DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-10567
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: *Pro Se*

April 28, 2009

Decision

HARVEY, Mark W., Administrative Judge:

Applicant has an extensive history of drug abuse. He failed to mitigate security concerns arising from drug involvement. Eligibility for access to classified information is denied.

Statement of the Case

On August 8, 2008, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) or security clearance application (2008 SF 86) (Government Exhibit (GE) 1). On February 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 Guideline H (Drug Involvement) (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 12, 2009, Applicant responded to the SOR allegations, and requested a hearing (GE 12). Department Counsel was ready to proceed on March 16, 2009, and the case was assigned to me that same day. At the hearing held on April 17, 2009, Department Counsel offered eight exhibits (GEs 1-8) (Transcript (Tr.) 18-19). There were no objections, and I admitted GEs 1-8 (Tr. 19). I held the record open until April 24, 2009, to permit Applicant to submit documentary evidence (Tr. 14). After the hearing, Applicant provided six more exhibits, which were admitted without objection (AEs A-F). I also admitted the hearing notice and amended notice (GEs 9-10), the SOR (GE 11), and Applicant's SOR response (GE 12). I received the transcript on April 24, 2009.

Findings of Fact[1]

In his response to the SOR, Applicant admitted all of the 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 28 years old (Tr. 6, 28).[2] He received his high school diploma in 1998 (Tr. 22). He earned a bachelor's of science degree in biology in December 2002 (Tr. 6, 22). He has never served in the military (Tr. 6). He has never married. He has never held a security clearance (Tr. 6). He has never been charged with any felony, any firearms or explosives offense, or any offense related to alcohol or drugs. He has not been arrested or charged with any minor or misdemeanor-type offenses in the last seven years, except for a 2002 arrest for failure to leave (GE 2 at 5). Later the failure to leave charge was dismissed (GE 2 at 5). In the last seven years, he has not had any debts delinquent over 180 days, bankruptcy petitions, unpaid judgments, or unpaid liens.

From 2000 to 2005, he had part-time employment at a university (Tr. 22-23). From 2005 to March 2006, he worked for a corporation as an environmental engineer (Tr. 23). He was unemployed from March to October 2006 (Tr. 24). From October 2006 to March 2007, he worked as an environmental consultant for another firm (Tr. 24-25).

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

[2]Applicant's 2008 SF 86 (GE 1) is the source for the facts in this paragraph, unless stated otherwise.

In March 2007, Applicant began working as an environmental scientist for his current employer, a government contractor (Tr. 25). He performs environmental site assessments, and collects groundwater and soil samples for testing and classification (Tr. 26). He did not believe his continued employment with the contractor was contingent on approval of his security clearance (Tr. 54-55).

Illegal Drug Possession and Sale

Applicant used marijuana approximately 65 times from about September 1998 to about April 2008 (SOR ¶ 1.a; Tr. 26-28; GE 12), hallucinogenics (mushrooms) about five times from about August 2001 to about February 2002 (SOR ¶ 1.c; Tr. 31-33; GE 2 at 2; GE 3 at 3; GE 12),[3] and cocaine about six times from about June 2001 to about November 2001 (SOR ¶ 1.d; Tr. 36-37; GE 12). He sold a small amount of marijuana for about $5 on two occasions (SOR ¶ 1.e; Tr. 41; GE 3 at 3; GE 12). He used illegal drugs because of peer pressure and to experiment (Tr. 54).

Applicant used marijuana approximately once a week, and sometimes every other week throughout his years of college attendance (Tr. 27). After he graduated from college in 2002, he continued to use marijuana with less frequency, perhaps once a month or even less frequently (Tr. 27-28). He ended his marijuana use in April 2008 (Tr. 26).

Applicant used steroids every other day for four of five weeks, during two time periods from about October 2005 to about May 2006, while he was playing semi-professional football (SOR ¶ 1.b; Tr. 31-33, 41; GE 3 at 3-4). He did not have a prescription authorizing steroid use (Tr. 42). He did not use steroids after May 2006 (Tr. 33).

Applicant was offered cocaine as recently as the fall of 2008 from a friend he has known since high school (Tr. 38). He refused the offer of cocaine (Tr. 38). He continues to have occasional contact with the friend (Tr. 39).

Applicant did not have any problems at work because of his illegal drug use (Tr. 43). He did use illegal drugs at work or during lunch breaks (Tr. 44). He passed every drug test at his employment and the tests did not detect any traces of illegal substances in his system (Tr. 44-46).[4] He provided negative drug-test results for urinalysis tests on September 21, 2007 (AE D), March 19, 2008 (AE E), and November 20, 2008 (GE F). Applicant disclosed his illegal drug use on his security clearance application and to an Office of Personnel Management (OPM) investigator (GE 1, section 24; GE 3 at 3). He continues to associate with friends or associates, who he knows are or were illegal drug users (Tr. 48). Generally, his friends and associates rarely use illegal drugs in his

[3]He was unsure about the drug in the mushrooms, or "shrooms", but conceded it was a hallucinogenic substance that he took to feel a drug-like effect (Tr. 33-34; GE 12).

[4]One employer-administered drug test was positive for the presence of a prescription-authorized drug (Tr. 47-48, 58). Because he was authorized use of the prescription drug by his dentist, this test result raises no adverse security concerns.

presence; however, the most recent illegal drug usage by others in his presence occurred in a friend's apartment on a balcony about four months before his hearing (Tr. 49-53).

Applicant has never received counseling for drug abuse (Tr. 53; GE 3 at 4). He emphasized that his drug use was part of the process of growing up and experimentation (Tr. 62). He was not dependent on illegal drugs (Tr. 62). He is tested at work for drugs (Tr. 63). He does not intend to ever use illegal drugs again (Tr. 54, 63; GE 2 at 2).

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 concern is under Guideline H (Drug Involvement) 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 conditions related to drug involvement that could raise a security concern and may be disqualifying. Two drug involvement disqualifying conditions raise a security concern and may be disqualifying in this particular case: "any drug abuse,"[5] and "illegal drug possession or sale or distribution."

AG ¶¶ 25(a) and 25(c) apply because Applicant used marijuana, cocaine, mushrooms (psilocybin), or steroids (without a prescription) from September 1998 to

[5]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."

April 2008.[6] The other disqualifying conditions listed in AG ¶ 25 are not applicable. He disclosed his illegal drug use on his security clearance application, to an OPM investigator, and at his hearing. He used illegal drugs primarily because he was curious about the effects of the drugs and his peers and friends were using illegal drugs. He possessed these illegal drugs before he used them. He sold marijuana on two occasions.

AG ¶ 26 provides four 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.

[6] 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 is a Schedule (Sch.) I controlled substance. *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 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). The adverse medical consequences of use of these illegal drugs are described in detail in GEs 4-8).

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. 02-24452 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."[7]

Applicant's last marijuana use was on April 2008, about 12 months prior to his hearing. AG ¶ 26(a) partially applies. His overall illegal drug use lasted approximately ten years (1998 to 2008), and involved numerous uses of marijuana, cocaine, mushrooms, and steroids. AG ¶ 26(a) cannot be fully applied because his past drug use was so extensive and is too recent. There remains some doubt about his current reliability, trustworthiness, or good judgment.[8] He has abstained from drug use for about 12 months, and he recognizes the adverse impact on his life of drug abuse. These actions create some certitude that he will continue to abstain from drug use. However, more time is needed to increase confidence that his illegal drug possession and use will not recur and to fully establish his current reliability, trustworthiness and good judgment with respect to abstaining from illegal drug use.

---

[7] ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

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

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

[8] 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(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 has refused offers to possess and use illegal drugs. He continues to associate with some current or former drug users. 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 12 months. However, he did not provide "a signed statement of intent with automatic revocation of clearance for any violation."[9] AG ¶ 26(b) does not fully apply.

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 marijuana, cocaine, mushrooms, and steroids were never prescribed for him. He did not satisfactorily complete a prescribed drug treatment program, including rehabilitation and aftercare requirements.

In sum, Applicant ended his marijuana abuse in April 2008, about 12 months ago. Aside from his marijuana use, all of his other illegal drug use ended in May 2006 or earlier.[10] His non-marijuana use is not recent. The motivations to stop using illegal drugs are evident. He understands the adverse results from drug abuse.[11] He has, however,

[9]Even if he had provided such a statement, insufficient time has elapsed since his most recent illegal drug use to warrant full application of this mitigating condition.

[10]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). Here, Applicant used hallucinogenics until February 2002, cocaine until November 2001, steroids until May 2006, and marijuana until April 2008. His repeated abuse of these particular drugs is relevant in the whole person analysis, but individually, as listed in the SOR, the abuse of three of the four illegal drugs more than three years ago is insufficiently aggravating to cause denial of his clearance. 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 9-10, *infra*.

[11]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.

not shown or demonstrated a sufficient track record of marijuana abstinence 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. I have incorporated my comments under Guideline H 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 began using illegal drugs. He stopped using illegal drugs in April 2008. In 2008, he frankly and candidly admitted his extensive history of drug use on his 2008 security clearance application. He subsequently admitted his drug use to an OPM investigator, in his response to DOHA interrogatories, on his SOR response, and at his hearing. He knows the consequences of drug abuse. Applicant 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. I am satisfied that if he continues to abstain from drug use, and avoids future offenses he will have <u>future</u> potential for access to classified information.

The evidence against approval of Applicant's clearance is more substantial. Applicant had a problem with drug abuse from 1998 to 2008. Applicant used hallucinogenics until February 2002, cocaine until November 2001, steroids until May 2006, and marijuana until April 2008. He used illegal drugs on numerous occasions. He has not received drug counseling or treatment. He continues to associate with some friends or associates that used and may currently be using illegal drugs. He was offered cocaine by a friend in the last 12 months. His abstinence from drug abuse for 12 months

is an insufficient period of time to mitigate drug involvement security concerns. His numerous decisions to possess and use illegal drugs over a ten-year period were knowledgeable, voluntary, and intentional. 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 relevant 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 he has not mitigated the security concerns pertaining to drug involvement primarily because his marijuana use is still too recent. *See* n. 10, *supra* (explaining why all misconduct must be considered as part of whole person concept).

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"[12] 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b to 1.e:	For Applicant

Conclusion

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

MARK W. HARVEY
Administrative Judge

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