DATE: March 9, 2005

In Re:

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

Applicant for Security Clearance

ISCR Case No. 02-31045

DECISION OF ADMINISTRATIVE JUDGE

JOSEPH TESTAN

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Department Counsel

FOR APPLICANT

Linda J. Berberian, Personal Representative

SYNOPSIS

Doubts about applicant's judgment, reliability and trustworthiness raised by his marijuana use while holding a security clearance are compounded by his inability or unwillingness to offer straightforward, credible testimony about said use. Clearance is denied.

STATEMENT OF THE CASE

On April 27, 2004, 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 administratively reissued on April 20, 1999), issued a Statement of Reasons (SOR) to 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 applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on May 26, 2004. The case was assigned to me on August 5, 2004. A Notice of Hearing was issued on October 6, 2004, and the hearing was held on November 9, 2004. Following the hearing, applicant submitted four pages of documents. These four pages, and Department Counsel's written two page response indicating he has no objection to them, were marked as Exhibit DD and admitted into evidence. The transcript was received on November 24, 2004.

FINDINGS OF FACT

Applicant is a 47 year old engineer. He has been employed by the same defense contractor, and has held a security clearance, since 1984.

On April 4, 1992, applicant's wife filed a Petition For Order Prohibiting Domestic Violence with a State A Court alleging applicant physically abused her the previous day. On the same day the Petition was filed, the Court issued a

Domestic Violence Order and Order to Appear. Three days later applicant was served with the Petition and Orders. On May 1, 1992, the Court granted the wife's request to dismiss her Petition. In doing so, the Court noted that applicant and his wife were "going to counseling" (Exhibit 3).

Applicant testified that the incident in question occurred after his daughter fell off a chair in the bathroom and started to cry. He further testified that he had been with the daughter, and when the wife heard the crying and saw what happened, she "was more or less attacking me and telling me, telling me, calling me an idiot and things like that . . and then accusing me of hitting [the daughter]" (TR at 37). Applicant does not recall interacting with the police during the night in question. He believes he left the house after the incident. According to applicant, during their marriage the wife "had a tendency to get rather angry" and was constantly yelling at him (TR at 45-46), they "engaged in three or four physical fights," and as a result, the police were sent to their residence "about 6 to 10 times" (Exhibit 2). They tried three different marriage counselors over an 18 month period, but according to applicant, "it wasn't getting anywhere"(TR at 49-50). They divorced in 1995.

Applicant dated a woman for a four month period ending in April 1997. During the time they were dating, the woman was renting the "mother-in-law quarters" (which was a separate apartment) of applicant's residence (TR at 75). Beginning in 1998, after their relationship had ended, applicant began harassing the woman by sending letters to her and her family, by calling her at her new residence, and by driving by her new residence. Applicant told the woman during one or more phone calls in March 1999 that he was making the phone calls because he was frustrated and angry with her, and he knew the calls were annoying her. In another call he told her "now it was her turn not to sleep, meaning now she would have to worry over things" (Exhibit 2; TR at 114). The woman took this as a threat and called the police. As a result, a criminal complaint charging him with Harassment was filed with a State A Court. Applicant was served with a Summons ordering him to appear in Court on May 12, 1999 to answer the complaint. It appears that after applicant completed seven or eight domestic violence counseling sessions in October and November 1999, the District Attorney dropped the charge against him.

In addition to the foregoing harassment, on at least one occasion applicant had gone into the woman's "mother-in-law quarters" without her permission (TR at 108-109), and on another occasion, he entered her unlocked car and left a violin (which belonged to the woman) and a handwritten note in the car (TR at 112-113).

Applicant testified that he never meant to threaten the woman, but acknowledges she had reason to feel threatened. As to why he wrote the letters, it is clear he did it at least partly out of anger and partly out of his belief the woman was spreading rumors about him. Applicant further testified, credibly, that when he read the letters and heard from his lawyer what was on the tapes, he was embarrassed and felt "it's just terrible what [he] did" (TR at 82). Applicant further testified that since this incident, there have been no similar incidents. A November 2004 letter from a woman he dated following this incident was admitted into evidence (Exhibit F). The woman stated that although they no longer have a romantic relationship, they are still friends. She further stated that applicant is trustworthy and has treated her courteously and with respect at all times.

In December 2003, applicant was arrested for Driving Under the Influence (DUI). Although two tests on the same blood sample taken from applicant indicated his blood/alcohol level exceeded the legal limit (.12% and .10%), he ended up being found guilty of Reckless Driving. Applicant completed a court ordered alcohol program in May 2004 (Exhibit R). He testified that he no longer consumes alcohol and does not intend to consume it in the future (TR at 95, 117).

Applicant used marijuana from 1970 to 2000 knowing full well that it was against both the law and DoD policy for holders of security clearances to do so. Applicant's testimony regarding why he smoked marijuana, knowing it was illegal and against DoD policy to do so, was rambling and almost incoherent (TR at 96-98). As to the exact details of his marijuana use, he has given various, often conflicting, statements. These statements are summarized as follows:

In his Security Clearance Application (SCA), he stated he used marijuana total of two times.

In a signed, sworn statement that he gave to the Defense Security Service (DSS) in May 2002 (Exhibit 2), he stated that he used marijuana three or four times while attending junior high school in about 1970, and at least once through a bong in 1976 while attending college. He then stated he "pretended" to smoke it several more times while in college and once at a wine festival in about 1998. He further stated he used it again (actually inhaled it) in December 1999 and February

2000, and once again "pretended" to use it in April 2000.

In his response to the SOR, he stated, "on approximately 4 to 5 occasions, between the years of 1997 to 2000 I have not always turned away marijuana if it was passed to me. I did not desire to draw attention to myself or make a big deal of it while it was passed *but I did not inhale*"(emphasis added).

He testified that with respect to his marijuana use in the late 1990s, he "would take a puff to make it look like [he] smoked, but [he] didn't because [he doesn't] like to smoke" (TR at 98). He then testified that he "like blew it into my mouth. I didn't inhale it" (TR at 99). On cross-examination he testified that he thinks he "breathed in" marijuana "two or three times, it was kind of twice, twice that I can only remember" (TR at 102). He then testified that he never took smoke into his mouth, he just "breathed it through [his] nose"(TR at 103). When asked why he stated in his response to the SOR that he never inhaled, applicant responded, "Because I'm not a pot smoker. I'm not" (TR at 104).

Considering the evidence as a whole, including applicant's conduct and demeanor while testifying, I find his testimony regarding his marijuana use to be incredible.

Applicant's current supervisor appeared at the hearing. He testified that he supervised applicant in State A in the early 1990s, was instrumental in bringing applicant to State B, and has supervised applicant since applicant moved to State B. He testified that applicant is an "outstanding performer." He is aware of applicant's DUI arrest, but has never seen applicant drunk. He further testified that based on what he knows about applicant, he would recommend him for a security clearance. On cross examination he further testified that this recommendation would change if he knew applicant used illegal drugs (TR at 71).

Applicant's mother and sister appeared at the hearing and testified on applicant's behalf. The mother testified that there were several occasions where she observed applicant's former wife get angry and yell. She further testified that applicant told her he smoked marijuana once or twice. She further testified that applicant is a "very responsible person." The sister, a physician, testified that applicant told her after his DUI he was "never drinking again," and she believes he is in fact committed to abstaining from the use of alcohol (TR at 156-157).

Applicant offered into evidence a considerable amount of documentation indicating he performs well at his job. The Government offered into evidence a document that indicates in November 2001, applicant was removed from his position due to "poor performance" (Exhibit 15).

Applicant also offered into evidence declarations from two gentlemen who described themselves as former coworkers and long time friends of applicant. These declarations corroborate applicant's testimony about his former wife's temper, and establish that he is considered to be a reliable and trustworthy friend (Exhibit DD).

CONCLUSIONS

With respect to Guideline J, the evidence establishes that (1) in 1992 applicant was served with a Petition For Order Prohibiting Domestic Violence, a Domestic Violence Order, and an Order to Appear following a some type of altercation with his wife, (2) in 1999 he was charged with harassing a former girlfriend, and (3) sometime in 2004, he was convicted of Reckless Driving following his arrest for DUI in December 2003.This conduct reflects adversely on applicant's judgment and reliability, and requires application of Disqualifying Condition E2.A10.1.2.2 *(a single serious crime or multiple lesser offenses)*.

With respect to the incident with his former wife, the evidence does not clearly establish that applicant's conduct on the night in question was criminal. Given this fact, and the passage of time since the incident occurred (over 12 years), SOR Allegation 1a is found for applicant.

Applicant's sustained harassment of his former girlfriend is quite troubling. Without question, he exercised extremely poor judgment. However, based on the sincere remorse he has shown, the counseling he received, the isolated nature of the conduct, and the passage of time since it occurred (over five years), I conclude that it is highly unlikely this type of misconduct will recur. For this reason, SOR Allegation 1b is found for applicant.

Applicant's arrest for DUI and his subsequent conviction for Reckless Driving is a serious concern. However, given the isolated nature of this conduct, his successful completion of the alcohol program, and his credible testimony that he no longer consumes alcohol and does not intend to consume it in the future, it is highly unlikely this misconduct will recur. For this reason, SOR Allegation 1c is found for applicant. Based on the foregoing, Guideline J is found for applicant.

With respect to Guideline E, applicant's use of marijuana while holding a DoD security clearance, when he knew such use was illegal and against DoD policy, reflects adversely on his judgment, reliability and trustworthiness, and raises serious doubts about his ability and/or willingness to safeguard classified information. Compounding the doubts about applicant's security-worthiness is the fact he is unwilling or unable to tell the truth about his marijuana use. Disqualifying Condition E2.A5.1.2.5 *(a pattern of dishonesty or rule violations)* applies to this case.

Given applicant's inability or unwillingness to offer straightforward, credible testimony about his marijuana use, I am unable to conclude he is currently complying with DoD's drug policy and not using it now. Accordingly, Guideline E is found against applicant.

FORMAL FINDINGS

GUIDELINE J: FOR THE APPLICANT

GUIDELINE E: 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.

Joseph Testan

Administrative Judge