DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-08068
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: John B. Glendon, Esq., Department Counsel
For Applicant: *Pro se*

March 13, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement) and E (Personal Conduct), based on cocaine use and failure to disclose an arrest for a felony and a drug offense in an Electronic Questionnaire for Investigations Processing (e-QIP) and a response to interrogatories. Applicant refuted the allegation that she intentionally failed to disclose the felony arrest, but she did not mitigate the security concerns based on her cocaine use. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on April 9, 2008. On November 5, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny her 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on November 11, 2008; answered it on November 18, 2008; and requested a determination on the record without a hearing. DOHA received the request on November 21, 2008. Department Counsel requested a hearing and was ready to proceed on January 29, 2009. The case was assigned to me on January 30, 2009. DOHA issued a notice of hearing on February 6, 2009, scheduling the hearing for February 24, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. GX 6 was marked as an exhibit but was not offered or admitted. Applicant testified on her own behalf. The record closed upon adjournment of the hearing on February 24, 2009. DOHA received the transcript (Tr.) on March 2, 2009.

Administrative Notice

I took administrative notice of three sections of the state criminal code defining the crime of burglary. The documents setting out the applicable provisions of the state criminal code were not admitted in evidence but are attached to the record as Hearing Exhibits (HX) I, II and III. The provisions of the state criminal code that were administratively noticed are set out below in my findings of fact.

Uncharged Misconduct

Department Counsel presented evidence that Applicant falsely denied illegal drug use when she submitted a Questionnaire for Non-Sensitive Positions (SF 85) in September 2007. This conduct was not alleged in the SOR. Conduct not alleged in the SOR may be considered to assess an applicant's credibility; to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; to decide whether a particular provision of the adjudicative guidelines is applicable; or in the whole person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). Additionally, an administrative judge may consider security concerns not alleged in the SOR when they are relevant and factually related to a disqualifying condition that was alleged. ISCR 05-01820 at 3 n.4 (App. Bd. Dec. 14, 2006) (citing ISCR Case No. 01-18860 at 8 (App. Bd. Mar. 17, 2003) and ISCR Case No. 02-00305 at 4 (App. Bd. Feb. 12, 2003)). I have considered Applicant's falsification of her SF 85 for the limited purposes of determining her credibility, evaluating evidence of rehabilitation, and in my whole person analysis.

Findings of Fact

In her answer to the SOR, Applicant admitted the allegations of drug involvement, but she denied intentionally concealing her arrest record. Her admissions in her answer and at the hearing are incorporated in my findings of fact.

Applicant is a 48-year-old integration and test technician employed by a federal contractor. She has worked for her current employer since August 1999. She is married and has two sons, ages 16 and 12. She has never held a clearance.

Applicant submitted a Questionnaire for Non-Sensitive Positions (SF 85) on September 4, 2007, and she answered "no" to the question whether she had used illegal drugs during the last year (GX 3 at 3). In a response to DOHA interrogatories dated September 27, 2008, Applicant admitted that she used cocaine once in July 2007, about two months before she submitted her SF 85. She also admitted using cocaine once in June 2008 (GX 2 at 2). In response to DOHA's question about her intentions regarding future use and frequency, she wrote "none."

Applicant testified that she was unaware of the sensitivity of the questions when she submitted her SF 85. She testified she did not feel it was necessary to disclose her cocaine use because she believed the questionnaire was simply a background check (Tr. 50).

When Applicant submitted her e-QIP in April 2008, she disclosed that she used cocaine about six times between July 2003 and June 2007. She explained that her instances of cocaine use were "isolated incidents that occurred at a few social gatherings." She stated, "I have learned from this experience and have not used this substance since June 2007" (GX 1 at 29).

At the hearing, she testified she told a security investigator in May 2008 that she did not intend to use illegal drugs again (Tr. 57). She also admitted that she used cocaine in June 2008, about two months after submitting her e-QIP and one month after declaring her intention to not use illegal drugs again (Tr. 59). At the hearing, she testified she does not intend to use drugs again (Tr. 89).

Applicant testified that she used cocaine with her friends about once a year. It usually occurred when someone offered it and she would take "a couple of sniffs just to stay there and keeping going for a little while longer." She does not believe she is addicted, and she has never entered a treatment program (Tr. 37-38, 63). She testified she has not used cocaine or any other illegal drug since June 2008 (Tr. 60). She has been in situations where cocaine was offered, and she has declined (Tr. 62). She continues to associate with the friends with whom she has used cocaine (Tr. 62, 70-71). Her husband knows about her cocaine use, but her sons do not (Tr. 75).

When Applicant submitted her e-QIP, she answered "no" to six questions about her police record, including questions whether she had ever been charged with or convicted of a felony or any offenses related to alcohol or drugs; and whether in the last seven years she had been arrested for, charged with, or convicted of any offenses not listed in the other questions (GX 1 at 28). In a response to DOHA interrogatories five months after she submitted her e-QIP, she stated she was arrested in July 1983 for trespassing, and the charges were disposed of by placing her on probation before judgment (GX 2 at 5).

State criminal records reflect that on August 14, 1983, five days before Applicant's 19th birthday, she was charged with breaking and entering with intent to murder, theft, trespassing on posted property, and unlawful possession of a controlled substance. The records reflect that a bail bond hearing was held on August 15, 1983, and all charges were dismissed on September 27, 1983 (GX 4 at 3).

Applicant testified her arrest occurred when she and a group of four friends were boating, and they docked at a private pier. Applicant and a friend asked "a couple of gentlemen" if they could use the bathroom in the waterfront home adjacent to the pier. According to Applicant, the gentlemen did not respond. Applicant and her friend approached the house, noticed that the door was ajar, knocked on the door, and called out, "Is anybody home?" No one responded, and they entered the house, wandered around for a short time, and left the house after they could not find the bathroom (Tr. 66).

As they left, the police had arrived and were arresting three of Applicant's friends who had remained at the pier, and they also arrested Applicant and her friend who had entered the house with her (Tr. 40). One of the persons arrested was her now-husband (Tr. 45). Applicant and her friends were jailed. Applicant's brother refused to post bail for her, and she remained in jail for two days until her mother posted bail (Tr. 46, 77). She remembered that the experience was "very scary." It was her first and only arrest (Tr. 67-69). She denied possessing marijuana on her person at the time of her arrest, and there are no records documenting the basis for this charge. She testified she could not remember much about the court proceedings, except that the judge told her and her friends that they would be on probation before judgment for a year (Tr. 46).

As requested by department counsel, I have taken administrative notice of the current state criminal code sections pertaining to three degrees of offenses involving breaking and entering a residence. All three degrees of breaking and entering are felonies. The state criminal code was redrafted and reorganized after Applicant's arrest. The offenses are now captioned as burglary, which is defined as the breaking and entering of the dwelling of another. The words "with intent to murder" reflected on the state criminal records do not appear in the criminal code sections administratively noticed, but the revised code contains a requirement that the breaking and entering be with intent to commit a criminal offense. Recognizing that the criminal code has been changed since Applicant's arrest, I have limited my administrative notice to the fact that breaking and entering a residence with intent to commit murder was a felony at the time of Applicant's arrest.

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 Applicant used cocaine approximately eight times from July 2003 to June 2008 (SOR ¶ 1.a), and she has admitted using it about six times. AG ¶ 24 expresses the security concern pertaining to drug involvement: "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."

Drugs are defined as mood and behavior altering substances, and include: "Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended." AG ¶ 24(a)(1). Drug abuse is defined as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." AG ¶ 24(b). Cocaine is listed in Schedule II of the Controlled Substances Act.

Disqualifying conditions under this guideline include "any drug abuse," and "illegal drug possession," and "failure to clearly and convincingly commit to discontinue drug use." AG ¶¶ 25(a), (c), and (h). Applicant admitted using cocaine, and the manner in which she used it necessarily encompassed possessing it, thus raising AG ¶¶ 25(a) and (c).

Applicant disclosed her prior drug use on her e-QIP in April 2008, and she declared she had learned her lesson about the implications of drug abuse. She was interviewed in May 2008 and unequivocally stated that she did not intend to use illegal drugs again, but she used cocaine a month later. Cocaine use is socially acceptable in her circle of friends. Although she knows the "correct" answer that she must give to obtain a clearance, her declarations of intent to refrain from future drug abuse are not convincing. Thus, I conclude AG ¶ 25(h) is raised.

The government has produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a), (c) and (h), shifting the burden to Applicant 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 clause of ¶ 26(a) ("happened so long ago") focuses on whether the drug involvement was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation 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 admitted drug use was in June 2008, about eight months before the hearing, and about one month after she told a security investigator she would never use it again. Her frequency of use has been once or twice a year. In the context of a five-year record of occasional but regular cocaine use and repeated broken promises to abstain, abstinence for eight months is not "a significant period of time." Thus, I conclude her cocaine use was "recent," not "infrequent," and did not happen under unusual circumstances. Her repeated cocaine use after she submitted a security clearance application and after she asserted to an investigator that she would never use it again casts doubt on her reliability, trustworthiness, and good judgment. I conclude AG ¶ 26(a) is not established.

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). The record reflects none of these indicia of intent to abstain from drugs. I conclude AG ¶ 26(b) is not established. No other enumerated mitigating conditions are applicable.

Guideline E, Personal Conduct

The SOR alleges Applicant falsified her e-QIP by failing to disclose her arrest for a felony breaking and entering and unlawful possession of marijuana (SOR ¶ 2.a), and gave misleading answers to DOHA interrogatories by stating she was arrested only for trespassing (SOR ¶ 2.b). The SOR also cross-alleges Applicant's drug use as personal conduct under this guideline (SOR ¶ 2.c).

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 pertaining to Applicant's omissions from her e-QIP is set out in AG ¶ 16(a), which applies to:

> 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.

The relevant disqualifying condition pertaining to Applicant's omissions from her responses to DOHA interrogatories applies to "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 demonstrated her lack of appreciation for the importance of candor when she executed her SF 85 in September 2007, but she was candid about her cocaine use when she executed her e-QIP in April 2008. Two issues must be resolved to determine if Applicant falsified her e-QIP and her response to DOHA interrogatories with respect to her arrest in 1983: (1) Did she know she was charged with a felony breaking and entering and possession of marijuana at the time she was arrested in 1983? and (2) Did she remember being charged with a felony breaking and entering and possession of marijuana at the time she executed the e-QIP in April 2008?

The arrest was almost 30 years ago, when Applicant was only eighteen years old. She found it a frightening experience. She vividly remembered spending two nights in jail, but her memory was vague about the formal charges or court proceedings. Except for her testimony at the hearing, there is no evidence showing the basis for the charges. She was accompanied by her mother in court, but she did not have a lawyer. She could not remember an arraignment, but she was certain that she would have spoken up if she heard that she was charged with intending to commit murder. Although Department Counsel made several references to a plea bargain in his questions, there is no evidence of a plea bargain. Her testimony regarding the allegations of falsification was plausible and credible. I am satisfied that she did not intentionally conceal information when she submitted her e-QIP and responded to DOHA interrogatories. Accordingly, I conclude that AG ¶¶ 16(a) and (b) are not raised.

The relevant disqualifying conditions based on Applicant's use of cocaine are AG ¶¶ 16(c), (e), and (g). AG ¶ 16(c) applies to

> credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor,

unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

AG ¶ 16(e) applies to "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing." Finally, AG ¶ 16(g) applies to "association with persons involved in criminal activity."

Applicant's history of cocaine use raises questions about her judgment and willingness to comply with rules and regulations. It has made her vulnerable to exploitation, manipulation, or duress. It would likely have an adverse effect on her professional and community standing. She continues to associate with users of illegal drugs. I conclude AG ¶¶ 16(d), (e), and (g) are raised.

Security concerns based on personal conduct may be mitigated if "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). Applicant's repeated uses of cocaine were not "minor" offenses, were recent, did not occur under unusual circumstances, and cast doubt on her reliability, trustworthiness, and good judgment. For these reasons and the reasons set out above in the discussion of AG ¶ 26(a) under Guideline H, I conclude AG ¶ 17(c) is not established.

Security concerns under this guideline also may be mitigated if "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." AG ¶ 17(d). Applicant acknowledged her behavior, but she has not obtained counseling or made any changes in her life to alleviate the causes of her illegal cocaine use. Thus, AG ¶ 17(d) is not established.

Security concerns may be mitigated if "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." AG ¶ 17(e). Applicant's teenaged sons are unaware of her cocaine use, making her vulnerable to threats of exposure to her sons. Thus, AG ¶ 17(e) is not established.

Finally, security concerns may be mitigated if "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." AG ¶ 17(g). Applicant continues to associate with her cocaine-using friends under the same circumstances that existed when she used cocaine in the past. Thus, AG ¶ 17(g) 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. I have incorporated my comments under Guidelines H and E in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature, intelligent adult. She has repeatedly promised to stop using cocaine, but those promises ring hollow in light of her continued use after promising to stop. She has made no significant lifestyle changes to reinforce abstinence from illegal drugs. She has not demonstrated that she will resist the situational pressure caused by continued association with cocaine users. There is a significant likelihood of recurrence.

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 refuted the allegations of falsifying her e-QIP and her responses to DOHA interrogatories, but she has not mitigated the security concerns based on her drug involvement and personal conduct. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the national interest to grant her 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
Subparagraph 1.a:	Against Applicant

Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	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