DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-18828
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel
For Applicant: Louis B. Cappuccio, Jr., Esquire

March 9, 2009

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Statement of the Case

Applicant submitted a Security Clearance Application (SF 86) on June 28, 2005. On August 20, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H and Guideline E that provided the basis for its decision to deny him 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 as of September 1, 2006.

Applicant answered the SOR in writing on September 15, 2008, and requested a hearing before an administrative judge. The case was assigned to me on November 20, 2008, to consider whether it is clearly consistent with the national interest to grant or

continue a security clearance for him. On November 21, 2008, I scheduled a hearing for December 17, 2008. On or about December 15, 2008, I was informed that counsel for Applicant had not received the notice[1] but that he and Applicant could be available on December 19, 2008. On December 15, 2008, I issued an amended notice rescheduling the hearing for December 19, 2008.

At the hearing, Applicant waived the 15-day notice requirement set forth in E3.1.8 of the Directive. Nine government exhibits (Ex. 1-9) were admitted without any objections, and Applicant was called as an adverse witness, having declined to offer testimony in his behalf. The hearing transcript (Tr.) was received on December 31, 2008. I held the record open for two weeks after the hearing for Applicant to submit documentation. By first class mail on December 30, 2008, Applicant forwarded through his counsel a statement to which Department Counsel did not object. The document was admitted as Exhibit A. Based on a review of the pleadings, exhibits, and hearing testimony, eligibility for access to classified information is denied.

Findings of Fact

DOHA alleged under Guideline H (Drug Involvement) that Applicant used cocaine with varying frequency from about 1980 to at least October 2006 (SOR ¶ 1.a); that he was placed in a diversion program following his arrest for illegal possession of cocaine in October 2006 (SOR ¶ 1.b); that he used cocaine while holding a security clearance granted in 2001 (SOR ¶ 1.c); that he used marijuana from at least 1975 to 1981 (SOR ¶ 1.d); and that he pleaded nolo contendere to a 1981 possession of marijuana charge (SOR ¶ 1.e). Under Guideline E (Personal Conduct) Applicant was alleged to have falsified a 1994 National Agency Questionnaire (NAQ) by indicating that he had tried marijuana a couple of times in 1975 and had not used the drug since (SOR ¶ 2.a); that he had falsified a February 2, 1995, sworn statement by denying any illegal drug use other than marijuana (SOR ¶ 2.b); and that he falsified a June 2005 SF 86 by denying any illegal drug use in the last seven years (SOR ¶ 2.c) and any illegal drug use ever while possessing a security clearance (SOR ¶ 2.d). The use of cocaine while holding a security clearance was also cross-alleged under Guideline E (SOR ¶ 2.e).

Applicant denied the allegations with the exception of his arrest for cocaine possession in October 2006 (SOR ¶ 1.b) and the use of cocaine while holding a clearance (SOR ¶ 2.e), which he asserted happened once. After considering the pleadings and the evidence of record, I make the following findings of fact.

Applicant is a 51-year-old material technical aide who has been employed by a defense contractor since December 1989. He currently possesses a secret-level security clearance that was granted to him in October 2001. He and his ex-wife divorced in November 2001 after 22 years of marriage. They had three children together, the youngest of which is now 17. (Exs. 1, 2)

[1]To date the notice that was mailed to Applicant's counsel had not been returned to DOHA by the U.S. Postal Service.

Applicant smoked marijuana on average twice a month when it was passed to him at parties from about 1975 to 1981 (Ex. 6). In September 1981, he was arrested for possession of marijuana. Heading to the beach with a friend, he had pulled over to he side of the road and was rolling a marijuana cigarette when an officer approached and arrested him. He pleaded nolo contendere, and the charge was filed for one year with costs (Exs. 7, 8). Applicant has also used cocaine. Following his initial experimentation in 1980, he snorted the drug once every two to three years to at least 2003 (Ex. 4).

In December 1989, Applicant began working for his present employer, and he was issued a company-granted confidential clearance. Needing a Department of Defense confidential security clearance for his duties, Applicant completed a NAQ on June 2, 1994. He listed October 1975 larceny and October 1981 driving while intoxicated charges to which he had pleaded nolo contendere, as well as a July 1983 disorderly conduct charge for which he was fined. He did not include his arrest for marijuana possession. In response to question 20.a ("Have you ever tried or used or possessed any narcotic (to include heroin or cocaine), depressant (to include guaaludes), stimulant, hallucinogen (to include LSD or PCP), or cannabis (to include marijuana or hashish), or any mind altering substance (to include glue or paint), even one time or on an experimental basis, except as prescribed by a licensed physician?"), Applicant indicated, "MARIJUANA TRIED A COUPLE OF TIMES IN 1975, DIDN'T LIKE IT, NO USE SINCE, NO FUTURE INTENT." (Ex. 3). Applicant did not disclose his use of cocaine on his NAQ because he was scared he would not obtain his clearance if he did so (Tr. 63).

On February 2, 1995, Applicant was interviewed by a senior special agent with the Defense Investigative Service (DIS) about his arrests and illegal drug involvement. Applicant acknowledged his September 1981 arrest for possession of marijuana. Applicant related that he had not reported this arrest on his NAQ because it did not appear on the copy of his arrest record that he obtained from the local police. Concerning his use of illegal drugs, Applicant admitted that he had used marijuana about 1975 to 1981. He denied any intent to use marijuana in the future or any involvement with other illegal drugs. Applicant explained that he did not disclose the full extent of his marijuana use on his NAQ because he did not feel that the secretary who assisted him with the form should know the particulars of his use. He knew he would have an interview with the DIS and intended to disclose his actual use at that time. (Ex. 6). Applicant was granted a Department of Defense confidential clearance shortly thereafter, in March 1995 (Exs. 1, 2).

In October 2001, Applicant's security clearance was upgraded to secret (Exs. 1, 2). For a periodic reinvestigation for that clearance, Applicant executed a security clearance application (SF 86) on June 28, 2005. In response to question 24 concerning whether he had ever been charged with or convicted of any offenses related to alcohol or drugs, Applicant listed a March 2000 DWI for which he was placed on probation for one year. He responded "NO" to questions 27 ("Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine,

codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?") and 28 ("Have you EVER illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting public safety?"). (Ex. 1)

In mid-October 2006, the state police had a local business under surveillance for alleged illegal gambling activities. They observed an individual exit the business carrying a partially concealed brown paper bag. Detectives pulled this person over for a motor vehicle violation and they found wagering slips, betting guides, and ledgers, as well as more than $1,000 in currency and some marijuana. As the police were searching this person's home, Applicant entered the residence unannounced. Asked about his intentions, Applicant explained that he had just left the business where he had heard that something was going on and that he wanted to check on the occupant of the residence. Applicant appeared intoxicated. An officer conducted a "pat-down search" of Applicant for safety reasons, and he found in Applicant's right pocket a green package containing a substance that tested positive for cocaine and a rolled one-dollar bill. Applicant was arrested for felony possession of a schedule I-V controlled substance (cocaine). Applicant pleaded not guilty at his arraignment in June 2007. In late August 2007, he was placed in a pretrial diversion program, and on completion his case was dismissed in early May 2008. (Ex. 5).

On June 5, 2007, Applicant was interviewed by a government investigator about his arrest for possession of cocaine. Applicant related (in variance to the police report) that he had been doing his laundry at a local laundromat when he decided to visit his friend. He claimed that he was searched when he first arrived at his friend's home, but that nothing was found on him until he was detained and searched a second time. Applicant admitted that a small amount of cocaine was then discovered in his pant pocket. The charges against him were still pending but his lawyer had assured him the charges would be dismissed due to the "unfounded second personal search." According to the investigator, Applicant denied any use of illegal drugs other than cocaine, which he first used in 1980, and snorted at parties once every two to three years when it was given to him. Applicant denied any use of cocaine since his recent arrest, or any intent to use cocaine in the future. Applicant related that the cocaine found on his person had been given to him at a party two days before his arrest but that he had last used cocaine three years before his arrest (Ex. 4).

At DOHA's request, Applicant subsequently reviewed the investigator's report of his June 2007 interview for its accuracy. On May 23, 2008, Applicant responded in part:

> Investigator states that I use cocaine when people give it to me. The investigator made this statement sound current when it is not. I did tell the investigator that I had tried cocaine in the past at parties etc. This experimentation with cocaine occurred in my early twenties and thirties. I have in the past used bad judgment and made mistakes that I truly regret.

Applicant provided documentation showing that he had completed the court-ordered adult diversion program as of mid-April 2008, and that the charges pending against him would be dismissed (Ex. 4).

At his hearing on December 19, 2008, Applicant testified that he last used marijuana "[y]ears and years and years ago . . . High school, a little after high school." Applicant subsequently admitted he had illegal possession of, and was smoking marijuana, to his arrest in 1981 (Tr. 53). As for his last use of cocaine, Applicant responded, "Again, I'm not sure of the date. It could have been 20, 25 years ago." He denied any use of cocaine since going to work for the defense contractor and averred that he used cocaine only about five times total (Tr. 35). He maintained that he was "under duress" when he told the government investigator in June 2007 that he had used cocaine on average every two to three years (Tr. 43-44). He denied that he had used cocaine after being granted a security clearance in 2001 (Tr. 49).

Concerning his arrest for illegal possession in October 2006, Applicant testified that he had been at a party at a stranger's house with "a bunch of people" that he had met at a bar. As to how he happened to be given the cocaine, Applicant claimed he took it just to be "sociable" and that he did not believe he would have used what he assumed was cocaine at some later point (Tr. 36). Applicant denied that he had used any of the cocaine given to him on that occasion or otherwise at the party before his arrest (Tr. 37). Applicant also denied that he deliberately withheld any information about his illegal drug involvement on his applications for a security clearance (Tr. 47) until he was questioned by me about the omission of cocaine use from his NAQ. On December 22, 2008, Applicant signed a statement of his intent to dissociate himself from drug-using associates and contacts and to abstain from using and drugs with the understanding that any violation would result in the immediate automatic revocation of his security clearance (Ex. A).

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 H, Drug Involvement

The security concern about drug involvement is set out in AG ¶ 24: "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." Police records confirm, and Applicant does not deny, that he was caught with marijuana in his possession in September 1981 and with cocaine in his possession in October 2006. Despite Applicant's recent efforts to minimize the extent of his illegal drug involvement (*see* Guideline E, *infra*), his prior admissions to government investigators support factual findings of marijuana use on average twice a month from 1975 to 1981, and of cocaine use initially in 1980 and then on an estimated basis of once every two to three years until at least 2003, if not to the date of his arrest in October 2006. AG ¶¶ 25(a), "any drug abuse," 25(c), "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of

drug paraphernalia," and 25(g), "any illegal drug use after being granted a security clearance," apply.

Concerning the potential mitigating factors under AG ¶ 26, there is no evidence showing Applicant has used or possessed any marijuana since his arrest in September 1981. However, AG ¶ 26(a), "the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is likely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment," cannot be fully applied because of his more recent cocaine abuse and possession. It is difficult to believe that he did not use any cocaine at that party in October 2006, or, if he did not use the cocaine, that he took it with no intent to use it in the future. Even if he last used cocaine in 2003, his illegal possession of the drug in October 2006, especially while he held a security clearance, raises serious doubts about his reliability, trustworthiness, and judgment.

Applicant submitted post hearing a written statement indicating that he is dissociated from drug-using associates (*see* AG ¶ 25(b)(1), "disassociation from drug-using associates and contacts"), and that he does not intend to abuse any drugs in the future with the understanding that his clearance would be revoked for any violation (*see* AG ¶ 25(b)(4), "a signed statement of intent with automatic revocation of clearance for any violation"). Applicant's credibility is suspect because of his deliberate falsifications about his illegal drug involvement during the investigation and adjudication of his security clearance. His uncorroborated claims are not sufficient to demonstrate the intent required for mitigation under AG ¶ 25(b), "a demonstrated intent not to abuse any drugs in the future."

Guideline E, Personal Conduct

The security concern about 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.

When Applicant applied for his confidential-level clearance in June 1994, he claimed that he had tried marijuana only a couple of times in 1975 and had not used it since (Ex. 3). His minimization of his marijuana involvement and omission of his cocaine abuse from that NAQ raise potentially disqualifying security concerns under AG ¶ 16(a), "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." In a sworn statement of February 2, 1995, provided during a subject

interview, Applicant falsely denied any use of illegal drugs other than marijuana ("I have never used or experimented with any other illegal drugs."). AG ¶ 16(b), "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative," also applies.

Furthermore, on his security clearance application completed for continuation of his secret-level security clearance in June 2005, Applicant again concealed his involvement with cocaine by responding "No" to question 27 (any use of illegal drugs in the last seven years), and question 28 (any use of illegal drugs while possessing a security clearance). AG ¶ 16(a) applies to these falsifications.

Potential personal vulnerability issues are also raised by Applicant's concealment of relevant and material facts about his illegal drug involvement (*see* AG ¶ 16(e), "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing"). Applicant told a government investigator in February 1995 that he had not revealed the extent of his marijuana involvement on his June 1994 NAQ because he did not think a secretary assisting him with the form had a reason to know the information. He admitted to me at his security clearance hearing that he had not disclosed his cocaine use on that form because he was concerned it could affect his clearance. Applicant acknowledged to Department Counsel at his hearing that he had not told his supervisor about his October 2006 drug arrest, but he contends that he did not have to because his coworkers read about his arrest in the paper. He provided no corroboration for that claim. AG ¶ 16(e) applies.

Also alleged was Applicant's use of cocaine after he had been granted a security clearance in 2001 (SOR ¶ 2.e). Certainly Applicant exercised poor judgment that would raise security concerns under AG ¶ 15, but that conduct is more directly addressed by Guideline H (*see* AG ¶ 25(g)).

None of the pertinent mitigating conditions fully apply to his repeated concealment of relevant and material facts concerning his illegal drug abuse history. Although Applicant acknowledged in his February 1995 statement that his marijuana use had been more extensive than he had reported on his June 1994 NAQ, his concealment of his cocaine abuse from that statement and from his SF 86 completed in June 2005 preclude favorable consideration of AG ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts."

Applicant's recent attempts to discredit his prior admissions of drug use undermine his case for mitigation under either AG ¶ 17(c), "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," or AG ¶ 17(d), "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." In May 2008, Applicant objected to the investigator's use of the present tense in June 2007 when discussing his cocaine abuse, as his "experimentation with cocaine occurred in [his] early twenties and thirties." While the investigator reported Applicant's use of cocaine in the present tense ("SUBJECT USES COCAINE RARELY AND ESTIMATES HE USES COCAINE ONCE EVERY TWO TO THREE YEARS"), the investigator also indicated that Applicant last used cocaine three years prior to his arrest. Had Applicant not used any cocaine in the past 20 or 25 years (Tr. 32), he likely would not have told the investigator that his last use of cocaine occurred as recently as 2003. There is no evidence to suggest that the investigator had any reason to report other than what Applicant told her. When confronted at his December 2008 hearing about his previous estimate of cocaine use every two to three years, Applicant did not deny that he made that statement:

> I believe I wrote that in a rebuttal–I was pretty scared at the time and she asked me when was the last time you did cocaine and I says I don't know, maybe two or three years or something like that. But I said it under duress; That wasn't an accurate statement . . . It was just a blurt because I was scared. I just wanted to move on. I said it to accommodate her. (Tr. 43)

Applicant would stand to gain little by admitting relatively recent cocaine use unless it was the truth. He also admitted SOR ¶ 2.e (one-time use of cocaine while holding a security clearance granted in 2001) when he answered the SOR. While he now claims that it was not in his handwriting, he admits he "might have" completed his Answer with the aid of his attorney (Tr. 49). By signing his Answer, Applicant adopted the responses as his own.

Applicant claims that he has been "pretty much straight" with his coworkers about his October 2006 cocaine arrest. Given his persistent unwillingness to provide a credible account of his illegal drug involvement or of his motives for his NAQ and SF 86 omissions, AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress," does not apply.

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 in light of 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.

Applicant was granted his confidential security clearance in 1995 after he had falsely claimed on an NAQ and to a government agent that he had not used any illegal drug other than marijuana. He continued to use cocaine, including on at least one occasion after his clearance had been upgraded to secret in 2001, and he was placed in a diversion program for an October 2006 illegal possession of cocaine offense. Although the felony charge was dismissed in May 2008 on his completion of the diversion program, and he has submitted a statement of intent to refrain from any future illegal drug involvement, I am unable to conclude that his drug abuse is safely behind him, or that his representations can be relied on. Applicant would now have the government believe that he had put his cocaine abuse behind him some 20 to 25 years ago, he just happened to be given a package of cocaine by unknown persons he felt comfortable with by simply sharing a beer or two at a bar, and he did not use or intend to use the cocaine in October 2006. His illegal possession of cocaine alone reflects extremely poor judgment on his part. His lack of forthright testimony at his hearing about his illegal drug involvement compounds the concerns for his judgment, reliability, and trustworthiness and his 19 years of employment with a defense contractor are not sufficient to mitigate those concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the amended SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant

Subparagraph 2.e: 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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

ELIZABETH M. MATCHINSKI
Administrative Judge