DATE: October 20, 2005

In re:

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

Applicant for Security Clearance

ISCR Case No. 03-07788

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Joseph L. Johnson, Esq.

SYNOPSIS

Applicant is 41 years old, and a commercial truck driver teamed with a co-driver. In 1990 and 1991 Applicant was arrested on charges of possession, distribution, and conspiracy to distribute marijuana. She pled guilty to distribution of marijuana and was sentenced to six years in jail, but was released on probation after three months incarceration. On December 31, 2001, at a New Years Eve party, Applicant took a few puffs on someone's marijuana cigarette. Applicant mitigated the criminal conduct and drug involvement security concerns. The 10 U.S.C. §986 bar to a security clearance for persons convicted and sentenced to more than a year in jail does not apply to Applicant under the 2004 amendment because she served less than one year in jail. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On May 25, 2004, DOHA issued a Statement of Reasons[(1)] (SOR) detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) and Guideline H (Drug Involvement) of the Directive. Applicant answered the SOR in writing on June 23, 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on August 11, 2004. On December 15, 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on December 27, 2004.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 41 years old, unmarried, and has two adult children and a minor child. She also has one grandchild. She

drives a truck as a co-driver on long-distance trips. Applicant needs a security clearance so she and her co-driver are eligible to drive sensitive loads for their employer, who contracts with the Government to deliver these shipments. Applicant's four-year driving record with her commercial driving license has no arrests or convictions. Applicant paid off $20,000 worth of debts in the past year from her earnings, and with her partner, manages her money well. (Tr. 24-26, 55, 56, 61, 73; Exhibit 1)

In December 1990 and January 1991, when she was 25 years old, Applicant helped an acquaintance sell marijuana by referring people to him. Three dates on which she made such referrals were December 18 and 28, 1990, and January 2, 1991 (see SOR paragraphs 1.a., 1.b., and 1.c.). She only bought marijuana for her own use at that time, and did not sell any. Applicant was arrested for these offenses, along with 64 other persons as part of a police sting operation, on arch 1, 1991. She was arrested at her home in one county, transported with the other prisoners to another county, where they were all arrested again because the crimes also occurred in that county (see SOR paragraphs 1.f. and 1.g.). Applicant was convicted on her guilty plea on November 25, 1991 for distribution of marijuana, and sentenced to six years in jail, but only served three months in jail when she was put on five years of supervised probation conditioned on her paying a monthly probation fee of $20, paying a $500 fine and court costs over the next 30 months, serving six months in the county jail, and submitting to drug screening at her own expense. The other charges were dismissed or otherwise disposed of by the local prosecutor. (see SOR paragraph 1.h.). (Tr. 31-39, 42, 60; Exhibits 2-4)

Before her March 1, 1991, arrest, Applicant was arrested on February 18, 1991 while a passenger in a pickup truck driven by another acquaintance whose former wife reported the truck as being stolen. Applicant and the driver were arrested, and held in jail for four days. The charges were later dropped when the prosecuting attorney declined further action. Applicant was not arrested on February 19, 1991, on other charges. (Tr. 37, 38; Exhibit 5)

During this time period, Applicant's marriage ended in divorce, her former husband took custody of her sons, and her parents took custody of her daughter. Applicant associated with a rough group of people. Since these incidents in 1991, Applicant has taken a different path and obtained a steady truck-driving job, her sons grew, and she reconciled with her parents and daughter. Applicant has had no other involvements with the law. (Tr. 40, 41)

Applicant moved to another state after her release from jail in 1992. She arranged to have the probation supervision transferred to her new home state where she remarried. That state's probation officers and Applicant could never get together, and eventually her case was transferred back to her original home state where the offense occurred. The $20 probation fee, $500 fine and court costs, and other conditions were not satisfied in a timely manner. Then, in August 1995, while driving her private vehicle through another state, she was stopped and arrested for speeding and probation violations. She was sent back to her former home state, where she spent another 30 days in jail while her paperwork was updated, she paid the fine and other fees and costs, and had her probation terminated unsatisfactorily. She was ordered to leave that state and never return. She did drive to that state once in the succeeding years as a truck driver to deliver a load. (Tr. 43-45; Exhibits 2 and 6)

Applicant smoked a marijuana cigarette that was being passed around at a New Year's Eve party on December 31, 2001. She took several puffs on the cigarette. She does not associate with the party attendees anymore. She does not use marijuana now and does not intend to use it in the future. Her boyfriend and co-driver has a security clearance and would not allow her to use drugs or do anything else to endanger their livelihood or his clearance. (Tr. 46-49, 62-74; Exhibit 2)

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry*

§ 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

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. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

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. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (See Directive, Section E2.2.1. of Enclosure 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 condition 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 other behavior specified in the Guidelines.

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). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of 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. (E2.A10.1.1)

Guideline H: Drug Involvement: 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. (E2.A8.1.1)

Disqualifying Conditions (DC) and Mitigating Conditions (MC) under each guideline are discussed in the Conclusions section of this decision. I relate them to the fact findings previously made.

The Department of Defense was prohibited from issuing a security clearance to anyone who had been sentenced to more than a year in jail. 10 U.S.C. § 986(c)(1). The statute was amended in 2004 to require an Applicant actually serve a year or more in jail.

CONCLUSIONS

The Government established by substantial evidence each of the allegations in the SOR. On these facts, the Criminal Conduct DC E2.A10.1.2.1 (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) and DC E2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*) apply. Applicant was arrested and convicted of three drug charges in 1991. She did not complete her probation successfully, though she attempted to report to a probation officer in her new residence state after she remarried. She finally paid the fines and court costs, and owes nothing on the charges.

Criminal Conduct MC E2.A10.1.3.1 (the criminal behavior was not recent) and MC E2.A10.1.3.6 (there is clear evidence of successful rehabilitation) apply. The first offenses occurred in 1990 and 1991, over 13 years ago, and there are no further violations of the law alleged except her 1995 speeding arrest and probation violation. Even those incidents are nine years ago. Applicant did, however, smoke a marijuana cigarette at a New Year's Eve party on December 31, 2001. In the social context of that evening, the ten year gap between her 1991 incidents and that incident, and the three years since the New Year's Eve party, I consider the incident a one-time de minimus occurrence that Applicant will not repeat. Nevertheless, Applicant has the burden of establishing the mitigating condition taking into consideration all of the evidence of record. That evidence includes her illegal use of marijuana in 2001.[(2)] I conclude she met her burden. Currently, she drives extensively for a commercial trucking firm and has had no moving violations in four years. At the time Applicant committed these offenses, her life was in turmoil and she was much younger. However, that environment does not rise to the level of pressure or coercion contemplated by the Guideline to allow the application of MC E2.A10.1.3.3 (*the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*), so I do not apply that MC. Weighing all the evidence, including the passage of time, Applicant's current maturity and formative life experiences, her consistent employment, her present steady romantic relationship contrasted with her earlier troubled marriages, her absence from the group of people with whom she got into trouble in the early 1990s, and her reconciliation with her children and parents, I conclude this guideline for Applicant.

Applicant never served more than three months in jail after her conviction in 1991. Therefore, under the 2004 amendments to 10 U.S.C. § 986 there is no bar to Applicant receiving a clearance.

Regarding the Drug Involvement security guideline, Applicant purchased marijuana in 1990 and 1991 for her own use, and acted to refer prospective purchasers to an acquaintance who was in the marijuana selling business regularly. Applicant also used marijuana once at a party in December 2001. Drug Involvement DC E2.A8.1.2.1 (*any drug abuse, defined as the illegal use of a drug*) and DC E2.A8.1.2.2 (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*) apply.

The drug use and purchase occurred 13 years ago in the first instance, and three years ago in the second one-time incident. Drug Involvement MC E2.A8.1.3.1 (the drug involvement was not recent) and MC E2.A8.1.3.3 (a demonstrated intent not to abuse drugs in the future) apply. Applicant's marijuana troubles in the early 1990s were serious and part of her life's pattern at the time, caused in large part by the group of friends with whom she traveled and her immaturity. The arrest and conviction in 1991 seems to have had an effect upon Applicant, deterring her from further involvement with the police and marijuana. Applicant has a stable life now, with a regular job, a long-time boyfriend who is her co-driver, and has matured over the years from 25 to 41 years of age. The family problems with her children are resolved, and the pressures of the conflicts with her former husband over the raising of their sons, and conflicts with her parents over custody of her daughter, are long in the past. Applicant articulated her intent not to use drugs in the future, and her boyfriend will not allow her to do anything to jeopardize their employment. The 2001 incident was an isolated incident. I conclude this guideline for Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g: For Applicant

Subparagraph 1.h: For Applicant

Subparagraph 1.i: For Applicant

Subparagraph 1.j: For Applicant

Paragraph 2. Guideline H: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

DECISION

In light of all of 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.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).

2. I am mindful of the Appeal Board's decision in ISCR Case No. 03-21220 at 3 (App. Bd. Aug. 24, 2005) that a Department Counsel may not raise this issue for the first time on appeal. In this case, the incident was alleged in ¶ 2.a of the SOR under Guideline H (Drug Involvement) and Department Counsel presented evidence on the issue.