DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 16-02219
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

11/30/2017

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on April 7, 2015. On November 15, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.[1]

[1] Security Executive Agent Directive 4 (SEAD 4) was issued on December 10, 2016, revising the 2006 adjudicative guidelines for all adjudicative decisions issued on or after June 8, 2017. The changes resulting from issuance of SEAD 4 did not affect my decision in this case

Applicant answered the SOR on December 5, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 15, 2017, and the case was assigned to me on July 19, 2017. On August 15, 2017, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for September 11, 2017. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified but did not present the testimony of any witnesses or submit any documentary evidence. He asked for additional time to submit two letters from colleagues attesting to his good character and documentary evidence that all his random drug tests were negative. (Tr. 12, 54.) I kept the record open until September 25, 2017, to enable him to submit documentary evidence. He did not submit anything further. DOHA received the transcript (Tr.) on September 19, 2017.

Findings of Fact[2]

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a-1.d and 2.a. He denied the allegation in SOR ¶ 2.b. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 28-year-old security consultant employed by a defense contractor since March 2015. He graduated from high school in May 2007. He attended a community college from May 2007 to May 2008 but did not receive a degree. He worked in various private-sector jobs involving information technology from May 2007 until he began his current job. He has never married, has no children, and has never held a security clearance.

Applicant was arrested for possession of marijuana and driving a vehicle with defective equipment in December 2012, after being stopped by police for driving a vehicle with one headlight out. Applicant was driving and another person was in the front passenger seat. According to the police report, the police noticed a strong smell of marijuana and observed multiple marijuana cigarettes and a scale in the vehicle. Applicant admitted purchasing the marijuana and splitting it with his passenger. Applicant disclosed this arrest in his SCA and stated that the police found a small bag of marijuana under the passenger seat and his passenger eventually admitted ownership of the marijuana. The prosecutor filed a *nolle prosequi.* (GX 1 at 28; GX 5; Tr. 24.) At the hearing, Applicant testified that he had not smoked marijuana before being stopped by the police. He testified that he did not purchase the marijuana that was found in the vehicle and he did not remember telling the police officer that had purchased it. (Tr. 25-27.) He testified that, about six months after being arrested, he stopped associating with the person who was arrested with him (Tr. 27-28.)

Applicant was arrested for possession of marijuana in July 2014 after being stopped for speeding. He was driving with three passengers. The police observed

[2] Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

marijuana in the vehicle. He also was charged with littering because the police observed him throwing small pieces of paper out of the vehicle. The disposition of the littering charge is not reflected in the record. In December 2014, Applicant pleaded not guilty to the marijuana charge, but he was convicted and sentenced to 30 days in jail, which was suspended, suspension of his driver's license for six months, and a fine and court costs totaling $575.

Applicant appealed and pleaded guilty under a plea agreement, and his sentence was reduced to a $150 fine and restriction of his driver's license for six months.[3] He completed the six-month suspension of his license without incident. (GX 2 at 16-17; GX 4.) He testified that he no longer associates with the three passengers who were in the vehicle with him. (Tr. 30.) However, he later admitted that one of the passengers was his cousin, with whom he still has contact at family reunions and "stuff like that." (Tr. 34.)

In a personal subject interview (PSI) on April 6, 2016, Applicant told an investigator that he was given marijuana on the day before July 2014 arrest to help him cope with the grief of grandfather's death. He said that this incident was the first and last time that he used marijuana, because he did not enjoy the feeling he experienced from using it. (GX 2 at 17.) In response to DOHA interrogatories in August 2016, he again stated that the July incident was his first and last use of marijuana. (GX 2 at 3.) He stated, "I, unequivocally, have no intentions or desires to indulge in marijuana or associate with any person who uses marijuana." (GX 2 at 6.) However, at the hearing, he admitted that he initially tried marijuana in 2005, and he admitted that he should have disclosed this previous marijuana use in the August 2016 interrogatories. (Tr. 28-29.)

Applicant was arrested for possession of marijuana in December 2015 after being observed driving a vehicle with the license plate light out. The vehicle was registered in the name of Applicant's brother. The police found a small quantity of marijuana in the center console. According to the police report, Applicant was asked if he had anything illegal in the car, such as marijuana, and Applicant answered "No." After further conversation, he admitted that he might have something illegal, and then he admitted that there was marijuana in the center console. He told the police officer that he had purchased the marijuana. (GX 3 at 3.)

At the hearing, Applicant testified that a friend left the marijuana in the vehicle after he gave her a ride home from work, but that he told the police that the marijuana was his because he did not want to get his friend in trouble. (Tr. 35-36.) In the April 2016 PSI, Applicant told the investigator that he pleaded no contest and was convicted of marijuana possession. This conviction is reflected in the court records, but the sentence is not. Applicant told the investigator that he was sentenced to 30 days in jail, which was suspended, fined $100, and his driver's license was restricted for six months. Applicant told the investigator that he was placed in a first-offender program. A county probation officer told the investigator that Applicant would complete the program if he tested

[3] The law of the jurisdiction allows a *de novo* adjudication of the findings and sentence on appeal.

negative in three random drug tests, and the charges would be dismissed if he completed the program.[4] (GX 2 at 22; GX 3.)

In Applicant's response to DOHA interrogatories, he stated that he tested negative in random drug tests in May, June, and August 2016. (GX 2 at 6.) However, at the hearing, he testified that he underwent six drug screenings that were negative. (Tr. 45-46.) The record was held open to enable him to submit evidence of his negative drug screenings, but he submitted nothing. There is no documentary evidence in the record reflecting whether the charges were ultimately dismissed.

Applicant did not disclose the December 2015 arrest during the April 2016 PSI. In a follow-up PSI on June 6, 2016, and at the hearing, he stated that he did not disclose it because it occurred after he submitted his SCA and he thought that he was not required to discuss events that occurred after he submitted his SCA. (GX 2 at 23; Tr. 19.) At the hearing, Applicant admitted that he had "an inkling" that he should have disclosed the December 2015 arrest during the April 2016 PSI, but that he was embarrassed by it. (Tr. 42, 53.)

The summary of the June 2016 PSI states that it was conducted to resolve "unadmitted information" about the December 2015 arrest. Applicant testified that the investigator in the June 2016 PSI asked him if there was anything else that they should discuss, and he immediately told the investigator about the December 2015 arrest. (Tr. 43.) He admitted that he did not attempt to correct his omission of the December 2015 until the investigator contacted him to schedule the June 2016 PSI, at which time he told the investigator that he had something to discuss. (Tr. 54.)

Policies

"[N]o 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 applicants 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 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and reliable information about the person, past and present, favorable and unfavorable.

[4] The record does not reflect why he would have been enrolled in a first-offender program after his December 2014 conviction.

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 that 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance 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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

Analysis

Guideline H, Drug Involvement

The SOR alleges Applicant's arrest for possession of marijuana in December 2012 (SOR ¶ 1.a), and his arrests and convictions for marijuana possession in July 2014 and December 2015 (SOR ¶¶ 1.b and 1.c). Applicant admitted all three allegations. The concern under this guideline is set out in AG ¶ 24:

> The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances

that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

Applicant's admissions and the documentary evidence submitted at the hearing establish the following disqualifying conditions under this guideline:

AG ¶ 25(a): any substance misuse (see above definition); and

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The following mitigating conditions are potentially applicable:

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;

AG ¶ 26(b): the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used; and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility;

Neither of the above mitigating conditions are fully established. Assuming the truthfulness of Applicant's declaration that his last marijuana involvement was in December 2015, the issue is whether his abstinence from marijuana use for almost two years is sufficient to establish the first prong of AG ¶ 26(a) ("so long ago") and the "pattern of abstinence" in AG ¶ 26(b). There are no "bright line" rules for determining when sufficient time has passed without recurrence to mitigate drug involvement. The

determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows "a significant period of time has passed" without further drug involvement, 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." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant's track record of candor regarding frequency, recency, and the circumstances of his marijuana use is less than perfect. Except for his marijuana use in July 2014, which he admitted, he has portrayed himself mostly as a bystander among drug users. He repeatedly stated that his marijuana use in July 2014 was his first and last use, but then admitted a previous use at the hearing. He dissembled regarding the question whether he purchased marijuana in December 2012. He has provided contradictory accounts of the ownership of the marijuana in December 2015.

Applicant's drug involvement was not "infrequent" and did not occur under unusual circumstances. He has acknowledged his drug involvement, but he has not totally disassociated himself from drug-using contacts. His cousin was involved in the July 2014 incident, and he was driving his brother's vehicle in the December 2015 incident. He has not significantly changed his environment. He was working for his current employer and had applied for a security clearance when the December 2015 incident occurred. He has repeatedly declared his intention to refrain from further drug involvement, but he has not submitted a signed statement that includes the provision for revocation of any clearance for further involvement.

Applicant asked for additional time to submit testimonials from colleagues regarding his duty performance, but submitted nothing after his request was granted. Thus, the record contains no evidence of the quality of his job performance. He did not avail himself of the opportunity to document his successful completion of a first-offender program. Based on the evidence, I am not convinced that the passage of time since his December 2015 arrest is sufficient to demonstrate that he has reformed and will not revert to his previous behavior once the pressure of qualifying for a security clearance is lifted.

Guideline E, Personal Conduct

The conduct alleged in SOR ¶¶ 1.a-1.c is cross-alleged under this guideline in SOR ¶ 2.a. SOR ¶ 2.b, which Applicant denied, alleges that his deliberately failed to disclose his December 2015 arrest for marijuana possession when he was interviewed by a security investigator in April 2016.

The concern under this guideline is set out in AG ¶ 15:

> 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 or sensitive information. Of special interest is any failure to

> cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

The relevant disqualifying condition for Applicant's failure to disclose his December 2015 arrest during April 2016 security interview is AG ¶16(b):

> [D]eliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

At the hearing, Applicant admitted that he had "an inkling" that he should have mentioned the December 2015 arrest when he was interviewed in April 2016. He admitted that his intentional omission was due, at least in part, to embarrassment. His admissions are sufficient to establish the disqualifying condition in AG ¶ 16(b). Two mitigating conditions are potentially relevant:

> AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

> AG ¶ 17(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.

AG ¶ 17(a) is not established. Applicant did not act on his "inkling," and made no attempt to correct his omission until he was contacted by the security investigator to schedule another interview. He correctly surmised that the follow-up interview was triggered by discovery of his December 2015 arrest, and he disclosed it during the June 2016 interview, which was exactly two months later. He told the investigator that he failed to disclose because he believed that the interview was limited to events that occurred before he submitted his SCA. He abandoned this implausible explanation at the hearing, admitting that he had "an inkling" that he should have disclosed it but was embarrassed by it. There is no evidence suggesting that Applicant would have corrected his omission if he had not been contacted by the investigator regarding a follow-up interview.

AG ¶ 17(c) is not established. Applicant's intentional omission was not "minor." An intentional falsification during the security clearance process "strikes at the heart" of the process. *See* ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011.)

The relevant disqualifying condition for the drug involvement cross-alleged under this guideline is AG ¶ 16(c):

> [C]redible 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, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

This disqualifying condition is established by Applicant's admitted drug involvement and lack of candor regarding the frequency and circumstances in which it occurred.

The relevant mitigating conditions for Applicant's drug involvement are AG ¶ 17(c), discussed above, and:

> AG ¶ 17(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
>
> AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and
>
> AG ¶ 17(g): association with persons involved in criminal activities was unwitting, 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(d) is not fully established. Applicant has acknowledged his drug involvement, but he has not obtained counseling or taken any other steps to reinforce his stated intention to abstain from illegal drugs.

AG ¶ 17(e) is established. Although Applicant has tended to downplay the seriousness of his drug involvement, he has admitted his arrests and convictions.

AG ¶ 17(g) is not fully established. Although Applicant has stopped associating with some of his drug-using friends, he continues to associate with family members who are or have been involved in illegal drug use.

Whole-Person Concept

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. In applying the whole-person concept, an 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 and applying the adjudicative factors in AG ¶ 2(d).[5] After weighing the disqualifying and mitigating conditions under Guideline H and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his drug involvement and personal conduct.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge

[5] The factors are: (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.