DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-03286
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 Guidelines 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 on November 6, 2007. On May 12, 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 May 19, 2008; answered it on June 3, 2008, and requested a hearing before an administrative judge. DOHA received the request on June 4, 2008. Department Counsel was ready to proceed on June 12, 2008, and the case was assigned to me on July 29, 2008. DOHA issued a notice of hearing on July 30, 2008, scheduling the hearing for August 25, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified on his own behalf, presented the testimony of three witnesses, and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. The record closed upon adjournment of the hearing. DOHA received the transcript (Tr.) on September 3, 2008.

Findings of Fact

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

Applicant is a 29-year-old systems engineer for a federal contractor. He earned a bachelor of science degree in physics and chemistry in 2002 (AX B) and a M.B.A. in September 2006 (AX C). He has worked for his current employer since October 2007. He has never held a security clearance.

On his security clearance application (e-QIP), Applicant disclosed that he used marijuana about 25 times between September 1998 and May 2002. He also disclosed that he used cocaine about 63 times between September 1998 and the "present" (GX 1 at 33). He signed his application on November 6, 2007 (GX 1 at 36 and 37).

In his response to DOHA interrogatories on March 25, 2008, Applicant again disclosed his uses of marijuana and cocaine, and he also disclosed had used ecstasy about four times a year until December 2005, used methamphetamine twice, and taken pain killers about ten times a year until 2004. He stated he would not use illegal drugs or use prescription drugs unlawfully in the future (GX 2 at 3).

In his response to additional DOHA interrogatories on April 15, 2008, Applicant disclosed using marijuana about 25 times ending in May 2002, using cocaine about 60 times ending in November 2007, and using ecstasy about 20 times ending in 2006. He stated his drug use had been declining over the past three years and it was easy for him to stop when he was offered his current job (GX 3 at 3).

During an interview with a security investigator in January 2008, Applicant admitted using marijuana about 25 times while an undergraduate in college. He remembered purchasing marijuana twice. On all other occasions, someone gave him the marijuana (GX 4 at 1). He also admitted his cocaine use and admitted purchasing cocaine twice while in graduate school and once after he graduated (GX 4 at 2). He admitted using methamphetamine once and ecstasy about 10 times while in college and 10 more times after graduation, usually paying $20 for one pill (GX 4 at 4). Finally, he

admitted traveling to Canada and purchasing 100 or 200 painkiller pills containing codeine without a prescription. The purchase was lawful in Canada, but a prescription was required in the U.S. Sometimes he used the pills for pain relief and sometimes to become intoxicated. He shared the pills with his friends until they were all consumed (GX 4 at 5).

According to the security investigator's summary of the interview, Applicant told the security investigator he did not disclose his methamphetamine use on his e-QIP because methamphetamine is similar to cocaine and he believed his methamphetamine use was covered in his use of cocaine. It also states Applicant told the investigator he did not disclose his use of ecstasy because he did not think the question about illegal drug use covered ecstasy (GX 4 at 4-5), and he told the investigator he did not disclose his illegal use of prescription pain killers because it was an oversight (GX 4 at 5).

Applicant testified he did not disclose his methamphetamine use on his e-QIP because he did not remember it, until his memory was triggered by the interview (Tr. 46). He said the security investigator's report of his interview was inaccurate, because the investigator suggested he might have thought that methamphetamine use was included in cocaine use, and he agreed, even though it was not really what he was thinking (Tr. 47). He admitted he did not tell the investigator he had forgotten about his methamphetamine use (Tr. 48).

Applicant testified he did not disclose his ecstasy use on his e-QIP because he did not think of it, and nothing jogged his memory (Tr. 53). He denied telling the security investigator he did not think the question about drug use covered ecstasy. He testified he told the investigator there was nothing in the application that triggered his memory of his ecstasy use (Tr. 55-56).

Applicant testified he last used marijuana in 2005, but his memory was "a little fuzzier" because his marijuana use declined gradually (Tr. 40). He also testified he did not disclose any marijuana use after 2002 on his e-QIP because he did not remember the isolated incidents of use after his graduation (Tr. 41-42).

Applicant testified he did not disclose his illegal use of prescription pain killers on his e-QIP because he did not remember it. He characterized it as an isolated incident, which he did not remember until the security investigator started asking him about travel outside the country (Tr. 58-59).

Applicant testified he completed his e-QIP on line at home. He completed it twice because the first attempt "got snagged somewhere" and was not received. It took several days to complete it (Tr. 38-40). He did not seek help from his security officer or anyone else to interpret the questions (Tr. 40).

At the hearing, Applicant used a line graph (AX A) to depict his cocaine use. Referring to the graph, he testified that 80 to 90 percent of his cocaine use occurred between 2000 and 2004, while he was in college. After graduation, his cocaine use

declined to once or twice a year and then stopped entirely (Tr. 34-35). He presented his transcripts (AX B and C) to demonstrate that his cocaine use did not affect his academic performance, even though he was also working full-time while in his M.B.A. program (Tr. 35-36). He testified he last used any illegal drugs was in September 2007, and the entry on his e-QIP was reflecting last drug use in November 2007 was incorrect (Tr. 36).

An active duty captain in the U.S. Marine Corps testified for Applicant (Tr. 64-68). The witness and Applicant went to high school and college together and were members of the same fraternity. The witness was aware of Applicant's drug use in college, because it was common knowledge among their circle of friends. In 1999, when they were sophomores, he voted for Applicant to be the fraternity vice-president of finance. Applicant was responsible for fraternity funds of about $170,000. The following year, he voted for Applicant to be president of the fraternity, because of his good performance as vice-president of finance and because of his good relations with the alumni and university officials.

Applicant's supervisor, who also attended the same college as Applicant and was a member of the same fraternity, testified for Applicant (Tr. 73-79). He was aware of Applicant's drug use in college, but he voted for Applicant to be the vice-president for finance because he was reliable. He voted for Applicant to be president of the fraternity because he was respected in the college community and the fraternity. He recruited Applicant to come to work for his current employer, knowing that he would need a security clearance.

Another of Applicant's supervisors, who also is the facility security officer, testified they recruited and selected Applicant because of his strong referrals and professional experience. He was aware of Applicant's prior drug use, but regarded it as "bad choices in the past" and not indicative of his current or future performance (Tr. 81-82). When Applicant started filling out his e-QIP, the witness advised him to not embellish but to not cover up anything (Tr. 85).

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 multiple instances of illegal drug use between September 1998 and November 2007, as well as purchases of cocaine, marijuana, and ecstasy. 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.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a) and (c), the burden shifted 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).

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 e-QIP indicates he was still using cocaine when he signed it. At the hearing, he testified the e-QIP was incorrect and that he stopped using illegal drugs in September 2007, about 11 months before the hearing. I conclude his drug use was recent. The 11-month period followed ten years of regular and sometimes frequent drug use. During all of those 11 months of abstinence, Applicant has been undergoing scrutiny, including an interview by a security investigator in January 2008, and DOHA interrogatories in March and April 2008. He has not carried his burden of persuading me that he will not resume his drug use once he is relieved of pressure of obtaining a clearance. Thus, I conclude the first prong of AG ¶ 26(a) is not established. The remaining prongs of AG ¶ 26(a) are likewise not established. His drug use was frequent, did not occur under unusual circumstances, and casts doubt on his current reliability, trustworthiness, and good judgment.

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 admitted at the hearing he still associates with some of his drug-using friends and a friend offered him cocaine in March 2008. For the reasons noted above, he has not had "an appropriate period of abstinence." I conclude AG ¶ 26(b) is not established.

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 received any drug treatment.

Guideline E, Personal Conduct

The SOR alleges Applicant falsified his e-QIP by disclosing his marijuana and cocaine use but not disclosing his use of methamphetamine, ecstasy, and prescription drugs. 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.

The relevant disqualifying condition in this case is "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). 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's drug use covered ten years, and it is understandable that he might not accurately recall the specific dates, frequency, and quantities of the drugs he purchased and used. It is somewhat plausible that he might even have forgotten isolated incidents, such as his one-time purchase of pain killers in Canada or one-time experimentation with methamphetamine. It is less plausible that he would forget his use of ecstasy ten times while in college and ten more times after graduation. It also is less

plausible that he would not remember his continued use of marijuana after graduation. After considering all the evidence of record, I am satisfied Applicant knew his drug use was an issue, knew his employers were aware of his drug use in college, knew that there was no evidence of his drug use other than his own admissions, and decided to understate his drug use on his e-QIP. Based on the above considerations, I conclude the disqualifying condition in AG ¶ 16(a) is raised, shifting the burden to Applicant to rebut, explain, extenuate, or mitigate the facts.

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 effort to correct his omissions until he was interviewed by a security investigator in January 2008. I conclude this mitigating condition is not established.

Security concerns raised by personal conduct also 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). Falsification of an e-QIP is a felony, not a minor offense. The falsification was recent and did not occur under unique circumstances. Applicant's 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. My comments above concerning Guidelines H and E are incorporated in my whole person analysis.

Applicant is well-educated, intelligent, and a natural leader, as evidenced by the testimony of his college classmates and fraternity brothers. He decision to stop his drug use was motivated by an opportunity for employment and the need for a clearance. His current employment may well be a turning point in his life, but he needs more time to demonstrate his desire to be drug free.

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 not mitigated the security concerns based on drug involvement and 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):	AGAINST APPLICANT
Subparagraphs 1.a-1.h:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	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.

LeRoy F. Foreman
Administrative Judge