



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ISCR Case No. 08-11194¹
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Braden Murphy, Esquire, Department Counsel
For Applicant: *Pro Se*

June 23, 2009

Decision

HARVEY, Mark, Administrative Judge:

Applicant used marijuana and cocaine while holding a security clearance. He failed to disclose his drug abuse on his 2008 security clearance application and to an Office of Personnel Management (OPM) investigator. Applicant failed to mitigate security concerns arising from drug involvement and personal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On May 23, 2008, Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP) for National Security Positions or security clearance application (SF-86) (Government Exhibit (GE) 1). On March 6, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,

¹I corrected and initialed the change to the case number listed on the statement of reasons (Tr. 4, 16-17). This decision was corrected before it was mailed outside DOHA, and "Corrected Decision" is added to the footer of each page of this Decision.

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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) and E (Personal Conduct) (GE 7). 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 April 20, 2009, Applicant responded to the SOR allegations (GE 8). Department Counsel was ready to proceed on May 1, 2009, and the case was assigned to another administrative judge on May 4, 2009. On June 2, 2009, the case was transferred to me because the other administrative judge had a family emergency (Transcript (Tr.) 17). At the hearing held on June 2, 2009, Department Counsel offered five exhibits (GE 1-5) (Tr. 22-25). There were no objections, and I admitted GE 1-5 (Tr. 25). Applicant did not provide any exhibits (Tr. 13). I also admitted the hearing notice (GE 6), the SOR (GE 7), and Applicant's SOR response (GE 8). I held the record open until June 9, 2009, to permit Applicant to submit additional evidence. I received the transcript on June 10, 2009. Applicant provided one document after the hearing, which was admitted as Applicant's Exhibit (AE) A.

Findings of Fact²

In his response to the SOR, Applicant admitted the SOR allegations in ¶¶ 1.d, 2.a, and 2.d (GE 8 on last page). He also made partial admissions concerning his drug use in relation to SOR ¶¶ 1.a, 1.b and 1.c (GE 8). He denied the allegations in SO ¶¶ 2.b and 2.c (GE 8). He did not address the allegations in SOR ¶ 2.e (GE 8). He claimed that his failure to disclose some of his drug involvement on his security clearance application was because he forgot (GE 8). His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is 27 years old and has been employed by a government contractor as a systems administrator since April 2008 (Tr. 6, 27, 29-30).³ He received a high school diploma in 2000, and he earned a bachelor's degree in information technology in 2007

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

³ Applicant's SF-86 (GE 1) is the source for the facts in this paragraph, unless stated otherwise.

(Tr. 7, 27-29). He has begun working on his master's degree (Tr. 28). His first defense-related employment was in 2002 (Tr. 32). He received a Secret security clearance in 2003 (Tr. 8, 30; GE 4). He applied for access to sensitive compartmented information (SCI) (Tr. 31). In the course of that application, he provided additional information about his history of drug use (Tr. 31).

Charge for underage alcohol consumption and failure to disclose that information (SOR ¶¶ 2.b and 2.c)

When Applicant was 19, he was attending a party where alcohol was being consumed (Tr. 34). A police officer came to the party and called some of the parents of the attendees, who were under the age of 21 (Tr. 34). He denied that he was arrested and did not believe he was issued a citation (Tr. 34). He did not remember whether he went to court (Tr. 35). However, municipal court records show that in 2001, the court charged Applicant with possession of alcoholic beverages while under the age of 21 (GE 3). The court's civil docket shows a "stet" entry in 2002 for disposition of the incident (Tr. 36; GE 3).

Section 23d of Applicant's May 23, 2008, SF-86 asked, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" Applicant answered, "No" (SOR ¶ 2.b; GE 1). On January 29, 2009, Applicant responded to a DOHA interrogatory, and he denied that he had any previous alcohol-related arrests or charges (GE 2 at 7; Tr. 40; SOR ¶ 2.c). He said he forgot completely about the incident where the police interrupted the party and collected information concerning those attendees, who were under the age of 21 because of alcohol consumption at the party (Tr. 40).

Information on Applicant's security clearance application concerning previous drug use

Applicant signed his SF-86 on May 23, 2008 (GE 1). He personally completed his May 23, 2008, SF-86 (Tr. 68-69, 74-75). He denied that he used illegal drugs in his response to Sections 24a and 24b (SOR ¶ 2.a). Section 24 provides:

Section 24. Your Use of Illegal Drugs and Drug Activity The following questions pertain to the illegal use of drugs or drug activity. You are required to answer the questions fully and truthfully, and your failure to do so could be grounds for an adverse employment decision or action against you, but neither your truthful responses nor information derived from your responses will be used as evidence against you in any subsequent criminal proceeding.

Answer the following questions:

- 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 public safety?

Information Applicant provided to an Office of Personnel Management (OPM) investigator concerning previous drug use (SOR ¶ 2.d)

On August 7, 2008, an OPM investigator interviewed Applicant (GE 2). Applicant denied that he had illegally used any controlled substance in the last seven years (Tr. 56-57, 63; SOR ¶ 2.d; GE 2 at 14). He also denied that he had used controlled substances while holding a security clearance (Tr. 58, 63; SOR ¶ 2.d; GE 2 at 14). As part of his DOHA interrogatories, Applicant verified that the OPM report of investigation (ROI) accurately described the content of his OPM interview (GE 2 at 12). In his SOR response, Applicant admitted that he did not disclose his illegal drug possession and use while holding a security clearance to the OPM investigator (Tr. 59; GE 8). He described his failure to disclose his illegal drug use to the OPM investigator as “an embarrassment in itself” and as “pretty bad” (Tr. 59). He was very sorry about experimenting with drugs while holding a clearance (Tr. 67). He has changed and is through doing things that are not legal (Tr. 67).

On December 19, 2008, Applicant completed an SF-86 when he applied for an SCI clearance as part of a job application with another agency (Tr. 72; AE A). He admitted he used marijuana once in October 2008 on the other agency’s SF-86 (Tr. 72; AE A at Question 23). However, he also indicated that he did not use a controlled substance while possessing a security clearance (AE A at Question 23b).⁴ On January 30, 2009, Applicant sent an email to DOHA stating he had “Past drug usage (Personal)” and he sent in his response to DOHA interrogatories, admitting drug use (Tr. 72-73; GE 2 at 2). He interpreted his email to DOHA as a correction of the information about drug use that he previously provided (Tr. 53; GE 2 at 2). On February 13, 2009, the other agency denied Applicant’s access to SCI (GE 4).

⁴ Any misstatements in Applicant’s December 19, 2008, SF-86, concerning his illegal use of cocaine, marijuana and ecstasy will not be addressed in the Personal Conduct and Drug Involvement sections of this decision, and are only being considered with respect to his credibility and for the Whole Person concept.

Illegal Drug Use (SOR ¶¶ 1.a to 1.d)

On May 23, 2008, Applicant completed his SF-86 to upgrade his security clearance from Secret to Top Secret (Tr. 30-31, 45, 48). He has held a security clearance since October 2003 (Tr. 46-47). He held a security clearance in 2006 or 2007 when he used cocaine and in October 2008 when he used marijuana (Tr. 46-47, 49). He said when he failed to disclose his drug use on his security clearance application he was “incorrect” (Tr. 52-53). He explained that when he provided his responses to interrogatories and provided inconsistent information from his statement at his hearing about the extent of his drug use, he “messed up” (Tr. 50).

At his hearing, Applicant claimed his first and only use of marijuana was in 2008 (Tr. 38, 51). He claimed he used cocaine once in 2006 (Tr. 38, 51-52, 62, 66). He claimed he used ecstasy once in 2002 or 2003 (Tr. 39, 51).

The most credible description of Applicant’s marijuana use is contained in his response to DOHA interrogatories (GE 2). Applicant actually used marijuana starting at the age of 16 and continuing on a monthly basis until October 2008 (GE 2). He used cocaine in 2006 or 2007, and he used ecstasy in 2002 (GE 2).

Responses to DOHA’s interrogatories concerning previous drug use

On January 29, 2009, Applicant responded to a DOHA interrogatory about previous drug use, under oath, as follows (GE 2 at 8):

DRUG INVOLVEMENT GENERAL INFORMATION:				
1. Have you EVER used any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP) and/or any Cannabis (to include marijuana and hashish), except prescribed by a licensed physician? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO				
**If you answered “No”, please go to question 2.. below. If you answered “YES”, please provide the following information:				
DRUG USED	FREQUENCY	AVERAGE QUANTITY	DATE LAST USED	INTENTIONS FOR FUTURE USE AND FREQUENCY
<u>Marijuana</u>	<u>monthly</u>	<u>grams</u>	<u>10/3/08</u>	<u>None</u>
<u>ecstasy</u>	<u>monthly ?</u>	<u>one pill</u>	<u>2002</u>	<u>None</u>
<u>cocaine</u>	<u>monthly ?</u>	<u>once a year</u>	<u>2007</u>	<u>None</u>
a. When did you first use each of the drug(s), listed above?				
<u>Marijuana ; 16 yr. Ecstasy ; 19 yr. ; Cocaine ; 24 yr</u>				

At his hearing, Applicant denied that he used marijuana, cocaine or ecstasy more than once each. However, he could not explain why he wrote “monthly” next to “Marijuana” without a question mark, other than to say he “messed up.” (Tr. 61-62, 66,

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70-71). He said the question marks in the frequency column for ecstasy pertained to when he used illegal drugs within that month or year (Tr. 71). He thought DOHA wanted more specifics about his drug use and he questioned what he was supposed to put down on the form (Tr. 71). He conceded, "But monthly was incorrect and seems like a lie. For someone outside looking in, it seems like a great big lie. It does." (Tr. 72).

As indicated above, in response to DOHA's question, "When did you first use each of the drug(s) listed above? He answered, "marijuana, 16 yr; extacy (sic), 19 yr; cocaine, 24 yr." (GE 2 at 8). Applicant responded to the interrogatories in his own handwriting (Tr. 41). He insisted that he used marijuana on one occasion in October 2008 (Tr. 41, 63-64, 66). Applicant explained when he wrote, "16," he was thinking about when he first used alcohol (Tr. 43). He only used cocaine once and that was in 2006 (Tr. 66). When he completed the DOHA interrogatory, he swore the information he provided in DOHA's interrogatory was accurate (Tr. 43-44; GE 2).

Applicant denied that he continued to associate with the persons involved in illegal drug use (Tr. 65; GE 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 Applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the Applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified

information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the Applicant that may disqualify the Applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an Applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An Applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is under Guidelines 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. AG ¶ 25(a), indicates, “any drug abuse,”⁵ AG ¶ 25(c) states, “illegal drug possession,” and AG ¶ 25(g) provides, “any illegal drug use after being granted a security clearance,” could raise a security concern and may be disqualifying.

AG ¶¶ 25(a), 25(c) and 25(g) apply. The other disqualifying conditions listed in AG ¶ 25 are not applicable. These disqualifying conditions apply because Applicant used and possessed marijuana, cocaine and ecstasy.⁶ He eventually disclosed his drug abuse in his response to DOHA interrogatories, and to a lesser extent at his hearing. He possessed marijuana, cocaine and ecstasy before he used these substances. Applicant’s Secret security clearance was approved in 2003, and he used marijuana and cocaine after his security clearance was granted.

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.

⁵AG ¶ 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.”

⁶AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including:

- (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana and ecstasy or 3,4 methylenedioxymethamphetamine are Schedule (Sch.) I controlled substances. See Sch. I(c)(9) and I(c)(10), respectively. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I); *United States v. Crawford*, 449 F.3d 860, 861 (8th Cir. 2006) (ecstasy). Cocaine is a Sch. II Controlled Substance. See Sch. II(a)(4) (cocaine).

(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 do 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."⁷

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. The Appeal Board addressed the recency of drug use, stating:

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.

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Applicant used marijuana on a monthly basis beginning when he was 16 years old. He used marijuana until October 2008. He used cocaine in 2006 or 2007 and ecstasy in 2002. Applicant's last marijuana use was recent because it was nine months before his hearing. 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. AG ¶ 26(a) partially applies to his marijuana-related offenses.⁸

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 his patterns of drug abuse, and he has changed his life with respect to illegal drug use. He has abstained from drug abuse for about nine 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. Marijuana, cocaine and/or ecstasy were never prescribed for him. He did not satisfactorily complete a prescribed drug treatment program. Moreover, he cannot receive full credit because he did not provide "a favorable prognosis by a duly qualified medical professional, including rehabilitation and aftercare requirements."

In conclusion, Applicant ended his marijuana abuse in October 2008, about nine months ago. Aside from his marijuana use, all of his other illegal drug use ended in 2007 or earlier.¹⁰ Applicant used marijuana and cocaine while holding a security clearance.

⁸In 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.

⁹Even if Applicant had provided such a statement, sufficient time has not elapsed since his most recent illegal drug use, to warrant full mitigation of security concerns relating to his drug involvement.

¹⁰The 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 ecstasy in 2002 and cocaine in 2006 or 2007, and marijuana until October 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 two of the three illegal drugs more than two 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

The motivations to stop using illegal drugs are evident. He understands the adverse results from drug abuse.¹¹ He has shown or demonstrated a sufficient track record of no drug abuse to partially, but not completely, mitigate drug involvement as a bar to his access to classified information.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. . . .

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

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

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

Applicant used marijuana, cocaine, and ecstasy in the previous seven years. He used marijuana and cocaine while holding a security clearance. He falsely denied this drug use in his response to section 24a and 24b on his May 23, 2008, SF-86. He falsely denied his drug use to an OPM investigator on August 7, 2008. His decisions to falsify his 2008 security clearance application and to lie to the OPM investigator were intentional and deliberate. The falsifications were intended to deceive his employer and security officials. AG ¶¶ 16(a) and 16(b) both apply.

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*.

¹¹Approval 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 SOR alleges in ¶ 2.e that Applicant's drug use as detailed in SOR ¶¶ 1.a to 1.d also raises a personal conduct security concern. The government cross-alleged the same conduct under both guidelines to ensure proper notice and full review as well as to address possible exigencies of proof. Clearly, his drug use raises disqualifying conditions under both Guideline E and H. See AG ¶ 16(e). However, I will find "For Applicant" with respect to SOR ¶ 2.e because his illegal drug use is more appropriately and fully addressed under Guideline H. Duplicative coverage of his illegal drug possession and use in my findings under Guideline E is not warranted in this case.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

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

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

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶¶ 17(a) and 17(b) do not apply. Applicant did not make a prompt, good-faith effort to correct the falsification of his May 23, 2008, SF-86 before being confronted with

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the facts. Instead, he chose to lie to the OPM investigator on August 7, 2008, about his drug use. These two falsifications were not caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing him concerning the security clearance process.

AG ¶ 17(c) does not apply. His falsification of his May 23, 2008, SF-86, and his lie to the OPM investigator about his drug abuse are not minor offenses. The two falsifications are relatively recent. Because there are two offenses, the offenses are not “isolated.” The Appeal Board’s jurisprudence requires consideration of all such offenses in a non-piecemeal fashion. The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of his conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). The two falsifications continue to cause doubt about Applicant’s current reliability, trustworthiness and good judgment.

AG ¶¶ 17(d), 17(e) and 17(g) have some application, but do not apply to a sufficient degree to mitigate all security concerns under Guideline E. There are some positive signs of Applicant’s rehabilitation. He admitted his extensive drug use in response to DOHA interrogatories on January 29, 2009. He said he ceased his associations with other drug users. No other allegations of problems at his employment have surfaced. He has promised not to use drugs in the future, which is an important step toward his rehabilitation. He received job training and has a good employment record. His security manager is well aware of his drug abuse problems. Disclosure of his drug use has reduced his vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(f) applies to Applicant’s failure to disclose the charge of underage consumption of alcohol because the allegations of falsification are not substantiated. There is insufficient information that he knew he was charged, as opposed to being cited, for these offenses. I find “For Applicant” in the Findings section of this decision with respect to SOR ¶¶ 2.b and 2.c.

AG ¶ 17(f) does not apply to Applicant’s false descriptions denying his illegal drug use on his May 23, 2008, SF-86 and to his false statement in 2008 to an OPM investigator. These false statements were deliberate, and the allegation of falsification is substantiated.¹² At the time he provided false information, he intended to deceive his

¹²The 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.

employer and security officials. These severe lapses in judgment are too recent and serious to be mitigated at this time.

In conclusion, Applicant falsely denied at his hearing the full extent of his marijuana use. He stated he only used marijuana once, when he actually used marijuana on a monthly basis beginning when he was 16 years old, and continuing until October 2008. The decision not to be candid and forthright at his hearing shows he has not been rehabilitated, and that personal conduct concerns are not mitigated.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guidelines 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 illegal drugs and falsified his May 23, 2008, SF-86 and lied to an OPM investigator on August 7, 2008. Applicant's December 19, 2008, SF-86, admitted that he used marijuana once in October 2008. This admission of drug use is a positive sign that Applicant was coming to terms with his drug use and beginning to take responsibility for his marijuana use in the context of his security clearance. He stopped using illegal drugs in October 2008. He subsequently made a more accurate admission of his illegal drug use in his response to DOHA interrogatories on January 29, 2009. He knows the consequences of drug abuse. Applicant contributes to his company and the Department of Defense. There is no evidence of any disciplinary problems at work. For example, there is no evidence he used illegal drugs at work. 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

Corrected Decision

or he would not have been able to retain his employment after his security clearance was called into question.

The evidence against approval of Applicant's clearance is more substantial. Applicant had a problem with drug abuse beginning with his marijuana use at age 16. He has not received drug counseling or treatment. However, if his only problem had been his drug abuse, security concerns under the drug involvement guideline would be mitigated by his continuing abstinence from drug abuse in about a year because of the passage of time. His falsification of his May 23, 2008, SF-86 and his lie to an OPM investigator denying his drug abuse cannot be mitigated at this time and for the foreseeable future. Applicant's December 19, 2008, SF-86, admits one use of marijuana in October 2008; however, he failed to disclose his illegal use of cocaine and ecstasy. He failed to disclose the extent and frequency of his marijuana use.

At his hearing, he chose to lie about the extent of his marijuana use. At his hearing, he chose to recant his description of his marijuana use that he provided in his response to DOHA interrogatories. He falsely claimed at his hearing that he used marijuana once in October 2008. Actually, I am convinced that he used marijuana on a monthly basis beginning at the age of 16 and continuing until October 2008. His decisions to provide false information were knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. The false statements show a lack of judgment in the context of security requirements. Such conduct raises a serious security concern, and a security clearance is not warranted. 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 and personal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"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 eligible for access to classified information.

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

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b and 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraphs 2.b and 2.c:	For Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.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 HARVEY
Administrative Judge