DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-03614
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Gina L. Marine, Esquire, Department Counsel
For Applicant: *Pro Se*

January 29, 2009

Decision

HARVEY, Mark W., Administrative Judge:

Applicant had an extensive history of drug abuse. He failed to disclose his drug abuse on his 2002 and 2005 security clearance applications. Applicant failed to mitigate security concerns arising from personal conduct and criminal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On June 6, 2002, Applicant completed a security clearance application (2002 SF 86) (Item 4). On February 17, 2005, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) or security clearance application (2005 SF 86) (Item 5). On July 31, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The revised adjudicative guidelines (AG) promulgated

by the President on December 29, 2005, are effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR alleges security concerns under Guideline E (Personal Conduct) and J (Criminal Conduct). 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 grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On August 20, 2008, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing (Item 3). A complete copy of the file of relevant material (FORM), dated November 14, 2008, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.[1] Applicant did not provide a response to the FORM. The case was assigned to me on January 21, 2009.

Findings of Fact[2]

In his response to the SOR, Applicant admitted all of the SOR allegations, except that his failure to disclose his drug involvement violated 18 U.S.C. § 1001. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 27 years old and has worked for a government contractor since 2002 as an office assistant.[3] From 1999 to 2002, he was a driver at a warehouse. He attended community college from 1999 to 2002 and from 2004 to 2005. He has never served in the military. In September 2002, he received a Secret clearance. He has never been married and does not have any children.

Illegal Drug Use

Applicant used marijuana, cocaine, ecstasy (methylenedioxymethamphetamine), and mushrooms (psilocybin) with varying frequency, in about 1997, and then again from about 1999 to at least 2002. He subsequently continued to use these same four drugs until at least 2004. He used Vicodin without a valid prescription for the expressed

[1]The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated November 14, 2008; and Applicant's receipt is dated November 20, 2008. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

[2]Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits. His response to SOR (Item 3) is the source for the facts in this section unless stated otherwise.

[3] Applicant's 2005 SF 86 (Item 5) is the source for the facts in this paragraph, unless stated otherwise.

purpose of obtaining a "high" in at least 1997, and then again from 1999 to at least 2002.

Applicant used marijuana about twice a week for the first two years of high school.[4] He stopped using marijuana for about two years to improve his school work and then resumed his marijuana use the last month of his senior year of high school. While he was in college, he used marijuana on weekends.

Applicant began using cocaine, ecstasy (methylenedioxymethamphetamine), mushrooms (psilocybin), and Vicodin approximately every couple of weeks starting at the end of his freshman year in high school. He stopped using these drugs for about two years and then resumed his use of these drugs. He has never had drug treatment or counseling.

Falsification of Security Clearance Applications

Applicant caused his 2002 SF 86 to be submitted on or about June 6, 2002 (Item 4), and signed his 2005 SF 86 on February 17, 2005 (Item 5). On his 2002 SF 86 he responded, "No" to question 27. On his 2005 SF 86, he answered "Yes" to question 27 and said he used marijuana 5-10 times from March 1997 to July 1997. Question 27 is identical on both the 2002 and 2005 SF 86s. Question 27 asks:

> **27. Your Use of Illegal Drugs and Drug Activity—Illegal Use of Drugs** Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?

Applicant's response to question 27 on his 2002 SF 86 was false. His response on his 2005 SF 86 provided incomplete information about the extent of his drug use. He explained to the OPM investigator on December 1, 2006, that he did not disclose his drug use because he really wanted the job and a unnamed person told him not to put the information on his SF 86 (Item 6 at 4). He thought he would not be hired if he revealed his drug use. *Id*.

On Applicant's 2005 SF 86, he answered "No" to question 28 and said he denied using drugs while holding a security clearance. Question 28 asks:

> **28. Your Use of Illegal Drugs and Drug Activity—Use in Sensitive Positions** Have you EVER illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official;

[4] The source for the facts in this and the next paragraph is Applicant's Office of Personnel Management (OPM) interview on December 1, 2006, which Applicant adopted as part of the DOHA interrogatory process (Item 6 at 3-5).

while possessing a security clearance; or while in a position directly and immediately affecting public safety?

Applicant's response to question 28 on his 2005 SF 86 was false because he was issued a Secret clearance on or about September 3, 2002, and his use of illegal drugs or controlled substances continued after he received his Secret clearance until 2004, as indicated previously.

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, "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 Applicant's 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 the Applicant meeting the criteria contained in the revised 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 over-arching adjudicative goal is a fair, impartial and common sense 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. Clearance decisions must be "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 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 concern is under Guidelines E (Personal Conduct) and J (Criminal Conduct) with respect to the allegations set forth in the SOR.

Guideline E, 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. . . .

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying:

> (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; 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 used cocaine, ecstasy (methylenedioxymethamphetamine), mushrooms (psilocybin), marijuana and Vicodin (without a prescription) from 1994 to

2004.[5] He falsely denied this drug use in his response to question 27 on his 2002 SF 86. His response on his 2005 SF 86 provided incomplete information about the extent of his drug use. He admitted very limited and not recent marijuana use, and did not disclose using cocaine, ecstasy (methylenedioxymethamphetamine), mushrooms (psilocybin), and the prescription drug Vicodin until 2004. He did not disclose drug use while holding a Secret clearance. His decisions to falsify his 2002 and 2005 security clearance applications were intentional and deliberate. The falsifications were intended to deceive his employer and security officials. AG ¶¶ 16(a) and 16(b) both apply.

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;

[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 and ecstasy or 3,4 methylenedioxymethamphetamine are Schedule (Sch.) I controlled substances. *See* Sch. I (c)(9) and I(c)(10), respectively. *See also Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I); *United States v. Crawford*, 449 F.3d 860, 861 (8th Cir. 2006) (ecstasy). Mushrooms are the street name for psilocybin or psilocin, which is a Sch. I Controlled Substance. *See United States v. Hussein*, 351 F.3d 9, 16 (1st Cir. 2003) (mushrooms are a plant which may contain the Sch. I(c)(15) and I(c)(16) controlled substance psilocybin or psilocyn). Cocaine is a Sch. II Controlled Substance. *See* Sch. II(a)(4) (cocaine).

(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. Applicant did not make a prompt, good-faith effort to correct the falsification of his 2002 and 2005 SF 86s before being confronted with the facts. These two falsifications were not caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing him concerning the security clearance process.

AG ¶ 17(c) does not apply. His falsifications of his 2002 and 2005 SF 86s are not minor offenses. The 2005 falsification is relatively recent. Because there are two offenses, the offenses are not "isolated." The Appeal Board's jurisprudence requires consideration of all such offenses in a non-piecemeal fashion. The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of his conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). The two falsifications continue to caused doubt about Applicant's current reliability, trustworthiness and good judgment. Because of his overall conduct, especially the 2005 falsification of his SF 86, neither of the offenses is mitigated under guideline AG ¶ 17(c).

AG ¶¶ 17(d), 17(e) and 17(g) have some application, but do not apply to a sufficient degree to mitigate all security concerns under Guideline E. There are some positive signs of Applicant's rehabilitation. He admitted his extensive drug use to an OPM investigator in his 2006 and 2007 interviews. In June 2008, he adopted the summary of his OPM interview in response to DOHA interrogatories, admitting his extensive drug use and falsification of his 2002 and 2005 SF 86s. In August 2008, he admitted his misconduct in response to the SOR. No other allegations of problems at his employment have surfaced. However, he did not indicate he had received drug counseling or other counseling to change his behavior and he did not state that he has ceased his associations with those persons who used illegal drugs. *See* AG ¶¶ 17(c) and 17(g). He has promised not to use drugs in the future, which is an important step toward his rehabilitation. He received job training and has a good employment record. His security manager is well aware of his drug abuse problems. Disclosure has reduced his vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(f) does not apply to Applicant's failure to disclose his extensive drug use on his 2002 and 2005 SF 86s. This failure was deliberate, and the allegation of

falsification is substantiated.[6] At the time he provided false information, he intended to deceive his employer and security officials. These severe lapses in judgment are too recent and serious to be mitigated at this time.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations."

AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying, ¶ 31(a), "a single serious crime or multiple lesser offenses," and ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

Applicant admitted that he knowingly and deliberately failed to disclose derogatory information about his drug use on his 2002 SF 86. Because he made limited admissions of marijuana use, not while holding a security clearance, on his 2005 SF 86, I infer the failure to disclose the nature and extent of his drug use on his 2005 SF 86 was deliberate and with intent to deceive. For a violation of 18 U.S.C. § 1001 to occur by falsifying his 2002 and 2005 SF 86s, the falsification must be material. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995), as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." *See also United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004).

If Applicant had provided accurate answers on his 2002 and 2005 SF 86s about his drug use, his accurate answer would be capable of influencing the government to deny his security clearance. The materiality requirement is satisfied. Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a $10,000 fine).[7] In sum, AG ¶¶ 31(a) and 31(c) apply with respect to Applicant's violations of 18 U.S.C. § 1001.

[6]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.

[7] In Applicant's case, this includes aspects such as, the seriousness of the misconduct, and the number of violations of the law, regardless of whether the misconduct resulted in an arrest or conviction.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

> (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
>
> (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
>
> (c) evidence that the person did not commit the offense; and
>
> (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

AG ¶¶ 32(a) – 31(d) do not fully apply to the two violations of 18 U.S.C. § 1001. As indicated previously, making a materially and deliberately false statement on an SF 86 is a felony. The 2005 falsification is somewhat recent. Applicant admitted that in 2002 he intentionally provided false information to improve his changes of obtaining employment with the government contractor. Both security clearance applications contained deliberately false information and the offenses are established and substantiated. Because there are two criminal offenses, they are not "isolated." They continue to cast doubt on Applicant's current reliability, trustworthiness and good judgment. He was not pressured or coerced into committing the criminal offenses.

There is some evidence of successful rehabilitation, including the passage of more than three years since the 2005 falsification of his SF 86. Criminal activity has not recurred. He eventually accepted responsibility for his misconduct. He has received some job training, and no other employment problems have surfaced. However, his post-offense behavior is insufficient to fully mitigate the very serious misconduct in this case as described in the SOR.

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 E and J 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. Appellant was relatively young and immature when he falsified his 2002 and 2005 SF 86s. He stopped using illegal drugs in 2004. In 2006, he frankly and candidly admitted his extensive history of drug use and admitted that he falsified his 2002 SF 86 to improve his chances of employment with a government contractor. He subsequently admitted his drug use in his response to DOHA interrogatories and his SOR response. He knows the consequences of drug abuse. Appellant contributes to his company and the Department of Defense. There is no evidence at work of any other disciplinary problems. There is no evidence of disloyalty or that he would intentionally violate national security. His character and good work performance show some responsibility, rehabilitation and mitigation. His supervisors evidently support him or he would not have been able to retain his employment after his security clearance was called into question in 2006. I am satisfied that if he continues to abstain from drug use, and avoids future offenses he will have future potential for access to classified information.

The evidence against approval of Applicant's clearance is more substantial. Applicant had a problem with drug abuse for many years. He has not received drug counseling or treatment. However, if his only problem had been his drug abuse, security concerns under the drug involvement guideline would be mitigated by his abstinence from drug abuse for more than four years because of the passage of time. His falsification of his 2002 and 2005 SF 86s cannot be mitigated at this time. His decisions to falsify these critical security documents were knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. These two offenses are felonies and show a lack of judgment and a deliberate failure to abide by the law (18 U.S.C. § 1001) in the context of security requirements. Such conduct raises a serious security concern, and a security clearance is not warranted at this time. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to personal conduct and criminal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), my "careful consideration of the whole person factors"[8] and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not currently eligible for access to classified information.

[8]*See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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 E:	AGAINST APPLICANT
Subparagraphs 1.a to 1.c:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against 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 W. Harvey
Administrative Judge