DATE: November 1, 2002

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-17000

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 45-year-old contractor employee was involved in two drug-related incidents, in 1976 and 1977. In one, he was detained for a few hours but never charged or convicted. In the other, he was convicted of possession of marijuana, and sentenced to a indefinite term in a youth authority facility, but the sentence was suspended and he did not serve any time. He was not sentenced to more than one year, so 10 U.S.C. 986 is not applicable. However, Applicant did knowingly falsify his answer to Item 24 on his August 2000 security clearance application, when he answered "No" to a question asking if he had ever been convicted of a drug-related crime. Mitigation was not established. Clearance denied.

On June 6, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

Applicant submitted an undated response that was accepted as timely by Department Counsel. In his response, Applicant elected to have a decision made on the written record, in lieu of a hearing before an Administrative Judge of the Defense Office of Hearings and Appeals (DOHA). On July 16, 2002, Department Counsel issued a File of Relevant Materials (FORM) that included seven exhibits, marked Government Exhibits (GX) 1 - 7. Applicant was advised that any response to the FORM had to be submitted with 30 days of receipt of the FORM. Applicant received the FORM on July 25, 2002, but he did not submit any response. The case was assigned to me on September 20, 2002. The FORM also includes a copy of 10 U.S.C. 986, of which I took official notice.

FINDINGS OF FACT

Applicant is a 45-year-old "Instructor" employed by a defense contractor who is seeking a security clearance for

Applicant in connection with his position. In his response to the SOR, Applicant denied SOR allegations 1.a. (a 1977 arrest) and 2.a. (falsification on his Form SF 86). He admitted SOR allegation 1.b. (a 1976 arrest), and he neither admitted nor denied SOR allegation 1.c. (which alleges the applicability of 10 U.S.C. 986), and is deemed a denial for purposes of this decision.

Based on the contents of the FORM, I make the following **Findings of Fact** as to each SOR allegations:

Guideline J (Criminal Conduct)

1.a. - Applicant was arrested on April 23, 1977 for possession of amphetamines.

1.b. - Applicant was arrested on April 30, 1976 and charged with Intention to Distribute Marijuana and for Possession of Marijuana. He was found guilty of Possession of Marijuana and was sentenced to "Youth Reception and Correction Center . . . , *indeterminate term*, credit 1 day, sentence suspended, probation 2 years, FINED $500 to be paid through probation over the two-year probationary period" (GX 5, Adult Presentence Report) (emphasis added). Based on this official document, Applicant was not sentenced to "Confinement 5Y," as cited in the FBI Criminal History (GX 6) and alleged in the SOR (GX 1).

1.c. - The Finding of Fact as to SOR 1.b., above, means that this matter does not fall within the specific prohibition of 10 U.S.C. 986©)(1), since the record does not establish that Applicant was convicted of a crime *and sentenced to more than one year imprisonment* , as alleged in SOR 1.b.

Guideline E (Personal Conduct)

2.a. - Applicant falsified material facts on his April 30, 2000 Questionnaire for National Security Positions (SF 86) when he answered NO to Question **24 - Your Police Record - Alcohol/Drug Offenses** [have you ever been charged], when he deliberately omitted any mention of the arrests and convictions for drug-related offenses in 1976 and 1977, as alleged in SOR 1.a and 1.b.

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

GUIDELINE J (Criminal Conduct)

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Conditions that could raise a security concern and maybe disqualifying include:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

1. The criminal behavior was not recent.

2. The crime was an isolated incident.[(1)]

6. There is clear evidence of successful rehabilitation, since Applicant has no criminal history reported for the last 25 years, since 1977.

Guideline E (Personal Conduct)

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

Condition that could raise a security concern and may be disqualifying includes:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire. . . .

Conditions that could mitigate security concerns include:

None that are applicable under the facts of this case.

Eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an

applicant for a security clearance, in his or her private life or connected to work, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by an applicant's admissions or by other evidence) and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to

classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Applicant is 45-years-old and holds a Diploma in computer science. Since this case has been decided on the written record, I have considered the evidence in light of the appropriate legal standards and factors, but without the opportunity to assess Applicant's credibility in person. I conclude the totality of the evidence establishes a case as to all three SOR allegations, which in turn establishes a nexus or connection with Applicant's security clearance eligibility.

Guideline J (Criminal Conduct)

SOR 1.a. - The fact of the 1977 arrest for possession of amphetamines is derived from the FBI Criminal History Report (GX 6). However, that exhibit reports *only* the arrest on April 23, 1977. No disposition is mentioned. Applicants' explanation of the incident is that he was in a house rented by an acquaintance, with other musical band members, when "the police came [found some amphetamines] and took everyone down to the police station" (GX 7, Sworn Statement of May 8, 2002.). As far as he remembers 25 years later, he was released that same night, returned home, and never went to court. He "didn't know [he] was actually arrested, . . . didn't pay any fines, . . . and didn't do any jail time" (Id.). The fact that nothing about this incident other than the arrest is reported in the FBI Criminal Record, tends to support the credibility of Applicant's claim that he was not aware he had been "arrested" on this occasion when he completed his SF 86.

SOR 1.b. - The fact of the 1976 arrest and conviction is admitted by Applicant and supported by both his Sworn Statement (GX 6) and the FBI Criminal Report (GX 7). His story of the circumstance surrounding the arrest is not implausible, considering the sentence documented in GX 5 and six. The fact remains however, that he was arrested and convicted by his guilty plea to the count of possession marijuana. Nothing in the record establishes that the offense was a felony *per se*, or a felony by sentence. The sentence, to a youth facility, for an indeterminate period, and suspended, with no additional time served, suggests it was handled as a misdemeanor. In any case, it clearly has not been established that Applicant was sentenced to more than one year.

As cited above, in the Findings of Fact section, there is a discrepancy between the official court records and the FBI Criminal History. Since the former is the original court document and the latter a secondary source containing abstracts of information submitted by local courts and law enforcement systems, it is much more likely that the FBI, the person(s) submitting the information about Applicant to the FBI, or the person(s) entering the information on the FBI report erroneously phrased what the sentencing court actually did, as reported in official court documents. On this basis, I conclude that Applicant *was not* sentenced to more than a year imprisonment.

SOR 1.c. - Considering the above discussion under SOR 1.b., Applicant's 1976 conviction and sentence does not fall within the language of 10 U.S.C. 986

Guideline E (Personal Conduct)

2.a. - It is undisputed that Applicant knowingly said "No" in answer to Question 24 on his August 30, 2000 SF 86. Question 24 asks: "Have you *ever* been charged with or convicted of any offense related to alcohol or drugs?" Despite this fact, Applicant did not report either the 1976 or 1977 arrests.

As to the 1977 arrest (SOR 1.a.), I conclude it has not been established that Applicant knew he had been arrested. Although he *admits* allegation 1.a. in his response to the SOR, his attached explanations show that he was admitting that the incident occurred, but that he didn't know he had been arrested (GX 3, his rely to the SOR), and therefore did not knowingly answer falsely when he failed to mention this arrest on his SF 86.

As to the 1976 arrest (SOR 1.b.), Applicant did know he had been arrested (and convicted) of this offense (GX 3 and GX 7). His explanation for omitting this arrest from his answer to Question 24 is that he "asked a coworker if I needed to put this [the 1976 conviction] in my security application. I was advised to go back 10 years and I deleted it" (GX 3, Response to SOR, undated but probably late June or July 2002). However, in his Sworn Statement to DSS of May 8,

2002, he states that he "thought I only had to disclose arrest[s] for the past seven years. I didn't read the question carefully enough and didn't realize I had to put any arrest[s] prior to seven years. I didn't intend to falsify any security forms" (GX 7). Even if a coworker gave Applicant the advice not to report the 1976 or 1977 incidents, Applicant should have known better. The different explanations make it impossible to ascertain which explanation is true or even whether either of the them is the true reason for the falsification. The language of Question 24, "Have you ever been arrested . . .?," could not be more explicit, so saying that he did not understand the words or that he acted on the advice of someone not authorized to give such advice, does not constitute an acceptable excuse.

Criminal Conduct - I conclude that Disqualifying Condition (DC) 1 is applicable since a knowing falsification of material facts on a security clearance application is a violation of 10 U.S.C. 1001. I also conclude that Applicant's falsification does qualify as a "single serious crime," although not as "multiple lesser offenses." As to Mitigating Conditions (MC), none are completely applicable under the facts of this case.

Personal Conduct - Disqualifying Condition 2 applies, since Applicant knowingly gave a false answer to Question 24. Again, none of the Mitigating Conditions are completely established.

I have also carefully considered this case under the nine general guidelines found in Section

E2.2 Adjudicative Process, on page 16 of Enclosure 2 of the Directive. My evaluation of the evidence under these standard leads to the same conclusions.

Based on the totality of the record, since 10 U.S.C. 986 is not applicable on the facts of this case, my decision focuses on two factors: (1) whether the two drug-related incidents in 1976 and 1977 have current security significance. In the absence of evidence of additional similar problems during the last quarter century, I conclude they do not have such significance; and (2) the falsification of Applicant's SF 86. If Applicant had not falsified the SF 86, the Government's concerns would focus only on two 25 year old offenses, neither of which has been shown to have resulted in a felony conviction. The falsification does make Applicant's conduct of current security significance. Second only to actual violations of security protocols, the falsification of material information on a security clearance application goes most directly to the heart of the security clearance process, since it prevents a decision from being made on the basis of a complete record of an applicant's conduct.

It is not absolutely clear whether the falsification was the result of carelessness in reading the question or of accepting and acting on bad advice from a person not authorized to speak for the Government. In either case, Applicant demonstrated poor judgment that is unacceptable in someone seeking access to the nation's secrets.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 - Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. For the Applicant

Paragraph 2 - Guideline E (Personal Conduct) Against Applicant

Subparagraph 2.a. Against 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.

BARRY M. SAX

ADMINISTRATIVE JUDGE

1. Usually, isolated incident is considered to be one incident. Here, we have two, 1976 and 1977, one year apart and a quarter century in the past. Under these circumstances, I consider this one year period of misconduct to be an isolated incident in a life of 45 years.