DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 10-08055
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Ray T. Blank, Esq., Department Counsel
For Applicant: *Pro se*

July 27, 2011

Decision

DUFFY, James F., Administrative Judge:

Applicant has failed to mitigate the Personal Conduct, Drug Involvement, and Criminal Conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On March 7, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct; Guideline H, Drug Involvement; and Guideline J, Criminal Conduct. DOHA acted under Executive Order (EO) 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.

In an undated document, Applicant answered the SOR and requested a hearing.[1] Department Counsel submitted the ready to proceed notification on May 11, 2011. The case was assigned to me on May 18, 2011. DOHA issued a notice of hearing on June 2, 2011, and the hearing was convened as scheduled on June 21, 2011. The Government offered exhibits (GE) 1 through 3, which were admitted into evidence without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) I. Applicant testified, called two witnesses to testify on his behalf, and offered exhibits (AE) A through D, which were admitted into evidence without objection. The record was held open for Applicant to submit additional information. Applicant timely submitted exhibit AE E, which was admitted into evidence. Department Counsel's email indicating he had no objection to AE E was marked as HE II. DOHA received the hearing transcript (Tr.) on July 6, 2011.

Procedural Ruling

Three preliminary rulings merit noting. First, Applicant waived the 15-day notice requirement imposed by ¶ E3.1.8 of the Directive. Second, Department Counsel made a motion to amend Paragraphs 1.a and 1.b of the SOR by adding "and May 24, 2010" following the date listed in each of those allegations. Applicant had no objection to the proposed amendment, and the SOR was amended as proposed. Third, Department Counsel requested I take administrative notice of 18 U.S. Code § 1001. The Applicant had no objection to that request, and administrative notice was taken of that statute.[2]

Findings of Facts

In his Answer, Applicant admitted each of the allegations in the SOR. In addressing the two Guideline E allegations, however, he indicated that he did not intentionally provide false information on his Electronic Questionnaire for Investigations Processing (e-QIP) signed on May 24, 2010. Consequently, his answers to the two Guideline E allegations are considered denials. His admissions to the allegations under Guidelines H and J are incorporated as findings of fact.[3]

Applicant is a 30-year-old employee of a defense contractor. He has been working there since August 2009. He is a high school graduate. He is married and has no children. This is the first time that he has applied for a security clearance.[4]

At the age of 17 in May 1999, Applicant was arrested and charged with trespassing and providing false information to a police officer. On that occasion, he and

[1] In his Answer to the SOR, Applicant indicated that he "would like a hearing if necessary to get my clearance."

[2] Tr. at 12-14.

[3] Applicant's Answer to the SOR.

[4] Tr. at 5-6, 47; GE 1. Since starting his current job, Applicant's company was bought out by another company.

a couple of friends were walking in the woods when they learned there was an individual nearby with a gun. They ran out of the woods and were caught about half a mile down the road. When questioned by a police officer, Applicant initially denied that he was in the woods. Approximately 45 minutes later, he told the police officer that he had, in fact, been in the woods. He went to court on the above charges and believed he pled guilty to the trespassing charge, but was not sure. He was sentenced to community service.[5]

In May 1999, Applicant began using marijuana and continued to use it until about 2003. During that period, the frequency of his marijuana use varied, but he estimated it to be monthly. In September 2003, Applicant stopped at a red light and a police car stopped in the opposite lane at that intersection. When the light turned green, Applicant cut off the police officer by turning in front of him. During a subsequent traffic stop, he stated the police officer found a "little piece" of marijuana on the floor of his truck. Applicant was transported to the police station in the police car, but stated that, to his knowledge, he was neither handcuffed nor arrested on that occasion. He was charged with possession of marijuana. He claimed the marijuana found in his truck did not belong to him, and his friend "took the rap for it." The charge against him was dismissed without him having to appear in court. He also testified that he did not use marijuana on the date of that arrest.[6]

During an interview with an Office of Personnel Management (OPM) investigator on June 29, 2010, however, Applicant reportedly stated he was arrested by the police for simple possession of marijuana in September 2003. He also stated the police officer found about a quarter gram of marijuana on the floorboard of his truck and that he was by himself in the truck when stopped by the police. Despite his claim that the marijuana did not belong to him, I find that he illegally possessed marijuana in September 2003.[7]

Applicant claimed he did not use marijuana from 2003 to 2009. During that period, he operated his own business and was focused on work. He met his wife in approximately 2005 and they married in March 2009. He indicated that she was "highly against" marijuana. In January 2010, Applicant went to a party at a longtime friend's house and used marijuana. He believed this was a New Year's Eve party. On that occasion, he smoked a marijuana joint with three or four other people. He stated that his wife was upset with him for using marijuana, and he had to sleep on the couch that night.[8]

[5] Tr. at 40-43, 51-53.

[6] Tr. at 43-46, 53-60; GE 2.

[7] GE 2.

[8] Tr. at 46-48, 53-55. Applicant indicated that he knew the friend hosting the party since the eighth grade. Applicant's responses to questions about whether he used marijuana from 2003 to 2010 were not definitive denials, but qualified with phrases such as "not off the top of my head" or "not to best of my knowledge." During his testimony, the following exchanges occurred:

Department Counsel: Okay. Between 2003 and 2010, do you think you used [marijuana]?

Applicant submitted an e-QIP on May 24, 2010. He responded "No" to Section 22e that asked whether he had ever been charged with any offenses related to alcohol or drugs. This question also required him to report information regardless of whether the record had been sealed, expunged, or otherwise stricken from the court record or the charge was dismissed. Applicant gave two explanations for answering this question inaccurately. First, in his Answer to the SOR, he stated, "I thought the possession charge had happened before September 2003, and was removed from my record entirely." At the hearing, he also testified, "At the time I filled this out, I filled it out to the best of my knowledge and did not think it fell in that seven-year period." In essence, he had misinterpreted the reporting period covered by Section 22e and did not remember accurately when he was charged with that offense. Second, he testified that he did not believe he was charged with possession of marijuana, because he never had to go to court and the matter was dropped. He stated, "Since the charges were dropped against me, I thought that, therefore, I wasn't charged."[9]

On that e-QIP, Applicant also responded "No" to Section 23a that asked, in part, if he had used marijuana in the last seven years. In his Answer to the SOR, Applicant indicated that he did not recall answering "No" to that that question and made a mistake in doing so. At the hearing, he testified that, when filling out the e-QIP, he did not think about the incident in which he smoked marijuana in January 2010. He stated that he filled out the e-QIP to the best of his knowledge and was honest in answering the questions. During the OPM interview, the investigator first brought up his arrest for possession of marijuana in 2003 that led to other questions about Applicant's use of

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> Applicant: I -- like I say, when I filled out the e-QIP, that my -- I did it to the best of my knowledge. In 2010 I remember that I did smoke. Between 2003 and that time, though, I would say no because I had actually -- I learned my lesson. It's (sic) brought a bunch of heartache in my life.
>
> * * *
>
> Department Counsel: Okay. So between 2003 and 2009 when you got married, you didn't use marijuana at all?
>
> Applicant: No, sir.
>
> Department Counsel: Okay.
>
> Applicant: Not off the top of my head; no, sir.
>
> * * *
>
> Administrative Judge: From 2003 to 2010, January 2010, you didn't use marijuana at all?
>
> Applicant: Not to the best of my knowledge; no. My recollection – from what I can remember of the time in 2010 that I did, I want to say between 2003, 2009, I didn't. . . .

[9] Tr. at 39-40, 56-59; GE 1; Applicant's Answer to the SOR.

marijuana. He indicated that, when asked by the investigator about his marijuana use, he freely admitted his use of marijuana in January 2010.[10]

In his Answer to the SOR, Applicant indicated that he has surrounded himself with different people since he last used marijuana. He has not received any drug treatment or counseling. Nor has he ever been diagnosed as a drug abuser or drug dependent. On the day before the hearing, he took a urinalysis test, which was negative for illegal drugs. Overall, I find that Applicant's testimony lacked credibility. Specifically, I do not find credible his explanation for why he failed to report his use of marijuana in January 2010 on his e-QIP.[11]

Applicant's first and second-line supervisors testified that he is credible and reliable. They have no reason to believe he has used illegal drugs. Furthermore, they indicated that he has done nothing that would cause them to question his eligibility for a security clearance. Applicant also submitted letters of reference that indicate he is a dedicated and hardworking employee. The letters also indicate he is a good role model with a strong character. A recent performance evaluation reflects that he meets or exceeds expectations in most core competencies.[12]

Applicant testified that he had no intention of ever using marijuana again. After the hearing, he submitted a signed statement indicating that he understood that his security clearance would be revoked if he engaged in any unlawful activity. Furthermore, he stated, upon request, he would provide a drug test or enroll in a certified drug/alcohol course. He applied to have the possession of marijuana charge expunged from his record and indicated that process normally takes eight to ten weeks to complete.[13]

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 that are to be 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, administrative judges apply the guidelines 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

[10] Tr. at 39-40; 57-61; GE 1; Applicant's Answer to the SOR.

[11] Tr. at 60; AE C; Applicant's Answer to the SOR.

[12] Tr. at 28-32; AE A-B.

[13] Tr. at 46-47; AE D, E.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline E, Personal Conduct

The security concern for Personal Conduct is set out in AG ¶ 15, as follows:

> 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. The following disqualifying condition is potentially applicable:

> (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.

A falsification under this disqualifying condition must be made deliberately – knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported. Here, Applicant smoked marijuana with three or four other individuals at a party in January 2010. His wife was upset with him for using marijuana on that occasion and made him sleep on the couch that night. In filling out his e-QIP approximately four month's later, he responded "No" to the Section 23(a) that asked if he used marijuana in the last seven years. He testified that he did not think about his use of marijuana in January 2010 when filling out the e-QIP. His explanation was not believable. I find that he knew of his recent use of marijuana when he submitted his e-QIP and deliberately failed to report it. I find that AG ¶ 16(a) applies to SOR ¶ 1.b.

Applicant was arrested for possession of marijuana in September 2003. At that time, he was transported to the police station in the police car and questioned. He was charged with possession of marijuana, but the charge was later dismissed without him making a court appearance. He has given two reasons for not disclosing that drug charge in responding to Section 22e of the e-QIP. First, he thought that, because the matter was dropped, he did not believe he was charged with an offense. Second, he indicated that he thought the charge fell outside the seven-year reporting requirement, which was obviously a misinterpretation of Section 22e that asked if he "ever" was charged with a drug or alcohol offense. While I found that Applicant's testimony, in general, lacked credibility and that the two explanations above were somewhat inconsistent, I find that he misunderstood Section 22e and did not deliberately falsify that answer. Given the length of time since his arrest for possession of marijuana and the circumstances surrounding its dismissal, his claim that he thought he did not have to report that matter is plausible. Consequently, I find in favor of Applicant on SOR ¶ 1.a.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

> (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
>
> (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advise of unauthorized personnel or legal counsel advising or instructing the individual specifically concerning security clearance process. Upon being made aware of the requirement to cooperate or provide information, the individual cooperated fully and truthfully;

(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;

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant deliberately falsified his response to Section 23(a) on his e-QIP. This is recent and serious misconduct. This falsification casts doubt on his reliability, trustworthiness, and good judgment. Although he did disclose to the OPM investigator his use of marijuana in January 2010, he did so only after the investigator began questioning him about the possession of marijuana charge. Moreover, he still has not admitted that he deliberately falsified his e-QIP by failing to report his marijuana use in January 2010. Consequently, he still has not been completely truthful about the allegation in SOR ¶ 1.b. After examining all of the applicable mitigating conditions, I find that none mitigate the Guideline E security concerns arising from his deliberate falsification on his e-QIP.

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.

I have considered all of the evidence in this case and the disqualifying conditions under Drug Involvement AG ¶ 25 and find the following are potentially applicable:

(a) any drug abuse; and

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

From 1999 to 2003, Applicant used marijuana on about a monthly basis. In September 2003, he illegally possessed marijuana. In January 2010, he again used marijuana at a party. AG ¶¶ 25(a) and 25(c) apply.

I have considered all of the evidence in this case and the mitigating conditions under Drug Involvement AG ¶ 26 and especially considered the following:

> (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; and
>
> (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; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant used marijuana from 1999 to 2003 and again in January 2010. His most recent use of marijuana occurred at a party hosted by a friend who he has known since the eighth grade. Such use of marijuana casts doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 26(a) does not apply. Applicant indicated that he had no intention of ever using marijuana again and that he has surrounded himself with different people. He also submitted a statement indicating he understood that his security clearance would be revoked if he engaged in any further unlawful activity. Furthermore, he expressed a willingness to take drug tests or enroll in a certified drug/alcohol course. AG ¶ 26(b) partially applies, but it does not fully mitigate the security concerns arising from his illegal drug usage.

Guideline J, Criminal Conduct

AG ¶ 30 sets out the security concern relating 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.

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and especially considered the following:

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

In 1999, Applicant was arrested for trespassing and providing false information to a police officer. Although he did not remember his pleas to those offenses, he was

sentenced to community service. In 2003, he illegally possessed marijuana and was charged with that offense. In 2010, he deliberately falsified his e-QIP in violation of 18 U. S. Code § 1001. I find the above disqualifying conditions apply.

I have considered all of the mitigating conditions for Criminal Conduct under AG ¶ 23 and especially considered 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;
>
> (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
>
> (c) evidence that the person did not commit the offense; 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.

When Applicant was charged with the trespassing and false information offenses, he was 17 years old. These offenses occurred over 12 years ago. Soon after making the false statement to the police officer, he corrected that statement by admitting that he trespassed in the woods. These offenses were relatively minor and happened so long ago as to not cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 23(a) mitigates SOR ¶ 3.a.

Applicant's possession of marijuana charge was dismissed without him having to make a court appearance. Nonetheless, he was the only person in the truck when the police officer found about a quarter of a gram of marijuana on the floorboard near him. His claim that a friend "took the rap for it" is difficult to believe. I found that he illegally possessed marijuana in September 2003. His denial of this offense weighs against a finding that he has rehabilitated himself. Although this offense happened over seven years ago, I cannot find that such criminal behavior is unlikely to recur because he again illegally possessed and used marijuana in 2010. Based on the evidence presented, I find that none of mitigating conditions apply to the possession of marijuana offense.

Applicant's violation of 18 U.S. Code § 1001 is a recent and serious offense. I have considered all of the evidence and conclude none of the mitigating conditions apply to this falsification offense.

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 the 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.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guideline H and Guideline J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's work performance. He is a dedicated and hard working employee. His supervisors are pleased with his performance. Nevertheless, he used marijuana less than two years ago when he was about 28 years old. He later deliberately failed to disclose that marijuana use when he filled out his e-QIP. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. Applicant has failed to mitigate the Personal Conduct, Drug Involvement, and Criminal Conduct security concerns.

Formal Findings

Formal findings on the SOR allegations, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant

Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraphs 3.b - 3.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
James F. Duffy
Administrative Judge