DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 15-04939
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

05/09/2017

Decision

Harvey, Mark, Administrative Judge:

From 2003 to 2011, Applicant occasionally used marijuana. His marijuana use is not recent, and drug involvement security concerns are mitigated. Applicant lied about the extent of his marijuana use: on his October 12, 2010 Questionnaire for National Security Positions (SF 86) or security clearance application (SCA); on his November 8, 2010 Office of Personnel Management (OPM) personal subject interview (PSI); and on his August 2013 responses to interrogatories for the Defense Office of Hearings and Appeals (DOHA). (Items 5, 6, 8) Personal conduct security concerns are not mitigated.

Statement of the Case

On October 12, 2010, Applicant completed and signed his SCA. (Item 5) On April 24, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance

for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. (Item 1) Specifically, the SOR set forth security concerns arising under the drug involvement and personal conduct guidelines. (Item 1)

Applicant provided an undated response to the SOR, and he requested a decision without a hearing. (Item 4) On June 22, 2016, Department Counsel completed the File of Relevant Material (FORM). On June 27, 2016, Applicant received the FORM. Applicant did not provide a response to the FORM. On April 25, 2017, the case was assigned to me. The case file consists of nine Government exhibits. (Items 1-9) Applicant did not object to any of the exhibits.

Findings of Fact[1]

Applicant admitted the conduct alleged in the SOR, and he provided some extenuating and mitigating information. (Item 4) His admissions are accepted as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 30-year-old employee of a defense contractor, who works as a designer.[2] In 2004, he graduated from high school. He has worked for the same employer since 2007. He has no prior military service. He has never married, and he has one five-year-old child. (Item 8)

Drug Involvement and Personal Conduct

Applicant was enrolled in an alcohol and drug treatment program (ADTP) several times from 2009 to 2012. On January 10, 2007, Applicant completed a questionnaire as part of his entry into an ADTP. (Item 9) The ADTP was in response to an alcohol-related arrest after he drove into the ditch. (Item 9) He indicated he first used marijuana when he was 18 years old, and he used marijuana once a month for the previous year. (Item 9 at 1) On July 9, 2009, Applicant completed a questionnaire as part of an ADTP, and he said his most recent marijuana use was in July 2009. (Item 9 at 18) On February 3, 2010, Applicant disclosed he first used marijuana when he was 16 years old, and he used marijuana about once a month for a year. His last use was in 2005. (Item 9 at 23) On January 10, 2012, Applicant disclosed during an ADTP that he used marijuana twice a week for the previous two months; he used marijuana twice between October 26, 2011 and December 25, 2011; and his most recent marijuana use was on December 25, 2011. (Item 9 at 34, 41)

[1] The facts in this decision do not specifically describe employment, names of witnesses or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information.

[2] Unless stated otherwise, the source for the facts in this paragraph is Applicant's October 12, 2010 Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Item 5)

When Applicant completed his October 12, 2010 SCA, he disclosed that he used marijuana four or five times from January 2003 to June 2004, and he said "I quit to get my life on track." (Item 4)

In Applicant's November 8, 2010 OPM PSI, Applicant reaffirmed his answers on his October 12, 2010 SCA and said he tried marijuana while in high school and has not had any marijuana since graduating from high school in June 2004. (Item 6) On August 1, 2013, he affirmed the accuracy of his OPM PSI, and he disclosed he received a fine for possession of drug paraphernalia in 2004. (Item 6) On August 13, 2013, Applicant responded to DOHA interrogatories and said he most recently used marijuana in June 2004, he rarely used marijuana; and he has no intention of using marijuana in the future. (Item 8) However, he indicated in his response to DOHA interrogatories that he associates with friends who use illegal substances. (Item 8)

The FORM noted that Applicant had 30 days from the receipt of the FORM "in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. . . . If you do not file any objections or submit any additional information . . . your case will be assigned to an Administrative Judge for a determination based solely" on the evidence set forth in this FORM. (FORM at 10)

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 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. Nothing in this decision should be construed to suggest that I 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

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.

The disqualifying conditions in AG ¶¶ 25(a) and 25(c) could raise a security concern and may be disqualifying in this case: "any drug abuse;"[3] and "illegal drug possession." From 2003 to 2011, Applicant occasionally possessed and used marijuana.[4] AG ¶¶ 25(a) and 25(c) apply.

[3] 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."

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

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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

> Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan*, *supra*. "Any doubt concerning personnel being considered for

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> (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 substances. *See* Drug Enforcement Administration 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).

> access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

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). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation."[5]

There is no evidence of Applicant's marijuana use after December 25, 2011. AG ¶ 26(a) applies to his marijuana-related conduct.[6]

AG ¶¶ 26(b), 26(c), and 26(d) are not fully applicable. 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 received drug and alcohol counseling; however, he continues to associate with marijuana users.

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[5] 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.

[6] 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.

In sum, Applicant used marijuana from 2003 to 2011. Each time he possessed and used marijuana he violated federal criminal law; however, there is no evidence he has used marijuana in the previous five years. Drug involvement concerns are mitigated because his illegal marijuana use is not recent.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

> 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 two conditions that could raise a security concern and may be disqualifying in this case, "(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, . . . determine security clearance eligibility or trustworthiness. . . ;"[7] 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." Applicant admitted that he made false statements about the extent of his marijuana use: on his October 12, 2010 SCA; on his November 8, 2010 OPM PSI; and on his August 2013 responses to DOHA interrogatories. AG ¶¶ 16(a) and 16(b) are established.

[7] The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

> (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

AG ¶ 17 provides five 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;
>
> (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 and improperly failed to fully disclose his marijuana use three times in a security context from October 12, 2010 to August 2013. His falsifications by intentionally failing to disclose the full scope of his marijuana use were serious, improper, and raised a security concern. No mitigating conditions apply. Guideline E concerns are not 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 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 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. My comments under Guidelines H and

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

Applicant is a 30-year-old employee of a defense contractor, who has worked as a designer for the same employer since 2007. There is no evidence of character statements or performance evaluations. There is no evidence that he tested positive for use of illegal drugs. There is no evidence of marijuana use after December 25, 2011. He received alcohol and drug treatment.

The evidence against approval of Applicant's clearance is more substantial. Each time he possessed and used marijuana, he violated federal criminal law. His decision to use marijuana was knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. Illegal drug use shows a lack of judgment and impulse control, and his use of marijuana is relevant to analysis of security concerns. Applicant admitted that he made false statements about the extent of his marijuana use: on his October 12, 2010 SCA; on his November 8, 2010 OPM PSI; and on his August 2013 responses to DOHA interrogatories. His falsifications in a security context raise a serious security concern. The protection of national security relies on applicants to self-report conduct that jeopardizes security, even when that disclosure might damage the applicant's career. Applicant cannot be trusted to disclose potentially derogatory information, and his reliability, trustworthiness and ability to protect classified information is not established.

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 Applicant mitigated drug involvement security concerns; however, he has not fully mitigated the security concerns pertaining to personal conduct 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a through 2.c:	Against Applicant
Subparagraph 2.d:	For Applicant

Conclusion

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

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Mark Harvey
Administrative Judge