



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



In the matter of:)
)
-----) ISCR Case No. 07-04845
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: *Pro Se*

March 24, 2008

Decision

HARVEY, Mark W., Administrative Judge:

Applicant failed to mitigate security concerns arising under Guidelines H (drug involvement), E (Personal Conduct) and J (Criminal Conduct). Clearance is denied.

Statement of the Case

On October 30, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,¹ pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.² The SOR alleges security concerns under

¹Item 1 (Statement of Reasons (SOR), dated Oct. 30, 2007). Item I is the source for the facts in the remainder of this paragraph unless stated otherwise.

²On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made

Guidelines H (Drug Involvement), E (Personal Conduct) and J (Criminal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue his security clearance, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations on November 21, 2007, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated December 11, 2007, was provided to him on January 3, 2008, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.³ Applicant's response was due on February 2, 2008. Applicant did not respond to the FORM. The case was assigned to me on March 13, 2008.

Procedural Ruling

Department Counsel requested amendment of the SOR to add an allegation that various false statements on security clearance applications and to a National Security Agency (NSA) investigator violate 18 U.S.C. § 1001 (FORM at 2-3) in addition to being a Guideline E security concern as articulated in SOR ¶ 2. My copy of the SOR includes the requested amendment (Item 1 at SOR ¶ 3.a). Applicant did not object to the amendment, and the amendment is approved.

Department Counsel offered supporting documents to show that Applicant's admissions concerning the use of "whippets" involved inhalants (Items 10 and 11). Applicant did not object to admission of Items 10 and 11. Items 10 and 11 are admitted. I will take administrative notice⁴ of the information concerning use of whippets in note 8, *infra*.

under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case.

³Defense Office of Hearings and Appeals (DOHA) transmittal letter, is dated Dec. 14, 2007; however, Applicant's receipt is signed, and dated January 3, 2008. The DOHA transmittal letter informed Applicant that he had 30 days after Applicant's receipt to submit information.

⁴Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from government reports. See Stein, *ADMINISTRATIVE LAW*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

Findings of Fact

As to the SOR's factual allegations, Applicant admitted in his response to the SOR all of the SOR's allegations of illegal drug use in SOR ¶¶ 1.a to 1.c. He also admitted using drugs while holding a security clearance, SOR ¶ 2.a, and admitted his answers to questions on his security clearance applications concerning drug use were incorrect as alleged in SOR ¶ 2. However, he said he misinterpreted the questions. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is a 38-year-old software engineer.⁵ In 1995 he received a masters degree in electrical engineering. He has no military service. He has never married and has no children. He has been employed for the last 17 years primarily as an electrical or software engineer.

Drug Use⁶

Applicant used marijuana from 1985 to 1994 about twice a month, and from 1994 to December 2003, he used marijuana about three-to-four times per year. He purchased the marijuana on about half of the occasions that he used it. He used cocaine about five times from 1989 to August 2003. He purchased and used hallucinogenic mushrooms about five times from 1989 to 1997. He purchased and used LSD⁷ about five times from 1987 to 1993. He purchased and used "whippets"⁸ twice, and used "whippets" an additional eight times without purchasing it from 1991 to 1995.

⁵Item 4 (Electronic Questionnaire for Investigations Processing (e-QIP), dated July 13, 2006, will be referred to as a security clearance application in this decision) is the source for the facts in this paragraph, unless otherwise stated.

⁶ Applicant admitted the drug use in this section to a representative of the Associate Directorate for Security and Counterintelligence (ADS&CI) on March 18, 2004. See Item 9 at 2, 11. On November 21, 2007, he reaffirmed the drug use as described to the ADS&CI representative. See Item 2 (Applicant's response to the SOR). Item 9 at 2, 11 and Item 2 are the sources for the facts in the Drug Use subsection of this decision, unless stated otherwise.

⁷ Lysergic acid diethylamide is also commonly known as "LSD." See *Kimbrough v. United States*, 128 S. Ct. 558 (2007). LSD is classified as a Schedule I drug in the Controlled Substances Act of 1970. LSD is a potent hallucinogenic substance. See Drug Enforcement Administration website (Available at: <http://www.fas.org/irp/agency/doj/dea/product/lsc/lsc-4.htm> .)

⁸ Abuse of inhalants, such as nitrous oxide, is also referred to as use of "whippets," and such use may, "cause a person to have slurred speech, difficulty maintaining balance, be slow to respond to questions, noises and speech, be immune to pain, and lapse into unconsciousness." See, e.g., *Peschko v. City of Camden*, 2006 U.S. Dist. LEXIS 43871 (D.C. N.J. 2006). See also Items 10 (Drug Enforcement Administration, Drugs of Abuse Extract, Chapter 9 (Inhalants) and 11 (National Institute of Drug Abuse, InfoFacts – Inhalants, dated May 2006). The particular chemical Applicant inhaled is not included in the record.

Applicant held a Secret clearance from December 1991 until 1997 while employed by the U.S. Army. He held a Top Secret clearance with access to Sensitive Compartmented Information (SCI) from May 1997 to March 2000, while employed by a defense contractor. See Applicant's Response to SOR ¶ 1.c.

Falsification of Security Clearance Applications and 2003 NSA Interview

Applicant responded, "No" and failed to disclose or fully disclose his illegal drug possession and/or use in response to the following questions on his security clearance applications in 1991, 1996, 2003 and 2004:

Question 25 of his application dated October 7, 1991, (Item 5) asked:

25. Illegal Drugs and Alcohol--a. In the last 5 years, have you used, possessed, supplied, or manufactured any illegal drugs? When used without a prescription, illegal drugs include marijuana, cocaine, . . . hallucinogenics (LSD . . .), [or] stimulants (cocaine . . .) (NOTE: *The information you provide in response to this question will not be provided for use in any criminal proceedings against you.*) (Emphasis in original).

Questions 24a and 24b of his application of December 5, 1996, (Item 6) asked:

24. Your Use of Illegal Drugs and 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.

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, . . . [or] hallucinogenics (LSD, PCP, etc.)?

b. Have you ever illegally used a controlled substance . . . while possessing a security clearance . . . ?

Questions 27 and 28 of his applications dated February 2, 2003, and March 18, 2004, (Item 7) asked:

27. Your Use of Illegal Drugs and Drug Activity-Illegal Use of Drugs.

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, . . . [or] hallucinogenics (LSD, PCP, etc.), . . . ?

28. Your Use of Illegal Drugs and Drug Activity-Use in Sensitive Positions Have you EVER illegally used a controlled substance while . . . while possessing a security clearance . . . ?

For Question 24 of his application dated May 4, 2006, and on July 13, 2006, (Item 4) he responded, "Yes" and disclosed his marijuana use from July 2000 (estimated) to December 2002, approximately once every two months. Question 24 asked for illegal drug use for other drugs in addition to marijuana:

24. Your Use of Illegal Drugs and Drug Activity a. Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, . . . hallucinogenics (LSD, PCP, etc.)?

During an interview with a National Security Agency (NSA) Investigator on September 3, 2003, as part of a background investigation pertaining to his eligibility for access to SCI information, Applicant denied any prior illegal drug use.⁹ On July 7, 2004, the NSA denied his request for eligibility for access to SCI information. On August 2, 2004, and September 6, 2004, he appealed the NSA's unfavorable determination. However, his appeals were subsequently denied.

On January 10, 2007, an Office of Personnel Management (OPM) investigator interviewed Applicant, and he disclosed that he used marijuana from 2000 to 2002 approximately once every two months with two friends, who were named in the interview.¹⁰ He said he ended his drug use in 2002. Although he did not disclose the extent and variety of his drug abuse in the 2007 OPM interview, the summary is unclear about whether he was specifically asked about non-marijuana drug use, and marijuana use with others after 2002.

On November 21, 2007, Applicant said that he did not disclose his illegal drug use because his interpretation at the time he completed his security clearance applications was that "using the listed substances in rare recreational circumstances was not what I constituted (sic) as 'use.' The most important lesson is that, although a misinterpretation, I now realize the lack of consideration of my activities and accuracy of the answers from the beginning inevitably cast doubt and the appearance of falsification."

⁹ Item 2 at 3, 5; Item 9 (NSA Clearance Adjudication, July 7, 2004) at 2 is the source for the facts in this paragraph.

¹⁰ Item 8 at 4-5 is the source for the facts in this paragraph. He affirmed the accuracy of the OPM interview (as summarized in the OPM Report of Investigation) in his response to a DOHA interrogatory on Aug. 9, 2007.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"¹¹ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. 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).¹²

¹¹ See Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

¹² "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Guideline H (Drug Involvement)

Guideline ¶ 24 articulates the Government’s concern concerning drug¹³ involvement stating:

[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.

Three drug involvement disqualifying conditions could raise a security concern and may be disqualifying in this case: “any drug abuse,”¹⁴ “illegal drug possession,” and

¹³Guideline ¶ 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 LSD are Schedule 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). Cocaine is a Schedule II controlled substance. See Sch. II(a)(4).

¹⁴ Guideline ¶ 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.”

“any illegal drug use after being granted a security clearance.” AG ¶¶ 25(a), 25(c), and 25(g). The other five disqualifying conditions listed in AG ¶ 25 are not applicable. These three disqualifying conditions apply because Applicant used a variety of illegal drugs from 1985 to December 2003, including marijuana, cocaine, hallucinogenic mushrooms, LSD and whippets. He used each of these illegal drugs at least once while holding a security clearance. His illegal drug use breached the government’s trust encompassed by holding a security clearance and raises especially serious security concerns.

The Government produced substantial evidence of these three disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove mitigation. AG ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence; and,
 - (4) a signed statement of intent with automatic revocation of clearance for any violation.
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and,
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Security concerns can be mitigated based on AG ¶ 26(a) by showing that the drug offenses happened so long ago, were so infrequent, or happened under such circumstances that they are unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based “on a careful evaluation of the totality of the record within the parameters set by the directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant’s last use of marijuana occurring approximately 17 months before the hearing was not recent.

If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.”¹⁵

AG ¶ 26(a) does not fully apply because Applicant’s last illegal drug use was in December 2003, which is still sufficiently recent to remain a concern. His overall illegal drug use lasted approximately 18 years, and involved numerous uses of marijuana, and several other illegal drugs with a much lesser frequency.¹⁶ I am not fully convinced that he ended his drug use in December 2003 because he did not provide any corroboration that his drug use ended.¹⁷ His failure to present corroboration about his rehabilitation from medical/psychiatric personnel, co-workers, neighbors, family or friends is a factor in this decision.¹⁸ Based on all the facts and circumstances, including the falsifications

¹⁵ 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.

¹⁶ 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.

¹⁷ See whole person analysis, *infra*. See ISCR Case No. 04-07360 at 2, 3 (App. Bd. Sep. 26, 2006) (indicating when a mitigating condition cannot be fully applied, “some credit” is still available under that same mitigating condition).

¹⁸Administrative judges “must look at the record for corroboration of Applicant’s testimony.” ISCR Case 02-03186 at 3 (App. Bd. Feb. 16, 2006). Moreover, a judge may consider “Applicant’s failure to present documentary evidence in corroboration of his denials and explanations.” ISCR Case 01-20579 at 5 (App. Bd. Apr. 14, 2004) (holding Applicant’s failure to provide reasonably available corroborative evidence may be used in common sense evaluation to determine whether Applicant’s claims are established). In ISCR Case 01-02677 at 7 (App. Bd. Oct. 17, 2002), the Appeal Board explained:

of his security clearance applications, his less than full candor in his 2003 NSA interview, and his 2007 less-than-credible explanation in his response to the SOR concerning the security clearance falsifications, he has not met his burden of establishing that his drug use will not recur. Because he may again use illegal drugs, his current reliability, trustworthiness and good judgment is not completely restored.

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. Although he has abstained from drug abuse since December 2003, he did not provide “a signed statement of intent with automatic revocation of clearance for any violation.” Guideline ¶ 26(b) is not applicable.

AG ¶ 26(c) is not applicable because his abuse of marijuana did not follow an illness, and marijuana was never prescribed for him. AG ¶ 26(d) is not applicable because he has not completed a prescribed drug treatment program, and there has not been a favorable prognosis by a duly qualified medical professional.

In sum, Applicant ended his drug abuse in December 2003. However, his credibility about abstaining from illegal drug use is damaged by his submission of multiple falsified security clearance applications. He lied in his 2003 NSA interview. Although the motivations to stop using drugs are evident,¹⁹ he did not disclose any internal motivation to refrain from drug abuse. He has not shown or demonstrated a sufficient track record of no drug abuse.

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

While lack of corroboration can be a factor in evaluating the reliability or weight of evidence, lack of corroboration does not automatically render a piece of evidence suspect, unreliable, or incredible. . . . Evidence that lacks corroboration must be evaluated in terms of its intrinsic believability and in light of all the other evidence of record, including evidence that tends to support it as well as evidence that tends to detract from it.

¹⁹Retention 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.

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

(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 failed to disclose or fully disclose his illegal drug possession and/or use on his security clearance applications in 1991, 1996, 2003, 2004, and 2006. He falsely denied illegal drug use during a 2003 NSA interview. In 2007, his claimed rationale in his SOR response for providing false statements on his security clearance applications was because his drug use was “in rare recreational circumstances” and not what he considered to be drug “use.” He has held a security clearance for many years, and has a masters degree. He is intelligent, well educated, and mature. His explanation is not credible. AG ¶¶ 16(a) and 16(b) both apply.

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

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

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

(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.

None of the mitigating conditions in AG ¶ 17 apply. Applicant's falsification of his security clearance application on July 13, 2006, is recent.²⁰ He did not promptly inform the government of the falsification. He attempted to mislead a security investigation. He did not receive counseling designed to improve his conduct. Applicant's claim that his illegal drug use was recreational and therefore not reportable to security officials is not credible. No one advised him to falsify his security clearance applications or to lie to a NSA investigator. He admitted the false statements at issue, and the falsification allegations are all substantiated. His statement that he learned from his mistakes does not convince me that similar misbehavior is unlikely to recur. His falsifications cast doubt on his current reliability, trustworthiness, and good judgment. Security concerns pertaining to his personal conduct are not mitigated.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations."

AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying, ¶ 31(a), "a single serious crime," and ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted." SOR ¶ 3.a alleges that Applicant violated 18 U.S.C. § 1001 by falsifying his security clearance applications in 1991, 1996, 2003, 2004, and 2006. Applicant deliberately provided false information. He falsely denied illegal drug use during a 2003 NSA interview.

For a violation of 18 U.S.C. § 1001 to occur, the falsification must be material. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512

²⁰ The falsifications cannot be considered in isolation or piecemeal. 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)). When the falsifications are considered in connection with the falsifications, the personal conduct in SOR ¶ 2 cannot be mitigated under AG ¶ 16(c). His misconduct continues to cast doubt on Applicant's current reliability, trustworthiness, or good judgment.

(1995): as a statement having a “natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed.” *See also United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004).

If Applicant had provided accurate answers on his security clearance applications, his accurate answers are capable of influencing the government to deny his security clearance, as indicated in the Drug Involvement section of this Analysis. His illegal drug use is sufficiently recent and serious²¹ to jeopardize approval of his security clearance. Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a \$10,000 fine). Accordingly, AG ¶¶ 31(a) and 31(c) apply because Applicant violated 18 U.S.C. § 1001.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

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

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and,

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

AG ¶¶ 32(a) – 31(d) do not apply. Applicant's false statement occurred on his 2006 security clearance application, which is recent. It casts doubt on Applicant's current reliability, trustworthiness and good judgment. He was not pressured or coerced into making his false statements. His expression that he has learned from his mistake is undercut by his incredible explanation in his SOR response that he did not believe his drug use was really drug use. He admitted making the false statements, and for the reasons stated previously, the offense is substantiated.

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):

²¹ In Applicant's case, this includes aspects such as, the seriousness of the misconduct, and the number of violations of the law, regardless of whether the misconduct resulted in an arrest or conviction.

(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) 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.

Applicant earned a masters degree in electrical engineering. He has been employed for the last 17 years primarily as an electrical or software engineer, working for the U.S. Army and government contractor. His record of good employment (aside from falsifying his security clearance applications and lying to an NSA investigator) weighs in his favor. This shows some responsibility, rehabilitation, and mitigation.

The evidence against mitigating Applicant's conduct is more substantial. Applicant used a variety of illegal drugs from 1985 to December 2003, including marijuana, cocaine, hallucinogenic mushrooms, LSD and whippets. He used each of these illegal drugs at least once while holding a security clearance. He failed to fully disclose his illegal drug possession and/or use on his security clearance applications in 1991, 1996, 2003, 2004, and 2006, and during a 2003 NSA interview. His decisions not to fully disclose his drug use were deliberate and intentional. His falsifications and drug use were knowledgeable, voluntary, and not isolated. He was sufficiently mature to be fully responsible for his conduct. Criminal misbehavior and drug use is not prudent or responsible. His falsification of his 2006 security clearance is particularly aggravating, and weighs most heavily against granting or continuing his security clearance. He did not receive counseling or therapy, and may not have a clear understanding about how to avoid problematic situations and why he engaged in the misconduct. I have persistent and serious doubts about his judgment, reliability, and trustworthiness.

Applicant's criminal misconduct calls into question his current ability or willingness to comply with laws, rules and regulations. 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, personal conduct and criminal 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"²² and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant

²²See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not 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
Subparagraphs 1.a(1) to 1.a(5):	Against Applicant
Subparagraphs 1.b(1) to 1.b(4):	Against Applicant
Subparagraphs 1.c(1) to 1.c(2):	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a to 2.g:	Against Applicant
Subparagraph 2.h:	For Applicant
Subparagraph 2.i:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

Mark W. Harvey
Administrative Judge