DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 04-08651
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

September 30, 2008

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Decision

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (e-QIP) on March 2, 2006. On May 29, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines H and E. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on June 9, 2008; answered it on June 24, 2008; and requested a hearing before an administrative judge. DOHA received the request on June 25, 2008. Department Counsel was ready to proceed on July 17, 2008, and the case was assigned an administrative judge on July 23, 2008. It was reassigned to me on July 25, 2008. DOHA issued a notice of hearing on July 29, 2008, scheduling the hearing for August 27, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 10 were admitted in evidence without objection. Applicant testified on his own behalf, and submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. The record closed upon adjournment of the hearing. DOHA received the transcript (Tr.) on September 11, 2008.

Amendment of SOR

On my own motion, I amended the SOR to correct Applicant's name by adding the suffix, "Jr." (Tr. 45-46).

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations under Guideline H and denied the allegations of falsification under Guideline E. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 34-year-old engineer/scientist employed by a federal contractor. He has worked for his current employer since February 2002. He worked for another federal contractor from January 1997 to February 2002. He received a security clearance in February 1998, and it was revoked in February 2003 because of delinquent debts (GX 3 at 7; Tr. 44).

On July 21, 2004, at about 6:00 p.m., Applicant was stopped by police because he was driving well below the speed limit and weaving across the center line of the road. The officer told Applicant he would issue him a warning. As the officer was writing the warning, he asked Applicant about his trip. He noticed that Applicant was extremely nervous, spoke so rapidly he was not understandable, and visibly agitated. The officer gave Applicant his warning and told him he was free to leave.

As Applicant was returning to his car, the officer asked him several more questions about his travel plans. He advised Applicant that he was driving on a highway where contraband traffic was heavy. He asked Applicant if he had any guns, knives, drugs or large sums of money in the car. When he asked Applicant if he had any cocaine, Applicant hesitated and then said no. The officer asked Applicant if he would consent to a search of his car, and Applicant declined. At some point thereafter, Applicant was handcuffed and placed in the police car (Tr. 60-61).

The officer summoned a canine team, and it arrived at 7:35 p.m. When the canine alerted, the police searched Applicant's car and found a baggy of methamphetamine in the center console of the front seat. Applicant was advised of his

rights and questioned. He admitted the substance was methamphetamine, he had purchased it for $20 on that morning, and that he had already used about half of it. He was released at about 8:20 p.m., about two and a half hours after he was initially stopped. (GX 6 at 1-5).

In October 2004, the local prosecutor charged Applicant with possession of a dangerous drug and possession with intent to use drug paraphernalia. Both offenses were charged as felonies (GX 5 at 2). A summons was issued in November 2004, and an arrest warrant was issued in December 2004 (GX 7). The certificate of service on the summons reflects it was mailed to Applicant's home address on November 17, 2005 by certified mail, return receipt requested; but there is no return receipt in the record (GX 4 at 7). The certificate of execution on the arrest warrant is blank (GX 4 at 6).

When Applicant submitted his e-QIP in March 2006, he disclosed two shoplifting arrests that were disposed of by adult diversion. In response to the question about prior arrests, however, he did not disclose the July 2004 incident. He also did not disclose it during an interview with a security investigator on May 29, 2007 (GX 9; Tr. 32-35). The investigator discovered the record of the incident after this interview.

During another interview with a different security investigator on July 30, 2007, Applicant told the investigator he did not disclose the July 2004 incident on his e-QIP because it was his understanding he was not arrested or charged with any crime. Applicant stated he had heard nothing from law enforcement officials about the incident. He also told the investigator he did not disclose the incident because he did not think it would "come up" during his security investigation, and he was afraid he would not receive a clearance if it were disclosed (GX 3 at 11). At the hearing, he admitted he intentionally omitted the information (Tr. 66).

In March 2008, Applicant responded to DOHA interrogatories and disclosed a one-time use of methamphetamine in July 2007, and he stated he did not purchase it (GX 3 at 3). At the hearing, he admitted his answers to the interrogatories were false (Tr. 70).

Regarding the source of the methamphetamine, Applicant told the second investigator a friend had given him the methamphetamine, and he had snorted one line of it about an hour before he began driving (GX 3 at 10). In his answer to the SOR, Applicant stated he could not remember if he bought the methamphetamine or it was given to him.

Applicant retained an attorney after he learned about the charges arising from the July 2004 incident. He entered an initial appearance on April 16, 2008, represented by counsel (GX 5 at 3-4). He was advised of the charges, ordered to be fingerprinted, and released. (GX 5 at 5).

On May 27, 2008, Applicant offered a plea agreement providing for pleas of guilty and entry into a drug offender treatment program. In return for successful completion of

the treatment program, the agreement provides for dismissal of the charge of possessing a dangerous drug, reducing the charge of possessing drug paraphernalia from a felony to a misdemeanor, and a fine of $100 plus costs (AX B).

Applicant completed the comprehensive evaluation and drug screening phase of his treatment, and he began weekly group therapy on June 17, 2008 (AX C and D). He will not complete his treatment program until December 2008 (Tr. 72).

Applicant testified he started using methamphetamine sometime before September 2001, initially using it on weekends, and then progressing to daily use (Tr. 53-55). He admitted purchasing it on more than one occasion (Tr. 61). He last used methamphetamine in July 2004.

Applicant testified he no longer uses drugs or consumes alcohol. He has moved across the country to a new job, no longer associates with old friends, and is attending church regularly. In April 2008, he was given custody of his nine-year-old daughter, to whom he is very devoted (AX A). He is a single parent. A friend who has known him for 20 years believes Applicant is now focused on the welfare of his daughter and has put himself on the right path toward a productive life (AX E).

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Policies

"[N]o 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 applicants 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 applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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). "[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

Guideline H, Drug Involvement

The SOR alleges a single arrest on July 21, 2004, for felony possession of a dangerous drug and felony use or possession of drug paraphernalia with intent to use. The concern under this guideline is as follows: "Use 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 ¶ 24. This guideline encompasses use or misuse of "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). AG ¶ 24(a)(1). Drug abuse is "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." AG ¶ 24(b).

Disqualifying conditions under this guideline include "any drug abuse," and "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution" AG ¶¶ 25(a) and (c). The evidence raises these two disqualifying conditions, shifting the burden to Applicant to produce evidence to rebut, explain,

extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

The SOR alleges only a single use of methamphetamine, but the evidence reflects years of weekly and sometimes daily use, and it also reflects purchases of methamphetamine on more than one occasion. Conduct not alleged in the SOR may be considered: "(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3." ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). I have considered the evidence of uncharged misconduct for these limited purposes.

Security concerns raised by drug involvement may be mitigated by showing that "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." AG ¶ 26(a). The first prong of ¶ 26(a) ("happened so long ago") focuses on the recentness of drug involvement. 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 evidence. 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." *Id*.

Applicant's last drug involvement was more than four years ago. He has changed his lifestyle, changed his environment, and is receiving treatment. I conclude AG ¶ 26(a) is established. Any doubt about his current reliability, trustworthiness, or good judgment arises from his lack of candor, discussed below, and not from his past drug involvement.

Security concerns arising from drug involvement also may be mitigated by evidence of "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; (4) a signed statement of intent with automatic revocation of clearance for any violation." AG ¶ 26(b)(1)-(4). Applicant has established the first three of the four indicia of "demonstrated intent" encompassed in this mitigating condition.

Security concerns also may be mitigated by "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." AG ¶ 26(d). This mitigating condition is not established because Applicant has not completed his drug treatment.

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified his e-QIP by failing to discose his pending felony charges for possession of drugs and drug paraphernalia (SOR ¶¶ 1.a and 1.b); and failing to disclose his purchase and use of drugs (SOR ¶ 1.c and 1.d). It also alleges he deliberately failed to disclose the July 2004 incident during an interview with a security investigator in May 2007 (SOR ¶ 1.e); failed to disclose purchases of illegal drugs during an interview with a security investigator in July 2007 (SOR ¶ 1.f); and deliberately falsified his response to DOHA interrogatories in January 2008 when he represented that he had only used methamphetamine once and had never purchased it (SOR ¶ 1.g).

The concern under this guideline is set out in AG ¶ 15 as follows:

> 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.

A disqualifying condition may be raised by "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." AG ¶ 16(a). A disqualifying condition also may be raised by "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative." AG ¶ 16(b).

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time of the omission. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

Applicant admitted at the hearing that he intentionally concealed his use of methamphetamine when he submitted his e-QIP. He was vague on the question whether he purchased the methamphetamine in his possession in July 2004, but he admitted earlier purchases. He admitted he intentionally concealed the July 2004 incident during his security interview in May 2007. He admitted his responses to DOHA interrogatories were false.

Based on all the evidence, I conclude Applicant probably did not receive the criminal charges, summons, and arrest warrant, and was not aware that formal charges

against him were pending at the time he submitted his e-QIP. He was aware, however, of his drug involvement; and he intentionally concealed it on his e-QIP, during his May 2007 security interview, and in response to DOHA interrogatories in January 2008. Accordingly, I conclude AG ¶¶ 16(a) and (b) are raised.

Security concerns raised by false or misleading answers on a security clearance application may be mitigated by showing that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." AG ¶ 17(a). Applicant made no attempt to correct his omissions and false statements, even though he had an opportunity during the May 2007 security interview. He did not make full disclosure until the hearing. I conclude AG ¶ 17(a) is not established.

Security concerns based on personal conduct may be mitigated by showing "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." AG ¶ 17(c). Deliberate, knowing, and material falsifications of an e-QIP and during security interviews are felonies, not minor offenses. *See* 10 U.S.C. § 1001. Applicant's falsifications were recent and did not occur under unique circumstances. His lack of candor casts doubt on his reliability and trustworthiness. I conclude this mitigating condition is not established.

Whole Person Concept

Under the whole person concept, an 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. An 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment. I have incorporated my discussion under Guidelines H and E in my whole person analysis.

Applicant is an intelligent adult. Since July 2004, he has taken significant steps to change his lifestyle, abstain from drugs, become a responsible adult, and care for his nine-year-old daughter. He disclosed his drug abuse in detail at his hearing and candidly admitted falsification of material information. This candor at the hearing is a positive indication of rehabilitation. His lack of candor on his e-QIP and during the security investigation preceding the hearing, however, raises doubts about his current reliability and trustworthiness. After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on drug involvement, but he has not mitigated the security concerns based on personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline H (Drug Involvement):	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	For Applicant
Subparagraphs 2.c-2.g:	Against Applicant

Conclusion

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

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LeRoy F. Foreman
Administrative Judge