DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 10-07690
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
For Applicant: Thomas Albin, Esquire

05/29/2012

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant abused cocaine, at times daily, between June 2002 and June 2006. Despite completing a 28-day drug rehabilitation program in July 2006, Applicant used cocaine at a party in late April 2012. He is not involved in any counseling or Narcotics Anonymous (NA). It is too soon to conclude that his cocaine abuse is unlikely to recur. Clearance denied.

Statement of the Case

On March 7, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H (Drug Involvement) as to why it could not find that it is clearly consistent with the national interest to continue Applicant's security clearance eligibility. DOHA took action 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) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR allegations on March 19, 2012, and he requested a hearing. On April 30, 2012, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for him. On May 3, 2012, I scheduled a hearing for May 23, 2012.

The hearing was convened as scheduled. Three Government exhibits (GEs 1-3) and one Applicant exhibit (AE A) were admitted into evidence without objection. Applicant and his general foreman testified, as reflected in a transcript (Tr.) received on May 31, 2012.

Findings of Fact

The SOR alleged that Applicant used cocaine on a daily basis from about June 2002 to at least July 2006 (SOR 1.a); that on several occasions during that time frame, he used cocaine at work or reported to work under the influence of the drug (SOR 1.b); that he used cocaine after being granted a DOD secret clearance in August 2000 (SOR 1.c); and that he attended a drug rehabilitation program in July 2006, when he believed he had become addicted to cocaine (SOR 1.d). Applicant denied that he used cocaine with the frequency alleged. He otherwise admitted the allegations without explanation. Applicant's admissions are incorporated as findings of fact. After considering the pleadings, exhibits, and transcript, I make the following additional findings of fact.

Applicant is a 50-year-old first class rigger, who has worked for the same defense contractor since June 1983, but for a strike from late June 1988 to October 1988 and a layoff from October 1996 to March 1999. (GEs 1, 2.) During his layoff, he worked as a laborer and then as a mechanic. (GE 2.) Applicant has held a secret security clearance since about August 2000. (GE 1; Tr. 22-23.)

Applicant and his ex-wife separated in December 2009 after 19 years of marriage. Their divorce was final in March 2011. (Tr. 44.) Their two children, now age 16 and 18, live with his ex-wife. (GE 1; Tr. 29, 32.) Applicant currently lives with his mother because he cannot afford to live on his own after paying alimony and child support. (Tr. 30.)

At times during his marriage, Applicant took on two or three part-time jobs (e.g., cutting trees, mowing lawns, mechanical work) for extra income to pay the household bills. Around June 2002, a friend offered him some cocaine "as a pick me up." (Tr. 29.) Applicant started using cocaine a couple of times a week to deal with his fatigue from working so many hours. He began using cocaine recreationally, after hours at card games with the "boys." His involvement with cocaine progressed to where he desired the drug and used it daily. (GE 3; Tr. 33-36.) Applicant provided the Government with discrepant accounts about the frequency of his abuse, including when it became daily, and about whether he used it at work. He testified at this hearing that he abused cocaine with varying frequency ("In the beginning, it was maybe a couple of times a week. As times grew, it could have been without [cocaine] for a week or it could have been a week straight. It varied on times but towards the end, before I went to rehab, the last week it was an everyday use."). He admitted that he used cocaine in his car before reporting to work ("what we would call take

a bump or a pick me up and then go into work"), but he denied ever using the drug in the yard. (Tr. 33-34.) Yet, in an August 3, 2010 affidavit provided to an Office of Personnel Management (OPM) investigator, Applicant stated:

> I snorted .25 grams of cocaine per day alone at work in the bathroom or at my residence for energy, which I do not know the name of my former supplier, from 6/2002 to 2004, which I do not know the exact date, when I became addicted and had a higher tolerance and began using 3.5 grams per day until 2006, which I do not know the exact date, when I began using seven grams per day until 7/2006 when my wife and I decided I needed counseling. (GE 3.)

Applicant now claims he was nervous during his interview and did not recall the amounts of cocaine used, so he just agreed with the investigator who "was the one giving [him] a lot of these numbers." (Tr. 54, 67.) Even if I accept that Applicant's abuse of cocaine progressed over time, it likely reached daily well before the week preceding his substance abuse treatment in June 2006. Moreover, Applicant's present denial of any drug use at the worksite cannot be squared with his previous admission that he used the drug in the bathroom at work. It appears that by 2004, Applicant had developed a craving and tolerance for cocaine. Regularly, if not every day, he snorted cocaine until mid-June 2006. Applicant abused the drug at home, in his car before reporting to work, and at times in the bathroom at work.

Applicant also operated a motor vehicle under the influence of cocaine at times. (Tr. 56.) He was very nervous and knew it was wrong, but he had to get home. (Tr. 66.) Applicant purchased his cocaine from a street dealer, whom he found through a friend. (Tr. 56-57.) Initially, he spent around $100 a month on cocaine. By the time he entered the rehabilitation program, he was spending around $800 a month on cocaine. (Tr. 57.) Applicant knew it was illegal to use cocaine, and that his employer prohibited illegal drug use. He "never really gave much thought" to his security clearance responsibilities because his job was still the same.[1] (GE 3; Tr. 33-36, 55-56.) The cocaine led him to feel more energized and alert. (GE 3; Tr. 55.)

Around June 2006, Applicant's ex-wife advised him to get help for his drug problem, and she filed for divorce in part because of his cocaine abuse. Not wanting his children to grow up without both parents in their lives, Applicant admitted himself in mid-June 2006 to a 28-day drug rehabilitation program at a cost to him of $9,400. Applicant attended rehabilitation classes twice a day, where he was given "tools" to stay clear of drug abusers and the "obstacles" that led him to abuse cocaine. (GE 3; Tr. 37-40, 42.) He completed the program on July 21, 2006. (AE A.) Applicant denies that he was diagnosed as being dependent on, or addicted to, cocaine. (GE 3; Tr. 59) The records of his substance abuse treatment are not in evidence. Nor is there a formal diagnosis or prognosis from a credentialed substance abuse or medical professional in the record before me for review.

[1]Applicant testified that before his security eligibility was questioned by DOHA, he did not realize how wrong it was to use drugs while he held a security clearance. (Tr. 63-64.)

Three weeks after Applicant returned from the rehabilitation program, he and his ex-wife reconciled for the sake of their children, but they eventually divorced. (GE 1; Tr. 43-44.) For aftercare, Applicant was supposed to attend 90 Narcotics Anonymous (NA) meetings in 90 days. Applicant attended two NA meetings a week for the next 18 months to two years, which was apparently sufficient for him to maintain a drug-free lifestyle.[2] (Tr. 41.) Applicant continued to abstain from cocaine by keeping busy attending his children's band meets and athletic events and working around the house. (Tr. 41-42.)

On March 16, 2010, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP). He disclosed that he used cocaine from June 2002 to July 2006 for energy when he was working a lot, but it became "a habit." Applicant also responded affirmatively to inquiries concerning the illegal use of a controlled substance while possessing a security clearance; the illegal possession and purchase of a controlled substance in the last seven years; and counseling or treatment for his use of drugs in the last seven years. He explained that he attended a 28-day drug rehabilitation program in July 2006, and he provided contact information for the facility. (GE 1.)

On August 3, 2010, Applicant provided an affidavit to an OPM investigator in which he admitted that he was "addicted" to cocaine by 2004, when he began using 3.5 grams of the drug per day. In 2006, the quantity increased to 7 grams a day. He denied any use since he completed his drug rehabilitation treatment in July 2006, any current association with people who use illegal drugs, and any intent to use illegal drugs in the future. (GE 3.)

At his hearing, Applicant volunteered that he had relapsed and used cocaine at a birthday party for a high school friend in late April 2012 ("It had been presented to me, in front of me, and I did a line."). Applicant had previously used cocaine "probably many times" with some of the individuals with whom he used cocaine at the party. (Tr. 64.) Applicant realized immediately that he had "screwed up," and he left the party. (Tr. 45-46, 61.) Applicant drove himself home. Since "it wasn't that big of a line," Applicant did not believe he was too impaired to drive. (Tr. 66.) He attributes his relapse to "a weak moment." (Tr. 46.) Applicant does not intend to use any illegal drug in the future. (Tr. 47.) Applicant did not seek out any counseling or support through NA or similar organization after he relapsed (Tr. 61), despite being advised by his counselors in 2006 that it was "up to [him] to be strong and to maintain going to [his] classes when these things arise or when [he is] feeling weak." (Tr. 48.) Applicant believes he knows what to do to keep "on the straight and narrow." (Tr. 61, 68.) He denies any ongoing association with any of the persons with whom he used the cocaine in April 2012. (Tr. 69.) Applicant reported his relapse to his general foreman but not to his security officer at work. (Tr. 63.)

Applicant's general foreman has known Applicant through work and company-related social events for about 18 years. He was Applicant's direct supervisor in 2003 and 2004, before becoming his general foreman. (Tr. 74-77.) In his experience, Applicant has

[2] Applicant has indicated he abused cocaine to July 2006. He completed the 28-day drug rehabilitation program on July 21, 2006 (AE A), so he would have admitted himself for treatment around June 24, 2006. Either he abused cocaine early on while in treatment or he was mistaken about the July 2006 date.

always been a hard worker, who is willing to work overtime when needed. In 2006, Applicant confided in him about an addiction for which he wanted treatment. Applicant's general foreman noticed no difference in Applicant's work performance on his return from rehabilitation. (Tr. 78-79.) On May 21, 2012, Applicant told him about his recent "slip." The general foreman was disappointed and upset, but he did not report Applicant to his security office. (Tr. 81, 85.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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 overall adjudicative goal is a fair, impartial, and commonsense 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. 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 to obtain 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 that the applicant may deliberately or inadvertently fail to 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

Drug Involvement

The security concern for 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.

Under AG ¶ 24(a), drugs are defined as "mood and behavior altering substances," and include:

> (1) 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),[3] and
>
> (2) inhalants and other similar substances.

Under AG ¶ 24(b), 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." Potentially disqualifying conditions 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 AG ¶ 25(g), "any illegal drug use after being granted a security clearance," apply. Applicant abused cocaine between 2002 and June 2006, with increasing tolerance and frequency. He used cocaine up to daily; drove a motor vehicle while under the influence of the drug on occasion; used cocaine immediately before reporting to work or in the lavatory at work; and purchased cocaine from a street dealer. By 2006, he was spending $800 a month on the drug. Then, after abstaining for over five years, he snorted a line of cocaine at a party in late April 2012. All of this drug involvement occurred while he held a DOD secret security clearance and with knowledge that it was illegal and against company policy.

Concerning the potentially mitigating conditions, AG ¶ 26(a) "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," is difficult to apply. Applicant's very recent relapse cannot be viewed in isolation from his extensive abuse between June 2002 and June 2006.

[3]Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c).

Concerning AG ¶ 26(b), "a demonstrated intent not to abuse any drugs in the future," can be shown by "(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." While acknowledging his cocaine use in April 2012 at a birthday party for a high school friend, Applicant asserts that abstaining from cocaine is not a problem for him under "normal circumstances." (Tr. 60-61.) Applicant apparently did not know that cocaine was going to be present at the party, even though he had smoked cocaine with some of these high school friends on many occasions in the past, and he had been texting or telephoning some of them until April 2012.[4] AG ¶ 26(b)(1) and ¶ 26(b)(2) apply in that the circumstances of his recent relapse were not routine. At the same time, the risk of another relapse cannot safely be ruled out. The "tools" Applicant reportedly learned during his 28-day rehabilitation program did not prevent him from accepting the line of cocaine in April 2012 in a "moment of weakness." Despite therapeutic advice to go to classes if he felt weak or in the case of a slip, Applicant chose not to return to NA or seek counseling after his relapse. While Applicant does not intend any future illegal drug involvement, his promise to "do [his] darndest to stay straight," is not enough to fully satisfy AG ¶ 26(b).

AG ¶ 26(d), "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," is minimally established. Although Applicant completed a 28-day substance abuse treatment program, and he followed up with NA meetings, he did not attend the 90 meetings in 90 days. His relapse in late April 2012 is a recurrence of abuse, and he lacks the favorable assessment of a qualified professional that might have mitigated some of the security concerns raised by that relapse. The drug involvement concerns are not fully mitigated.

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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).[5] In making the overall commonsense determination required under AG ¶ 2(c), I have

[4] Applicant indicated that he did not see the old high school friends regularly, although they stayed in contact by telephone and texting. (Tr. 60.) In response to whether he was still texting the persons with whom he used the cocaine in April 2012, Applicant indicated that he was in touch only with the "birthday girl," and she was not one of the friends with whom he used the cocaine. He denied any ongoing contact with his other high school friends. (Tr. 69.)

[5] The factors under AG ¶ 2(a) are as follows:

> (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.

to consider Applicant's poor judgment in abusing cocaine while he held a secret clearance. Applicant knew it was illegal and against his employer's policies, even if he did not realize that abusing cocaine, including just before reporting for duty and also at work, was inconsistent with his security clearance. After he received the SOR, Applicant was on notice that the Government was concerned about his cocaine abuse. His subsequent use of cocaine, while awaiting his hearing on his continued eligibility for a secret clearance, casts serious doubt about whether he can be counted on to comply with his security responsibilities.

Applicant showed a willingness to comply with his reporting obligations, in that he volunteered the information about his April 2012 cocaine relapse at his May 2012 hearing. Yet, his credibility suffers from the inconsistencies between his August 2010 affidavit and his hearing testimony about the frequency, quantity, and circumstances of his previous cocaine abuse. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). Based on the facts before me and the adjudicative guidelines that I am bound to consider, for the aforesaid reasons, I am unable to conclude that it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance at this time.

Formal Findings

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

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant[6]

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge

[6] Treatment is viewed favorably, but the allegation is found against Applicant because of his failure to complete the recommended aftercare.