DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-11586
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Francisco Mendez, Esq., Department Counsel
For Applicant: *Pro se*

December 11, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement) and E (Personal Conduct). Security concerns raised by Applicant's drug involvement are mitigated, but security concerns raised by his falsification of his security clearance application are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on April 12, 2008. On April 24, 2009, the Defense Office of Hearings and Appeals (DOHA) sent him 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on May 6, 2009; answered it on May 26, 2009; and requested a hearing before an administrative judge. DOHA received the request on June 1, 2009. Department Counsel was ready to proceed on July 24, 2009, and the case was assigned to an administrative judge on July 28, 2009. It was reassigned to me on July 31, 2009, to consolidate the docket. DOHA issued a notice of hearing on August 6, 2009, scheduling the hearing for September 3, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1, 2, and 4 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibit (AX) A, which was admitted without objection. The record closed upon adjournment of the hearing. DOHA received the transcript (Tr.) on September 15, 2009.

Amendment of SOR

On July 13, 2009, Department Counsel amended the SOR by amending SOR ¶¶ 1.e, 2.a and 2.b. Applicant testified he received the amendments in mid-July 2009, but he misplaced the document and did not acknowledge receipt in writing (Tr. 17). He responded to the amended allegations at the hearing (Tr. 18). He did not object to the amendments (Tr. 19).

At the hearing, Department Counsel moved to amend SOR ¶ 1.a by deleting the allegation that he tested positive for cocaine in January 2004. I granted the motion to amend, without objection from Applicant (Tr. 23-24).

Evidentiary Ruling

Department Counsel offered GX 3, a report of investigation. He did not authenticate the report as required by Directive ¶ E3.1.20, and Applicant declined to waive the authentication requirement (Tr. 32). GX 3 was not admitted.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the original SOR, as well as the additional allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 39-year-old employee of a federal contractor. He has worked for his current employer since January 2008. He does not hold an active clearance. He was employed in the private sector from April 2006 until he began his current employment.

Applicant was first introduced to illegal drugs by his mother, who supplied him with marijuana when he was 16 years old. He smoked it at home once every three months. (GX 2 at 6).

Applicant was arrested and charged with drug-related offenses in 1990, 1991, and 1993. The charges were dismissed on all three occasions because of illegal

searches (GX 2 at 5-6). In May 2008, Applicant told a security investigator that he did not possess drugs on any of these occasions, but he was in the area when drug users ran away and dropped their drugs on the ground near him (GX 2 at 6). Notwithstanding his assertion that he did not possess drugs on any of these occasions, he also told the investigator that the 1991 arrest occurred when the police searched him and found approximately two grams of crack cocaine (GX 2 at 5).

Applicant sold cocaine during 1995 and 1996, and he earned about $1,500 a day, three days a week. In an interview with a security investigator, he denied using cocaine during this time, except for tasting it to make sure that it was cocaine (GX 2 at 6). In 1996, he tested positive for cocaine during a urinalysis administered by an employer as a condition of employment (GX 2 at 6).

Applicant testified he enlisted in the Army National Guard in 1990. He was unable to report for active duty because of his arrest for possession of cocaine in 1991 (Tr. 47). He enlisted in the Regular Army in November 1997, and he received a security clearance shortly after his enlistment. He deployed twice to Iraq. In January 2005, he tested positive for cocaine during a random urinalysis just before his second deployment. He learned while in Iraq that he had tested positive for cocaine. He received nonjudicial punishment for wrongful use of cocaine. In December 2005, he received a general discharge under honorable conditions (GX 2 at 7).

At the hearing, Applicant denied intentionally using cocaine in 2005. He testified he believed that someone put cocaine in his drink without his knowledge while he and a group of soldiers were at a club. He testified that "about five" other soldiers who were at the club also tested positive for cocaine (Tr. 43). He considered contesting the charges by obtaining evidence from the club. He claimed his appointed lawyer was not able to help him and so he accepted the nonjudicial punishment and the discharge from the Army (Tr. 40).

Applicant has been married since August 1997 and has five children, two by his present wife. He has one child from a previous relationship for whom he pays child support, and his wife has two children from a previous relationship (Tr. 51-52).

Applicant's wife testified that she encouraged him to contest the cocaine charges arising from the 2005 urinalysis, but he did not have the time or resources and he was afraid of going to jail (Tr. 57). She testified that Applicant was a sergeant at the time of the urinalysis, was involved in the collection of the urine samples, and could have switched his sample with someone else's if he had known he had ingested cocaine (Tr. 58).

Applicant's wife also testified that Applicant was raising his three-year-old daughter by himself when she first met him. She encouraged him to "get off the street" and start being a father to his child. Since then, he has become a responsible father (Tr. 58-60).

Applicant testified his last drug involvement was in 1995 and 1996, when he was selling and tasting cocaine. He no longer associates with drug users (Tr. 50).

When Applicant submitted his security clearance application in April 2008, he answered "no" to question 23d, asking if he had ever been "charged with or convicted of" any offenses related to alcohol or drugs." In his explanatory comments, he disclosed that he tested positive for cocaine in a urinalysis in 2005, received nonjudicial punishment, and was discharged from the Army for drug use. However, he denied using cocaine in 2005, and he claimed that he was unable to contest the positive urinalysis because he was in Iraq (GX 1 at 30-31). He did not disclose that he had been arrested and charged with drug-related offenses in 1990, 1991, and 1993.

In an interview with a security investigator in May 2008, he told the investigator that he did not disclose the drug-related charges because he was not required to do so when he enlisted in the Army, and he did not want to incriminate himself (GX 2 at 7). At the hearing, he testified he thought he was not required to disclose the charges because the charges were dismissed (Tr. 41). He also testified he did not disclose the drug-related charges when he enlisted because he was scared and did not know what would happen if he disclosed them (Tr. 48-50). He submitted a copy of his local arrest record (AX A). It reflects misdemeanor convictions in 1990-1991 for drinking in public, three failures to appear, an assault and battery, and carrying a concealed weapon. It does not list any drug-related charges.

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 overarching adjudicative goal is a fair, impartial, and commonsense 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 made "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 tested positive for cocaine during a urinalysis in January 2005 (SOR ¶ 1.a, as amended); tested positive for cocaine during a urinalysis in 1996 (SOR ¶ 1.b); was arrested for possession of drugs with intent to distribute in March 1993 (SOR ¶ 1.c); was arrested for possession of cocaine with intent to distribute in March 1991 (SOR ¶ 1.d); and sold illegal drugs in 1995 and 1996 (SOR ¶ 1.e, as amended).

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. Guideline H encompasses "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).

The following disqualifying conditions under this guideline are relevant:

> AG ¶ 25(a): any drug abuse (defined in AG ¶ 24(b) as 'the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction");
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> AG ¶ 25(b): testing positive for illegal drug use;
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> AG ¶ 25(c): illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
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> AG ¶ 25(g): any illegal drug use after being granted a security clearance; and
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> AG ¶ 25(h): expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

The evidence is sufficient to raise AG ¶¶ 25(a), (b), (c), and (g). I find that AG ¶ 25(h) is not raised, because Applicant has "clearly and convincingly" committed to discontinuing his drug involvement. He has been gainfully employed since May 2006, and he has focused on carrying out his family duties. There is no evidence of any drug involvement or other criminal conduct since his positive urinalysis in January 2005, almost five years ago.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a), (b), (c), and (g), 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 under this guideline may be mitigated if "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 AG ¶ 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 totality of the evidence. 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." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). I conclude that

AG ¶ 26(a) is established, because Applicant's drug involvement is not recent and does not cast doubt on his current reliability, trustworthiness, or good judgment.

Security concerns also may be mitigated by "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; [or] (4) a signed statement of intent with automatic revocation of clearance for any violation." AG ¶ 26(b). I conclude that AG ¶ 26(b)(1), (2), and (3) are established.

Guideline E, Personal Conduct

SOR ¶ 2.a cross-alleges Applicant's drug involvement alleged in SOR ¶ 1.a-1.e. SOR ¶ 2.b alleges that he falsified his security clearance application by not disclosing his drug-related arrests in 1991 and 1993[1].

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 arising from Applicant's failure to disclose his arrest record is "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . ." 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 falsification. An administrative judge must consider the record evidence as a whole to determine whether 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 was not a security neophyte when he submitted his April 2008 application, because he held a clearance during most of his Army service. He disclosed the January 2005 positive urinalysis, for which he believed he had a plausible explanation, but he did not disclose his three drug-related arrests and charges. He gave multiple explanations for omitting this information. He claimed he did not think he needed to disclose it because the charges were dismissed, but he also admitted at the hearing that he did not disclose his drug-related arrests when he enlisted in the Army because he was afraid of the consequences of disclosure. He told a security investigator he did not disclose his arrests on his security clearance application because

[1] Question 23d on the security clearance application asks whether the person had ever been "charged with or convicted of" any offenses related to alcohol or drugs. It does not ask about arrests. All three of Applicant's arrests resulted in drug-related charges. Thus, he was required to disclose them.

he did not want to incriminate himself. On consideration of all the circumstances surrounding Applicant's security clearance application, I conclude AG ¶ 16(a) is raised.

The relevant disqualifying conditions arising from Applicant's personal conduct are:

> AG ¶ 16(c): 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;
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> AG ¶ 16(e): 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; and
>
> AG ¶ 16(g): association with persons involved in criminal activity.

Applicant's history of drug possession, use, and trafficking raises all three of these disqualifying conditions.

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). This mitigating condition is not established, because Applicant did not disclose his drug-related arrests and charges until more than a year later, when he was confronted with his criminal record.

Security concerns arising from 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 drug involvement and his falsification of his security clearance application were not "minor" offenses. His falsification was recent and did not occur under unique circumstances. His personal conduct casts doubt on his current reliability, trustworthiness, and good judgment. I conclude AG ¶ 17(c) is not established.

Security concerns based on personal conduct may be mitigated if "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." AG ¶ 17(e). This mitigating condition is established for his drug-related conduct, because Applicant has finally made full disclosure of his drug involvement, thereby reducing his vulnerability to exploitation, manipulation, or duress.

However, this mitigating condition does not apply to his falsification of his security clearance application.

Finally, security concerns under this guideline may be mitigated if "association with persons involved in criminal activity has ceased . . . ." AG ¶ 17(g). This mitigating condition is established because Applicant no longer associates with drug users, dealers, or purchasers, but it does not apply to his falsification of his security clearance application.

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 relevant 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 commonsense 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 grew up in a dysfunctional family and has a long history of drug-related incidents. With the help of a strong and supportive spouse, he appears to have left his drug involvement behind him. On the other hand, his implausible and unconvincing explanation for his positive urinalysis in January 2005 and his lack of candor on his security clearance application raise doubts about his current reliability, trustworthiness, and good judgment. 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 arising from his 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 on the allegations in the SOR:

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