DATE: December 13, 2004

In Re:

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

Applicant for Security Clearance

ISCR Case No. 02-33427

ECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

James B. Norman, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In May 1972, Applicant was sentenced to five years incarceration, suspended, and placed on five years probation for possession of a narcotic drug (marijuana) after the police raided his residence and found a quantity of marijuana and suspected drug paraphernalia. He complied with the conditions of his probation and his conviction was set aside and he was discharged from probation in July 1975. His criminal conduct was not recent and there has been no other criminal involvement. Since he was not incarcerated for the offense, he is not barred from having his clearance renewed under 10 U.S.C. § 986 as amended October 28, 2004. Clearance is granted.

STATEMENT OF THE CASE

On February 25, 2004, the Defense Office of Hearings and Appeals (DOHA) 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.(1) 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 Criminal Conduct (Guideline J).

On March 16, 2004, Applicant executed an Answer to the SOR, and requested a hearing before a DOHA administrative judge. The case was formally assigned to me on May 10, 2004, and a hearing was held on May 26, 2004, pursuant to notice dated May 5, 2004.(2) The Government submitted three exhibits and called Applicant as an adverse witness. Applicant testified and offered 11 exhibits, with the admission of Exhibit C pending post-hearing submission of an unredacted copy. On May 28, 2004, Applicant timely submitted the original of that document. Department Counsel having no objection, it was entered as Exhibit C. A transcript of the personal appearance was received on June 7, 2004.

RULINGS ON PROCEDURE

Under the provisions of 10 U.S.C. § 986 then in effect, the Government issued an SOR to Applicant on February 25,

2004, alleging Applicant is statutorily disqualified from having a security clearance granted or renewed absent a meritorious waiver because of his felony drug conviction. On October 28, 2004, 10 U.S.C. § 986 was amended to apply to persons sentenced to a term of imprisonment of more than one year and been incarcerated as a result for not less than one year.[(3)]

After the close of the evidentiary record in this case but before a decision on the merits, DOHA Chief Department Counsel issued a letter dated November 22, 2004, stating, in part:

In accordance with DoD Directive 5220.6, Enclosure 3, paragraph 6, a determination now has been made, based upon all available information, that further processing of the referenced case in accordance with the Directive is not warranted.

The Defense Industrial Security Clearance Office (DISCO) has been instructed on this date to grant a security clearance at the level requested.

Paragraph E3.1.6. gives Chief Department Counsel the authority to take appropriate action, including but not limited to withdrawal of the SOR, whenever review of the applicant's answer to the SOR indicates that allegations are unfounded or evidence is insufficient for further processing. While the only limitation on Chief Department Counsel's action under E3.1.6. is that it be appropriate, the authority to take action such as granting a clearance exists in the context of review of Applicant's answer to the SOR, before the case is assigned to an Administrative Judge. If the Chief Department Counsel has authority to withdraw in the current circumstance, it follows the Chief Department Counsel has authority to withdraw the SOR in a case after the hearing is completed if the Chief Department Counsel thinks the case will be decided for an applicant due to lack of evidence or some other reason adverse to the government. Then another SOR could be issued once sufficient evidence was obtained in admissible form. That situation would have troubling implications for due process. Moreover, to construe E3.1.6. as authorizing the action directed by Department Counsel on November 22, 2004, would violate other provisions of the Directive, most notably E3.1.25, which provides the Administrative Judge is to decide whether it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. Accordingly, the government's action of November 22, 2004, does not relieve the Administrative Judge of jurisdiction over this case or of the obligation to render an overall commonsense decision under the Directive.

Concerning the recent amendment to 10 U.S.C. § 986, the prohibition on granting an applicant a clearance for criminal conduct applies only if the person actually served at least a year in jail for his or her offense. Whether to apply a statute retroactively is generally a matter of congressional intent:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf v. USI Film Products et al., 511 U.S. 244, 280 (1994).

Congress did not expressly prescribe whether the amendments to 10 U.S.C. § 986 should apply retroactively. Application of the amendments retroactively would not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* Therefore, there is no reason not to apply the amendments to Applicant's case. I conclude 10 U.S.C. § 986 does not bar Applicant from receiving a clearance.

FINDINGS OF FACT

The SOR alleges Criminal Conduct (Guideline J) concerns due to Applicant's arrest in June 1971 on four counts involving illegal drugs (possession of narcotic paraphernalia, possession of dangerous drugs, possession of LSD, and

possession of marijuana), and conviction of possession of marijuana, for which he was sentenced to five years incarceration, suspended, and five years probation. Since he was sentenced to a term of incarceration of more than one year (albeit suspended), Applicant was alleged to be disqualified from having a clearance granted or renewed under 10 U.S.C. § 986 (commonly referred to as the "Smith Amendment"). Applicant admitted his conviction of the marijuana charge, but he was released from all penalties and disabilities after successfully completing his probation. After a complete and thorough review of the evidence of record and upon due consideration of the same, I make the following findings of fact:

Applicant is a 57-year-old senior technical support engineer who has been employed by a defense firm since February 1986 after working there for one year as a contractor. Applicant has held at least a secret-level security clearance for the past 19 years and requires a clearance for access to secure or restricted areas.

Applicant had been working in mechanical engineering attending college at night when he was called to serve in the U.S. military in May 1968. He served honorably until his discharge in May 1971 at the pay grade of E-5, having received a letter of appreciation in August 1970 for outstanding performance of duties and a letter of commendation on his release from active duty for the outstanding manner in which he carried out his duties as assistant chief fire control mechanic.

Applicant remained in the area of his military duty station pending repairs to his automobile so that he could return to his home state. He was then living in an apartment with his future wife and her baby. In June 1971, a confidential informant, who had proved reliable in the past, notified the local police that he had been to Applicant's apartment within the past 24 hours and personally seen Applicant with several baggies of marijuana and pills suspected to be illegal drugs.[(4)] Acting on a search warrant, the police went to Applicant's apartment and found marijuana and items suspected to be drug paraphernalia. Applicant and four companions in the apartment were arrested on drug charges, Applicant for possession of narcotic paraphernalia, possession of dangerous drugs, possession of LSD, and possession of marijuana. The state proceeded against Applicant on a charge of felony narcotics (marijuana) possession and against another male who had been exiting the apartment when the police arrived. Warrants against the other subjects in the case were dismissed.

Applicant was allowed to return to his native state pending trial on a charge of felony narcotics (marijuana) possession. He and his girlfriend married and he supported them by working at the job he had before he was drafted. Applicant and his first wife divorced after only about one year.

In May 1972, Applicant was convicted of the narcotics possession charge to which he had pleaded not guilty. Following a pre-sentencing interview, the probation office recommended a sentence of supervised adult probation for a period of no less than two nor more than eight years, with the understanding that any violation of the terms would be sufficient grounds for revocation.

Applicant was sentenced to five years incarceration, suspended, and five years probation for possession of a narcotic drug. Applicant complied with all the conditions of his probation and in mid-July 1975 his conviction was set aside. Applicant was discharged from probation and released from all penalties and disabilities resulting from the judgment of conviction.

In 1981, Applicant married his second wife, who he had met while doing engineering work for a laser company. He raised two stepsons with his spouse in a home they purchased in 1982. After working for his present employer as a contractor in 1984/85, Applicant was hired as a full-time employee of the defense firm in 1986. Based on his belief that his criminal record had been essentially expunged, Applicant did not report his felony conviction on his initial application for a security clearance completed when he started contract work for his current employer. In January 1990, he was given a top-secret clearance that he held until March 1991.

In 1998, he and his spouse purchased a second home in the mountains. Applicant applied for a pistol permit in his primary state of residence as he wanted a gun for protection from wild animals around his second home. When his permit was denied because of his felony conviction, Applicant learned for the first time that felony offenses could not be expunged. On a subsequent security clearance application (SF 86) completed in August 2000, Applicant disclosed his

1971 possession of narcotic drug offense.

Applicant has proven to be a very dedicated and responsible employee for his current employer. In the performance of his duties over the years, Applicant has visited facilities where clearance is required and has handled security issues appropriately. His current supervisor, who has known Applicant since 1988, considers him to be a team player and valuable asset to the mechanical engineering department. Applicant's former supervisor found him consistently conscientious and dependable.

Applicant has not been arrested for, or involved in, any criminal activity since his arrest on drug-related charges in 1971.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

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

GUIDELINE J

Criminal Conduct

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 admissions of criminal conduct, regardless of whether the person was formally charged;

b. A single, serious crime.

Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent;

b. The crime was an isolated incident;

d. . . . the factors leading to the violation are not likely to recur;

f. There is clear evidence of successful rehabilitation;

CONCLUSIONS

On review of the evidence of record and application of pertinent law and regulation, I conclude the following with respect to Guideline J:

Applicant was convicted in 1972 of felony possession of marijuana and sentenced to five years incarceration, suspended, and five years probation. Although he pleaded not guilty in court, he admits he had at least some marijuana residue in his possession when the police searched his apartment in June 1971. Under the state law in effect at that time, it was enough to support a felony conviction and sentence of five years incarceration, suspended, and five years probation. Since Applicant was not incarcerated for the offense, 10 U.S.C. § 986, as amended, does not bar Applicant from having his clearance renewed.

In assessing Applicant's security eligibility under the Criminal Conduct adjudicative guideline, disqualifying conditions a. (allegations or admissions of criminal conduct), and b. (a single serious crime or multiple lesser offenses) apply. The Department of Defense is not precluded from considering the security implications of conduct that was criminal in the jurisdiction in which it occurred, notwithstanding Applicant was discharged from probation and his conviction set aside in July 1975. However, several mitigating conditions (MC) apply to Applicant's criminal conduct: a. (the criminal behavior was not recent); b. (the crime was an isolated incident); d. (the factors leading to the violation are not likely to recur); and f. (there is clear evidence of successful rehabilitation). The criminal drug violation occurred 33 years ago, when he was 24 years old. He complied with the terms of his probation and was discharged after only two years. There has been no subsequent criminal activity and he has a stable lifestyle. Married to his second wife since 1981, he has owned his home since 1982, raised two stepsons, and maintained a productive career in mechanical engineering. He has held a security clearance for the last 19 years and not violated the Government's trust. There is no evidence of any recent questionable judgment. Favorable findings are returned as to subparagraphs 1.a. and 1.b. of the SOR.

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 J: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.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 Applicant. Clearance is granted.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of 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).

2. The hearing was scheduled before official assignment on notification from Department Counsel that the case was ready to proceed to hearing.

3. As of the issuance of the SOR, Section 986 provided in pertinent part:

§ 986. Security clearances: limitations

(a) Prohibition.--After the date of the enactment of this section, the Department of Defense may not grant or renew a security clearance for a person to whom this section applies who is described in subsection (c).

(b) Covered Persons.--This section applies to the following persons:

(1) An officer or employee of the Department of Defense

(2) A member of the Army, Navy, Air Force, or Marine Corps who is on active duty or is in an active status.

(3) An officer or employee of a contractor of the Department of Defense.

(c) Persons Disqualified From Being Granted Security Clearances.--A person is described in this subsection if any of the following applies to that person;

(1) The person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year. . .

(d) Waiver Authority--In a meritorious case, the Secretary of Defense or the Secretary of the military department concerned may authorize an exception to the prohibition in subsection (a) for a person described in paragraph (1) or (4) of subsection (c). The authority under the preceding sentence may not be delegated.

On October 28, 2004, Subsection (c)(1) of 10 U.S.C. § 986 was amended to disqualify those persons convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than one year.

4. Applicant was not prosecuted for LSD possession. He testified that while gel caps were found in his apartment, his girlfriend was into nutritional supplements. Applicant admits he had a small quantity of marijuana on that occasion, the residue from a party.