DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-17390
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
For Applicant: Gregory M. Wade, Esquire

September 16, 2008

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Decision

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HARVEY, Mark W., Administrative Judge:

Applicant mitigated security concerns arising under Guideline H (drug involvement) but not under Guideline G (alcohol consumption). Clearance is denied.

Statement of the Case

On May 8, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant,[1] 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, modified and revised.[2] The SOR alleges security concerns under

[1]Government Exhibit (GE) 8 (Statement of Reasons (SOR), dated May 8, 2008). GE 8 is the source for the facts in the remainder of this paragraph unless stated otherwise.

[2]On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*

Guidelines G (alcohol consumption) and H (drug involvement). 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 his security clearance, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations on June 4, 2008, and elected to have his case decided without a hearing (Government Exhibit (GE) 9). Department Counsel requested a hearing (Transcript (Tr.) 9). At the hearing held on August 28, 2008, Department Counsel offered nine exhibits (GEs 1-5) (Tr. 14-16), and Applicant offered nine exhibits (Applicant's Exhibits (AE) A1-A11) (Tr. 34-35). There were no objections, and I admitted GE 1-5 and AE A1-A11 (Tr. 16, 35-36). I received the transcript on September 8, 2008.

Findings of Fact[3]

Applicant admitted in his response to the SOR all of the SOR's allegations. 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 28 years old (Tr. 31).[4] He graduated from high school in 1998, and attended college, majoring in engineering and business (Tr. 32). However, he did not graduate (Tr. 32). Eventually, he intends to obtain a mechanical engineering degree (Tr. 33). On November 11, 2001, his father committed suicide, and Applicant increased his drug use (Tr. 33). After 2001 his depression gradually decreased; however, he remains on medication for depression (Tr. 33-34). He is currently "emotionally stable" (Tr. 43, A5). Although Applicant was fired twice (in May 2001 and July 2001), he did not disclose these terminations when he applied for his current employment because he did not think there was enough room on his employment application, and did not think it was relevant because he was fired from part-time jobs (Tr. 53-54). Moreover, the terminations back in 2001 were not that recent (Tr. 54). He does not currently hold a security clearance (Tr. 57). He does not have any prior military service.

(Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case.

[3]Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits. GEs 2 and 3 (Responses to Interrogatories) and 9 (Response to SOR) are the sources for the facts in this section unless stated otherwise.

[4]GE 1 (Electronic Questionnaire for Investigations Processing (e-QIP), dated Jan. 9, 2007, will be referred to as a security clearance application in this decision). GE 1 is the source for the facts in this paragraph, and the next paragraph unless otherwise stated.

Alcohol Consumption

Applicant consumed alcohol to the point of intoxication two to three times each month from about 1997 to about February 2007 (SOR ¶ 1.a, Tr. 46). He was charged with underage possession of alcohol in 1998, fined and ordered to complete community service (SOR ¶ 1.b). His parents suggested to Applicant in the late 1990s that he had an alcohol problem and should seek alcohol counseling (SOR ¶ 1.c, Tr. 50). In May 2001, he was terminated from employment for bringing a 12 pack of beer to work (SOR ¶ 1.d, Tr. 46, 55). He drank alcohol at work, but thought alcohol possession and consumption at work was allowed (Tr. 55).

The police arrested Applicant in May 2003 and authorities charged him with driving under the influence of alcohol (DUI) (Tr. 40). The breath alcohol tests conducted by the police were at .24 and .18 (Tr. 58, GE 3 at 6). Applicant claimed he drank two shots (one of tequila and one of Jaegemeister), two beers and two mixed drinks over about a five hour period (Tr. 60, GE 3 at 6). The last four drinks were within about 90 minutes of leaving the bar (Tr. 61; GE 3 at 6). The court found him guilty and sentenced him to jail for six months (suspended) attendance at Alcohol Safety Action Program (ASAP), three years of probation, and a one year restriction on his driver's license (SOR ¶ 1.e). He completed ASAP (Tr. 41). However, he mistakenly said he did not have any alcohol counseling (Tr. 53, *Compare* GE 1 at § 25 *with* GE 1 at § 23). He has not had any alcohol-related offenses after his 2003 DUI (Tr. 41). His father had an alcohol problem, and Applicant did not want to repeat his father's mistakes with alcohol (Tr. 51). He did not get into any fights because of alcohol, and alcohol consumption did not adversely affect his finances (Tr. 52). Before his May 2003 DUI, he occasionally drove while under the influence of alcohol, but after his 2003 DUI he stopped drinking alcohol and then driving (Tr. 63).

Applicant drank three or four beers one to three times a week from the age of 19, until he obtained his current employment in November 2006 (Tr. 47). Applicant does not currently drink alcohol on a daily basis, but he does consume alcohol on weekends (Tr. 39). He usually drinks on Friday or Saturday, usually at a concert or gathering of friends (Tr. 40). He drinks about four or five beers, but does not drive after drinking (Tr. 40).[5] It takes about four beers for Applicant to become intoxicated (Tr. 47). He currently drinks to intoxication perhaps twice a month (Tr. 48).

Applicant occasionally drinks more than six or seven beers (Tr. 48). The most recent time was a month before his hearing when he was vacationing with friends at the beach (Tr. 49). During the week at the beach, he consumed alcohol on about four nights (Tr. 49). On each night, he drank about six beers and one or two shots (Tr. 50). He did not drive after drinking alcohol (Tr. 50). He continues to consume alcohol to intoxication because he "I'm adult enough to handle it in a responsible manner" (Tr. 57). He describes his alcohol consumption as moderate (Tr. 39).

[5] Applicant told the OPM investigator on February 9, 2007, "since his DUI [he] is very careful to not drink more than 1 or 2 drinks when he is at a social club or social gathering. If he does drink more than two alcohol drinks while out he gets a ride home from someone." (GE 3 at 6).

Drug Involvement

Applicant used marijuana approximately 50 times from approximately August 1997 to about August 2006 (SOR ¶ 1.a, Tr. 45, GE 1 at § 24). He purchased marijuana (SOR ¶ 1.b). His employer terminated his employment in July 2001 because his drug test came back positive for the presence of the marijuana metabolite (SOR ¶ 1.c, Tr. 45-46). He used cocaine at least five times from about June 2001 to about March 2006 (SOR ¶ 1.d, Tr. 45, GE 1 at § 24). He used mushrooms three times from about January 2004 to September 2004 (SOR ¶ 1.e, Tr. 45, GE 1 at § 24). He has never sold illegal drugs (Tr. 41). He has never been arrested or convicted of a drug offense (Tr. 61). He passed a drug test on August 11, 2003 (A4). The only source of information about his drug use came from Applicant's disclosures (Tr. 62).

An Office of Personnel Management (OPM) investigator interviewed Applicant on February 9, 2007 (Tr. 24, 28; GE 3). The interview (GE 3) accurately reflects what Applicant told the OPM investigator (Tr. 26). His statement to the OPM investigator was consistent with his statement at his hearing.

On November 28, 2006, he started working at his current job (Tr. 34). He passed his drug test when he started this job in 2006 (Tr. 34, 37, A3). He has remained drug free after starting his employment in November 2006 (Tr. 37). He does not plan to use drugs in the future (Tr. 41). His current employment is to design ductwork for heating and ventilations systems (Tr. 38). He loves his current employment (Tr. 39). He plans to marry, have a good career, and purchase a house (Tr. 41, 44). He recognizes that accomplishing these goals is not compatible with drug abuse (Tr. 41, 44).

Applicant's primary physician for the last ten years indicates he has no history of alcohol or drug addiction, and is not addicted to illegal drugs today (Tr. 42-43, A5). He ended his association with his drug-using friends and associates (Tr. 43-44). However, he meets his drug-using associates four or five times per year "in passing" (Tr. 56). He avoids the locations where drug abusers congregate (Tr. 44). The four persons who rented the beach house with Applicant a month before his hearing included marijuana user(s) (Tr. 62). He offered to sign a statement of automatic revocation of his clearance for any violation of drug laws (Tr. 44).

Recommendations

Applicant's supervisors, friends and co-workers at his current employment provided six letters supporting reinstatement of his clearance (A6, A7, A8, A9, A10, A11). Those letters describe Applicant as a valuable member of the firm with a solid work ethic and integrity. His contributions to his company have been numerous and valuable. His work is good and accurate. He is a dedicated, trustworthy, bright, intelligent, talented, competent and honest employee. He volunteers in the community. Applicant is a professional, who is eager to show initiative and improve himself.

Policies

In an evaluation of an applicant's security suitability, an administrative judge must consider Enclosure 2 of the Directive, which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process provision in Section E2.2, Enclosure 2, of the Directive. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, facts must be established by "substantial evidence.[6] The government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to the applicant to produce evidence and prove a mitigating condition. Directive ¶ E3.1.15 provides, "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, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." 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).[7]

[6] "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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).

[7] "The administrative judge [considers] the record evidence as a whole, both favorable and unfavorable, [evaluates] Applicant's past and current circumstances in light of pertinent provisions of the

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an 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.

The scope of an administrative judge's decision is limited. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance 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* Executive Order 12968 (Aug. 2, 1995), Section 3. Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. 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.

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 G (alcohol consumption) and H (drug involvement) with respect to the allegations set forth in the SOR.

Alcohol Consumption

AG ¶ 21 articulates the Government's concern about alcohol consumption, "[e]xcessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness."

Seven Alcohol Consumption disqualifying conditions could raise a security or trustworthiness concern and may be disqualifying in this case. AG ¶¶ 22(a) - 22(g) provide:

> (a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

Directive, and [decides] whether Applicant [has] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

(b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;

(e) evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;

(f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program; and

(g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

AG ¶¶ 22(d) to 22(g) do not apply. A qualified medical professional or licensed clinical social worker did not determine Applicant had an alcohol abuse or dependence problem. He did not have a relapse after completion of an alcohol rehabilitation program. Binge drinking is not defined in the Directive and is not established. Although he received an alcohol evaluation from a physician, and the diagnosis ruled out drug dependence, it did not rule out or address alcohol abuse. Although he received counseling in an "alcohol rehabilitation program," he did not subsequently have a relapse because the program did not result in advice to abstain from alcohol consumption. No court orders concerning alcohol use or treatment were violated.

AG ¶ 22(a) applies because Applicant was convicted of DUI in May 2003. AG ¶ 22(b) applies because he was fired for bringing a 12-pack of beer to work. AG ¶ 22(c) applies because he habitually consumes alcohol to the point of impaired judgment.

Four Alcohol Consumption Mitigating Conditions under AG ¶¶ 23(a)-(d) are potentially applicable:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and

> has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);
>
> (c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and
>
> (d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

AG ¶ 23(a) applies in part because Applicant only had two documented alcohol-related incidents that had an adverse effect on his life (the 2001 termination and the 2003 DUI). These two events considered in isolation are somewhat infrequent or isolated, and not recent. He does not drink alcohol and drive, and accordingly, "it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." AG ¶ 23(a), cannot be fully applied because he continues to consume alcohol to intoxication. Additionally, he admitted committing other DUIs before the 2003 arrest that were not detected by law enforcement.

AG ¶¶ 23(b) to 23(d) do not fully apply. Applicant did not acknowledge being alcohol dependent or having an alcohol abuse problem. Although he completed an alcohol abuse treatment program, he did not attend any Alcoholics Anonymous treatment program. He continues to consume alcohol to intoxication and does not recognize that drinking alcohol to intoxication, after his previous alcohol-related problems raises security concerns. Applicant's counsel argued that continued alcohol consumption to intoxication showed a "pattern . . . of responsible use" because he did not drive after consuming alcohol.

Security clearance cases are difficult to compare, especially under Guideline G, because the facts, degree and timing of the alcohol abuse and rehabilitation show many different permutations. The Appeal Board has determined in cases of more substantial alcohol abuse than Applicant's that AG ¶ 23(b) did not mitigate security concerns unless there was a fairly lengthy period of abstaining from alcohol consumption. *See* ISCR Case No. 06-17541 at 3-5 (App. Bd. Jan. 14, 2008); ISCR Case No. 06-08708 at 5-7 (App. Bd. Dec. 17, 2007); ISCR Case No. 04-10799 at 2-4 (App. Bd. Nov. 9, 2007). In a case more factually similar to Applicant's case the Appeal Board listed the following pertinent facts:

> In August 2004, Applicant was charged with Driving While Intoxicated (DWI) after having consumed between 12 and 24 cans of beer at a social

> function. His breathalyzer results were .223, the legal limit for alcohol being .08. He pled guilty and was sentenced to a fine and to perform community service. He was required to attend a "substance abuse traffic offender program." Applicant's dates of attendance were January through February 2005. Additionally, he was placed on probation for two years, which was set to expire in December 2006. Applicant has continued drinking after completion of this program. He became intoxicated on Memorial Day 2006 and again the following July, when he consumed 12 to 18 beers. Applicant stated at the hearing that he intends to continue drinking but will avoid becoming intoxicated.

ISCR Case No. 05-16753 at 2-3 (App. Bd. Aug. 2, 2007) (reversing administrative judge's grant of a clearance and noting, "That Applicant continued to drink even after his second alcohol related arrest vitiates the Judge's application of MC 3.").

In ISCR Case No. 05-10019 at 3-4 (App. Bd. Jun. 21, 2007), the Appeal Board reversed an administrative judge's grant of a clearance to AB where AB had several alcohol-related legal problems. However, AB's most recent DUI was in 2000, six years before an administrative judge decided AB's case. AB had reduced his alcohol consumption, but still drank alcohol to intoxication, and sometimes drank alcohol (not to intoxication) before driving. The Appeal Board determined that AB's continued alcohol consumption was not responsible, and the grant of AB's clearance was arbitrary and capricious. *See also* ISCR Case No. 04-12916 at 2-6 (App. Bd. Mar. 21, 2007) (involving case with most recent alcohol-related incident three years before hearing, and reversing administrative judge's grant of a clearance).

After carefully consideration of the Appeal Board's jurisprudence on alcohol consumption, I conclude his continued alcohol consumption to intoxication after receipt of SOR ¶ 1.a, which states, "You consumed alcohol, to the point of intoxication two to three times each month. . . " shows he is unwilling or unable to curtail his alcohol consumption. As such, his conduct demonstrates a lack of judgment and/or a failure to control impulses which is inconsistent with the holder of a security clearance.

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.

AG ¶ 25 describes eight drug[8] involvement-related conditions that could raise a security concern and may be disqualifying:

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

(a) any drug abuse;[9]

(b) testing positive for illegal drug use;

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;

(f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;

(g) any illegal drug use after being granted a security clearance; and

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Three drug involvement disqualifying conditions could raise a security concern and may be disqualifying in this case: "any drug abuse," "testing positive for illegal drug use," and "illegal drug possession." AG ¶¶ 25(a), 25(b) and 25(c) apply. The other disqualifying conditions listed in AG ¶ 25 are not applicable. These disqualifying conditions apply because Applicant used marijuana, cocaine, and mushrooms. He possessed these drugs before he used them. He tested positive in 2001 on a drug test for the marijuana metabolite, and was fired for drug use.

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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 I controlled substances. *See* Sch. I (c)(9). *See also Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I). Mushrooms are the street name for psilocybin or psilocin, which is a Schedule (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 Schedule I(c)(15) and I(c)(16) controlled substance psilocybin or psilocyn). Cocaine is a Schedule II Controlled Substance. *See* Sch. II(a)(4) (cocaine).

[9]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."

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.

Security concerns can be mitigated based on AG ¶ 26(a) by showing that the drug offenses happened so long ago, were so infrequent, or happened under such circumstances that they are unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment. There are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation."[10]

[10] 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:

Applicant's last drug use was about two years ago in August 2006. AG ¶ 26(a) fully applies despite Applicant's last illegal drug use being relatively recent. His overall illegal drug use lasted approximately nine years (1997 to 2006), and involved numerous uses of marijuana, brief use of mushrooms in 2004, and five cocaine uses.[11] AG ¶ 26(a) applies because his past drug use does not cast doubt on his **current** reliability, trustworthiness, or good judgment. Because of his abstention from drug use for about two years, and his recognition of the adverse impact on his life of drug abuse, there is reasonable certitude that he will continue to abstain from drug use. I am reasonably confident his illegal drug possession and use will not recur. Because he will not use illegal drugs in the future and is subject to drug testing at his employment, confidence in his current reliability, trustworthiness and good judgment with respect to drug use is restored.

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. He has somewhat disassociated from his drug-using associates and contacts. He does not routinely return to locations where he abused illegal drugs, and has changed or avoided the environment where drugs were used. After breaking his patterns of drug abuse, he has changed his life, and has not routinely associated with the drug abusing friends from his past. He has abstained from drug abuse for about two years. Moreover, he offered to provide "a signed statement of intent with automatic revocation of clearance for any violation." AG ¶ 26(b) partially applies.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse prescription drugs. The marijuana, cocaine and mushrooms were never prescribed for him. He did not satisfactorily complete a prescribed drug treatment program, including rehabilitation and aftercare requirements.

> *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, considered 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.

[11]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 conclusion, Applicant ended his drug abuse in August 2006, about two years ago. The motivations to stop using drugs are evident.[12] He understands the adverse results from drug abuse. He has shown or demonstrated a sufficient track record of no drug abuse to eliminate drug involvement as a bar to his access to classified information.

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.

There is considerable evidence supporting approval of his clearance. Applicant revealed his drug abuse on his security clearance application, to an OPM investigator on June 20, 2007, and at his hearing. Applicant used illegal drugs from 1997 to 2006. He does not routinely associate with his drug-abusing friends. Now that he is in the workforce, and in a job he really enjoys and treasures, the consequences of drug abuse will be much more severe. He stopped using illegal drugs about two years ago. He knows the consequences if he resumes his drug abuse. He completed SARP. With respect to excessive alcohol consumption, he no longer drives after drinking alcohol. Although he drinks alcohol to intoxication, he does not become extremely intoxicated. Applicant is a valued employee with excellent potential. There is no evidence at his current employment of any disciplinary problems. There is no evidence of disloyalty or that he would intentionally violate national security. His law-abiding character and good work performance shows some responsibility, rehabilitation and mitigation. His co-workers, friends and supervisors support approval of his clearance. I am satisfied that his current judgment, reliability, trustworthiness, and his current ability or willingness to comply with laws, rules and regulations show solid <u>future</u> potential for access to classified information.

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

The evidence against approval of Applicant's clearance is more substantial. Applicant had a substantial problem with drug abuse for nine years. He abused marijuana from 1997 to August 2006, using the substance approximately 50 times. He used cocaine five times from June 2001 to March 2006. He used mushrooms three times from January 2004 to September 2006. He was terminated from employment because he tested positive showing marijuana use in 2001. He did not attend any drug treatment or counseling program. These serious drug problems are fully mitigated for the reasons previously discussed. However, his problems with alcohol cannot be mitigated at this time. He has consumed alcohol to intoxication two or three times each month from approximately 1997 to the present. He had a DUI in 2003, and was terminated from employment in 2001 because beer was found at his work station. Even after being informed that there was a security concern with drinking alcohol to intoxication in SOR ¶ 1.a, he continued to drink alcohol to intoxication. His decision to continue to drink alcohol to intoxication was knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. Excessive alcohol consumption shows a lack of judgment and/or impulse control. 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 mitigated the security concerns pertaining to drug involvement, but not alcohol consumption.

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"[13] 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.

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 G:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b and 1.c:	For Applicant
Subparagraphs 1.d and 1.e:	Against Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraphs 2.a to 2e:	For Applicant

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

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