DATE: December 17, 2002

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-23317

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY II

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant was arrested in 1997 for having an open container of alcohol in a vehicle and possession of marijuana. Although ticketed, the Applicant assumed the matter had been dropped when he was unsuccessful in getting information about his arrest from the state court. When he completed a security clearance application, he denied he had ever been arrested. The falsification was in response to a single question on a single SF 86 completed more than four years ago. After applying the mitigating factors, clearance is granted.

STATEMENT OF THE CASE

On March 28, 2002, 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)] it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Applicant, in an undated letter received by DOHA on April 2, 2000, answered the SOR and requested a hearing. The case was assigned to me on May 17, 2002. A Notice of Hearing was issued on June 7, 2002, scheduling the hearing which was held on June 25, 2002.

The Government's case consisted of six exhibits (Gov Ex). The Applicant relied on his own testimony and four exhibits. (App Ex) Following the hearing, additional documents concerning the Applicant's duty performance were received, provisions having been made at the time of the hearing for their submission following the hearing. Department Counsel having no objection to their admission, the submissions were admitted. The transcript (tr.) of the hearing was received on July 5, 2002.

FINDINGS OF FACT

The SOR alleges personal conduct (Guideline E) and criminal conduct (Guideline J). The Applicant admits a 1997 arrest and denies the remaining allegations.

The Applicant is 28-years-old, has worked for a defense contractor since June 1998, and is seeking to maintain a security clearance. The Applicant's duty performance exceeds expectations and he is a valuable asset to his company. (App Ex E)

In May 1997, the Applicant, then age 23, was a passenger in a car when he was arrested by a federal park service officer [(2)] and charged with possession of marijuana and having an open container of alcohol in a motor vehicle. It was the last day the Applicant was a university student and another student gave him a ride home. (Gov Ex 3) The Applicant has not had an open container of alcohol in a vehicle since then. (tr. 63) The Applicant was arrested, taken to the police station, and finger printed. He knew he had been arrested, but did not believe he had been charged. (tr. 39) The police report [(3)]

(Gov Ex 6) indicates the Applicant told the arresting officer the marijuana found in the vehicle was his. The report states the amount of marijuana was approximately 3 gm, worth approximately $30.00. At the time of his arrest, the Applicant was never shown the marijuana, nor was he confronted about the marijuana by the arresting officers. The Applicant was not in the car when the search was conducted. At the DOHA hearing, the Applicant denied there was marijuana in the car and denied admitting, at the time of arrest, the marijuana was his. (tr. 55) He did admit to smoking marijuana in the car and that a marijuana cigarette, which was two or three inches long had been thrown out of the car after the park police stopped the car. (tr. 65)

When the Applicant received the ticket, he was told he would be notified of the court date within 45 to 60 days. The court date was set for June 1997, but the Applicant never received the notice for it was sent to an incorrect address. On two occasions the notice was returned without notice to the Applicant. (App Exs A and B) Approximately 45 days after receiving the ticket, the Applicant contacted the state court providing his name, social security number, and driver's license number and was informed there was no record of him. (App Ex C, tr. 37) However, this was not a state matter, but a federal court matter. The Applicant called the courthouse two or three times. The Applicant incorrectly assumed the matter had been dropped and he believed the alcohol offense no longer existed. (tr. 39)

In February 1998, when applying for a school job which required a criminal background check, the Applicant requested a check of his criminal history through the state criminal justice information system. A check of that system found no criminal history for the Applicant under state statute or regulation.

In June 1998, the Applicant, then age 23, completed a Security Clearance Application, (Gov Ex 1) Standard Form (SF) 86. Question 24 asked the Applicant if he had ever been charged with or convicted of any offense related to alcohol or drugs, regardless whether the record had been sealed, stricken from the court record, or expunged. The Applicant answered "no" to question even though the question addressed about both alcohol and drug charges. He did not reveal the open container of alcohol charge because he did not believe the question required it. (tr. 43)

In January 1999, the Applicant was interviewed by a Defense Security Service (DSS) special agent. It was during this interview the Applicant first became aware he had been charged with marijuana possession. (tr. 45) When asked about the charge by the DSS special agent, the Applicant did not believe the agent and told the agent his facts were wrong. (tr. 51) As part of the interview, the Applicant made a signed, sworn statement (Gov Ex 3) in which he acknowledges receiving a ticket for having an open container of alcohol, but denied being arrest for possession of marijuana. (tr. 40) In his sworn statement the Applicant admitted the police told him they smelled marijuana when the car was stopped, but the Applicant stated a search failed to find any marijuana. The Applicant stated he did not disclose the incident on his SF 86 because he had checked with the courthouse and finding no record, assumed the ticket had never been processed. The day after his DSS interview, the Applicant again contacted the state court and was again informed there was no information about him. (tr. 42-43)

In February 1999, after his DSS interview, the Applicant contacted an attorney to look into this incident and assist him. At the time the Applicant contacted his attorney, the Applicant believed all charges had been dismissed. His attorney told him he had been arrested for possession of marijuana and should have appeared in court in June 1997. (App Ex C) When the Applicant was told this, he contacted the DSS special agent and relayed this information the same day or within the week. (tr. 46)

In May 1999, the Applicant's attorney reviewed the police report which indicated the marijuana possession. In May

1999, the prosecutor agreed to dismiss the open container charge and did not object to the entry of "probation before judgement" on the marijuana possession charge. Although believing marijuana was not present in the car, the Applicant agreed to the offer. He was fined $250.00, ordered to complete 25 hours of community service, undergo regular urinalysis and/or drug counseling as deemed by his probation officer during his one year of probation. The Applicant then received probation before judgement.

In June 1999, the Applicant's attorney informed the Applicant that the record of the charge had been sealed and there was no finding of guilt. In July 1999, the Applicant's attorney informed the Applicant he had received disposition under 18 U.S.C. 3607, which meant the Applicant had not been "convicted" of an offense and upon satisfactory completion of probation, no conviction would be entered and the records related to the incident would be sealed. In July 1999, the Applicant completed another SF 86 and in response to question 24, he listed the May 1997 incident and relevant information concerning it. (Gov Ex2)

In a signed, sworn statement made in August 2000 the Applicant stated he had been charged in May 1997 with open containers in a vehicle, but was unaware he had also been charged with marijuana possession. In that sworn statement he denied ever admitting he possessed marijuana. In the August 2000 statement, the Applicant states he first became aware of the charge of marijuana possession during a January 1999 DSS interview. (Gov Ex 4)

The Applicant completed a university degree, was a member of the university honors' program, and was inducted into a national honor society. He spends his free time studying and visiting with his goddaughter, nieces and daughters. The Applicant acknowledges he made a mistake, is not proud of it, and takes responsibility for it. He acknowledges he should have been more forthcoming with information (tr. 40) and he should have done more back in 1997 to determine the status of the charges when the court date was not received in the promised time frame. (tr. 60) He now understands he must include everything, no matter how he interprets the question. (tr. 76) The Applicant does not smoke marijuana and has no intent to use. (tr. 63) The Applicant believes he has matured greatly since the 1997 incident (tr. 73) and is more responsible. (tr. 77)

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making 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 in the context of factors set forth in section E 2.2.1. of the Directive as well. 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 an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. 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.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

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 that the person may not properly safeguard classified information. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility: (E2.A5.1.1.)

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

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.A5.1.2.2.)

Conditions that could mitigate security concerns include:

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

Criminal Conduct (Guideline J) 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 may be disqualifying include:

a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.

b. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent.

b. The crime was an isolated incident.

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 that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline 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." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness.

In May 1997, the Applicant knew he had been arrested on his way home from school for he had been stopped, taken to the police station, finger printed, and given a ticket. In June 1998, he completed an SF 86 and answered "no" to question 24 which asked he had ever been charged with or convicted of any offense related to alcohol or drugs. Even if the Applicant was unaware he had been charged with possession of marijuana, he knew he had been arrested and given a ticket for an alcohol related offense. The Applicant should have answered "yes" to the question and by answering "no" gave a false answer. Disqualifying Conditions 2[(4)] applies.

The Applicant's explanation for failing to reveal his arrest did not change when questioned by the DSS or during the hearing. His explanation being, when ticketed, he was told he would receive notice of the court date in the mail. When that notice never came, he tried numerous times to check on his record, including the criminal history required for a school position he held. Not being aware of the different court jurisdictions, he failed to understand a check with state

authorities concerning his criminal record would not necessarily reveal matters being handled in federal court system. When the state court had no information about his arrest, he incorrectly assumed the matter had been dropped. This explanation would be sufficient mitigation had the question asked if the Applicant had been "convicted" of any offense. However, the question also asked if he had ever been charged with an arrest related to alcohol or drugs and he clearly knew he had been arrested and ticketed which makes the disqualifying condition applicable.

There is no question the arrest should have been revealed, however the falsification was a single answer on an SF 86, completed more than four years ago. I find the falsification to be an isolated incident, not recent, and the Applicant provided correct information voluntarily when he discovered the charge included marijuana possession. When confronted about the 1997 arrest by the DSS special agent in January 1999, the Applicant told the agent about the citation for having an open container of alcohol in a motor vehicle, but told the agent he (the agent) was mistaken about the marijuana charge. The following day, the Applicant checked with an attorney and discovered the agent was correct and that day, or within a short period of time, the Applicant called the agent and informed the agent he(the Applicant) had been mistaken about the marijuana charge.

Mitigating Condition (MC) 2[(5)] is applicable for MC2 does not require the information to be provided by the Applicant before being confronted about the facts. C 3[(6)] is inapplicable because it requires the Applicant to provide correct information before being confronted with the facts. Because the falsification was isolated and not recent, I find for the Applicant as to SOR subparagraph 1.a.

Although he knew he had been arrested and given a citation, the first time he knew the charges involved marijuana possession was in a January 1999 when confronted by the DSS special agent. This was seven months after the SF 86 had been completed. Initially the Applicant did not believe the agent but later discovered the matter had not been dropped as he had previously assumed, and his court date had occurred in June 1997. He also learned two notices had been sent to an incorrect address and never reached him. In May 1999, the matter was settled when the Applicant paid a fine and given probation before judgment. He completed his required community service and probation, received disposition under 18 U.S.C. 3607 which allowed the records related to the incident to be sealed.

The Applicant acknowledges he and the driver had smoked some marijuana and a marijuana cigarette had been thrown out of the car after the car was stopped by the police. What the Applicant disputes is that marijuana was found in the car, that the marijuana was his, or that he was charged with marijuana possession. When the Applicant told the agent these things, which were incorporated into the Applicant's January 1999, he was stating the facts as he believed them. Although he later learned he had actually been charged with marijuana possession, he discovered that after his January 1999 statement had already been made. Therefore, he did not falsify material facts when he denied he had been arrested for marijuana possession. I find for the Applicant as to SOR subparagraph 1.b

In August 2000, the Applicant provided another sworn statement in which he again stated he was unaware that marijuana had been found in the car or that he had been charged with marijuana possession. This simply restates facts as he believed them to be and was not a false statement. I find for the Applicant as to SOR subparagraph 1.c.

The Government has satisfied its initial burden of proof under Guideline J, (Criminal Conduct). Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. Providing a false answer concerning being charged with alcohol related offenses is a serious matter. It is a violation of 18 U.S.C. section 1001, a felony and, therefore, DC a[(7)] and b[(8)] apply.

The falsification, which asked about his arrest, occurred in response to one question on a single SF 86 completed in June 1998. This false answer is not recent having occurred more than four years ago. I find MC a[(9)] and b[(10)] apply. As previously described, I find the more recent allegations of falsification alleged to have occurred in the Applicant's January 1999 and August 2000 statements to be unfounded. I find for the Applicant as to SOR subparagraph 2.a and 2.b.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or

absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

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

Paragraph 1Personal Conduct (Guideline E):FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Paragraph 2 Criminal Conduct (Guideline J): FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

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Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.

2. This matter was handled by the U.S. magistrate in U.S. district court and not by the local state court or by other local courts.

3. The Applicant did not see the police report at the time of the incident because it was written up after the dated of the arrest. The Applicant's attorney saw the report in May 1999 and the Applicant saw the report prior to the DOHA hearing as part of discovery.

4. DC 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.A5.1.2.2.)

5. MC 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. (E2.A5.1.3.2.)

6. MC 3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts. (E2.A5.1.3.3.)

7. DC a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.

8. DC b. A single serious crime or multiple lesser offenses.

9. MC a. The criminal behavior was not recent.

10. MC b. The crime was an isolated incident.