DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-07998
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: Greg T. Rinckey, Esquire

May 29, 2009

Decision

HARVEY, Mark, Administrative Judge:

Applicant's most recent steroid use was in 2005. Security concerns related to drug involvement are mitigated. He deliberately failed to fully disclose the extent of his steroid use on his 2007 security clearance application. He failed to mitigate security concerns arising from personal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On September 13, 2007, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) also known as a security clearance application (2007 SF 86) (Government Exhibit (GE) 1). On January 2, 2009, 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 Guidelines H (Drug Involvement), J (Criminal Conduct), and E (Personal Conduct) (GE 11). 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 February 7, 2009, Applicant responded to the SOR allegations (GE 11). Department Counsel was ready to proceed on April 8, 2009, and the case was assigned to me on April 14, 2009. At the hearing held on May 1, 2009, Department Counsel offered seven exhibits (GE 1-7) (Transcript (Tr.) 18-19). There were no objections, and I admitted GE 1-7 (Tr. 19). Applicant did not provide any exhibits (Tr. 7). I also admitted a hearing notice, an amended hearing notice, the SOR, a notice of appearance, and Applicant's SOR response (GE 8-12). I received the transcript on May 18, 2009.

Procedural Ruling

Department Counsel elected not to present evidence to support SOR ¶ 2, which alleged Applicant's steroid use constituted criminal conduct under Guideline J (Tr. 11-12). Applicant's counsel did not object to my proposal to find "For Applicant" (Tr. 12), and I have done so without addressing Guideline J in my Analysis.[1]

Findings of Fact[2]

In his response to the SOR, Applicant admitted the SOR allegations in ¶¶ 1.b to 1.e and denied partial or full culpability for the remaining SOR allegations (GE 12). 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 a 28-year-old cost analyst for a defense contractor (Tr. 46). Applicant graduated from high school in 1999 and joined the Marine Corps on July 6, 1999 (Tr. 33, 46). His specialty in the Marine Corps was electrical equipment repairman (Tr. 46). He is married and has two stepchildren, ages 15 and 17 (Tr. 40, 66). His employment for the contractor sponsoring his clearance involved supervision of 40 foreign nationals, who were providing security in Iraq, as well as providing personal security for individuals in Iraq (Tr. 42). The contract in Iraq ended in April 2009 and Applicant returned to the United States, where he obtained temporary employment with another government contractor (Tr. 43).

[1]Three other procedural matters merit brief mention. Applicant's sponsor for his clearance continued to sponsor his security clearance, even though he began new employment shortly before his hearing (Tr. 31-32, 43, 69-70). Applicant waived the 15-day notice requirement for the start of the hearing (Tr. 12-13; GE 8, 9). I disclosed I was acquainted with a corporate officer at the corporation sponsoring Applicant's security clearance (Tr. 70). The parties did not object to my continuation as administrative judge in this case (Tr. 70-71).

[2]Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

On August 27, 2004, the Department of the Navy Central Adjudication Facility (DON CAF) approved a conditional Top Secret clearance for Applicant (GE 6). The DON CAF warned Applicant to "avoid any personal or criminal conduct involving questionable judgment or unreliability" (GE 6).

Applicant has never been charged with any felony, firearms or explosives offense (GE 1). He has not been charged with any minor or misdemeanor-type, non-traffic-related offenses in the last seven years (GE 1). In the last seven years, he has not had any debts delinquent over 180 days, bankruptcy petitions, unpaid judgments, or unpaid liens (GE 1).

Applicant's DD Form 214 listed the following ribbons and awards: Marine Corps Good Conduct Medal, Global War on Terrorism Service Medal, National Defense Service Medal, Navy and Marine Corps Overseas Service Ribbon, Sea Service Deployment Ribbon, Navy Unit Commendation, Secretary of the Navy Letter of Commendation, Letter of Appreciation (2d award), Meritorious Mast (3d award), and Certificate of Appreciation.

Steroid Possession and Use

While Applicant was assigned to be a security guard at an overseas embassy, he used steroids for one cycle[3] during the period from about September 2002 to May 2003 (SOR ¶ 1.a; Tr. 36; GE 12). He was using steroids with about four other U.S. Marines (Tr. 53). A cycle is a four-to-12 week period of frequent steroid injections during about half of the cycle (Tr. 35, 49-50, 52). He used steroids to have larger muscle mass and to improve his physical fitness test scores (Tr. 53). The remainder of the cycle has less frequent or no steroid use (Tr. 35). Applicant had a Department of Defense (DoD) security clearance at the time he was using steroids in 2002-2003 (SOR ¶ 1.b; Tr. 47-48; GE 12).

Applicant used steroids over about a six-week period from March 2005 to April 2005 (SOR ¶ 1.c; Tr. 50; GE 12). On May 25, 2005, Applicant received nonjudicial punishment for use of steroids (SOR ¶ 1.d; GE 12). He received a reduction in grade to Lance Corporal (E-3), restriction and extra duty for 45 days, and forfeiture of one half of one month's pay for one month (SOR ¶ 1.d; Tr. 39-40; GE 3, 4, 12). His DoD-issued security clearance was in effect when he used steroids in 2005 (SOR ¶ 1.d; GE 12).

Applicant has not received any drug counseling (Tr. 54). Applicant does not currently associate with drug users (Tr. 45). He believes his steroid use was wrongful, and accepted responsibility for this misconduct (Tr. 63). Applicant denied illegal drug use after his steroid use in 2005 (Tr. 40). He has changed because of his marriage and recognition that he is responsible for two stepchildren (Tr. 40). Bible study is very important to Applicant (Tr. 44-45).

[3] Applicant used steroids for one cycle in 2002-2003 and one cycle in 2005 (Tr. 36, 50; GE 12).

Falsification of 2007 Security Clearance Application

On September 13, 2007, Applicant signed his SF 86 (SOR ¶ 3.a; Tr. 55; GE 1). On his 2007 SF 86 he responded, "Yes" to Sections 24a and 24b, which ask:

> **24. Your Use of Illegal Drugs and Drug Activity**
>
> a. 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?
>
> b. Have you ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting the public safety?

On his 2007 SF 86, he explained that from April 2005 to August 2005 he used Steroids once. He specifically noted, "Used [steroids] one time expirementally (sic) and will NOT ever use again (emphasis added)." He noted that he used marijuana one time in January 1999 when he was a senior in high school (GE 1).[4]

In the Additional Comments section of the 2007 SF 86, Applicant elaborated on his drug use stating, "I used Steroids one time while I was in the Marine Corps and have never touched or wanted to use it again. I used marijuana a few times in my Senior year of High School, and I have refrained from using since, seeing as I joined the Marines immediately after High School (emphasis added)" (GE 1 at § 24).

On May 25, 2005, a Marine Corps investigator interviewed Applicant about his steroid use (GE 5).[5] Applicant signed a sworn statement and disclosed that he used steroids and lifted weights for six months while on an overseas assignment to embassy duty (GE 5 at 2). He gained about 60 pounds over those six months (GE 5 at 2). He used steroids again from March 2005 to April 16, 2005 (GE 5 at 2). He injected steroids once every three days at first, then twice every two days, then twice every day and then tapered off to every third day (GE 5 at 2). He was using Testosterone Propionate, Deca-Durabolin, Sustanon, and Dianabol" (GE 5 at 3).

On October 27, 2008, in response to two DOHA interrogatories about his most recent marijuana use, Applicant said he, used marijuana three or four times from

[4]The question sought drug use in the last seven years, and his marijuana use was more than seven years previously (Tr. 59).

[5]Applicant falsely told the investigator that no other Marines in his unit were using steroids (Tr. 61).

January 1999 to June 1999 (GE 2 at 2). He used steroids during two cycles from September 2002 to May 2003 (GE 2 at 2). He noted that he "decided to stop using steroids after his last cycle. I decided to stop using steroids because I became more aware of the health dangers, and my family has a history of heart problems, so I decided that I want to live as long as possible." (GE 2 at 2). Applicant said his DOHA interrogatory, rather than his 2001 and 2007 security clearance applications, had accurate information about the number of his marijuana uses in high school (Tr. 60).[6]

At his hearing Applicant emphasized that he was incorrect in his description of his steroid use on his 2007 SF 86, and he explained why he did not disclose his 2002-2003 steroid use:

> I'm honestly not sure. I guess I might have been in a hurry, and I was just trying to get it done. But if you look at the explanation, later, I did say that I did use steroids two cycles (referring to the responses on the DOHA interrogatories).
>
> * * *
>
> Like I said, I must have just been going through it real quickly, and just wasn't paying attention to detail. I just completely forgot about the one in 2002. I hadn't been charged for it, or anything like that. So it is not something that is in the forefront of my mind, where I'm constantly thinking about it.

(Tr. 37, 57, 63). When he said he used steroids "once" he meant he used steroids multiple times, but it was only one cycle (Tr. 61-62). He noted, however, that on the DOHA interrogatories he disclosed the 2002-2003 steroid use, but not the 2005 steroid use (Tr. 38). He attributed the failure to accurately disclose his steroid use on his DOHA interrogatories to "an oversight" (Tr. 38-39) and "inattention to detail" (Tr. 58).

Character Evidence

Applicant's supervisor (S) served in the Marine Corps for eight years and left active duty as a Staff Sergeant (Tr. 23). S was discharged from the Marine Corps in October 2001 with an Honorable Discharge (Tr. 23). S held a Top Secret clearance (Tr. 24). S has worked in Information Technology for his current employer for six years (Tr. 24). S hired Applicant as an electronics technician in March 2007 (Tr. 22, 24). Applicant worked for his firm until May 2008 (Tr. 25). S has met Applicant's wife and children, and they have been to each other's residences (Tr. 27-28). S observed and supervised Applicant's work performance on a daily basis (Tr. 25). Applicant received an outstanding performance rating (Tr. 25). Applicant's behavior was excellent (Tr. 25-26).

[6] He attributed his decision not to disclose accurate information about his marijuana use on his 2001 security clearance application to advice from his recruiter (Tr. 60).

S rehired Applicant in April 2009 (Tr. 26-27). Applicant's employment on this current project requires a security clearance (Tr. 29-31).

Applicant's spouse met him in 2005, and they married in October 2005 (Tr. 66). She has never known her husband to use illegal drugs (Tr. 67). He does not associate with individuals who use illegal drugs (Tr. 67). Applicant is a good husband and father to her children (Tr. 68). The family missed Applicant when he was in Iraq (Tr. 68). Applicant is honest and trustworthy (Tr. 68).

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 an Applicant 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 concerns are under Guidelines H (Drug Involvement) and E (Personal Conduct) with respect to the allegations set forth in the SOR.

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 involvement-related conditions that could raise a security concern and may be disqualifying. Three drug involvement disqualifying conditions could raise a security concern and may be disqualifying in this particular case: "(a) any drug abuse,"[7] "(c) illegal drug possession or sale or distribution," and "(g) any illegal drug use after being granted a security clearance."[8]

[7] 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."

[8] Applicant's steroid use on active duty violated Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a. *See United States v. Commander*, 39 M.J. 972, 975-977 (A.F.C.M.R. 1994) (noting possession of Deca-Durabolin among other anabolic steroids violated Article 112a, UCMJ, as this substance was listed as a Schedule III controlled substance).

AG ¶¶ 25(a), 25(c) and 25(g) apply. These disqualifying conditions apply because Applicant used and possessed steroids.[9] He fully disclosed his drug abuse in his SOR response and at his hearing. He possessed anabolic steroids before he used them. Applicant held a security clearance at the time he used anabolic steroids. The other disqualifying conditions listed in AG ¶ 25 are not applicable.

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.

Concerning AG ¶ 26(a), 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-

[9]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.

Title 21 U.S.C. § 812(c) contains Schedules I through V of the Controlled Substances Act of 1970 (as amended). Title 21 U.S.C. § 802(41)(A) defines the term "anabolic steroid" to mean "any drug or hormonal substance, chemically and pharmacologically related to testosterone (other than estrogens, progestins, corticosteroids, and dehydroepiandrosterone)," and then the statute lists a variety of specific chemical substances. Anabolic steroids are a Schedule (Sch.) III controlled substance. *See* Sch. III(e).

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]

AG ¶ 26(a) applies. Applicant's last drug use was in May 2005, about four years prior to his hearing. His overall illegal drug use was relatively brief, and involved two cycles of anabolic use and a few marijuana uses in high school. The absence of evidence of more recent or extensive drug use, and his promise not to use illegal drugs in the future eliminates doubts about his current reliability, trustworthiness, or good judgment with respect to abstaining from illegal drug use.[11]

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. He has disassociated from his drug-using associates and contacts. He has broken or reduced the prevalence of his patterns of drug abuse, and he has changed his own life with respect to illegal drug use. He has abstained from drug abuse for about four years. However, he did not provide "a signed statement of intent with automatic revocation of clearance for any violation." AG ¶ 26(b) partially applies.

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[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 change and therapy. For the recency analysis the Appeal Board stated:

> *Compare* ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, 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.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse prescription drugs after being prescribed those drugs for an illness or injury. The steroids were never lawfully prescribed for him. He did not satisfactorily complete a prescribed drug treatment program. Moreover, he did not provide proof of a "favorable prognosis by a duly qualified medical professional" as required in AG ¶ 26(d).

In sum, Applicant ended his relatively isolated drug abuse in May 2005, about four years ago.[12] His illegal drug use is not recent. The motivations to stop using illegal drugs are evident. He understands the adverse results from drug abuse.[13] He promised not to use illegal drugs in the future. Drug involvement security concerns are mitigated.

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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes three conditions that could raise a security concern and may be disqualifying with respect to the alleged falsifications of documents used to process the adjudication of Applicant's security clearance in this case:

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[12]The Appeal Board has reversed decisions granting a clearance because the administrative judge considered individual acts of misconduct one-by-one and determined the isolated acts were mitigated. ISCR Case No. 07-03431 at 4 (App. Bd. June 27, 2008); ISCR Case No. 06-08708 at 3-4 (App. Bd. Dec. 17, 2007); ISCR Case No. 04-07714 at 5-7 (App. Bd. Oct. 19, 2006). In ISCR Case No. 07-03431 at 4 (App. Bd. June 27, 2008), the Appeal Board explained it is the overall conduct that determines whether a clearance should be granted stating:

> The Judge's analysis of the numerous acts of misconduct in this record failed to reflect a reasonable interpretation of the record evidence as a whole. By analyzing each category of incidents separately, the Judge failed to consider the significance of the "evidence as a whole" and Applicant's pattern of conduct. *See, e.g., Raffone v. Adams*, 468 F.2d 860, 866 (2d Cir. 1972)(taken together, separate events may have a significance that is missing when each event is viewed in isolation). Under the whole person concept, a Judge must consider the totality of Applicant's conduct when deciding whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. *See, e.g.*, ISCR Case No. 98-0350 at 3 (App. Bd. Mar. 31, 1999). The Judge's piecemeal analysis of Applicant's overall conduct did not satisfy the requirements of ¶ E2.2 of the Directive.

See also ISCR Case No. 04-07714 at 5-7 (App. Bd. Oct. 19, 2006), *see* Whole Person Concept at pages 13-14, *infra*.

[13]Approval 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.

(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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and

(d)(3) a pattern of dishonesty or rule violations.[14]

Applicant failed to disclose his steroid use from September 2002 to May 2003 on his 2007 SF 86 (SOR ¶ 3.a). Even more egregiously, he typed two false statements into the comment sections of his 2007 SF 86. He stated he, "Used [steroids] one time expirementally (sic) and will NOT ever use again (emphasis added)." And he stated, "I used Steroids one time while I was in the Marine Corps and have never touched or wanted to use it again." AG ¶¶ 16(a), 16(b) and 16(d)(3) all 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;

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

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

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

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(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.

The mitigating condition outlined in AG ¶¶ 17(d) and 17(e), "the individual has acknowledged the behavior" and "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress" partially apply to mitigate his steroid use and his falsification of his 2007 SF 86. Security officials are well aware of Applicant's problems. Applicant has taken the positive step of disclosure, eliminating any vulnerability to exploitation, manipulation or duress with respect to this misconduct. I do not believe Applicant would compromise national security to avoid public disclosure of these problems.

Applicant deserves substantial credit in the whole person analysis for admitting his steroid use in 2002-2003 and in 2005, when he was under investigation in May 2005 for steroid use. He re-admitted his steroid use during these two periods at his hearing and in his SOR response. I found Applicant's admissions about his steroid use at his hearing and in his SOR response to be credible. However, the personal conduct concerns pertaining to Applicant's falsification of his 2007 security clearance application (SOR ¶ 3.a) about the extent of his steroid use cannot be mitigated at this time because it is too serious and too recent. He denied that he deliberately falsified his 2007 security clearance application and attributes the false information to lack of attention to detail, inadvertence, or oversight. I do not find these explanations to be credible. He affirmatively added one-time steroid use to the comments on his 2007 SF 86. Moreover, his 2007 SF 86, when viewed in its entirety, does show careful, attention to detail with respect to his traffic fines and employment. I believe he deliberately understated his steroid use on his 2007 SF 86.

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 change; (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 H and E 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. Applicant was relatively young and immature when he used marijuana and steroids. He honorably served his country as a U.S. Marine for six years, rising to the rank of corporal. He showed he has the ability to abstain from illegal drug use for lengthy periods of time. In his SOR response and at his hearing, he admitted his history of illegal drug use. He knows the consequences of drug abuse. Applicant contributes to his company and the Department of Defense. He served in Iraq as a contractor employee, facing danger and hardship on behalf of the United States. 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. His supervisor lauds his hard work and dedication. I am satisfied that if he continues to abstain from drug use, and avoids future offenses he will eventually have <u>future</u> potential for access to classified information.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant used steroids in the period 2002—2003 and in 2005 for a total of two cycles. His decisions to possess and use steroids (each time he injected the substance into his body was a separate decision about whether to violate the law) were knowledgeable, voluntary, and intentional. Applicant failed to fully disclose his steroid use on his 2007 SF 86. In the 2002—2003 timeframe, he used steroids for about six months and gained about 60 pounds, going from 160 pounds to 220 pounds. This is more than a brief experimental use of steroids. Then in 2005, he used steroids again, was questioned by investigators, and disciplined under the UCMJ for steroid use. These events are too important to inadvertently or accidently fail to include, while adding to the

comments that his steroid use was a one-time event. He was sufficiently mature to be fully responsible for his conduct. These offenses show a serious lack of judgment and a failure to abide by the law. Such judgment lapses are material in the context of security requirements. His misconduct 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 Applicant has not mitigated the security concerns pertaining to personal conduct; however, he has fully mitigated drug involvement primarily because his illegal drug use is not recent. His criminal conduct is mitigated because the government did not present any evidence relating to the applicability of this guideline.

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"[15] 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 H:	FOR APPLICANT
Subparagraphs 1.a to 1.d:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.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.

_____
Mark Harvey
Administrative Judge

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