

Once home, he began socializing with high school acquaintances, including some who "had priors." (Tr. 51.) In mid-May 2006, Applicant was driving around with three friends late at night when he was stopped by the police. During a search, the police found some cocaine and drug paraphernalia in the center console. Applicant denied any knowing possession of the cocaine or paraphernalia, but when none of his friends would admit culpability, all were arrested. (Tr. 49-50.) Applicant was charged with felony possession of cocaine and with misdemeanor possession of drug paraphernalia (SOR 1.a). (GEs 6, 10.) He pleaded not guilty to the charges, and they were dismissed on July 24, 2007. (GE 10.) Applicant claims that his record was expunged (GE 6), although the offense was still on his record as of an FBI record check in February 2009. (GE 10.)

Applicant was cited for several motor vehicle infractions in his home state (SOR 4.f), including in June 2004, for improper lane change; in April 2005 for speeding; and in mid-June 2005 for operating a motor vehicle in unsafe condition. In late April 2006, his license was suspended for failure to pay a fine. In September 2006, he was convicted of the April 2005 speeding charge. (GEs 6, 9.) In May 2007, Applicant was pulled over for failing to stop at a red light. A check of his license revealed an active traffic warrant (AE A; Tr. 52-53), which Applicant explained was issued because he failed to return to court and show that he had completed the requirements for reinstatement of his license. (Tr. 53.) Applicant was arrested and charged with misdemeanor failure to appear and with following too close (SOR 1.b). The failure to appear charge was not prosecuted and the traffic offense was dismissed. (GE 10.) In October 2007, Applicant was cited for high-

occupancy vehicle lane and improper lane change. In December 2007, adjudication was withheld on the October 2007 traffic violations. Applicant failed to pay a traffic fine by February 22, 2008, and on March 13, 2008, his license was suspended indefinitely. (GE 9.)

On March 9, 2008, the police observed Applicant smoking a marijuana cigarette (SOR 1.c). Applicant admitted his marijuana use to the police. About .5 grams of marijuana was also found in Applicant's vehicle. Applicant was arrested and charged with possession of cannabis—less than 20 grams, a first degree misdemeanor. In court in late April 2008, he pleaded no contest, and adjudication was withheld. (GEs 7, 8, 10.)

On March 28, 2008, Applicant was cited for speeding and driving on a suspended license (SOR 4.f). In September 2008, Applicant moved across the country to get away from the bad influence of his old high school friends and to help out his brother, who had infant twins and whose wife was being deployed to the Persian Gulf. (Tr. 55.) Applicant left his spouse, whom he had married in May 2007. In January 2009, Applicant began working for the U.S. military as a gate guard at the base where his brother and sister-in-law were stationed. (GE 1.) He continued to accrue delinquent debt. (GE 11.)

On February 1, 2009, Applicant executed a Questionnaire for National Security Positions (SF 86) for a secret security clearance. In response to the police record inquiries, Applicant answered affirmatively to whether he had been arrested within the last seven years by any police officer, sheriff, marshal, or other type of law enforcement officer, and he disclosed his March 2008 possession of cannabis offense. Applicant responded "No" to whether he had ever been charged with a felony offense, to all the drug inquiries, including whether he had illegally used any controlled substance in the last seven years, and to all the financial record inquiries, including whether he was currently over 90 days delinquent on any debts.[1] (GE 1.)

A check of Applicant's credit on May 29, 2009 (GE 11), revealed some outstanding debt that should have been reported on his SF 86, the details of which follow.

- A retail charge account, opened in December 2004 (not alleged) with a $100 credit limit, was $127 past due on a balance of $893. He last paid on the account in February 2005. With a payment of $250 on April 21, 2011, Applicant settled the debt for less than its full balance. (AE E.) On June 14, 2011, the lender cancelled $603.48 of the debt. (AE B.)

[1]Applicant attached a brief resume to his 2009 SF 86 in which he indicated that he attended college from 2003 to 2004. The document contains a handwritten entry indicating "no degree." (GE 1.) Yet, on his latest resume (AE J), Applicant indicates for education ("August 2007 Associates Degree in Criminal Justice"). Misrepresentation of his professional qualifications would undermine his case for mitigation of the personal conduct concerns. *See* n. 6, infra.

- In October 2005, Applicant made a last payment on a credit card with a $7,515 balance (not alleged).[2] As of December 2008, the debt was in collection.[3] Applicant settled the debt on June 30, 2010. (AE D.) (GE 15.)

- A fitness club debt of $1,832 from December 2007 was reportedly in collection as of February 2009 (SOR 3.h). Applicant disputes the debt, claiming that he is a victim of identify fraud in that it is not his social security number which is on the account. Yet, he presented no documentation to substantiate his dispute.

- A medical debt of $513 was placed for collection in February 2009 (SOR 3.i). The debt is apparently from emergency services Applicant needed when he had no insurance in September 2008. (GE 3; Tr. 42-43.)

- In March 2007, he stopped paying on a debt balance of $1,200 on a revolving charge with a high-end retailer (not alleged in SOR). Applicant paid the debt around March 2011. (AE C.)

- A $556 debt for electronics from June 2005 was placed for collection in January 2009. The past-due balance on the account was $567 as of May 2009 (not alleged). As of June 10, 2010, the balance was $453.49. On payment of $151.82 in June 2010, Applicant settled the debt for less than its full balance. (AE G.)

- A wireless telephone account from January 2006 was placed for collection in March 2008 with $1,137 past due. As of May 2009, the collection balance was $1,319. By February 2011, the outstanding debt had increased to $1,439 (SOR 3.a). (GE 14.)

- A medical debt of $413 from September 2008 was placed for collection in January 2009 (SOR 3.d). (Tr. 42-43, 45.)

- Medical debts of $20,208 (SOR 3.b) and $7,857 (SOR 3.c) from October 2008 were placed for collection in March 2009. As of July 2009, they were unpaid. (GE 14.) The debts were incurred when Applicant had to be rushed to the hospital for a second time when he had no insurance. (GE 3.)

[2]Applicant owed delinquent debts that were not alleged in the SOR. At his hearing, he presented evidence of satisfaction of these debts. The debts can properly be considered for the purpose of assessing Applicant's reform. *See* n. 6, infra.

[3]Available information shows that the assignee holding the debt in SOR 3.e also held the $7,516 debt (#853000) that was not alleged. While Applicant presented AE D as proof that he paid off the $3,131 debt (#853857) in SOR 3.e, the exhibit shows account #853000 was satisfied in June 2010 rather than #853857 in SOR 3.e. (GEs 11, 15; AE D.) Based on the available credit records, it appears that the debt in SOR 3.e is an updated balance of the debt in SOR 3.f, which was satisfied by Applicant on July 27, 2011. (GE 15; AE F.) So, while Applicant at one time owed two delinquent credit card debts of $7,516 and $3,131 in collection with the same agency in SOR 3.e, only the $3,131 debt is alleged in the SOR and it is also alleged in SOR 3.f.

- A $3,000 credit card debt for a computer from September 2006 had been charged off and placed for collection with a balance of $3,131 as of April 2008 (SOR 3.f). In February 2011, the debt was placed for collection in the amount of $3,448 (SOR 3.e). The debt was settled in full on July 27, 2011. (AE F.)

- In May 2009, a creditor placed a $706 balance for collection (not alleged). Applicant paid the debt in full around June 2010. (AE C.)

- A $150 medical debt from February 2010 was placed for collection in June 2010. As of September 2010, the balance was $159 (SOR 3.g). (Ex. 13.)

On June 12, 2009, Applicant was interviewed by an authorized investigator for the DOD about his undisclosed arrests and adverse credit history. Applicant told the investigator that he was with a female acquaintance in March 2008, and that an identification check "resulted in a positive flag" for his passenger. Applicant indicated that a search was then conducted of his vehicle, during which marijuana was found on the floor of the passenger's side. His acquaintance denied the marijuana belonged to her, and they were both arrested.[4] As for the adverse credit information on his record, Applicant expressed his belief that the $7,515 credit card debt was for college expenses, and the charge account with a high-end retailer was for clothes bought while in college. Applicant admitted he had not made any payments on the debts, but for one payment on the retail credit card since it went into collection. Applicant did not recognize some of the debts, and he indicated that the medical debts should have been paid because he had applied for state medical assistance. Applicant attributed his debts to a lack of maturity and full understanding of the credit system. As for his failure to list his 2006 arrest for felony possession of cocaine, Applicant volunteered that when he was completing his SF 86, he was unsure whether he should list the arrest. He contacted his attorney, who advised him that the charges had been dismissed and his record expunged, so he did not need to disclose his arrest. Applicant then denied any illegal drug use. Applicant added that he was looking forward to make a valuable contribution to his employer. He expressed plans to complete a degree in mechanical engineering before joining the U.S. military. (GE 3.)

Applicant was re-interviewed on August 13, 2009, to discuss his previously undisclosed traffic citations, including for speeding in a work area in January 2008, speeding in February 2009, and for driving on a suspended license without his knowledge in May 2009 (SOR 4.f). During a trip home in February 2009, Applicant was fined $585 for speeding. Applicant claimed he received no notice of the fine. He failed to pay the fine and his license was suspended. He satisfied all outstanding court fines and fees in June or July 2009, and his license was reinstated. Applicant indicated that he

[4]Applicant submitted the police report of his 2007 arrest for failure to appear (AE A) to show that what he detailed were the facts that led to his arrest for failure to appear in 2007 rather than his arrest for marijuana possession in 2008. (Tr. 25-27.) The police record does not indicate that anyone was with him when he was stopped in 2007. Furthermore, confusion about the circumstances of his arrest in 2007 would not explain his denial of any illegal drug use.

was now taking his responsibilities seriously, and he had initiated a repayment plan for his $7,515 delinquent credit card account. (GE 6.)

While deployed to Southwest Asia as a contract security guard from early March 2010 until November 2011 (AEs J; K), Applicant earned about $57,000 annually. (Tr. 45-46.) Applicant had his aunt contact his creditors because it was not easy for him to telephone or email them. (Tr. 32, 44.) On October 22, 2010, Applicant indicated in response to DOHA interrogatories that he was currently in negotiations with the creditors identified in the SOR, including SOR 3.h which he now disputes, and the retail creditor owed an $893 balance that is not in the SOR. Applicant maintained that his credit issues would be resolved in the next few months. He explained that his non-medical debts were mainly from when he was enrolled in college away from home, and that he had started settling with some of his creditors. (GE 2.)

On June 23, 2011, Applicant responded to DOHA interrogatories concerning illegal drugs. Applicant responded "No" to "Have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.) or prescription drugs?." Applicant explained that since his criminal offenses, he had moved and had new friends. He was no longer affiliated with "the people, places, and opportunity" that had caused him problems in the past. (GE 5.)

Shortly after Applicant returned to the United States in November 2011, he answered the SOR. He was still negotiating settlement of SOR 3.a and repayment plans on $28,065 (SOR 3.b and 3.c) of his medical debt. He had satisfied or settled the debt in SOR 3.e (original balance in 3.f). He planned on settling $572 in medical debt (SOR 3.d and 3.g) shortly, as well as the medical debt of $513 in full. He maintained that the fitness debt in SOR 3.h was not his debt. Applicant admitted his arrest record, but he denied that he had used marijuana in 2008. Applicant explained his failure to fully disclose his arrest record on his SF 86 to being misinformed by his attorney, who told him he did not need to mention them. He described his failure to list delinquent debts as "a mistake," and that he planned on settling with all his creditors.

Applicant expounded at his hearing that the attorney appointed for his May 2006 felony cocaine case advised him, "I did not need to list it, that it wouldn't come up, since it was expunged. The reason for not listing the others, he also said that since it was another state, that it wouldn't be affected, that I don't—I shouldn't have to list that." (Tr. 60-61.) Applicant did not seek the counsel of security or legal professionals at the base when he filled out the SF 86. As for his failure to list his debts, Applicant testified, "I honestly almost had no knowledge of, didn't even think of the—it's not that I had no knowledge, it didn't even come to mind on all my—on the debts that I had." (Tr. 62.) About whether he was concerned if he listed his indebtedness, Applicant responded, "I guess at the time it just may have been a lot to list. I did hear amongst co-workers, individuals speaking of their credit history and it affecting their clearance, and that was already after I had submitted the SF 86." (Tr. 63.)

On March 6, 2012, Applicant submitted both urine and hair samples for drug testing. The results of both samples were negative for the substances tested, including cocaine and marijuana. (AE H.) At his hearing, he denied any validity to the 2006 drug charges. (Tr. 49.) However, he admitted that he had possessed marijuana as charged in March 2008, and that he had smoked marijuana as shown in the arrest report. Applicant explained that he had previously denied use of marijuana because "it was hard to admit it and wrongdoing on [his] part." (Tr. 54-55.) Concerning his negative response to the SF 86 illegal drug inquiries, Applicant testified that he was embarrassed and ashamed. He "didn't want to believe it about [himself] almost." (Tr. 65-66.) Applicant denies any illegal drug use since 2008 (Tr. 56), and there is no evidence to the contrary.

As of March 14, 2012, Applicant had yet to make any payments on the undisputed debts in SOR 3.a-3.d, 3.g, and 3.i. He was still negotiating to settle the larger medical debts for less than their full balances. (Tr. 42.) He intended to pay his debts. (Tr. 47.) On March 26, 2012, Applicant contacted a debt management company for assistance in resolving his outstanding delinquencies. (AE N.) The company is awaiting documentation from a collection agency before Applicant can proceed with a repayment plan. He expects to be able to pay off his remaining debt within 48 months. (AE L.)

Applicant is currently unemployed and living off his savings. The company that employed him in Southwest Asia until November 2011 has a position on a contract that does not require a DOD secret clearance, but there is presently no opening. (Tr. 66.) He is ineligible for other open positions unless he obtains a secret clearance. (Tr. 59.) Because the company underbid the contract, he would be paid around $200 a day if deployed overseas. Applicant anticipates he would be able to put $500 a month toward his debts. (Tr. 68.)

Applicant has lived with his girlfriend since he returned from his overseas assignment. (Tr. 56.) Applicant and his spouse have been separated for almost three years, and he plans to file for divorce. (Tr. 58.) Applicant's girlfriend is a first year dental student, living on her student loans. (Tr. 59.) She is applying for a military scholarship program for health professionals. She has discussed Applicant's previous legal problems with him. She was surprised to learn of them because he has been drug-free and law-abiding since they began dating two years ago. He has exhibited to her a "great deal of respect" for the military and remains in close contact with the personnel whom he supported overseas. His girlfriend is confident that Applicant "would not let us down" if he is granted a security clearance and allowed to continue to work alongside the military. (AE I.)

Two of Applicant's former coworkers, who are familiar with Applicant's performance at the U.S. military base, attest to Applicant's integrity and moral character, his enthusiasm about his work for the U.S. military, and his trustworthiness and reliability. (AEs I, M.) A family friend, who works in law enforcement for a federal agency (AEs I, J; Tr. 38-39), has known Applicant for over 12 years. Because of their difference

in age, this reference was not always aware of what occupied Applicant's spare time. In his experience, Applicant "has always demonstrated a desire to do the right thing." Applicant encouraged this reference's younger brother to join the U.S. military because he recognized the importance and dignity of military service. (AE I.)

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

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in 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." The security concerns under AG ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted," applies because of Applicant's marijuana possession offense in March 2008. He pleaded no contest to the charge in court, and he admitted culpability at his March 2012 hearing on his clearance eligibility. Concerning the May 2006 drug charges, Applicant admits that cocaine was found in his vehicle. It was apparently in the center console, which makes it difficult to believe he did not know it was in his vehicle. That being said, he had three passengers, and it is possible that one of them placed the drug there when Applicant was pulled over. Applicant denies knowing possession, pled not guilty to both cocaine and drug paraphernalia possession, and the charges were dismissed. Applicant exercised poor judgment in the company that he kept, but it is unclear whether Applicant would be considered culpable under a theory of constructive possession.[5] The May 2007 misdemeanor failure to appear was not prosecuted. Applicant's explanation is that he failed to return to court to show that he had complied with the requirements for reinstatement of his motor vehicle license. AG ¶ 31(c) applies to the failure to appear, although the offense primarily raises poor judgment concerns that are more appropriately addressed under Guideline E.

Mitigating condition AG ¶ 32(a), "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely

[5] The pertinent state statute under which Applicant was charged, § 893.13(6A), provides as follows:

> It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision commits a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

Under § 893.101, the state legislature clarified that knowledge of the illicit nature of a controlled substance was not an element of any offense under the chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense that gives rise to a "permissive presumption" that the possessor knew of the illicit nature of the substance. However, the state's appellate court for the second district has recently affirmed that constructive possession requires proof that (1) the accused knew of the presence of the contraband, and (2) he could exercise dominion and control over it. Proximity, without more, is not sufficient. *See G.G. v. State*, 2012 Fla. App. LEXIS 5003 (Fla. 2d DCA, Mar. 30, 2012) (citing *Brown v. State*, 8 So. 3d 464 (Fla. 2d DCA 2009)).

to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," applies because Applicant has ceased his affiliation with those persons that were conducive to drug-related criminal conduct. The failure to appear was isolated and does not cast doubt on his present reliability, trustworthiness, or good judgment.

There is no evidence that Applicant has had possession of any illegal drug since he moved across the country around September 2008. He has since established a favorable record of protecting U.S. civilian and military employees and assets, not only at a U.S. military base, but for ten months at a base in Southwest Asia. His dedication to his work implicates 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." That being said, reform involves not only ceasing the drug involvement, but also acknowledging the wrongdoing. While Applicant may have confused some of the details concerning his arrests in 2007 and 2008, his account of being with a female acquaintance who denied possessing the marijuana is seen as an attempt to shift blame for the offense to his passenger. His account is not substantiated by the police reports of either incident. Moreover, given Applicant's very belated admission to abusing marijuana on the occasion of his arrest for possession in March 2008,[6] it is too soon to fully mitigate the criminal conduct concerns.

Guideline H, 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:

[6]Although not alleged in the SOR, Applicant falsely denied any illegal drug use on his SF 86; during his June 12, 2009 interview; in his June 23, 2011 response to DOHA interrogatories; and in his answer to the SOR. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

> (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.

(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),[7] 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."

Disqualifying conditions 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. Applicant abused and possessed marijuana on the occasion of his arrest in March 2008. He denies any illegal drug involvement after he relocated in September 2008. Applicant was not asked about any previous involvement with marijuana before his March 2008 offense. (Tr. 54-56.) It is highly unlikely, although possible, that Applicant was caught with marijuana the first time that he smoked or possessed it. Without any evidence to the contrary, I am constrained to conclude that Applicant's abuse of marijuana was isolated, and that he did not know the cocaine was in his vehicle in May 2006.

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," applies in that his marijuana involvement was "so infrequent," and it occurred four years ago. Applicant has also demonstrated an intent not to abuse any drugs in the future under AG ¶ 26(b) in that he has disassociated himself from drug-using associates and contacts (¶ 26(b)(1)), is no longer in the environment where drugs were used (¶ 26(b)(2)), and has an appropriate period of abstinence (¶ 26(b)(3)). His negative hair follicle test of March 6, 2012, is a reliable indicator of no recent drug abuse. The drug involvement concerns are sufficiently mitigated.

Guideline F, Financial Considerations

The security concerns for Financial Considerations are set out in AG ¶ 18:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

[7]Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c).

Guideline F notes several conditions that could raise security concerns. AG ¶ 19 (a), "inability or unwillingness to satisfy debts," and 19(c), "a history of not meeting financial obligations," are established. Applicant incurred $4,912 in proven, undisputed delinquent consumer credit debt alleged in SOR 3.a and 3.e (updated balance of 3.f) and medical debt of $29,510 in collection.

Concerning potential mitigation, AG ¶ 20(a), "the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment," cannot reasonably apply, given he is still negotiating with his two largest medical creditors in an attempt to settle the debts for less than their full balances. Those two debts alone total $28,065. Moreover, Applicant incurred past-due debt totaling around $10,881 that was not alleged in the SOR.

Mitigating condition AG ¶ 20(b), "the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances," applies in part in that most of his medical debt is for unforeseen emergency services. Applicant's overseas deployment is also extenuating of his inaction on several of his debts between March 2010 and November 2011. Yet, AG ¶ 20(b) does not mitigate the irresponsible manner in which he handled his consumer credit debts.

AG ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," is established by his satisfaction or settlement of most of his outstanding consumer credit debt, the telephone debt in SOR 3.a being the notable exception. Some of the debts, including a $7,515 credit card balance (not alleged), were paid or settled in 2010, well before the SOR was issued in October 2011. Yet, it would be premature to apply AG ¶ 20(c), "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control." While Applicant has recently inquired about a debt management plan, it is unclear which debts would be repaid under such a plan.

AG ¶ 20(e), "the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue," warrants some consideration because Applicant disputes the validity of the fitness debt in SOR 3.h, claiming that it is not his social security number that is on the account. Yet, he did not provide documentation to substantiate his assertion. Especially without a formal plan in place to address his sizeable medical debt, I cannot find that the financial concerns are fully mitigated.

Guideline E, Personal Conduct

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

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

The Government alleged that Applicant chose not to disclose on his SF 86 his 2006 felony cocaine arrest (SOR 4.a and 4.b), his 2006 drug possession arrest (SOR 4.a and 4.c), his 2007 failure to appear arrest (SOR 4.a), and his financial delinquencies (SOR 4.d). Applicant does not dispute his arrests, which evidence shows should have been listed on his SF 86. A knowing and willful omission implicates AG ¶ 16(a):

> (a) deliberate omission, concealment, or falsification of relevant facts from 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's disclosure of his more recent marijuana possession offense on his SF 86 does not relieve him of his responsibility to report other arrests that were within the scope of the inquiries. Applicant testified that he was unsure whether he should report the 2006 charges, which he believes were expunged, and the failure to appear, which was not prosecuted. He contacted his attorney, who represented him on the 2006 felony charge, and this attorney reportedly "misinformed" him that he need not report the charges. Such advice would have been contrary to the SF 86's clear instruction to report information regardless of whether the record in his case had been sealed, expunged, or otherwise stricken from the court record. Without evidence showing that the attorney knew of the instruction and advised Applicant to disregard it, I cannot apply AG ¶ 17(b):

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

Applicant cannot avail himself of mitigation under AG ¶ 17(b) if he was not forthcoming to the lawyer about the instructions on the form. Alternatively, if he received advice that was contrary to the directions, it was incumbent on him to seek clarification from authorized personnel on the military base. He did not do so.

It is also difficult to find Applicant completed his SF 86 in a spirit of full disclosure when he did not list any financial delinquencies. Applicant admitted during his June 2009 interview that he was aware of a couple of delinquent credit card accounts,

including an account in collection, which he believed he had used in college. Whether or not they were opened when he was in college or after he moved back home, they were clearly past due over 90 days as of the date he completed his SF 86. Applicant did not elaborate when he admitted he made a "mistake" in denying any financial problems. Based on the evidence, I am led to conclude that he deliberately omitted his adverse credit information from his SF 86. AG ¶ 16(a) applies to his omission of past-due debts as well.

AG ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts," cannot fully be applied in mitigation, despite Applicant's disclosures of salient details of his arrest record and finances during his June 2009 interview. Applicant was not fully candid during that interview about the circumstances that led to his arrest for marijuana possession, and he falsely denied any illegal drug use. Moreover, Applicant lied in response to DOHA interrogatories and in his Answer about whether he used marijuana in 2008.

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," is not satisfied. Concealment of relevant and material information from an SF 86 has the potential to affect the investigation and adjudication of an individual's security clearance eligibility. It raises very serious concerns about a person's judgment, trustworthiness, and reliability.

The Government is now aware of the full extent of Applicant's financial delinquencies and of his involvement with marijuana in at least 2008. Applicant has not elaborated about his use of marijuana, other than to indicate that he is no longer associating with the persons conducive to his illegal drug use in the past. Even if Applicant used marijuana only one time, on the occasion of his arrest in March 2008, it would be premature to 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," in light of his denials of any illegal drug use in his response to DOHA interrogatories and in his Answer. AG ¶ 17(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," does not mitigate his falsifications.

Applicant's criminal drug activity and his repeated violations of state traffic laws raise concerns about his personal judgment as well. His illegal drug possession is more aptly covered under Guideline H. Although his disassociation from drug-using associates makes him less likely to repeat the poor judgment of the illegal drug activity cross-alleged in SOR 4.e, his reform of the marijuana possession offense is incomplete

because of his lack of candor about his involvement. Applicant's repeated traffic violations (SOR 4.f) implicate AG ¶ 16(d):

> credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:
>
> (3) a pattern of dishonesty or rule violations.

Applicant knowingly violated the traffic laws on at least one occasion after he moved in September 2008, when he was caught speeding on a trip home in February 2009. Apparently, he was unaware that his license had been suspended when he was stopped in May 2009. Given the number of traffic violations on his driving record, it is difficult to apply AG ¶ 17(c) in mitigation, which requires that the offenses be minor, so infrequent, or happened so long ago. Yet, Applicant is credited with acknowledging his irresponsible behavior and not repeating it since 2009. AG ¶ 17(d) applies.

Whole-Person Concept

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(a).[8]

Applicant's drug abuse and possession can reasonably be attributed to his youth and peer pressure. So too, his pattern of traffic violations is explained by his immaturity. His sizeable medical debts were incurred because he lacked insurance to cover the cost of emergency care. However, Applicant acted in self-interest when he was not fully forthcoming about his drug-related criminal conduct, including his use of marijuana, or his past-due debts, when he completed his SF 86. Applicant's employment in Southwest Asia provided him with the motivation to become a more responsible adult. It also gave him the income to begin to address his past-due debts. He has favorable character references. Yet, doubts persist about whether Applicant can be counted on to fulfill the fiduciary obligations of a security clearance, especially in light of his false

[8] 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 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.

denials of any illegal drug involvement when he responded to DOHA interrogatories and to the SOR. Based on the evidence before me, I am unable to conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance at this time.

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:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3, Guideline F:	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:	For Applicant
Subparagraph 3.f:	For Applicant (duplicated in 3.e)
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
Subparagraph 4.d:	Against Applicant
Subparagraph 4.e:	Against Applicant
Subparagraph 4.f:	For 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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Elizabeth M. Matchinski
Administrative Judge