DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 11-01952
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel
For Applicant: *Pro se*

07/25/2012

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Decision

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MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant abused marijuana with varying frequency from October 1989 to October 1999, from June 2002 to July 2002, in June 2003, and from October 2003 to June 2010. He resumed his use of marijuana in violation of his conditional discharge for driving while impaired in July 2002. Applicant does not intend to use any illegal drug in the future, but there is an unacceptable risk of recurrence where he continues to participate in social activities with drug-abusing friends. Clearance denied.

Statement of the Case

On December 7, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H, drug involvement, and explaining why it was unable to find it clearly consistent with the national interest to grant or continue a security clearance for him. DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended

(Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant submitted an undated Answer to the SOR allegations and requested a decision without a hearing. On April 17, 2012, the Government submitted a File of Relevant Material (FORM) consisting of eight exhibits (Items 1-8). DOHA forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. Applicant received the FORM on April 26, 2012. He filed a timely rebuttal dated May 22, 2012, to which the Government did not object. On July 2, 2012, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. I accepted Applicant's rebuttal to the FORM into the record as an Applicant exhibit (AE A).

Findings of Fact

The SOR alleged under Guideline H that Applicant used marijuana on several occasions from about October 1989 to at least October 2010 (SOR 1.a), including while possessing a DOD secret clearance (SOR 1.b); that he was charged in July 2002 with unlawful possession of marijuana, criminal possession of a controlled substance, and driving while impaired by drugs and was sentenced on the driving while impaired charge to a $500 fine and 90 days suspended license (SOR 1.c); and that he attended alcohol and drug treatment from February 2003 until April 2003 when he was advised to abstain (SOR 1.d). (Item 1.)

In his Answer, Applicant admitted that he used marijuana, although only until June 5, 2010. He denied that he used marijuana while holding a DOD security clearance in that he was no longer employed by the company that had sponsored him for a security clearance as of May 31, 2002, and he was never notified that he had been issued a security clearance. Concerning the drug and alcohol charges, Applicant denied pleading guilty to the original charge of driving while impaired by drugs. Instead, he pled guilty to driving while impaired by alcohol, a violation of a state traffic law. Applicant admitted that he had substance abuse treatment in 2003, but the class was intended for him to make better decisions when driving and taking substances. He was required to abstain only while participating in the course. (Item 2.)

After considering the Government's FORM, which includes Applicant's Answer to the SOR allegations (Item 2), and Applicant's rebuttal to the FORM (AE A), I make the following findings of fact.

Applicant is a 41-year-old senior test engineer, who has worked for his defense contractor employer since March 2010. (Item 3.) Applicant was previously employed by another defense contractor from December 1999 to May 2002. He has otherwise been engaged in non-defense work. (Items 3, 4.) Applicant earned his bachelor's degree in February 1995. He married in June 2008 and has a young son. (Items 3, 6.)

Applicant began smoking marijuana in college in October 1989. Over the next ten years, he used the drug about 300 times,[1] continuing after he earned his degree and started his career as a project engineer. In September 1999, Applicant was laid off from a job he had held for five years. He was unemployed until December 1999, when he began working as a project engineer for a defense contractor. Applicant abstained from any illegal drug use until 2002. (Items 4, 6; AE A.)

On December 20, 2001, Applicant completed a security clearance application. He disclosed that he had used marijuana 300 times from October 1989 to October 1999, about 50 of those times in 1999. (Items 4, 6.) Around February 2002, Applicant was granted a secret security clearance. (Item 3.) Effective with the pay period ending May 31, 2002, Applicant's employment with the defense contractor terminated, and he was paid $2,676.92 in severance. (Item 6.)

Applicant resumed smoking marijuana around June 1, 2002. Over the next six weeks, he used marijuana about 14 times. On July 19, 2002, Applicant smoked a joint of marijuana at a softball game and another joint en route home from the game. He was stopped for several motor vehicle and traffic violations. The police detected the odor of burning marijuana in the vehicle. Applicant was arrested and charged with criminal possession of a controlled substance (misdemeanor), unlawful possession of marijuana (violation), operating a motor vehicle while impaired by drugs (misdemeanor), and some traffic infractions. Applicant refused to submit to a chemical test, but two partially burned marijuana cigarettes, a wooden pipe, and suspected marijuana, were recovered from his vehicle. On April 23, 2003, under a plea agreement, Applicant pled guilty to an amended charge of driving while impaired by alcohol (traffic infraction). His guilty plea was based on the same facts as gave rise to the original charges. Applicant was granted a conditional discharge for one year with conditions, including that he abstain from the use of intoxicating beverages for the year and not use any narcotic substance or dangerous drug such as marijuana, unless prescribed by a licensed physician. Applicant was fined $500 and his driver's license was suspended for 90 days. (Items 6-8.)

On February 7, 2003, Applicant was evaluated by a certified substance abuse counselor to determine whether he had a substance abuse problem. Applicant admitted that he had used marijuana in college and throughout his early 20s. He told the evaluator that he might smoke marijuana on a very limited basis with friends during a softball game. Applicant denied any use of marijuana since his July 2002 arrest. The therapist referred Applicant for a minimum of eight weeks of outpatient treatment, starting March 1, 2003, with urinalysis testing and abstinence required during the program.[2] On April 24, 2003,

[1]In response to DOHA interrogatories, Applicant indicated on September 23, 2011, that he smoked marijuana about 3,000 times from October 1989 to October 1999. (Item 6.) In rebuttal to the FORM, he indicated that he should have written 300 times. He had accidentally multiplied the number by 10 for the 10 years covered. (AE A.) I accept his explanation in light of the fact that he reported on his December 2001 security clearance application that he had used marijuana 300 times between October 1989 and October 1999. (Item 4.)

[2]Abstinence was listed as a specific responsibility of the program participant along with other requirements, including that he attend a minimum of eight sessions. (Item 6.) His clinicians made no aftercare recommendations in their discharge summary.

Applicant was discharged, having successfully completed the counseling. He was an asset to his group. In the opinion of his clinicians, Applicant clearly understood that any additional negative consequences from the misuse of mood-altering chemicals could have an impact on his future, and he was "on a healthy and appropriate course." Applicant smoked marijuana three times from June 13-15, 2003, and about 24 times from October 1, 2003, to June 5, 2010. (Items 5, 6.)

Applicant worked for a custom engineering and manufacturing company for about six years before being laid off in January 2009 for lack of work.[3] Applicant was supported by his spouse and unemployment compensation until March 2010, when he began his current employment with a defense contractor. (Items 3, 5.) On October 14, 2010, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP). In response to question 23.a, concerning whether he had illegally used any controlled substance in the last seven years, Applicant indicated that from October 2003 to present, he used marijuana "recreational[ly], sporadic, a few dozen" times. He responded "No" to question 23.b, about whether he had ever illegally used a controlled substance while possessing a security clearance, and to question 22.e, "Have you EVER been charged with any offense(s) related to alcohol or drugs." (Item 3.)

On November 11, 2010, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM) about his self-reported use of marijuana. When reviewing the e-QIP, Applicant was asked whether he had ever been charged with any offense related to alcohol or drugs. Applicant indicated that he had thought the question had a seven-year scope. On being advised that the inquiry covered his entire life, Applicant disclosed his arrest in July 2002. He admitted to the investigator that he had smoked marijuana before his arrest, had refused chemical or blood alcohol testing on legal advice, and had been fined on a reduced charge of driving while impaired by alcohol, although he denied he had been drinking. Applicant also related that he had counseling sessions to review his ideas of socially acceptable use of marijuana. As he had listed on his e-QIP, Applicant reportedly stated to the investigator that he had used marijuana from about October 2003 to October 2010 recreationally, about a few dozen times, at social events with friends or at concerts when it was passed around. He used marijuana, usually with a certain friend, because it was socially acceptable in those settings. Applicant denied that he ever purchased marijuana, tested positive for any illegal drugs, or was asked to seek treatment or counseling of any kind because of his drug use. Applicant denied any intent to use an illegal drug in the future or to use a prescription drug without authorization. He had a good job that he did not want to risk, and he wanted a healthy lifestyle for the child his spouse was expecting. On May 11, 2011, Applicant affirmed that the summary of

[3]There is discrepant information about when Applicant started working for the company. He indicated on his October 2010 e-QIP that he was employed from June 2002 to February 2009. (Item 3.) As of his substance abuse evaluation in February 2003, Applicant had reportedly been unemployed since November 2002, although as of his discharge in April 2003, he was working for the company. (Item 6.) Applicant's employment with the company likely began sometime between November 2002 and April 2003. Irrespective of his start date, his security clearance would have been inactive and then lapsed by the time of his current employment. There is no evidence that he needed a clearance from May 2002 to October 2010, when he filed his e-QIP for his current employer.

his interview containing the aforesaid information was accurate with some minor corrections unrelated to his illegal drug use. (Item 5.)

On September 23, 2011, Applicant responded to DOHA interrogatories inquiring about his illegal drug use. Applicant indicated that he smoked marijuana an estimated 3,000 [sic] times between October 1, 1989, and October 1, 1999, 14 times from June 1, 2002, to July 19, 2002, three times from June 13, 2003, to June 15, 2003, and 24 times from October 1, 2003 to June 5, 2010. Applicant reported a last use of marijuana on June 5, 2010, and he had no intent of future illegal drug use. With added family responsibilities since the birth of his son, Applicant did not want to jeopardize the stable employment needed to care for his family. Applicant admitted that he still associates with persons who use illegal drugs or frequents places where he has reason to believe drugs are being used. He explained that some teammates on various softball teams over the last 25 years have smoked marijuana before and after games on occasion, and that some of his friends have smoked marijuana at concerts he attended. Concerning his arrest, Applicant indicated that he had smoked "a partial marijuana cigarette" before a softball game. After the game, he smoked another marijuana joint and drank a beer. Applicant denied any subsequent arrests. (Item 6.)

In response to the SOR alleging that he used marijuana to at least October 2010, Applicant reiterated that he last used marijuana on June 5, 2010. He averred that when asked about his use, he was given a timeframe to follow.[4] Now that he had a child and spouse to support, he did not want to jeopardize his health or employment by using marijuana in the future. (Item 2.)

In rebuttal to the FORM, Applicant indicated on May 22, 2012, that he has continued to abide by his commitment to abstain from marijuana. He still plays softball with his friends, although asserts that he has no need or desire to smoke marijuana. He expressed his willingness to submit to drug testing to prove his abstention. (AE A.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in

[4]The report of Applicant's interview does not include a specific date on which he last smoked marijuana. He was given an opportunity to review the investigator's report of his interview in May 2011, and he did not indicate at that time that he last used marijuana in June 2010 vice October 2010. However, the dates of marijuana use reported on his e-QIP, "October 2003 to Present," correspond to the seven-year scope of the inquiry. Applicant apparently believed he was to provide the number of times he used marijuana during the coverage period, and he did not intend to indicate that he was still using marijuana as of his e-QIP. When asked to provide specific dates for his first and last uses of marijuana in the interrogatories, Applicant admitted that he first used marijuana in October 1989 and last used the drug in June 2010.

evaluating an applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Drug Involvement

The security concerns about drug involvement are set out in AG ¶ 24:

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

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

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens),[5] and

(2) inhalants and other similar substances.

Under AG ¶ 24(b), drug abuse is defined as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." Potentially disqualifying condition AG ¶ 25(a), "any drug abuse," applies because Applicant abused marijuana on more than 300 occasions between October 1989 and June 2010. Although he has not been convicted of a drug-related offense, he admits that he smoked marijuana before his arrest in July 2002. The police seized some drug paraphernalia and marijuana from his vehicle on that occasion. AG ¶ 25(c), "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," also applies.

However, the Government did not establish its case with respect to AG ¶ 25(g), "any illegal drug use after being granted a security clearance." On his October 2010 e-QIP, Applicant indicated that he was granted a secret clearance in about February 2002. In his detailed response to interrogatories (Item 6), Applicant admitted that he used marijuana 14 times from June 1, 2002, until his arrest on July 19, 2002; three times in June 2003; and about two dozen times between October 2003 and June 2010. Applicant did not use marijuana between February 2002 and May 2002, when his employment ended with the company that sponsored him for a security clearance. There is no evidence that Applicant needed a security clearance for his work with the custom engineering company, so his clearance would have been inactive or lapsed when he used marijuana in June 2003 and from October 2003 to June 2010.

Mitigating condition AG ¶ 26(a), "the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment," cannot reasonably apply. Applicant's abuse of marijuana was more extensive in college and during his early 20s, but he relapsed in 2003 after he had completed substance abuse counseling following his arrest on drug charges and while he was on a conditional discharge and required to abstain from non-prescribed dangerous drugs, including marijuana. He smoked marijuana another 24 times between October 2003 and June 2010. Although Applicant has not used marijuana since June 2010, the passage of time does not necessarily guarantee against relapse, particularly where Applicant resumed marijuana use with friends or softball teammates in June 2002 after abstaining since October 1999, and he continues to associate with these drug-using friends.

Applicant told the OPM investigator in November 2010, and DOHA in September 2011, and in response to the SOR, that he decided to stop using marijuana because he did

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

not want to risk his employment and had family responsibilities incompatible with continued drug use. Under AG ¶ 26(b), "a demonstrated intent not to abuse any drugs in the future," can be shown by "(1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; or (4) a signed statement of intent with automatic revocation of clearance for any violation." AG ¶ 26(b)(4) is satisfied even in the absence of a separate statement expressly acknowledging that his clearance would be revoked for any violation. Applicant has repeatedly indicated his intent to abstain from marijuana in the future, and he understands that continued marijuana use would be inconsistent with his employment. Applicant has responsibilities since the birth of his son, which reinforce this intent.

However, Applicant's use of marijuana in recent years was at softball games with teammates and at concerts with friends. As of September 2011, he was still associating with teammates, some of whom have smoked marijuana occasionally before and after games over the past 25 years. Applicant acknowledged in May 2012 that he continues to play softball "to support [his] teams that [he has] played on for decades." He maintains he has been able to continue to play with his friends "without the need or desire to smoke," and that he is willing to submit to drug testing to prove his continued abstention. Applicant is unlikely to have suggested drug testing if he was abusing marijuana. There is no evidence that Applicant has used any illegal drug in the past two years, but neither AG ¶ 26(a) nor AG ¶ 26(b) can be invoked in mitigation. Applicant risks his abstention by continuing to associate with known drug users. His present abstinence falls short of establishing AG ¶ 26(b)(3) under these circumstances. The drug involvement concerns are not fully mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).[6] In making the overall commonsense determination required under AG ¶ 2(c), I have to consider Applicant's poor judgment in abusing controlled substances. Applicant's youth cannot fully extenuate his frequent, if not regular, abuse of marijuana in college and throughout his 20s. Applicant indicated during his February 2003 substance abuse evaluation that he might smoke marijuana with friends during softball games, but on a very limited basis. He smoked marijuana at least 27 times thereafter, including on a few occasions during his one year of conditional discharge, in apparent violation of its general

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

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

conditions. Applicant has abstained from marijuana since June 2010. His candor with the DOD about his illegal drug involvement also weighs in his favor. However, Applicant's unwillingness to dissociate himself completely from the persons and activities so conducive to his drug abuse in the past raises doubts about the strength of his commitment to a drug-free lifestyle and about whether he can be counted on to fulfill the fiduciary obligations of a security clearance. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). Based on the facts before me and the adjudicative guidelines that I am bound to consider, for the aforesaid reasons, I am unable to conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance at this time.

Formal Findings

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

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant[7]

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.

_____
Elizabeth M. Matchinski
Administrative Judge

[7]Treatment is viewed favorably, given his successful completion and the absence of evidence proving he was advised to abstain at discharge. The evidence shows that Applicant smoked marijuana in violation of the general conditions of his conditional discharge for the offense in SOR 1.c.