DATE: December 14, 2001

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 00-0432

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esquire, Department Counsel

FOR APPLICANT

David T. Young, Esquire

STATEMENT OF THE CASE

On 30 August 2000, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding[(1)] that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 27 September 2000, Applicant answered the SOR and requested a hearing. The case was assigned to me on 18 October 2000. However, at the time the case was assigned to me it was subject to a moratorium on issuing final decisions in certain types of Guideline J cases, pending resolution of proposed legislation which would affect the processing of these cases. Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 amended Title 10 U.S. Code to add a new section, § 986, precluding the initial granting or renewal of a security clearance by the Department of Defense (DoD) under four specific circumstances. On 7 June 2001, the Deputy Secretary of Defense issued implementing regulations under DoD 5200.2-R; the Director, DOHA issued Operating Instruction 64 (O.I. 64) on 10 July 2001, lifting the moratorium effective 23 July 2001.

On 25 July 2001, I issued an amended SOR in accordance with O.I. 64. Because of postal delays, Applicant did not receive the amended SOR until 21 August 2001. On 10 September 2001, Applicant--through counsel--timely requested an extension of time to file the answer; Department Counsel did not object, and I granted the extension to 20 September 2001. Applicant answered the amended SOR on 18 September. I set the case for hearing on 22 October 2001, and issued a notice of hearing on 23 October 2000 for a hearing on 15 November 2001.

At the hearing, the Government presented four exhibits--admitted pursuant to stipulation--and no witnesses; Applicant presented four exhibits--admitted without objection--and the testimony of one witness, himself. DOHA received the transcript on 26 November 2001.

RULINGS ON PROCEDURE

On 10 September 2001, Applicant requested an extension of time to file his answer, and Department Counsel interposed

no objection to the request. Consequently, I granted the extension of time to file.

At the hearing (Tr. 11-014), I admitted Government's Exhibits 1-4 pursuant to stipulation between Applicant and the Government, after ascertaining that Applicant understood the import of the agreement.

FINDINGS OF FACT

Applicant admitted the factual allegations of the SOR; accordingly, Applicant's admissions are incorporated as findings of fact.

Applicant--a 44-year old employee of a defense contractor--seeks access to classified information.

On 13 November 1990, Applicant executed a Personnel Security Questionnaire (G.E. 1) on which he answered "yes" to a question designed to elicit his arrest record, and disclosed an approximately January 1979 misdemeanor marijuana possession charge for which he served six months probation and forty hours of community service. He also answered "yes" to a question designed to elicit his use and possession of illegal drugs, and disclosed his occasional use and possession of marijuana before his 1979 arrest. However, he did not disclose that he had also used used cocaine on two occasions in approximately 1978.(2) Applicant was granted a security clearance.

Between approximately March 1990 and summer 1990--during a period of unemployment and underemployment--Applicant served as middleman(3) for three separate marijuana sales totaling about 135 pounds. For his role in the transactions, Applicant was paid approximately $50.00 per pound, or a little over $6,400.00. (G.E. 4).(4) Although Applicant was aware of the criminal nature of his conduct, he considered that his risk on a first offense was slim (Tr. 41). Nevertheless, he was concerned about his criminal liability, and ceased participating in the criminal conspiracy in approximately June or July 1990. Several years passed, and Applicant came to believe he had escaped criminal responsibility for his conduct. He had not.

On 21 October 1993, Applicant was charged with conspiracy to possess with intent to distribute and distribution of marijuana--a violation of 21 U.S.C. §846, a felony. Applicant initially faced a maximum sentence of 20 years imprisonment, a $1,000,000.00 fine, and three years of supervised probation. However, Applicant began to cooperate with Federal authorities early in the process and negotiated a plea arrangement which offered Applicant a three-level downward sentence adjustment under the Federal sentencing guidelines in recognition of Applicant's acceptance of responsibility for his conduct, conditioned upon Applicant's full cooperation with the Government's prosecution of other related drug cases. Applicant met his end of the bargain, and the Government filed its required otion to Recognize Defendant's Substantial Assistance, and the presiding judge granted the motion; thus, instead of facing sentencing under level 19 of the sentencing guidelines,(5) Applicant faced sentencing under level 16 of the sentencing guidelines(6) and was ultimately sentenced to 24 months imprisonment, a $10,000.00 fine, and three years supervised probation. Execution of the fine was stayed to permit Applicant to make payment once he was released from prison and able to work.

Applicant successfully completed his prison term, and his supervised probation (during which he passed random drug tests)(Tr. 32). There has been no recurrence of the criminal conduct since 1990.

Applicant has been married eighteen years, and has two sons. Applicant has been involved in his sons' lives as a baseball and football coach in organized leagues, and as an assistant scoutmaster. He has not gone out of his way to disclose his criminal past to these organizations, but assumes that the fact is generally known because of the small size of the community in which Applicant and his family live. Applicant was asked to apply for the job he currently has by his former supervisor from 1993, who is aware of Applicant's criminal past.(7)

Applicant's character references (A.E. A., B., C.) consider him a good employee, and a reliable friend and family man. None of the references recite an awareness of Applicant's criminal record, although one reference (A.E. B) appears to be Applicant's father-in-law.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.,* under an assessment of the whole person.

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

CRIMINAL CONDUCT (GUIDELINE J)

E2.A10.1.1. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

E2.A10.1.2.3. Conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year.[(8)]

E2.A10.1.3. Conditions that could mitigate security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent.

E2.A10.1.3.2. The crime was an isolated incident.

E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

E2.A10.1.3.7. Potentially disqualifying conditions 3. . ., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver.[(9)]

PERSONAL CONDUCT (GUIDELINE E)

E2A5.1.1. The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. . .

E2. A5.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] determine security clearance eligibility or trustworthiness. . .;

E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, . . . in connection with a personnel security or trustworthiness determination;

E2.A5.1.3. Conditions that could mitigate security concerns include:

E2.A5.1.3.1. The information was. . . not pertinent to a determination of judgment, trustworthiness, or reliability;

E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;

Burden of Proof

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

The Government has established its case under Guideline E. The information sought by the Government on the security clearance application in 1990 was relevant and material to the Government's investigation of the Applicant's fitness for access to classified information, and the Applicant knowingly and wilfully falsified that information. However, I conclude this conduct is mitigated. At the time Applicant completed the 1990 clearance application, he disclosed his most recent and most extensive drug use, as well as his 1979 misdemeanor possession arrest. His experimental use of cocaine on two occasions in approximately 1978, while involving an admittedly more serious drug, nevertheless would not have added appreciably greater weight to the derogatory information disclosed by Applicant, and would not have affected the decision to grant Applicant's clearance at that time. Consequently, I conclude that the omitted information was not pertinent to a clearance determination. Second, while Applicant did not make a prompt, good faith effort to correct the falsification before being confronted with the facts within the meaning of Mitigating Condition E2.A.5.1.3.3. (mostly because the disclosure was not prompt), the falsification was an isolated incident, was not recent (having occurred over 11 years ago), and Applicant later provided correct information voluntarily. Indeed, Applicant provided this information before being confronted with it, disclosed this information without any reason to believe that the Government was aware of it, and indeed, disclosed it precisely because he wanted to make a clean break with all of his past conduct (Tr. 37). Under these circumstances, I conclude it unlikely Applicant will engage in similar behavior in the future. I find criterion E. for the Applicant.

The Government has established its case under Guideline J. Applicant's criminal conduct in the Spring and Summer 1990 was serious, a conclusion confirmed by the fact that Applicant was sentenced to two years in prison and a $10,000.00 fine even with the full benefit of his plea arrangement and cooperation with Federal prosecutors. Nevertheless, I conclude that the criminal conduct is otherwise mitigated, but for the application of 10 U.S.C. § 986 to this case. First, Applicant abandoned his participation in the criminal endeavor in Summer 1990, long before he was charged with the offense. Although Applicant indeed had every reason to fully comply with the terms of his plea arrangement, thus lessening the weight that can be accorded this conduct, the fact remains that Applicant is entitled to some credit for his cooperation with Federal prosecutors beyond that already reflected in his lowered sentence. Furthermore, the criminal conduct was not recent, having occurred over 11 years ago, and was isolated, being confined to a fairly discrete period of time in Spring and Summer 1990.[(10)] Finally, there is clear evidence of successful rehabilitation, documented both by Applicant's continued participation in community activities and his character references which, while not indicating any knowledge of Applicant's criminal past, nevertheless attest to his work performance and family involvement.

Were this the end of the analysis under Guideline J., I would conclude Applicant's criminal conduct in 1990 mitigated.

However, as alleged in subparagraph c. of the SOR, Applicant's case falls within the purview of 10 U.S.C. § 986. Under the new regulations issued by the Deputy Secretary of Defense, because Applicant was convicted in Federal court and sentenced to imprisonment for more than one year, I may not mitigate his criminal conduct. Accordingly, I find Guideline J. against Applicant. However, because I do so solely because of the applicability of 10 U.S.C. § 986 to this case, I make the following statement as required by O.I. 64 in such a case: I recommend further consideration of this case for a waiver of 10 U.S.C. § 986 .

FORMAL FINDINGS

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: Against the Applicant

Paragraph 2. Guideline E: FOR THE APPLICANT

Subparagraph a: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996 and Change 4 dated 20 April 1999 (Directive).

2. Although not alleged in the original SOR, Applicant also failed to disclose his involvement in the sales of marijuana which later became the subject of the allegations in paragraph 1.a. of the SOR. While this omission is not before me, and thus not relevant on the merits of this case, I have considered the omission on the issue of Applicant's credibility.

3. In the sense that the Applicant was the individual who introduced the buyer and the seller, and was the individual known and trusted by each party to the marijuana sale.

4. Applicant's testimony about the details of his criminal involvement was essentially consistent with both his sworn statement (G.E. 3) and the court records (G.E. 4).

5. 30-37 months imprisonment, $1,000,000.00 fine, and 3-5 years supervised probation.

6. 21-27 months imprisonment.

7. Applicant is employed by a different company than employed him in 1993, because Applicant is employed in an industry where the Government contractor frequently changes, but employees simply move to the new contractor, thus remaining employed on the same contract for several years, but with different contractors.

8. As issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.

9. Disqualifying conditions c. and d. in original as issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.

10. I consider Applicant's 1979 misdemeanor possession of marijuana charge to have little effect on this conclusion, both because of its remoteness from the felony charge (11 years) and the substantial difference in criminal import between the two offenses.