DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 10-05559
	)	
Applicant for Security Clearance	)	

Appearances

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

07/24/2012

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on March 15, 2010. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on December 1, 2011 and a clarifying Amendment to the Statement of Reasons on February 13, 2012, detailing security concerns under Guideline H, drug involvement, Guideline J, criminal conduct, and Guideline E, personal conduct.[1] 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*

[1]The SOR references an e-QIP execution date of March 5, 2010. Since the e-QIP clearly reflects a certification date of March 15, 2010, I find the March 5, 2010 date to be a typographical error.

Security Clearance Review Program (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant received the SOR on January 4, 2012, and later, the amended SOR. He answered the SOR on January 24, 2012 and the amended SOR on May 10, 2012. Applicant requested a hearing before an administrative judge. DOHA received the request, and Department Counsel was prepared to proceed on March 2, 2012. I received the case assignment on May 1, 2012. DOHA issued a Notice of Hearing on May 16, 2012, and I convened the hearing as scheduled on June 5, 2012. The Government offered exhibits (GE) marked as GE 1 through GE 4, which were received and admitted into evidence without objection. Applicant testified. He submitted one exhibit (AE) marked as AE A which was received and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on June 13, 2012. I held the record open until June 25, 2012, for Applicant to submit additional matters. Applicant timely submitted AE B - AE H, which were received and admitted into evidence without objection. The record closed on June 25, 2012.

Procedural Ruling

Notice

Applicant received the hearing notice on May 31, 2012, less than 15 days before the hearing. I advised Applicant of his right under ¶ E3.1.8 of the Directive to receive the notice 15 days before the hearing. Applicant affirmatively waived his right to the 15-day notice. (Tr. 11)

Findings of Fact

In his Answer, Applicant admitted the factual allegations in ¶¶ 2.a, 2.b, and 2.d of the SOR. His admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶¶ 1.a - 1.e, 2.c, 2.e, and 3.a - 3.g of the SOR.[2] He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

[2]When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." *See* ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

Applicant, who is 50 years old, works as a carpenter and in vehicle maintenance for a Department of Defense contractor. Applicant began his current employment in January 2010, when the contract switched from the prior company.[3]

Applicant graduated from high school in 1979. He married in 1984 and divorced in 1996. He has two sons, ages 24 and 21. He is unmarried at this time.[4]

In 1980 or 1981, the police stopped Applicant for speeding. They smelled alcohol on him and conducted a field sobriety test, which he failed. The police drove him to the police station and after a breathalyzer test, charged him with driving under the influence (DUI). He pled not guilty, and the court found him guilty of DUI. He paid a fine, and the court sentenced him to probation, the amount of time not recalled. He has not been arrested for DUI again.[5]

Applicant stated that after he married, he began to make bad decisions, which included increased alcohol consumption and experimenting with marijuana. After he married his former wife, Applicant discovered she smoked marijuana. On two separate occasions, he tried marijuana, but did not like it. Outside of these instances, he has not used marijuana or any other illegal drugs.[6] Applicant adamantly denies regular use of marijuana and trying methamphethamines.[7]

In 1985, Applicant's neighbor called the police, who came to his house.[8] Applicant allowed the police to enter his house. They found a bag with a small amount of marijuana, which belonged to his wife. Although he denied that the marijuana was his, the police arrested him and placed him in their car. He denies going to the police station or spending time in jail. The police cited him for selling drugs, and he does not know the reason for this, instead of a citation for possession. When he appeared for his court date several weeks later, the court clerk advised that the charges had been

[3]From September 2008 until January 2010, he worked for the company which had the work contract. His job has remained the same since September 2008. GE 1; AE D.

[4]GE 1; Tr. 25, 93-94.

[5]GE 3; Tr. 34.

[6]Tr. 27-28, 43-46, 69-70. Applicant's former wife generally, but not always, smoked marijuana out of his presence or when he was not at home. When they invited friends for a party or barbecue, he and his friends consumed alcohol. If she and her friends smoked marijuana at these events, they would smoke it out in the yard. Tr. 44-47.

[7]Tr. 27-28, 40-41, 69-70.

[8]In his statement to the investigator, Applicant stated that his neighbor knew that marijuana was in his house and called the police. GE 2. At the hearing, Applicant stated that he and his neighbor argued about the neighbor's cat destroying Applicant's newborn exotic rabbits, and the neighbor called the police. Tr. 49.

dropped and that he was free to go. He never received any other requests from the court to appear to answer a criminal charge on this incident.[9]

In 1992, Applicant returned home to discover his wife had broken the windshield in his truck. They argued, and he pushed her. She called the police, and made a number of allegations against him, including brandishing a gun and hitting her. There was no evidence of an injury nor did his wife require medical treatment. Nonetheless, the police charged him with domestic violence and brandishing a gun, felony charges. The police placed him in jail. He did not have bail money, so he remained incarcerated. The prosecutor offered him a plea bargain, which he took because if he accepted the plea, he would be able to leave within a week. His employer had agreed to hold his job for a week. Applicant pled guilty to injury to cohabitant or spouse, a misdemeanor offense. The court dropped the felony charges.[10]

Even though the Federal Bureau of Investigation (FBI) criminal records report indicates that Applicant was arrested in 1994 for vandalism valued at $5,000, Applicant has no memory of this arrest and could not find a police report on it. He could not provide any information about the incident in his interrogatory answers or at the hearing. He admitted the 1997 petty theft charge. He stole a screwdriver, even though he had money to pay for it. He pled guilty and paid restitution of $400. He acknowledges this was a stupid decision and said: "To this day, I kick myself when I think about it."[11]

By 2000, Applicant worked sporadic construction jobs, which created financial problems for him,as did his divorce. One day at a construction worksite, a co-worker offered him a way to make some extra money by delivering a large quantity of marijuana. Applicant accepted the offer. Applicant transported 70 pounds of marijuana by airplane from his location to a city over 2,000 miles away. He successfully delivered the marijuana and returned home. The police arrested the person to whom Applicant had delivered the marijuana, and this person gave the police Applicant's name. The police in the state 2,000 miles from his home issued a fugitive warrant, and the police in his home state arrested him. Applicant was extradited to the charging jurisdiction and was charged with possession of marijuana, preparation of drugs for sale, and drug abuse. He pled not guilty in 2000, but the court found him guilty of these charges and sentenced him to five to ten years in prison. He appealed the drug abuse finding, which was reversed. Applicant was released from prison in June 2008 and placed on probation for 18 months. As a condition of his probation, Applicant was required to attend a drug counseling program. Applicant completed the terms of his probation and has been released from probation.[12]

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[9]The FBI report indicates that Applicant was charged with a felony. Applicant does not know if the charge was a felony. The actual police report is not in the record. GE 4; Tr, 52-54.

[10]GE 2; GE 4; Tr. 35-36.

[11]GE 3; GE 4; Tr. 38-39,

[12]GE 3; GE 4; Tr. 26, 30-33, 66-68, 89-94.

Applicant describes his decision to transport drugs as terrible and a bad choice. While incarcerated, Applicant states that he had plenty of time to reflect on this decision and past decisions, as well as his conduct in the previous years. He made a decision to "straighten up" his life upon his release from prison. After leaving prison, he moved near family members and reestablished his relationship with his sons, parents, and sisters. He no longer lives near his former wife or former places of work. He does not associate with individuals involved in criminal activities. He stopped working in the construction industry because he does not like the type of people working in this industry. His new friends are not involved with drugs or any illegal activities. His new environment is a positive influence in his life.[13]

Applicant's probation officer referred him to a drug counseling program. He met with LW, a counselor at the program, in July 2008. LW developed a treatment plan for him. This plan involved attending meetings where individuals spoke about their drug problems, watched movies, and completed questionnaires. He attended two counseling sessions a week for 17 weeks, but denies ever speaking about a drug problem. When he completed the program four months later, Applicant did not receive any diagnosis for a drug problem and was not told he needed additional treatment. Applicant never met with any other individuals in the program.[14]

Applicant submitted a copy of the five-page document given to him by the counseling program upon his release from the program.[15] This document contains no information showing a diagnosis of a drug problem. Department Counsel submitted a four-page document from the counseling program, which contains a diagnosis of cannabis dependence. This document indicates that marijuana was his drug of choice and that he used methamphetamines twice.[16] After the hearing, Applicant submitted a five-page document from the counseling program, which contains the cannabis dependence diagnosis and the statement about his methamphetamine drug use.[17] The document given to Applicant upon his release contains a release form signed by Applicant on July 30, 2008; a two-page family team prevention crisis plan signed by Applicant and LW, his counselor whose qualifications are unknown; Part B Core Assessment and interim service plan with no diagnosis signed by Applicant and JB, a licenced professional counselor and intake clinician whom Applicant does not know and never met; and a Part D, behavioral health service plan signed by Applicant and LW. The document submitted by Department Counsel is marked Part B core assessment and shows a two-page clinical formulation and diagnoses with a case summary identifying Applicant's drug history and a diagnoses of cannabis dependent signed by

[13]Tr. 26-27, 69-70.

[14]AE A; Tr. 85-89.

[15]AE A.

[16]GE 3.

[17]AE C.

SFR, who is unknown to Applicant and whose qualifications are unknown. This document also contains the interim service plan signed by Applicant, LW, JB, and GE, the supervisor, whose qualifications are unreadable and who is a person unknown to Applicant, and the Part D behavioral health service plan signed by Applicant, LW, and GE. The last document submitted by Applicant contains a new release signed by Applicant in June 2012, a discharge summary dated April 8, 2009 signed by LW which indicates a DSM-IV-TR Code 304.30, the code for cannabis dependence, without further explanation and three previously submitted pages. Besides Applicant's signature, these documents contain four other signatures, only one of which is known to Applicant, and three different handwritings, one of which is clearly LW, Applicant's counselor. Applicant adamantly denied telling LW that he used marijuana regularly and that he used methamphetamines twice. He does not know the reason for this information in the reports. None of these documents are certified to be a complete record of Applicant's treatment in this program. Likewise, the records provided by both parties contain only that part of Applicant's treatment record.[18]

The DSM-IV-TR, 4th edit., states the following about substance dependence:

> The essential feature of Substance Dependence is a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues use of the substance despite significant substance-related problems. There is a pattern of repeated self-administration that can result in tolerance, withdrawal, and compulsive drug-taking behavior. . . Dependence is defined as a cluster of three or more of the symptoms listed below occurring at any time in the same 12-month period.

These symptoms included Tolerance (Criterion 1), the need for greatly increased amounts of the substance to achieve intoxication (or the desired effect) or a markedly diminished effect with continued use of the same amount of the substance. Withdrawal (Criterion 2) is a maladaptive behavioral change, with physiological and cognitive concomitants. The individual may take the substance in larger amounts or over a longer period than was originally intended (Criterion 3). The individual may express a persistent desire to cut down or regulate substance use, with many unsuccessful attempts (Criterion 4). The individual may spend a great deal of time obtaining the substance, using the substance, or recovering from its effects (Criterion 5). All of the person's daily activities may revolve around the substance, resulting in reduced involvement in social, occupational or recreational activities (Criterion 6). The individual may withdraw from family activities or hobbies to use the substance in private or to spend more time with substance-using friends. Finally, despite recognizing the contributing role of the substance to a psychological or physical problem, the person continues to use the substance (Criterion 7).

According to the DSM-IV-TR, the key issue in evaluating this criterion is not the existence of the problem, but rather the individual's failure to abstain from using the

[18]GE 3; AE A; AE C; Tr. 30-33, 40-41, 75-79, 81-86.

substance despite having evidence of the difficulty it is causing. Section 304.30 notes that in addition to the above, individuals with Cannabis Dependence have compulsive use and associated problems. Individuals with Cannabis Dependence may use very potent cannabis throughout the day over a period of months or years, and they may spend several hours a day acquiring and using the substance. This often interferes with family, school, work, or recreational activities. These individuals may have physical problems such as a chronic cough or excessive sedation.[19]

While the counseling reports indicate a cannabis dependence, the reports do not reflect a history of Applicant's marijuana use, including frequency, amount, length of use, and efforts to obtain marijuana. The reports do not indicate the impact, if any, marijuana had on Applicant's normal life activities nor do the reports reflect an understanding of his social and work activities. In essence, the reports do not address any of the criteria outlined in the DSM-IV-TR, which provides professionals with a baseline for a cannabis dependency diagnosis. While the report appears to be documented, it is not reasoned because the report does not outline any DSM-IV-TR criteria to support its conclusion or explain the basis for the diagnosis.[20]

When Applicant completed his e-QIP on March 15, 2010, he answered "yes" to four of the five questions in Section 22, which inquires about his police record. He then listed his arrest in 2000 for possession and sale of marijuana and noted he served eight years in prison. He did not list a marijuana arrest in 1985, his 1992 arrest following a fight with his wife, or his 1980 or 1981 DUI arrest. When he met with the Office of Personnel Management (OPM) investigator, he did not discuss any marijuana or methamphetamine use or a diagnosis of cannabis dependency. The SOR alleges that he intentionally left out this information, which he denies.[21]

When he completed his e-QIP, Applicant listed his most serious criminal offense. He also acknowledged some financial problems and identified the debts. Under Section 23, two questions request information about his illegal drug use in the last seven years, one question asks if he ever used a controlled substance while holding a security clearance, and one question asks if he received drug counseling in the last seven years. Applicant answered "no" to the first three questions and "yes" to the question about drug counseling. In explaining this response on his e-QIP, Applicant stated that drug counseling was a condition of his parole. However, he denied using marijuana. In his response to the SOR, Applicant denied falsifying his answers to these question because the question asked for the previous seven years. In his answers to interrogatories, he denied ever using marijuana and methamphetamines. At the hearing, Applicant

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[19]DSM-IV-TR, 4th Edit., pages 192-195, 236.

[20]In *Director, OWCP v. Rowe*, 710 F.2d 251, 254-255 (6th Cir. 1983), the United States Court of Appeals for the Sixth Circuit held, "The determination of whether a physician's report is sufficiently documented and reasoned is essentially a credibility matter and is for the finder of fact to decide." *See also Poole v. Freeman United Coal Mining Company*, 897 F.2d 888 (7th Cir. 1990).

[21]SOR; GE 1; GE 3; Response to SOR.

admitted to trying marijuana twice while he was married, but stated he did not like it. He again denied using marijuana on a regular basis. He denied an intent to hide the two times he tried the marijuana in the 1980s, stating he was not thinking back to this time. His discussion about his marijuana use with the OPM investigator was in conjunction with his arrest and subsequent imprisonment. He did not acknowledge the cannabis dependency diagnosis to the OPM investigator because he had never been told by the substance abuse counselor of this diagnosis. He provided a copy of the documents given to him in July 2008 by the counseling service, which do not show a diagnosis of cannabis dependency. He denied ever using methaphetamines, which is not mentioned in these documents. He also denied telling the counselor, LW, that he regularly used marijuana or that he ever used methaphetamines. He could not explain this information in the counseling records.[22]

During his personal interview, the OPM investigator asked him about his arrest in 1985. He admitted the arrest, but he does not know why the charge was for selling marijuana, instead of possession. He did not know if the charge was a felony or not. When he appeared in court, the case had been dropped. Following the inquiry on this arrest, the OPM investigator stated that Applicant volunteered information about his 1980 or 1981 DUI. As for the 1992 arrest for domestic violence and brandishing a weapon, Applicant stated that it was an oversight not to list this arrest. He indicated at the hearing that he tries to forget his past conduct, which may be why he forgot to list these two arrests.[23]

Applicant submitted letters of recommendation from supervisor and manager. His supervisor describes him as a reliable and efficient employee. He works well with others and willingly works on whatever projects are available. She praises his contributions to the work place and states he is an extraordinary employee. His group manager wrote a similar letter, praising Applicant's performance. He is aware that Applicant spent time in prison and that Applicant capitalized on the opportunity to work for his company through a prisoner re-entry program. Two sisters wrote letters of recommendation, as did his girlfriend. They recognize that he made mistakes in the past, but indicate that he has changed his life. They describe him as hardworking and responsible. He is more involved with family as shown by his participation in family activities. He provides assistance to his elderly parents when needed. One sister acted as his sponsor upon his release from prison. She attested to his attendance and completion of his drug counseling program, from which he was released early. She also stated that he was released from parole two years ahead of his release date because of his success after leaving prison.[24]

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[22]GE 1; AE A; Tr. 40-41, 64-70, 76-79, 81 -83.

[23]GE 2; Tr. 40-41, 52-54

[24]AE D- AE H.

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 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 H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement:

> 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.
>
> (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), and
> >
> > (2) inhalants and other similar substances;
>
> (b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

> (a) any drug abuse (see above definition);
>
> (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
>
> (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence; and
>
> (e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program.

Applicant experimented with marijuana twice during his marriage, which ended in 1996. To smoke marijuana, he possessed it. In June 2000, he agreed to transport and deliver 70 pounds of marijuana to a location 2000 miles from his home. He possessed the 70 pounds of marijuana, which was for sale. A security concern under AG ¶¶ 25(a) and 25(c) is raised.

The record contains medical reports, which indicate a diagnosis of cannabis dependency. The qualifications of only one of the four signatures in these reports is known. JB identifies himself as a licensed professional counselor (LPC). The qualifications of LW, the counselor with whom Applicant met, are unknown, as are the qualifications of SFR, who appears to have written the diagnosis of cannabis dependent, which LW appears to have adopted without explanation. Even assuming these individuals are qualified professional counselors, the clinical records are insufficient to establish the diagnosis of cannibus dependency because the factual basis for this diagnosis is not identified in the records, nor are any of the criteria identified in the DSM-IV-TR for making such a diagnosis discussed or reviewed. The diagnosis of cannabis dependency in these reports is not reasoned. Thus, a security concern is not established under AG ¶¶ 25(d) and 25(e). In light of the deficiencies in these reports, they are also insufficient to establish that Applicant used methamphetamines or that he was drug dependent.

AG ¶ 26 provides conditions that could mitigate security concerns:

> (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
>
> (b) a demonstrated intent not to abuse any drugs in the future, such as:
>
> > (1) disassociation from drug-using associates and contacts;
> >
> > (2) changing or avoiding the environment where drugs were used;
> >
> > (3) an appropriate period of abstinence; and,
> >
> > (4) a signed statement of intent with automatic revocation of clearance for any violation; and,
>
> (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant twice experimented with marijuana more than 20 years ago. He did not like the drug and declined to use it. While Applicant did not smoke or use marijuana for many years, he did transport a large quantity of marijuana for resale 12 years ago. During his time in prison, Applicant thought about this decision and other poor decisions on many occasions. He decided to change his life when he left prison, and he did. He moved to a new location, which is closer to his family members and away from the poor influences of his past. He has worked steadily for the last four years at a job where his work is respected. He complied with the terms of his probation by attending a drug counseling program. He has no intent to be involved with drugs. He is focused on his

family and girlfriend. His old friends are no longer part of his life. Drug use has never been a major part of his life and transporting drugs for money will not happen again. Applicant has mitigated the security concerns under AG ¶¶ 16(a), 16(b)(1)-(3), and 16(d).

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 may be disqualifying:

> (a) a single serious crime or multiple lesser offenses;
>
> (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and,
>
> (f) conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year.

Applicant was arrested for serious crimes and lesser crimes on at least five occasions between 1980 and 2000. His last arrest led to eight years in prison. A security concern is raised under AG ¶¶ 31(a), 31(c), and 31(f).

AG ¶ 32 provides conditions that could mitigate security concerns. I have considered all the mitigating conditions, and especially the following:

> (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; and
>
> (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.

The police arrested Applicant only once for DUI, more than 30 years ago. While he still consumes alcohol, Applicant uses it responsibly. There is little likelihood that Applicant will be arrested for DUI in the future. Between 1985 and 2000, Applicant was involved in criminal conduct, some by his own choice and some as a result of incidents with his former wife. He is no longer married or involved with his former wife. He works

steadily, and is viewed by his employer as a reliable employee. During his time in prison, he thought about his poor decisions, which resulted in his incarceration, and he decided that he needed to change his life and his attitude when he left prison. Since leaving prison, he has improved his relationship with his family and has a girlfriend. He considers them and his work as positive influences in his life, which are helping him to stay in the right direction. He described his decision to transport a large quantity of marijuana as a terrible decision and a poor choice, which he now regrets. Applicant has mitigated the criminal conduct security concerns under AG ¶¶ 32(a) and 32(d).

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 describes conditions that could raise a security concern and may be disqualifying:

> (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and
>
> (b) 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(a) and 16(b) to apply, Applicant's omission must be deliberate. The Government established that Applicant omitted material facts from his March 2010 e-QIP, when he failed to list his DUI arrest, his 1985 arrest, his 1992 arrest, and to acknowledge his marijuana experimentation over seven years ago. This information is material to the evaluation of Applicant's trustworthiness and honesty. In his response and at the hearing, he denied that he intentionally falsified his answers on his e-QIP or that he intented to hide his past criminal conduct and drug involvement from the Government. When the allegation of falsification is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine

whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.[25]

Applicant answered "yes" to the questions on his police record, but only listed his most recent, and most serious criminal charge. He explained that his failure to list his other arrests and his experimental use of marijuana was an oversight because it had occurred more than seven years ago. Since his DUI occurred over 30 years ago, it is not unreasonable that he forgot about it. Because he was never told that he had been diagnosed as cannabis dependent, he did not have knowledge of this diagnosis and therefore, he did not knowingly fail to provide material facts to the OPM investigator. He adamantly denies ever using methamphetamines and the regular use of marijuana, as well as telling the drug counselor this information. His denial is credible because outside of the problematic clinical records, which do not comply with the requirements of the DSM-IV-TR for making a diagnosis or which show the basis for the information in it, there is no evidence that he knew of the diagnosis of drug dependency. There is no evidence of his habitual use of marijuana or his use of methampetamines. Thus, he did not intentionally falsify his answers on his e-QIP or provide deliberately fail to provide information about his drug use to the OPM investigator. The Government has not established that the Applicant intentionally omitted material information from his 2010 e-QIP. AG ¶¶16(a) and 16(b) are not established and Personal Conduct 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 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

[25] *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)).

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.

The evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The police arrested and charged Applicant with DUI once over 30 years ago. Applicant continues to drink responsibly and not to drive if intoxicated. His problems started after he married. His wife smoked marijuana, usually not in his presence. Her habit led to his first marijuana-related arrest in 1985. The charges against him were dropped, probably by the prosecutor. As their marriage deteriorated, arguments ensued. In 1992, after she broke the windshield in his truck, they had another argument, in which he pushed her several times, causing her to call the police. The police arrested him and charged him with domestic violence and brandishing a gun, which he denies. He pled guilty to a misdemeanor offense and the felony charges were dropped. He has no memory of being arrested in 1995 and could not find any information on this incident. He acknowledged a poor decision to steal a screwdriver in 1997. He admits that his decision to transport 70 pounds of marijuana in 2000 was a terrible decision and poor choice.

Applicant's last criminal act led to eight years in prison and time to reflect on his conduct. He regrets the decisions he made in the past and decided that, upon his release from prison, he would change his life. Since his release four years ago, Applicant has made substantial positive changes in his life. He has stayed out of trouble for four years, and there is no indication that he was involved in misconduct while in prison. He works steadily at a job he likes and is respected by his management and coworkers. He enjoys time with his family and his girlfriend. He stays away from the negative influences from his past, preferring his family and current friends.

Applicant does not wish to think about his past conduct. In so doing, he put much of his long ago conduct out of his mind. He does not forget and will never forget the time he spent in prison. While he did not provide all information about his criminal past, he provided information about the most serious criminal charges against him. He acknowledged criminal conduct, financial problems, and drug counseling on his e-QIP, all of which is negative information about him. He did not intend to deceive the government.

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 drug involvement, criminal conduct, and personal 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 H:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	For Applicant
Subparagraph 3.c:	For Applicant
Subparagraph 3.d:	For Applicant
Subparagraph 3.e:	For Applicant
Subparagraph 3.f:	For Applicant
Subparagraph 3.g:	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