DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
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SSN: -----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Kathryn D. MacKinnon, Esquire, Department Counsel
For Applicant: *Pro se*

December 30, 2010

Decision

HARVEY, Mark, Administrative Judge:

Applicant possessed and used marijuana, methylenedioxymethamphetamine (MDMA), cocaine, and psilocybin. Her illegal drug possession and usage are too recent to be mitigated at this time. Eligibility for access to classified information is denied.

Statement of the Case

On December 14, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF 86) (Item 4). On August 3, 2010, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline H (drug involvement). (Item 1) 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 Applicant's clearance should be granted, continued, denied, or revoked. (Item 1)

On August 18, 2010, Applicant responded to the SOR allegations. (Item 2) She was advised of her right to a hearing, and she did not request a hearing. (Item 2; Directive at ¶ E3.1.4.) A complete copy of the file of relevant material (FORM), dated October 13, 2010, was provided to her on October 21, 2010. She was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation.[1] Applicant did not respond to the FORM. The case was assigned to me on December 10, 2010.

Findings of Fact[2]

In Applicant's response to the SOR, she admitted SOR ¶¶ 1.a-1.h.[3] She acknowledged that she used MDMA intermittently from November 2007 to May 2009, and that she used illegal drugs while in England from September 2006 to May 2009. She no longer associates with illegal drug users, and she offered to sign a statement of intent with automatic revocation of clearance for any violation. Her admissions are accepted as factual findings.

Applicant is a 25-year-old employee of a defense contractor, working as an office administrator.[4] In 2009, she received a bachelor's degree from a university in the United Kingdom. She has not served in the military. She has never married.

Drug involvement

From November 2006 to December 2008, Applicant used marijuana and cocaine. (SOR ¶¶ 1.a, 1.c; Item 2) From November 2007 to May 2009, she used MDMA also known as ecstasy. (SOR ¶ 1.e; Item 2) Around February or March 2008, she used hallucinogenic mushrooms (psilocybin). (SOR ¶ 1.g; Item 2) She also purchased marijuana, cocaine, MDMA, and hallucinogenic mushrooms. (SOR ¶¶ 1.b, 1.d, 1.f, 1.h; Item 2)

Applicant's December 14, 2009 SF 86 indicates she used illegal drugs from November 2006 to December 2008, stating:

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[1]The DOHA transmittal letter is dated October 15, 2010, and Applicant's receipt is dated October 22, 2010. The DOHA transmittal letter informed Applicant that she had 30 days after her receipt to submit information.

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

[3]Item 2, Applicant's SOR response, is the basis for the facts in this paragraph.

[4]Item 1, Applicant's SF 86, is the basis for the facts in this paragraph.

> It was all recreational/experimental while I was attending university in the UK. I only used maybe once every few months. The mushrooms I only tried one time when I went on my Amsterdam trip. I was never addicted to anything, or needed any kind of rehabilitation. It was all from curiosity, and I don't plan on ever doing it again. Approximate count: Marijuana: 5 times Cocaine: 4 times MDMA: 5 times Mushrooms: 1 time.

Item 1 at 51 of 58.

In Applicant's Office of Personnel Management (OPM) personal subject interview (PSI) on January 14, 2010, she admitted more extensive illegal drug use.[5] Applicant used cocaine approximately every two to three months from November 2006 to November 2008 for a total of eight to twelve times. She purchased one or two grams of cocaine on three or four occasions. She shared cocaine with others.

Applicant used MDMA every three or four months with friends from November 2007 to May 30, 2009. She purchased one or two grams of MDMA, and shared her MDMA with friends. From November 2006 to December 2008, she used marijuana four times every two or three months. She purchased one-eighth of an ounce of marijuana on one occasion. In February or March 2008 in Amsterdam, she purchased and used hallucinogenic mushrooms. She was unaware possession and use of hallucinogenic mushrooms or psilocybin in Amsterdam was illegal. She did not subsequently possess or use psilocybin.

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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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[5] The information in this paragraph and the next paragraph is from Applicant's OPM PSI. (Item 3)

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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 applicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), § 3.1. 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 about 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

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 drug involvement-related conditions that could raise a security concern and may be disqualifying. Two drug involvement disqualifying conditions could raise a security concern and may be disqualifying in this particular case. AG ¶ 25(a), indicates, "any drug abuse,"[6] and AG ¶ 25(c) states, "illegal drug possession," could raise a security concern and may be disqualifying in Applicant's case.

AG ¶¶ 25(a) and 25(c) apply. The other disqualifying conditions listed in AG ¶ 25 are not applicable. These disqualifying conditions apply because Applicant used and possessed marijuana, cocaine, psilocybin, and ecstasy.[7] She disclosed her drug abuse in her SF 86, her OPM PSI, her responses to DOHA interrogatories, and her SOR response. She possessed marijuana, cocaine, psilocybin, and ecstasy before she used these substances.

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;
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> (2) changing or avoiding the environment where drugs were used;
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> (3) an appropriate period of abstinence; and
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> (4) a signed statement of intent with automatic revocation of clearance for any violation.

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[6]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."

[7]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, ecstasy or 3, 4 methylenedioxymethamphetamine, and psilocybin are Schedule (Sch.) I controlled substances. *See* Sch. I(c)(9), I(c)(10), and I(c)(15) 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). 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."[8]

Applicant used cocaine approximately every two to three months from November 2006 to November 2008. She used MDMA every three or four months with friends from November 2007 to May 30, 2009. From November 2006 to December 2008, she used marijuana four times every two or three months. Applicant's last MDMA use was recent because it was in May 2009, or about 19 months ago. She recognizes the adverse

[8] 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.

impact on her life of drug abuse. These actions create some certitude that she will continue to abstain from drug use. AG ¶ 26(a) partially applies to her drug-related offenses.[9]

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. She has disassociated from her drug-using associates and contacts. She has broken her patterns of drug abuse, and she has changed her life with respect to illegal drug use. Applicant offered to provide "a signed statement of intent with automatic revocation of clearance for any violation." Although she has abstained from drug abuse for 19 months, in light of her extensive period of drug abuse, she has not had a sufficient period of abstinence to fully mitigate drug involvement concerns. AG ¶ 26(b) partially apples.

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, psilocybin, and ecstasy were never prescribed for her. She did not satisfactorily complete a prescribed drug treatment program. Moreover, she cannot receive full credit because she did not provide "a favorable prognosis by a duly qualified medical professional, including rehabilitation and aftercare requirements."

In conclusion, Applicant ended her drug abuse in May 2009, about 19 months ago.[10] The motivations to stop using illegal drugs are evident. She understands the

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[9]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.

[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 marijuana, cocaine, psilocybin, and MDMA. Her repeated abuse of these particular drugs is relevant in the whole-person analysis. 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.

(punctuation corrected). *See also* ISCR Case No. 04-07714 at 5-7 (App. Bd. Oct. 19, 2006), *see* Whole-Person Concept at pages 8-9, *infra*.

adverse results from drug abuse.[11] She has shown or demonstrated a sufficient track record of no drug abuse to partially, but not completely, mitigate drug involvement as a bar to her access to classified information. If she continues to refrain from drug abuse, there is no reason why she would not be able to fully mitigate drug involvement concerns after a more significant period of abstinence from illegal drug possession and use has elapsed.

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 she used illegal drugs. Applicant's SF 86, admitted that she used illegal drugs. She continued to admit her drug use in her OPM interview, response to DOHA interrogatories, and response to the SOR. Her admissions of drug use are a positive sign that Applicant is taking responsibility for her drug use in the context of her security clearance. She only possessed and used hallucinogenic mushrooms or psilocybin on one occasion. Her one-time abuse of psilocybin is mitigated. She stopped using all illegal drugs in May 2009, and has made a commitment to refrain from using illegal drugs in the future. She knows the consequences of drug abuse. Applicant contributes to her company and the Department of Defense. There is no evidence of any disciplinary problems at work. For example, there is no evidence she used illegal drugs at work. There is no evidence of disloyalty or that she would intentionally violate national security. Her employer has sponsored her for a security clearance, which is an indication of her good character and work performance. Her work

[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.

performance shows some responsibility, rehabilitation and mitigation. Her supervisors evidently support her or she would not have been able to retain her employment after her security clearance was called into question.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant did not fully admit the extent of her drug abuse on her SF 86, and her more extensive statement of her drug abuse in her OPM PSI and in her SOR response is accepted as more accurate. Applicant possessed and used marijuana on numerous occasions, and to a lesser extent, cocaine and MDMA. She possessed and used illegal drugs overseas from September 2006 to May 2009. She has not received drug counseling or treatment. Each time she used illegal drugs, she possessed the illegal drugs before she used them. Each time she possessed and used illegal drugs, she showed poor judgment. Most of her drug use involved use in a social setting with drug-using friends. Essentially she yielded to peer pressure and accepted and used drugs she received or purchased herself from others. She knew what she was doing was wrong, and did it anyway. Her poor judgment exposed her to possible sanctions from her university or law enforcement officials.

I have carefully applied the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude she has not mitigated the drug involvement security concern at this time.

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
Subparagraphs 1.a to 1.f:	Against Applicant
Subparagraphs 1.g and 1.h:	For Applicant

Conclusion

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

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MARK HARVEY
Administrative Judge