DATE: March 20, 2002

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-17936

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR), dated October 12, 2001, to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on personal conduct (guideline E) and criminal conduct (guideline J) related to deliberate falsification of a December 1998 security clearance application.

On October 27, 2001, Applicant responded to the allegations set forth in the SOR and requested that his case be determined on the written record in lieu of a hearing. The Government submitted its File of Relevant Material (FORM) on January 4, 2002. In the FORM, the Government moved to delete subparagraph 1.a. and its factual subpart (1) from the SOR, which alleges the deliberate omission by Applicant from his December 1998 SF 86 (EPSQ) of his arrest in December 1991 on charges of disorderly person, possession of a class D substance (marijuana), and violation of civil rights. The proposed amendment was based on documentation forwarded by Applicant with his response to the SOR which shows Applicant listed the December 1991 offense on a handwritten SF 86 completed in October 1998. A copy of the FORM, including notice of the proposed amendment, was forwarded to Applicant with instructions to submit additional information and/or any objections within thirty days of receipt. Applicant elected not to respond, and the case was assigned to me on March 7, 2002, for a decision.

The motion to delete subparagraph 1.a. in its entirety from the SOR is hereby granted, the Government having accepted as credible that the December 1991 arrest was inadvertently omitted from the EPSQ version of the SF 86 when that form was typed in December 1998 and that Applicant overlooked the omission when he signed the EPSQ, Allegations related to deliberate falsification of that same EPSQ by failure to report marijuana involvement from 1982 to at least Spring 1998 have been admitted by Applicant and remain relevant to a determination of his current security suitability.

FINDINGS OF FACT

After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a 38-year-old carpenter who has been employed by the same defense contractor since August 1981. Granted a Confidential security clearance by his employer, Applicant has held that access throughout his tenure.

Applicant smoked marijuana two to three times per month from about 1982 to about Spring 1998. Applicant purchased marijuana during this period in quantity of a quarter ounce for $20.00, spending about $200.00 to $300.00 per year. At the request of his girlfriend, Applicant ceased his marijuana involvement in about Spring 1998. He intends no future use of illegal drugs.

Applicant's involvement with marijuana led to adverse legal consequences. In December 1991, he was arrested after he got into a fight outside of a local coffee bar. Arrested for disorderly conduct because of his unruly behavior, Applicant was also charged with civil rights violation (hate crime) for derogatory comments he had made to another person during the incident and with illegal possession of a class D substance (marijuana) after a small amount of the illegal drug was found on his person. Applicant pleaded not guilty to the charges, but in late January 1993, he was found to have admitted sufficient facts for disorderly conduct and illegal possession. The case was continued without a finding as to both counts on payment of $300.00. The civil rights violation was dismissed.

Applicant was arrested on one occasion in September 1992 for disorderly conduct when he and a friend had a physical altercation over a wristwatch. Applicant paid a $50.00 fine for that offense.

In about June 1993, Applicant was caught drinking beer at a local beach in violation of the law. Arrested for consuming alcohol in public, a charge of illegal possession of marijuana was added when, during a search of his person incident to the arrest, the police found a marijuana pipe and a small quantity of the drug in a plastic bag in Applicant's pocket. Applicant was fined about $200.00 for the offenses.

On October 13, 1998, Applicant completed a Questionnaire for National Security Positions (SF 86). In response to question 23 regarding any police record, Applicant reported his June 1993 illegal possession of marijuana arrest as well as the 1991 civil rights violation and illegal possession charges. He also referenced an attached police report which pertained to a September 1992 disorderly conduct charge. Applicant also responded "Yes" to inquiry concerning any illegal drug use in the last seven years ["24 a 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?"], but disclosed only use of marijuana two times each in October 1991 and in June 1993. Applicant responded negatively to question 24 b ["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?"].

Circa December 1998, another version of the SF 86 was prepared for electronic submission.[(1)] On this EPSQ signed by Applicant on December 7, 1998, are listed the June 1993 possession of marijuana charge and the September 1992 disorderly conduct charge. An affirmative response was entered as to question 27, regarding any use of illegal drugs within the last seven years, with use of marijuana "2 times" in June 1993 indicated. A negative response was entered as to question 28 concerning whether he had ever used illegal drugs while in possession of a security clearance. Applicant signed the EPSQ, making no effort to accurately reflect the extent of his marijuana involvement, which was on the order of monthly from 1982 to Spring 1998 while he held a company granted Confidential security clearance.

On May 6, 1999, Applicant was interviewed by a special agent of the Defense Security Service (DSS). Applicant detailed his marijuana involvement on the order of two to three times monthly with friends from age nineteen (circa 1982) to 1998. He admitted spending about $200.00 to $300.00 per year on marijuana. Maintaining he had abstained since 1998, Applicant related he had no intent to use any illegal drug in the future, including marijuana, as his girlfriend disapproved and he did not want to offend her. Regarding his failure to report the full extent of his marijuana involvement on his SF 86, Applicant responded, "I misunderstood the question about drug use when I completed by

(sic) security clearance application and that is why I listed I only used it two times." (2)

Sometime in early 2001, Applicant was interviewed by the DSS agent about his foreign connections. Following that interview, Applicant provided the DSS agent with a copy of his handwritten SF 86 completed in October 1998 which he had submitted to his employer.

On October 12, 2001, DOHA issued a Statement of Reasons to Applicant alleging falsification of his December 1998 security clearance application for failure to list his December 1991 arrest and for indicating he had used marijuana only twice in June 1993 when he had used the drug from 1982 to at least Spring 1998. On receipt of the Statement of Reasons on October 24, 2001, Applicant contacted the DSS special agent who had interviewed him in May 1999, and he requested another interview to clarify the issue of omission of the December 1991 offense. Interviewed by the agent on October 26, 2001, Applicant explained he had listed on his October 1998 SF 86 all three of his arrests, but had crossed out the information for the September 1992 disorderly conduct "because it did not look like it fit there." Instead, he had provided as an attachment to the October 1998 SF 86 the police report of the September 1992 incident. Applicant indicated that he gave the handwritten SF 86 to his employer who then typed the application for him which he signed in December 1998, overlooking the fact that security officials had left off the electronically generated SF 86 the December 1991 arrest. During his October 26, 2001, interview, Applicant acknowledged he had reported on his October 1998 SF 86 that he had used marijuana two times in October 1991 and two times in June 1993. Applicant admitted "[t]hat was not the complete truth," and he disclosed use of marijuana from about 1982 to about Spring 1998 about two or three times monthly. As to why he failed to disclose the extent of his marijuana use on his handwritten SF 86, Applicant responded:

I don't know why I only listed use of marijuana those four times for the question about use in the prior seven years on my handwritten security clearance application. I also denied using any illegal drug while I had a security clearance on that form because I did not read the question thoroughly and did not notice the words "while possessing a security clearance." I now realize that I answered the question wrong and should have answered "YES."

In light of the extent of his marijuana involvement and the unambiguous nature of the drug-related inquiries on the SF 86, he is found to have deliberately concealed the extent of his marijuana involvement when he completed his October 1998 SF 86 and signed the December 1998 EPSQ.

On October 27, 2001, Applicant filed his Answer to the SOR in which he admitted without explanation the falsification of his December 1998 SF 86 by failing to disclose the extent of his marijuana involvement on that clearance application.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors 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. See Directive 5220.6, Enclosure 2, Section E2.2.4.

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

GUIDELINE E

Personal Conduct

E2.A5.1.1. 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 also 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, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

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

None.

GUIDELINE J

Criminal Conduct

E2.A10.1.1. The Concern: 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 admission 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.A10.1.3. Conditions that could mitigate security concerns include:

None.

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which 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. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern 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 criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the 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 is nonetheless security worthy. 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 that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. *See* Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to guidelines E and J:

Applicant presents a history of marijuana use from about 1982 to at least Spring 1998, with arrests for illegal possession in December 1991 and June 1993. When he filled out in his own handwriting the SF 86 in October 1998, Applicant disclosed use of marijuana two times each in June 1993 and October 1991.[(3)] Applicant's employer relied on this application in preparing the electronic version in December 1998. When the form was typed for electronic submission, security officials listed only that use of marijuana reported by Applicant which was within seven years of the clearance application. Applicant signed the December 1998 EPSQ knowing it did not accurately reflect his marijuana involvement and aware it contained a false denial of any illegal drug use while possessing a security clearance. Intentional misrepresentations on a security clearance application raise very serious personal conduct (guideline E) concerns. Disqualifying condition (DC) E2.A5.1.2.2. (the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire) applies in this case. Furthermore, by certifying falsely that his statements on the security clearance application were "true, complete, and correct to the best of [his] knowledge and belief," Applicant violated Title 18, Section 1001 of the United States Code.[(4)] Under guideline J, criminal conduct, the fact that Applicant has never been formally charged with a violation of that statute does not preclude its consideration for security purposes, as any criminal conduct is potentially disqualifying. DC E2.A10.1.2.1. (allegations or admission of criminal conduct, regardless of whether the person was formally charged) as well as E2.A10.1.2.2. (a single serious crime) must also be considered in evaluation of Applicant's security worthiness.

The personal conduct concerns engendered by deliberate falsification of a security clearance application may be overcome if the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability (MC E2.A5.1.3.1.); the falsification was isolated, not recent and corrected voluntarily (MC E2.A5.1.3.2.); the individual made prompt, good faith efforts to correct the falsification before being confronted (MC E2.A5.1.3.3.); or omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided (MC E2.A5.1.3.4.). None of these mitigating conditions (MC) work to Applicant's benefit. The December 1998 EPSQ cannot be viewed in isolation from the October 1998 SF 86. Applicant having made no effort to correct the EPSQ presented to him for signature in December 1998, he cannot reasonably claim that his May 1999 rectification was prompt.

Applicant fares no better with regard to mitigation under the criminal conduct guideline. While the SF 86 falsifications were in 1998, Applicant was not completely candid during his DSS interviews when asked why he failed to disclose his extensive marijuana involvement on his security clearance applications. Although Applicant admitted when he was interviewed in May 1999 that he had used marijuana from about age 19 to Spring 1998 and had been arrested twice on drug possession charges, he claimed that he misunderstood the question on the SF 86 regarding illegal drug use. In October 2001, Applicant told the agent, "I don't know why I only listed use of marijuana those four times for the question about use in the prior seven years on my handwritten security clearance application."[(5)] With regard to his failure to disclose on his security clearance application that he had used marijuana while in possession of a security clearance, Applicant claimed he did not read the question thoroughly. As recently as October 2001, Applicant was unwilling to accept responsibility for his actions. While security clearance decisions are not meant to punish applicants for past wrongdoings, rehabilitation of such serious personal and criminal conduct requires a showing of remorse and a demonstrated track record of reform. During neither interview did Applicant exhibit any meaningful understanding that he has an obligation at all times to be completely candid with the Government. After considering all the evidence in this case, his criminal conduct is regarded as recent and repeated. Adverse findings are returned with respect to

subparagraphs 1.b. and 2.a., as doubts persist as to whether Applicant's representations can be relied on.

FORMAL FINDINGS

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

Paragraph 1. Guideline E: AGAINST THE APPLICANT

Subparagraph 1.a.: withdrawn

Subparagraph 1.b.: Against the Applicant

Paragraph 2. Guideline J: AGAINST THE 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.

Elizabeth M. Matchinski

Administrative Judge

1. Applicant indicated the October 1998 form was provided to his employer and that security officials typed in the entries on the form electronically generated on December 7, 1998.

2. Applicant told the agent he had forgotten the December 1991 arrest when he completed his [December 1998] SF 86. Applicant apparently did not recall in ay 1999 that he had listed the December 1991 arrest on his October 1998 handwritten application. During a subsequent interview in October 2001 wherein Applicant produced the October 1998 SF 86, Applicant speculated the December 1991 incident must have been inadvertently left off the December 1998 SF 86 when it was typed by security personnel, and that he must have overlooked the omission when he signed the form.

3. On his October 1998 SF 86, Applicant provided an estimated date of October 1991 for his first arrest. It is not coincidental that the dates on which he indicated he used marijuana correspond to the dates on which he was arrested (by his report) for illegal possession of marijuana. Applicant disclosed use of marijuana only on those occasions where a check of criminal records would have revealed his involvement with the drug.

4. Section 1001 of Title 18 of the United States Code provides in pertinent part:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully-

(1) falsifies, conceals, or covers up by any trick scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

5. Applicant's lack of candor when discussing the reason for his SF 86 omissions was not alleged as raising an independent security concern, although deliberately providing false or misleading information concerning relevant and material matters to an investigator . . . in connection with a personnel security or trustworthiness determination is

potentially security disqualifying (See E2.A5.1.2.3.). Conduct not alleged may still be considered where it is relevant and material to evaluating evidence of extenuation, mitigation and changed circumstances; to decide whether a particular adjudicative guideline is applicable; or to evaluate whether an applicant has reformed his behavior.