DATE: November 6, 2002

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-17175

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

Stephen Dicht, Esq.

SYNOPSIS

After he was arrested and charged with marijuana possession in March 1995, arrested and charged with disorderly conduct in April 1996, and after he had used marijuana several times within seven years of the date he completed his SF 86 (Security Clearance Application), Applicant answered "no" to each relevant question on the SF 86 designed to elicit that information. He has not provided a persuasive explanation for omitting information that was relevant and material to a determination of his judgment, trustworthiness and reliability. Clearance is denied.

STATEMENT OF THE CASE

On April 2, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, as amended, and modified, and Department of Defense Directive 5220.6, "*Defense Industrial Personnel Security Clearance Review Program*." (Directive)), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary finding under the Directive that it is clearly consistent with the national interest to grant a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether a security clearance should be granted, denied, or continued.

Applicant answered the SOR on April 29, 2002, and stated he wanted a hearing before a DOHA Administrative Judge. Because of case load considerations, the case was reassigned to this Administrative Judge on July 23, 2002 after having been previously assigned to another Administrative Judge. On August 27, 2002, a hearing was convened for the purpose of considering whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of seven exhibits. Applicant relied on his own testimony and the testimony of two witnesses. A transcript of the proceeding was received on September 6, 2002.

AMENDMENT OF STATEMENT OF REASONS

Department Counsel moved to amend the SOR at the conclusion of its evidence presentation by changing the date

alleged in Subparagraph 1.a.(2) from March 7, 1995 to March 17, 1995 (Tr. 18-19). Applicant did not object to the proposed amendment and the SOR was amended as proposed.

FINDINGS OF FACT

The Statement of Reasons (SOR) charges Applicant with dishonesty and a lack of candor because he deliberately omitted relevant and material facts from the SF 86 (*Security Clearance Application)* when he answered "no" to the question which asked if he been charged or convicted of any offense related to alcohol or drugs, "no" to the question that asked if had been arrested for or charged with, or convicted of any offense in the last 7 years, and "no" to the question of whether he had used marijuana in the last 7 years or since the age of 16. In his answer to the SOR, Applicant denied all SOR allegations.

After a complete and thorough review of the evidence of record and Applicant's testimony at his administrative hearing, I make the following findings of fact:

Applicant is a 25-year-old employee of a DoD contractor for whom he has worked since January 2000. His father died when he was a freshman in high school and he currently lives at home with his mother[(1)] for whom he provides financial support. In addition to providing financial support to his mother, he provides financial support to a child he fathered out of wedlock four years ago (Tr. 55). Although not a high school graduate (Tr. 77) he has earned the "government equivalency to a high school diploma", and has completed trade school (Tr. 77-78). The interim security clearance granted to him by his employer was suspended approximately two months ago (Tr. 90-91).

In March 1995 and April 1996, Applicant had encounters with law enforcement authorities about which he failed to provide information in response to pertinent questions on the SF 86 (Security Clearance Application) he completed in December 1999. Except for a very brief excerpt from FBI records, a brief narrative summary in a police report and municipal court records, Applicant's testimony and an earlier signed, sworn statement to the Defense Security Service (DSS), are the principal source of information about these two events

The first event occurred in March 1995 when Applicant and two friends entered a house under construction for the ostensible purpose of finding a ride to concert (Tr. 52). The area where the house was being constructed was a formerly wooded area where he and his friends had "hung out" over the years (Tr. 51). According to Applicant, there were other friends, associates, etc., in the house when they arrived (Tr. 52). The police arrived approximately 15 minutes after Applicant and arrested him and his friends for possession of marijuana (Tr. 52). He claims that he was charged with possessing marijuana because everyone else scattered when the police arrived; he stayed around because he had not done anything wrong and had no reason to leave (Tr. 52-53, 54).Applicant testified he arrived at the construction site without marijuana in his possession, and he did not use marijuana while he was there (Tr. 52). Applicant and his friends were taken to the police station where they were informed of the charges against them--possession of marijuana (Tr.72-73). Applicant hired an attorney to represent him and then: "another guy confessed when we came to court for the possession so that charge was dropped" (Tr. 53). Applicant was charged with criminal trespass in violation of a borough ordinance. He was required to pay a $500.00 fine .

In April 1996, Applicant was stopped by the police while driving his car with two friends at 2 A.M. According to Applicant, he was stopped[(2)] because the police suspected his car was "illegal" (Tr. 48). Just after he was stopped by the police, he "flicked (his) cigarette" so he would not "end up blowing smoke" in the police officer's face. The officer issued him a $500.00 ticket for littering (Tr. 49). When he appeared in court, the officer admitted the $500.00 ticket "was a little steep" and he reduced/changed the ticket to a $50.00 fine for disorderly conduct which Applicant paid (Tr. 49-50).

While Applicant was in high school--between his freshman and junior years, he smoked marijuana five or six times at parties with friends (Tr. 57-58, Gov. Exh. 2).

When Applicant completed his SF 86 (Social Security Application) in December 1999, he answered "no" to specific, pertinent questions[(3)] intended to elicit information about past arrests and illegal drug use. He answered "no" to questions 24 and 26, and did not provide information about his March 1995 arrest and charge for possession of

marijuana. He explained he did not list the arrest and charges because the charges were dismissed and it was "yes/no question," where he would not have been able to "explain" himself[(4)](#4) (Tr. 54). He did not want to answer "yes" and jeopardize his job over a matter he had been cleared of in court (Tr. 54). Later he explained further:

I didn't think it was right that I'd have to answer that question because I thought that would have a bearing on me not getting hired or being terminated at the time if I did that.

He also testified that his lawyer had told him he would not have a record for pleading to a charge of criminal trespass in violation of a borough ordinance (Tr. 74). When he was asked if he had read the language in questions 24 and 26 that instructed him to report information about arrests even if the record has been sealed or otherwise stricken from the record, Applicant admitted reading the language and not being "totally sure what that meant" (Tr. 74).

Applicant has provided different explanations for why he did not answer "yes" to question 26 and admit being arrested for littering in April 1996. In his signed sworn statement (dated March 2001), he explained:

I did not list this offense on my Security Questionnaire because the fine was under $200.00 and because I considered it a motor vehicle offense (Gov. Exh. 2).

At his hearing, Applicant testified he "didn't even see it as a traffic offense" (Tr. 50),"it was a littering ticket..." he "forgot" about it (Tr. 51), he had no idea he had been charged with disorderly conduct, he was pleased when the ticket was reduced from $500.00 to $50.00 because when "you're that young, $500.00 is a lot of money (Tr. 67), and he considered the disorderly conduct charge a "motor vehicle offense" (Tr. 68). He was unable to provide a satisfactory explanation for the inconsistency in testifying on the one hand: he had forgotten about the incident, and then testifying he did not list the offense on his SF 86 because it was a traffic fine for less than $200.00 (Tr. 85-86).

Applicant testified he did not admit using marijuana in response to question 27 because he "kind of misinterpreted that seven years;" he now admits his "no" answer was a mistake (Tr. 61-62)

In the 30 months he has worked for his current employer, Applicant has earned a reputation as an "above average" worker. The company chose to retain Applicant and to reassign him to a position where a security clearance was not required after he lost his interim security clearance--two months prior to the hearing--even though he could have been summarily terminated with the loss of his security clearance.

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judge on a case by case basis with an eye toward making decisions with reasonable consistency that are clearly consistent with the national interest. In making these overall common sense determinations. Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but also in the context of the factors set forth in Section 6.3 of the Directive. In that vein, the Government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to Applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter:

PERSONAL CONDUCT

(Guideline E)

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

Conditions that could raise a security concern and may be disqualifying also include:

E2A5.1.2.3. 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, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Conditions that could mitigate security concerns include:

None Applicable

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to Applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates it is clearly consistent with the national interest to grant or continue his security clearance.

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

CONCLUSION

Having considered the record evidence under the appropriate legal precepts and factors, this Administrative Judge concludes the Government has established its case with regard to Guideline E. In reach my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section E2.2., as well as those referred to in the section dealing with the Adjudicative Process.

A security concern is raised by Applicant's "deliberate omission...of relevant and material facts" from his SF 86. Facts are considered relevant and material when they are capable of influencing a federal agency's decision, e.g., a decision to grant or deny a security clearance.

Applicant has explained he did not list his March 1995 arrest (and subsequent charges) for marijuana possession because he was innocent of the charge and the charge was eventually dismissed. He read the language that required him to list an arrest even "if the record was sealed or otherwise stricken" but because he "was not totally sure what that meant,"he answered "no to questions to which the correct answer was clearly "yes." His explanations are not credible. The charge of marijuana possession may have been dismissed, but Applicant was also arrested for being in a place where he should not have been. And for that he was fined $500.00. Applicant's financial circumstances were/are not sufficiently comfortable that he would have likely forgotten a fine of that magnitude. His claim that his attorney advised him there would be no record of the criminal trespass for which he paid a $500.00 fine because it was a violation of a borough ordinance, is specious at best. The more logical explanation for Applicant's omitting his arrest for marijuana possession, and an explanation based on the evidence of record, is his fear of the consequences. He admitted thinking information of the arrest "would have a bearing on (his) not getting hired or being terminated at the time if I did..." Applicant supplied the motive for his not being truthful.

Because Applicant did not list the most serious adverse information in his background (the arrest and charges for marijuana possession) in response to questions 24 and 26 out of fear he would not be hired, or would be terminated as a consequence of that information becoming known, a similar motive is found for his not disclosing his occasional marijuana use in high school and his 1996 arrest for disorderly conduct. His stated explanations that he forgot about the disorderly conduct, misread the question, or made a mistake when answering the question about his drug use history are not credible for the same reason his explanation for not disclosing being arrested for and being charged with marijuana possession is not credible. Applicant did not tell the truth because he feared what would happen to him if he did. Guideline E is concluded against Applicant.

FORMAL FINDINGS

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

Paragraph 1 (Guideline E) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. 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 Applicant's security clearance.

John R. Erck

Administrative Judge

1. Appellant testified his mother's other income is earned from cleaning houses (Tr. 57).

2. Earlier in his March 2001 signed, sworn statement, Applicant stated he had been stopped for passing in a no passing zone (Gov. Exh. 2).

3. **Question 24:** Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the Court issued an expungement order under the authorities of 21 U.S.C. 844 or 18 U.S.C. 3607.

Question 26: In the last 7 years, have you been arrested for, charge with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than $150.00 unless the violation was alcohol or drug related). For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. (There is an exception for this question identical to the exception in question 24 above).

Question 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 durgs?

4. This is not true, question 43 of the SF 86 provides an applicant with a space to explain himself.