DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 10-08377
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Carolyn H. Jeffreys, Esquire, Department Counsel
For Applicant: *Pro se*

November 8, 2011

Decision

HARVEY, Mark, Administrative Judge:

Applicant's marijuana use between January 2002 and January 2008 showed poor judgment and raised security concerns. In regard to the whole-person concept, he permitted friends and colleagues to use marijuana on his property as recently as two days before his hearing. Drug involvement concerns are not fully mitigated; however, personal conduct concerns are mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On October 6, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF-86). (GE 1) On April 8, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guidelines H (drug involvement) and E (personal conduct). (Hearing Exhibit (HE) 2) The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether Applicant's clearance should be continued or revoked. (HE 2)

On May 6, 2011, Applicant responded to the SOR. (HE 3) On July 22, 2011, Department Counsel indicated she was ready to proceed on Applicant's case. On August 1, 2011, DOHA assigned Applicant's case to me. On September 7, 2011, DOHA issued a hearing notice, setting the hearing for September 28, 2011. (HE 1) Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered two exhibits (GE 1-2) (Tr. 16), and Applicant offered three exhibits. (Tr. 20; AE A[1]-C) There were no objections, and I admitted GE 1-2 and AE A-C. (Tr. 17, 22) Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR. (HE 1-3) I held the record open until October 7, 2011 to permit Applicant to submit a transcript from a radio discussion about Applicant's contributions to information technology and a copy of AE A. (Tr. 13) On October 12, 2011, I received the transcript. I also admitted a brief summary of the law on mere presence to establish an offense. (HE 4; *Federal Criminal Practice: A Second Circuit Handbook* § 46-5, Sufficiency of the Evidence, Mere Presence, 2 pages) On November 1, 2011, Department Counsel informed me that Applicant had not submitted any post-hearing documentation. (HE 5)

Motion to Amend the SOR

SOR ¶ 1.a alleges that Applicant used marijuana with varying frequency from January 2002 to January 2008. At the hearing, Applicant disclosed that he had used marijuana once in fourth grade, and with varying frequency from 1984 to 2008. Department Counsel moved to amend the SOR to reflect the full-scope of Applicant's marijuana use. (Tr. 54) Applicant objected to the amendment. (Tr. 54) I sustained Applicant's objection; however, I indicated I would consider all of his marijuana use for purposes of Applicant's rehabilitation under Guideline H and under the whole-person concept. (Tr. 55-57) *See* n. 7, *infra*.

Findings of Fact[2]

Applicant's SOR response admitted all of the SOR allegations: (1) he "used marijuana, with varying frequency, between Jan[uary] 2002 and January 2008" (SOR ¶ 1.a); (2) he "operated a marijuana quality testing company" (SOR ¶ 1.b); and (3) his

[1] Applicant presented his business licenses at the hearing (AE A), and he said he would provide copies of his business licenses after the hearing. (Tr. 20-22; AE A) However, he did not provide copies of his licenses after the hearing. I find that he had business licenses issued by the State, and copies of the licenses are unnecessary for the record. Applicant has not been prejudiced by the absence of this exhibit from the record. I substituted a memorandum for record (MFR) for Exhibit A.

[2]Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

drug involvement as specified in (1) and (2) raised judgment concerns under the personal conduct guideline (SOR ¶ 2.a). (HE 3) He disagreed that his conduct raised reliability or trustworthiness concerns, and he emphasized his candor in disclosing his history of drug involvement. (HE 3) His admissions are accepted as factual findings.

Applicant is a 43-year-old employee of a defense contractor. (Tr. 5, 23) In 1988, he graduated from high school. (Tr. 5) In 1991, he was awarded a bachelor's of science degree in management information systems. (Tr. 5) He intends to marry on October 15, 2011. (Tr. 5) He does not have any children. (Tr. 6) He has never served in the military. (GE 1)

Applicant has specialized in cyber security issues and had an important role in mitigating a global worm that was targeting corporate America. (Tr. 21-22) His role is documented in two books. *Id*. He is very science oriented, and he started two companies at the same time. (Tr. 35) One company was established to analyze the potency of various marijuana samples, and the other was established to infiltrate robotic networks (botnets). (Tr. 34-35, 42-44) The latter company's goal is to enhance cyber security and to mitigate the damage from malicious botnets by taking over those botnets. *Id*. His company also conducts analysis of penetrations of systems by botnets. *Id*.

Drug Involvement

Applicant first used marijuana when he was in the fourth grade. (Tr. 24) The next time he used marijuana was when he was in the 9th grade. (Tr. 25) He used marijuana about twice a year while he was in high school, which was from 1985 to 1988. (Tr. 25) He used marijuana a few times each year of college; however, his total marijuana use was less than ten times each year. (Tr. 25) From 1991 until 2002, he used marijuana infrequently, perhaps every couple of months. (Tr. 27) From 2002 to 2005, he used marijuana a few times each year. (Tr. 30) He is able to moderate his marijuana use. (Tr. 29) He is not addicted to marijuana. He said he was not ashamed of his history of marijuana use. (Tr. 29)

Applicant obtained a prescription to use marijuana for treatment of his insomnia. (Tr. 33) He purchased marijuana at pot clubs. (Tr. 33)

Applicant's fiancé has used marijuana; however, he did not know details about the extent of her marijuana use. (Tr. 41) The most recent use of marijuana at Applicant's residence was when a former employee came over to Applicant's residence and used marijuana two days before his hearing. (Tr. 41) Applicant gave her permission to use the marijuana on his property.[3] (Tr. 41) Applicant's next door neighbors use

[3] The question arises whether Applicant has committed the criminal offense of aiding or abetting or conspiracy to possess marijuana when he authorized a former employee's marijuana possession when he expressly permitted her to use marijuana on his premises. In *United States v. Sarabia*, No. 10-4015, 2011 U.S. App. Lexis 21240 (2011) at *11-12 the Fifth Circuit explained that "conspiracy under the law is an agreement between two or more persons to join together to accomplish some unlawful purpose." The court continued:

marijuana. (Tr. 28) Applicant owns a farm, and he does not grow marijuana on his farm. (Tr. 28) He has smelled marijuana smoke at parties at his farm in the last year. (Tr. 62) However, when he detects someone smoking marijuana at his farm he tells them that they "can't get high here." (Tr. 62) He has been offered marijuana in the last year. (Tr. 64) He summarized, "Having somebody come over to my house and smoke pot, I don't really care. I've certainly seen so much of this [marijuana] industry, it doesn't phase me." (Tr. 66) He said he was unwilling to exclude marijuana users from his life, even if that meant he could not hold a security clearance. (Tr. 69, 71)

Applicant wanted to operate a marijuana testing laboratory, and he intended to operate this laboratory in compliance with the laws of his state. (Tr. 32) He obtained state business licenses. (Tr. 32; AE A and B) He taught himself organic chemistry, rebuilt a gas chromatograph, and taught himself how to use it. (Tr. 48) He purchased marijuana test samples when he was starting his marijuana testing laboratory. (Tr. 30) He spent about $2,500 on cannabinoid standards, which he used to evaluate his testing methods so he could determine the amount of THC in a marijuana sample. (Tr. 31) He was purchasing marijuana for testing and not for personal use. (Tr. 31) He did not want to use marijuana at the pot clubs, and his reluctance to use marijuana had a chilling effect on his business. (Tr. 34) Applicant's attempt to capitalize on the medical marijuana industry was an unpleasant experience for Applicant. (Tr. 28) His marijuana analysis company was unprofitable, and he closed it down around the end of 2007. (Tr. 36)

Applicant's idea to test marijuana potency was a sound business idea. Three businesses are now testing marijuana potency, and Applicant's business venture was too early in the state legalization process. He noted that the need for testing was only recently and widely recognized as a economically valuable service. (Tr. 50) He emphasized that his marijuana testing business complied with state law. (Tr. 60)

Applicant admitted his marijuana involvement in his October 6, 2009 SF-86, during his January 6, 2010 Office of Personnel Management (OPM) personal subject interview (PSI), and in his responses to DOHA interrogatories. (GE 1, 2) His statements about his drug history are consistent. Aside from his own admissions of marijuana involvement, there is no other evidence of drug involvement such as witness statements, arrests, charges, convictions, or police reports.

> Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other and may have assembled together and discussed common names and interest does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of the conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.

See also HE 4. The issue here is not whether Applicant has engaged in criminal conduct but on whether he showed poor judgment by permitting drug use on his premises.

Applicant applied for a security clearance because he wanted to contribute to his country, and security-clearance holders told him he had a duty to help the United States. (Tr. 40-41, 72) He could be more effective in the arena of cyber security if he held a security clearance. *Id*. He enjoyed working with security-clearance holders, and he wanted to work to protect national security and enhance cyber security for Government agencies and corporations. *Id*.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch 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). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id*. at 527. The President has authorized the Secretary of Defense or his designee to grant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the 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. Adverse clearance decisions are made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531.

"Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). 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. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guidelines H (drug involvement) and E (personal conduct) with respect to the allegations set forth in the SOR.

Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

> [u]se 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.

Two drug involvement disqualifying conditions in AG ¶¶ 25(a) and 25(c) could raise a security concern and may be disqualifying in this case: "any drug abuse,"[4] and "illegal drug possession . . . [or] processing." These two disqualifying conditions apply because Applicant used and possessed marijuana between January 2002 and January 2008.[5] He admitted his marijuana use on his SF-86, to an OPM investigator, in his

[4]AG ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

[5]AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

> (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.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substance. *See* Drug Enforcement Administration

response to DOHA interrogatories, in his SOR response, and at his hearing. He possessed marijuana before he used it. He established a business that tested the potency of medical marijuana and sought business at "pot" clubs. He commercially tested a small amount of marijuana for a marijuana distributor. His possession and use of marijuana before January 2002 and his involvement with marijuana after January 2008 are not considered as part of the analysis of whether any disqualifying conditions are applicable.

AG ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

> (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;
>
> (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; 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.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no "bright line" rules for determining when such conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge

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listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. *See also Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation."[6]

Applicant's marijuana use in this case lasted for approximately 23 years from 1985 to 2008, and he permitted friends and colleagues to possess and use marijuana at his residence as recently as two days before his hearing. He did not clearly express his intention of preventing friends and colleagues from possessing and using marijuana at his residence in the future.[7] He recognizes the adverse impact on his life of drug abuse in connection with access to classified information. He also understands that possession of marijuana violates federal law. However, he continues to associate with known drug users. I accept Applicant's statement as credible that his career goals have

[6] ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

> *Compare* ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, affirmed the administrative judge's decision to revoke an applicant's security clearance after considering the recency analysis of an administrative judge stating:

> The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

[7] The SOR did not allege that Applicant possessed and used marijuana prior to January 2002. The SOR did not allege that Applicant knowingly permitted friends and colleagues to possess and use marijuana at his residence. 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.

changed sufficiently to create some certitude that he will continue to abstain from personal drug possession and use. AG ¶ 26(a) partially applies to his marijuana-related offenses.[8]

Applicant demonstrated his intent not to abuse illegal drugs in the future. He has not used marijuana since early 2008. He has broken his patterns of drug abuse, and he has changed his life with respect to illegal drug use. He has abstained from drug abuse for about 45 months. AG ¶ 26(b) partially applies.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse drugs after being issued a prescription that is lawful under federal law. Marijuana was never lawfully prescribed for him under federal law. He did not receive a medical prognosis of low probability of recurrence of drug abuse.

In conclusion, Applicant ended his drug abuse in early 2008, about 45 months ago after more than two decades of sporadic marijuana abuse. The motivations to stop using illegal drugs are evident. He understands the adverse results from marijuana use.[9] However, he has not shown or demonstrated a sufficient track record of no drug abuse, and he has consented to marijuana use on his property. Applicant's drug involvement continues to be a security concern.

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 three conditions that could raise a security concern and may be disqualifying in this case:

> (c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness,

[8]In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

[9]Approval of a security clearance, potential criminal liability for possession of drugs and adverse health, employment, and personal effects resulting from drug use are among the strong motivations for remaining drug free.

unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(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: (1) untrustworthy or unreliable behavior . . . ; and (3) a pattern of dishonesty or rule violations . . . ; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

AG ¶¶ 16(c) and 16(d) do not apply. As indicated under the drug involvement guideline, there is credible adverse information that is sufficient for an adverse determination under Guideline H. However, AG ¶ 16(e)(1) applies because marijuana possession and use creates a vulnerability to exploitation, manipulation, or duress, and such conduct adversely affects Applicant's professional standing as an employee of a Department of Defense contractor. There is substantial evidence of this disqualifying condition, and further inquiry about the applicability of mitigating conditions is required.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

(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 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;

(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;

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

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶¶ 17(a) and 17(b) do not apply because Applicant has been candid about his drug involvement, and 17(f) does not apply because Applicant admitted his marijuana possession and use. However, Applicant has met his burden of establishing AG ¶ 17(e) and the SOR allegations under Guideline E are mitigated. His most recent marijuana possession and use was in around January 2008, about 45 months ago. He fully disclosed his marijuana possession and use on multiple occasions. His decision to end his marijuana use is a positive step that tends to reduce or eliminate his vulnerability to exploitation, or duress. I do not believe that anyone could use Applicant's history of marijuana possession or use to coerce him into compromising classified information.

AG ¶ 15 indicates that poor judgment can cause reliability and trustworthiness concerns, resulting in disqualification under the personal conduct guideline. Judgment issues under the personal conduct guideline are more specifically addressed in this case under the drug involvement guideline. I find for Applicant under Guideline E because those judgment issues are a duplication of the judgment concerns previously discussed under Guideline H.

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 the 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 have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There is some evidence supporting approval of Applicant's clearance. Applicant was a child in fourth grade when he was introduced to using marijuana. He served his country in the battle against malicious botnets, and he has volunteered to continue to help in the field of cyber security against those who would damage our country using information technology. He stopped using marijuana in 2008. I am confident that he has the ability to abstain from marijuana use. He has consistently described his history of marijuana use in his SF-86, OPM PSI, response to DOHA interrogatories, SOR response, and at his hearing. He knows the consequences of marijuana use. Applicant has contributed to the Department of Defense. There is no evidence of disloyalty or that he would intentionally violate national security. From my review of his book, I am convinced that Applicant is exceptionally intelligent, and he has the potential to be a significant asset to national security. His character and good work performance show some responsibility, rehabilitation and mitigation. I am satisfied that if he continues to abstain from marijuana use, and avoids future offenses he will eventually have future potential for access to classified information.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant has sporadically used marijuana for about 25 years from 1985 until early 2008. As recently as two days before his hearing he told a former employer that she could smoke marijuana on his property. He is sufficiently mature to be fully responsible for his conduct. His many years of marijuana use show lack of judgment. He allowed marijuana on his property just two days before his hearing, which "raise[s] questions about [his] reliability, trustworthiness and ability to protect classified information." *See* AG ¶¶ 15 and 24. His marijuana involvement under such circumstances raises a serious security concern, and a security clearance is not warranted at this time.

I have carefully applied the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude drug involvement concerns are not fully mitigated at this time; however, personal conduct concerns are mitigated. For the reasons stated, I conclude he is not currently eligible for access to classified information.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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

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Mark Harvey
Administrative Judge