DATE: February 5, 2003

In Re:

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

Applicant for Security Clearance

ISCR Case No. 02-16230

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

William S. Fields, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant used marijuana on two occasions, once in the mid-1970's and again in September 2001. In October 2001, the Applicant made a signed, sworn statement stating he had never used illegal drugs, a statement which was false. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from this recent, false statement. Clearance is denied.

STATEMENT OF THE CASE

On June 17, 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. In an undated response, the Applicant answered the SOR and requested a hearing. The case was assigned to me on July 29, 2002. A Notice of Hearing was issued on August 14, 2002, scheduling the hearing, which was held on September 12, 2002.

The Government's case consisted of five exhibits (Gov Ex). The Applicant relied on his own testimony and three exhibits (App Ex). The transcript (tr.) of the hearing was received on September 23, 2002.

FINDINGS OF FACT

The SOR alleges drug involvement (Guideline H) and personal conduct (Guideline E). The Applicant admits he used marijuana on a casual basis from the 1970's thorough September 2001, and denies the remaining allegations.

The Applicant is 51 years old, has worked for a defense contractor since July 1998, and is seeking a top-secret security clearance.

In 1985, the Applicant was on active duty in the Air Force and his duties required him to travel 300 days per year. He owned a house, which he shared with his 18-year-old, unemployed cousin. In October 1985, two police officers were

dispatched to the house when a firearm was exhibited. (App Ex A) When the police entered the cousin's bedroom, they saw marijuana plants growing. The police arrested the Applicant's cousin, who was under the influence at the time, for cultivation of marijuana (a felony) and drawing, exhibiting a firearm (a misdemeanor). (App Ex A) The exhibiting a firearm charge was a citizen's arrest done by a friend of the Applicant's cousin who had stayed at the house.

The Applicant was out of town when his cousin was arrested. (tr. 21) Upon his return, the Applicant found a note on his door asking him to report to the local police department to answer some questions. He complied with the request, but was unable to provide the police with any additional relevant information. He was asked about the marijuana plants and about a firearm. He did not own a firearm and did not believe his cousin owned a firearm. Although questioned, the Applicant was never read his rights, never cited, and never charged with an offense. (tr. 22) He was not incarcerated, not given an arrest warrant, nor summoned to court concerning this matter. (tr. 21) The Applicant's only court attendance was when he went to his cousin's bail hearing. (tr. 24) When the Applicant appeared at this hearing, the prosecutor stated there was an outstanding arrest warrant for the Applicant. However, a computer search failed to disclose any arrest warrant for the Applicant. The Applicant's cousin was released on his own recognizance and they both went home. (tr. 25)

All police records regarding the firearms and marijuana possession offenses were destroyed as part of the local jurisdiction's retirement of records. None of the underlying records were available to the DSS agent. (tr. 29) An FBI Identification Record (Gov Ex 5) indicates the Applicant was "Arrested or Received" in December 1985, the charge being "Produce Cultivate Marijuana/Hashish." The Applicant contends he was never arrested. (tr. 21)

The Applicant's cousin continued to live with the Applicant as long as his cousin had court appearances. Ultimately, the charges against his cousin were dropped, at which time his cousin moved out of the house and left the area. (tr. 30) The only jail time his cousin served was the four or five days following his arrest before being released on his own recognizance.

The Applicant's security access was temporarily suspended--not further discussed in the record--in December 1985 (App Ex B) and reinstated in February 1986. (App Ex C) In May 1991, the Applicant honorably retired from the Air Force.

In May 1999, the Applicant completed a Questionnaire for National Security Positions, Standard Form (SF) 86. He answered "No" to Question 21. concerning his police record - felony offenses, which asked if he had ever been charged with or convicted of any felony offense. The Applicant acknowledges the sheriff's department records reflect a September 1986 arrest for Lewd or Lascivious Acts with a Child (LLAWC) Under Age14 (felony) and production/cultivation of marijuana/hashish (felony). Some time ago, the Applicant's neighbor informed the Applicant of certain accusations being made against the Applicant by one of the Applicant's cousin's friends. The Applicant was never contacted by the sheriff's department or questioned about the LLAWC. (tr. 25)

The Applicant answered "No" to Question 22. concerning his police record - firearms/explosives offenses, which asked if he had ever been charged with or convicted of a firearms or explosives offense. There was no evidence produced at the hearing that the Applicant was ever charged with Drawing/Exhibiting a Firearm, or any other firearm offense.

The Applicant answered "No" to Question 24. concerning his police record - alcohol/drug offenses, which asked if he had ever been charged with or convicted of any offense related to alcohol or drugs even though the FBI record (Gov Ex 5) indicates he was arrested or received in 1985 for "Produce Cultivation arijuana/Hashish." The Applicant acknowledges he was questioned about the incident with his cousin, but denies he was ever arrested.

In July 2000, a special agent of the Defense Security Service (DSS) questioned the Applicant about his prior arrests. It was during this interview that the Applicant first learned of the September 1986 LLAWC charge as well as the marijuana charge, and the firearm charge. Being unaware of the charges, the Applicant had not listed them when he completed his May 1999 security clearance application

The Applicant took one puff of marijuana in the mid 1970's and one puff during the summer of 2001. (tr. 22) In an October 2001-written statement (Gov Ex 3), the Applicant stated he had never cultivated, sold, transferred, or used any illegal drug. He answered in this manner because he did not consider himself a "user" even though he had tried

marijuana twice in a 25-year plus period. In March 2002, he was again interviewed and asked about his marijuana usage, but the agent gave "the definition and broke it down to everything that was considered to be drug use." (tr. 23) At that time, the Applicant realized his two experiences with marijuana was drug use and stated he had used marijuana one time in the mid 1970's and a second time during the summer of 2001. The Applicant is sure his second use occurred prior to September 1, 2001. His second use was the result of the Applicant being at a party and wanting to try marijuana. (tr. 26) He has no intent to take up smoking marijuana. (tr. 26)

The Applicant was asked if, in his lifetime, he ever expected to use illegal drugs to include prescriptions in someone else's name or any other use. He responded, "I estimate that I will probably never use marijuana in the future, but realistically there could be a 1% chance of marijuana use." (Gov Ex 4) The Applicant's response was the result of his attempt to be as honest as possible coupled with his belief that "you never say never." (tr. 31) The agent asked him what the probability was and the smallest probability the Applicant could give was one percent. At the hearing, the Applicant stated, "I never really aid that I was intending to using [sic] marijuana again. So I do not intend on using any kind of illegal drugs." (tr. 24)

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:

Drug Involvement (Guideline H) The Concern: Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

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

a. Any drug abuse.

Conditions that could mitigate security concerns include:

b. The drug involvement was an isolated or aberrational event.

c. A demonstrated intent not to abuse any drugs in the future.

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:

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.A5.1.2.3.)

Conditions that could mitigate security concerns include:

None Apply.

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 H (Drugs) in that the Applicant used marijuana twice between the 1970's and September 2001. Disqualifying Condition a.[(2)] applies.

The Applicant took one puff of marijuana in the mid 1970's and another puff during the summer of 2001, sometime prior to September 1, 2001. Two uses during more than a 25-year period is sufficient to find the Applicant's use isolated and Mitigating Condition b.[(3)] applies. I find for the Applicant as to SOR subparagraph 1.a.

An FBI Identification Record (Gov Ex 5) indicates the Applicant was "Arrested or Received" in December 1985, the charge being "Produce Cultivate arijuana/Hashish." The police had come to the Applicant's house, when the Applicant was not present, to talk with the Applicant's cousin. When talking with the Applicant's cousin, the police noticed marijuana plants in the bedroom and arrested the Applicant's cousin. Upon his return home several days later, the Applicant was asked to come to the police station to answer questions, which he did. The Applicant denies he was ever arrested and produced information (App Ex A) the arrest was related to his cousin and not to him.

Even if the Applicant had been arrested, that standing alone, does not prove he engaged in criminal conduct. However, the absence of a criminal conviction is not dispositive. Even if criminal charges have been dropped or dismissed, Department Counsel (DC) can present evidence to prove an Applicant has engaged in the conduct that was the basis of the criminal charges. See, e.g., ISCR Case No. 99-0119 (September 13, 1999) at p. 2. Since the Applicant denied the allegation he had been arrested, DC is required to provide sufficient evidence to rebut the denial. None of the underlying records related to the arrest were available to the DSS agent. The only evidence at hearing was an FBI report (Gov Ex 5) which contains an entry indicates the Applicant was "Arrested or Received" by the Sacramento Sheriff's Office. No definition of the term "Received" is provided in the record. The Applicant denies being arrested and stated the police asked him to answer questions about his cousin, which he did. The FBI report entry is sufficiently addressed by the Applicant's evidence--the arrest report related to the Applicant's cousin. There is no other evidence the Applicant was arrested on drug charges. I find for the Applicant as to SOR subparagraph 1.b.

When the Applicant was asked if he would ever use marijuana again, he stated "I estimate that I will probably never use marijuana in the future . . . " However, in an attempt to be as honest as possible, coupled with his personal belief that a person "never say never," he gave the smallest probability he could give, which was one percent. SOR subparagraph 1.c.

alleges the Applicant admitted he "may use marijuana again in the future." The Applicant's statement is a denial of intended future use presented in the most honest manner the Applicant could respond. At the hearing, he stated he never intended to use illegal drugs in the future. I find for the Applicant as to SOR subparagraph 1.c.

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. Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate and meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. In October 2001, the Applicant made a signed sworn statement that he had "never cultivated, manufactured, used, purchased, sold, transported, or trafficked any illegal drug or narcotic." (Gov Ex 3) Within two months--sometime before September 1, 2001--before he completed this statement, the Applicant had used marijuana at a party. Because of this false statement, DC 3[(4)] applies.

The wording of the sworn statement clearly states "use." The Applicant's explanation was that he did not consider himself a "user" even though he had tried marijuana twice. The statement indicates "use" and does not address whether the Applicant is or was a "user." MC 2[(5)] does not apply because even though this falsification may have been an isolated incident, it occurred in October 2001, and, as such, is considered recent. The Applicant did provide additional information about his marijuana use in March 2002, when he was again interviewed and asked about his marijuana usage. At this interview the agent gave an expanded definition of drug use. There is no showing the Applicant voluntarily provided the information before being confronted about it by the DSS agent. Because DC 2 applies, and no MC apply, I find against the Applicant as to SOR subparagraph 2.a.

In May 1999, the Applicant completed an SF 86 and answered "No" to Question 21. concerning his police record - felony offenses, which asked if he had ever been charged with or convicted of any felony offense. The Applicant was never contacted by the sheriff's department or questioned about the LLAWC even though the sheriff's department records reflect a September 1986 arrest for LLAWC (felony) and production cultivation of marijuana/hashish, (felony).

It was in July 2000, during a DSS interview, the Applicant first learned of the September 1986 charge as well as the 1985 marijuana charge. Being unaware of the charges, the Applicant did not list them when he completed his May 1999 security clearance application. Since he was unaware of the charges, he did not provide false information when the SF 86 was completed. I find for the Applicant as to SOR subparagraph 2.b, 2.b(1), and 2.b (2).

The Applicant answered "No" to Question 22. concerning his police record - firearms/explosives offenses, which asked if he had ever been charged with or convicted of a firearms or explosives offense. There was no evidence the Applicant was ever charged with Drawing/Exhibiting a Firearm, or any other firearm offense. There is insufficient evidence to substantiate the Applicant has ever been charged with a firearm offense. I find he did not falsify question 22 on his SF 86. I find for the Applicant as to SOR subparagraph 2.c.

The Applicant answered "No" to Question 24. concerning his police record - alcohol/drug offenses, which asked if he had ever been charged with or convicted of any offense related to alcohol or drugs even though the FBI record indicates a 1985 arrest "or received" for "Produce Cultivation Marijuana/Hashish." The Applicant acknowledges he was questioned about the incident involving his cousin, but denies he was ever arrested. The Applicant has sufficiently explained and evidenced by the arrest report he provided that the incident related not to him, but to his cousin. There is insufficient evidence to substantiate the Applicant has ever been arrested and charged with a drug offense. I find he did not falsify question 24 on his SF 86. I find for the Applicant as to SOR subparagraph 2.d.

The awarding of a security clearance is not a one time occurrence, but is based on current disqualifying and mitigating conditions. Under the Applicant's current circumstances a clearance is not recommended, but this decision should not be construed as a determination that the Applicant's conduct could never justify the award of a DoD security clearance. Should the Applicant be afforded an opportunity to reapply for a security clearance, in the future, he may well demonstrate persuasive evidence of his security worthiness. A clearance at this time is not warranted.

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 1Guideline H (Drug Involvement): FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Paragraph 2 Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: For the Applicant

Subparagraph 2.c.: For the Applicant

Subparagraph 2.d.: For 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 the Applicant.

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. DC a. Any drug abuse.

3. MC b. The drug involvement was an isolated or aberrational event.

4. DC 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.A5.1.2.3.)

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.)