DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
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----------	)	ISCR Case No. 07-05139
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: *Pro Se*

June 26, 2008

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Criminal conduct concerns raised by his felony drug conviction are mitigated by the passage of time and compliance with sentencing terms. Personal conduct concerns persist because he denied any felony convictions when he applied for a security clearance. Eligibility for a security clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Sensitive Positions (e-QIP) on October 26, 2006. On August 31, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J and Guideline E as the bases for its decision to deny his request for a security clearance. 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.

On September 5, 2007, Applicant answered the SOR in writing and requested a decision without a hearing. On February 27, 2008, the government submitted a File of Relevant Material (FORM) consisting of 11 exhibits (Items 1-11). DOHA forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. Applicant did not respond by the April 3, 2008, due date, and on May 30, 2008, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Based on a review of the government's FORM, including Applicant's answer to the SOR (Item 4), eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Motion to Amend SOR

DOHA alleged in part under Guideline J that Applicant was disqualified from having a security clearance granted or renewed under 10 U.S.C. § 986 because he had been incarcerated from March 15, 1990, to August 1, 1991, and then on work release until December 2. 1991, following his conviction of felony possession of cocaine with intent to distribute (SOR ¶ 1.b). In the FORM, the government moved to withdraw SOR ¶ 1.b due to the repeal of 10 U.S.C. § 986. On January 28, 2008, the President signed into law Public Law 110-181, the National Defense Authorization Act for Fiscal Year 2008, Section 1072 which repealed 10 U.S.C. Section 986, formerly known as the Smith Amendment. Under 50 U.S.C. § 435c, after January 1, 2008, an employee of a contractor of a federal agency who has been convicted in any court of the United States of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated under that sentence for not less than one year, may not be granted or renewed a security clearance, absent an express waiver, if that clearance provides for access to special access programs, restricted data, or sensitive compartmented information. Since Applicant seeks a collateral clearance, there is good cause to grant the amendment. Accordingly, SOR ¶ 1.b is considered withdrawn. Findings and conclusions still warrant and will be made as to SOR ¶ 1.a concerning Applicant's arrest, conviction, and sentence on the drug charge, and as to SOR ¶ 2.a concerning his alleged failure to list that offense on his SF 86.

Findings of Fact

DOHA submits under Guideline J, criminal conduct, as amended, that Applicant was sentenced to 20 years in prison, 14 years suspended, for a June 1989 charge of felony possession of cocaine with intent to distribute, and that he was incarcerated from March 15, 1990, to August 1, 1991, was on work release to December 2, 1991, and remains on probation to 2010 (SOR ¶ 1.a). Under Guideline E, personal conduct, Applicant is alleged to have deliberately falsified an Electronic Questionnaire for

Investigations Processing (e-QIP) executed on October 26, 2006,[1] in that he responded negatively to whether he had ever been charged with or convicted of a felony offense (SOR ¶ 2.a). In his Answer, Applicant denied the alleged falsification without explanation but admitted the felony drug charge, conviction, and sentence.[2] After considering the evidence of record, I make the following findings of fact.

Applicant is a 52-year-old painter who has worked for his present employer, a defense contractor, since April 1992 (Item 5). The record available for review does not reflect that he holds a security clearance.

In about 1986, Applicant began to use cocaine. He continued his involvement with the drug by himself or at parties approximately three times weekly until June 1989 (Item 6). Sometime in or before June 1989, Applicant began to sell cocaine. He was arrested at his home in June 1989 and charged with possession of cocaine with intent to distribute, a felony. He was jailed for four days and then released on $50,000 bail (Item 6). In early February 1990, he pleaded guilty to the felony charge.[3] He was sentenced to 20 years in the state penitentiary, 14 years of the prison term suspended to be spent on probation with conditions. The conditions were that he be of good behavior, not violate the law, comply with the terms of his parole and probation, including complete any drug/alcohol program deemed appropriate by his probation officer, and pay court costs within two years of his release from confinement. He was also ordered to pay a $5,000 fine at a rate and an amount set by his probation officer prior to the end of his suspension (Items 6, 7, 8, 9).

Applicant was incarcerated from about mid-March 1990, to mid-November 1991.[4] While in custody, he voluntarily attended a drug treatment program consisting of twice weekly group sessions (Item 6). He was on work release for the last five months, from

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[1]The security clearance application admitted as Item 5 is a Standard Form 86-Questionnaire for Sensitive Positions bearing a typewritten entry on page 7 of "SF-86 DATED 10/25/06 ********** END OF EQSP." However, the attached signature page bearing Applicant's handwritten signature and date of "10-26-06" is a signature form for the electronic version (Electronic Questionnaire for Investigations Processing (e-QIP)) of the SF 86.

[2]The Answer submitted as Item 4 consists of three pages. The first two pages are a copy of the original SOR containing Applicant's responses to the Guideline J concerns only, and no response to the Guideline E concern. On November 14, 2007, Applicant's employer of record faxed a copy of the second page of Applicant's SOR also bearing a notarization on September 5, 2007, but containing his responses to the Guideline E concern. DOHA included it as page 3 of Applicant's Answer. It is not clear whether Applicant answered the Guideline E concern in September or in November 2007.

[3]Applicant told a government investigator on February 20, 2007, that he was convicted of a reduced charge of possession of cocaine (Item 6). The FBI also reports, apparently on information from correctional authorities, that Applicant was sentenced to six years for possession of cocaine (Item 7). Yet, the circuit court sentencing record shows he was convicted of cocaine possession with intent to distribute (Item 9). Local police report a charge of possession of cocaine with intent to distribute (Item 8).

[4]The dates of his incarceration are taken from the activity dates reflected on the prisoner location record (Item 10). The release date in November 1991 conforms to the date he indicates he was paroled (Item 6).

June to November 1991 and then paroled. In mid-April 1993, he was discharged from parole and placed on probation for the remainder of his sentence (Items 6, 10). As of February 2007, Applicant had paid his fines in full and was on unsupervised probation. He is scheduled to be released from probation in 2010 (Item 6).

On or about October 25, 2006, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) that was entered into the e-QIP system electronically. On October 26, 2006, he certified that his statements on the e-QIP were "true, complete, and correct to the best of [his] knowledge and belief and [were] made in good faith." (Item 5). A printed form of the completed e-QIP was not included in the file for review.

A Questionnaire for Sensitive Positions (SF 86) was prepared and then printed out on November 7, 2006. "NO" responses were entered as to all the police record inquiries including "23A - FELONY?" (Item 5). The evidence is inconclusive as to who entered the data entries that appear on the SF 86, but the document on its face indicates it is the property of the U.S. Office of Personnel Management (OPM). Item 5 in the FORM includes the SF 86 with Applicant's signature forms from the e-QIP attached. There is no information of record as to how the signature forms for the e-QIP came to be attached to the SF 86, which does not contain a signature block.

A check of Applicant's record with the Federal Bureau of Investigation (FBI) revealed on November 8, 2006, that Applicant had been sentenced to six years in prison in 1990 for "poss cocaine" (Item 7). On February 20, 2007, Applicant was interviewed by an investigator for the Department of Defense about his criminal conduct. Applicant averred he had been arrested in June 1989 for possession of cocaine with intent to distribute, but convicted of a reduced charge of possession of cocaine. He acknowledged his 20-year-prison sentence, 14 years suspended, although he only served 21 months. He denied any violations of his probation, currently unsupervised, from which he will be released in 2010. Applicant denied any use of cocaine since that arrest or any future intent to use drugs (Item 6). There is no indication that the investigator inquired about any omission of the charge from his e-QIP.

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 overarching 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.

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30: "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." Applicant was engaged in the sales of cocaine in at least June 1989 if not before. He told a government investigator in February 2007 that he believed someone had alerted police that he was selling cocaine and that the police had him under surveillance before his arrest in June 1989 (Item 6). In February 1990, Applicant was convicted of possession of cocaine with intent to distribute, a felony offense under state law. Sentenced to serve six years in the state penitentiary, he was paroled in

about November 1991 after 20 months of incarceration. Disqualifying conditions AG ¶ 31(a) ("a single serious crime or multiple lesser offenses") and AG ¶ 31(c) ("allegation or admission of criminal conduct, regardless of whether the person was formally charged") apply because of his felonious criminal conduct. AG ¶ 31(d) ("individual is currently on parole or probation") also is implicated because he is on probation, albeit now unsupervised, until 2010.

Involvement in illegal drug distribution or sales reflects a serious disrespect for the law. Applicant submits in mitigation that he stopped his illegal drug involvement after his arrest on the felony drug charge. Certainly while he was incarcerated from March 1990 to November 1991, he was not in a position to access illegal drugs for sale or personal consumption, and there is no evidence of any involvement with illegal drugs since he was paroled. AG ¶ 32(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") applies in mitigation of his drug sales. The absence of any recurrence of drug-related criminal conduct for some 19 years is also a relevant factor in assessing whether Applicant has demonstrated sufficient reform to warrant favorable consideration of AG ¶ 32(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"). So too is his current probationary status, which although not a *per se* bar to a clearance, raises somewhat his burden of showing successful rehabilitation. The state where he committed the criminal conduct has not yet seen fit to release him. Yet, the fact that his probation apparently has been unsupervised since at least 2007 if not before indicates that he has been compliant with its conditions. He asserts, also with no evidence to the contrary, that he has paid all his fines for his offense. What little can be garnered from the limited information about his work record available for review is that he has been employed by the same company since April 1992, which shows a stable work record. Applicant also took steps to ensure that his drug activity would not recur by voluntarily obtaining counseling while he was in prison. Correctional officials did not consider him at significant risk to re-offend since they granted parole after he served 20 months of the six-year sentence. He is sufficiently rehabilitated of his drug-related criminal conduct to find for him as to SOR ¶ 1.a.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

> 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.

DOHA alleged Applicant deliberately falsified his e-QIP by responding negatively to inquiry concerning whether he had ever been charged with or convicted of any felony offense. Under AG ¶ 16(a), personal conduct concerns are raised by the "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." Since Applicant denied any intentional falsification, albeit with no explanation,[5] the government has the burden to prove that he knowingly and willfully concealed his felony conviction when he applied for his security clearance.

Likely due to the e-QIP being transmitted electronically, the file available for review does not contain the e-QIP on which Applicant allegedly answered "No" to 23a, "Have you ever been charged with or convicted of any felony offense? (Include those under the Uniform Code of Military Justice)." The government submitted a SF 86 dated November 7, 2006 (Item 5), containing the same lines of inquiry but in truncated form (e.g., "23A-FELONY?") with attached signature forms from the e-QIP dated October 26, 2006. The government offered no evidence to explain the process of completing the SF 86, such as who entered the data onto the SF 86 or how Applicant's signature forms for the e-QIP completed days earlier, came to be appended to a SF 86 that on its face is the property of OPM.

However, Applicant was given a copy of the SF 86 with the FORM. His failure to raise any inaccuracies about the SF 86 supports a logical inference that he responded "No" to the relevant police record inquiries when he completed the electronically submitted e-QIP. He has not asserted that he reported his felony conviction on his e-QIP. While a negative response to question 23a does not necessarily prove the willful intent required under AG ¶ 16(a), Applicant offered no explanation for his failure to disclose his felony conviction. Especially given his prison sentence and current probationary status, the evidence supports a reasonable finding of intentional falsification.

About four months after he completed his e-QIP, Applicant was interviewed about his criminal conduct by a government investigator. There is no indication that Applicant was reluctant to discuss his conviction. He admitted someone had alerted police to the fact that he was selling drugs and that he had been using cocaine himself up to three times per week. While this effort at rectification is reasonably prompt, AG ¶ 17(a) ("the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted"), also requires that it be before confrontation. The purpose of the subject interview was to discuss Applicant's criminal conduct, so the government knew of his conviction before the interview. The likely

[5]Department Counsel asserted in the FORM that Applicant in his Answer "is apparently admitted that he did not provide the requested information, but denying that he falsified his [e-QIP]." I am not persuaded that Applicant was admitting to other than that he had been charged and convicted of a felony.

source of the government's information was the FBI record of November 8, 2006 (Item 7), showing that Applicant had been sentenced to six years in prison in 1990. It is not clear whether Applicant volunteered the information up-front. Under the circumstances, I am unable to fully apply AG ¶ 17(a). Moreover, Applicant's recent denial of any intentional falsification casts doubt about whether his representations can be relied on. None of the other mitigating conditions are pertinent.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's involvement with cocaine included frequent use, purchase, and some sales of the drug to others. While felonious criminal conduct reflected extremely poor judgment on his part, it occurred some 19 years ago. He showed some rehabilitation even during his incarceration in that he volunteered for drug counseling, and he was granted work release little more than a year into his six-year sentence. He was paroled early, and within five months of his release, he started with his present employer in April 1992. There is no indication that Applicant has been other than law-abiding, but concerns persist about his judgment, reliability, and trustworthiness, because of his failure to disclose his felony conviction when he applied for his security clearance.

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 J: FOR APPLICANT

Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Withdrawn
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against 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. Eligibility for access to classified information is denied.

ELIZABETH M. MATCHINSKI
Administrative Judge