DATE: October 21, 2005

In Re:

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

Applicant for Security Clearance

ISCR Case No. 03-08054

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Thomas Albin, Esq.

SYNOPSIS

Applicant abused marijuana with varying frequency from approximately 1977 to 1998. His illegal drug involvement led to criminal arrests for felony sale of marijuana in about 1982, for which he was sentenced to a deferred prison term and ten years probation, and for marijuana possession in 1980, 1993, 1994, and 1998. Since he was not incarcerated for any of these criminal drug charges, 10 U.S.C. § 986 as amended does not apply. Yet, criminal conduct and personal conduct concerns persist where he deliberately misrepresented his marijuana involvement on his security clearance application. Clearance is denied.

STATEMENT OF THE CASE

On May 3, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the 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 the 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), including statutory disqualification under 10 U.S.C. § 986, and personal conduct (Guideline E).

Applicant responded to the SOR on May 19, 2004, and requested a hearing before a DOHA administrative judge. The case was assigned to me on August 27, 2004. Pursuant to notice dated November 8, 2004, I convened a hearing on November 24, 2004. Six government exhibits and four Applicant exhibits were admitted into the record, and testimony was taken from Applicant, his spouse, and his working leader, as reflected in a transcript received on December 6, 2004.

With a decision on the merits still pending in this case, 10 U.S.C. § 986 was amended on October 28, 2004. On December 14, 2004, the Director, DOHA, placed a moratorium on all cases involving paragraph (1) or (4) of subsection (c) of that statute. With the recent lifting of the moratorium in August 2005, the case is now ripe for a decision.

RULING ON PROCEDURE

Under the provisions of 10 U.S.C. § 986 then in effect, the government issued an SOR to Applicant on May 3, 2004, alleging in part that Applicant is statutorily disqualified from having a security clearance granted or renewed absent a meritorious waiver because he had been sentenced to a ten year deferred prison term for sale of marijuana to an undercover police officer in 1985 (corrected in his answer to 1982). In October 2004, 10 U.S.C. § 986 was amended to apply to persons sentenced to a term of imprisonment of more than one year and incarcerated as a result for not less than one year.[(2)]

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. Congress did not expressly prescribe whether the amendments to 10 U.S.C. § 986 should apply retroactively. In *Landgraf v. USI Film Products et al.*, 599 U.S. 244, 280

(1994), the U.S. Supreme Court held:

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.

Accordingly, 10 U.S.C. § 986 as amended applies, as it 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.*

FINDINGS OF FACT

DOHA alleged criminal conduct concerns related to felony marijuana sale in 1985, marijuana possession offenses in about 1980, 1993, 1994, and 1998, and deliberate misrepresentation on an April 2002 security clearance application (SF 86) concerning the extent of marijuana use since 1995. Specifically, he disclosed on his SF 86 that he had used marijuana five times in 1998 when he had used marijuana with varying frequency, to include once or twice weekly, from about 1995 to at least September 1998.The alleged lack of candor on his SF 86 was also raised under Guideline E, personal conduct. Applicant admitted his criminal drug offenses, correcting the date of his felony offense to 1982, but denied intentional misrepresentation of his SF 86. Applicant's admissions are accepted and incorporated as findings of fact. After thorough review of the record, I make the following additional findings:

Applicant is a 42-year-old first class sheet metal worker, who had been employed by a defense contractor (company X) from April 2002 to May 2004 when he was laid off subject to recall due to lack of a security clearance. He had worked for the company previously, from May 1982 to August 1997. He seeks a secret security clearance.

Applicant began using marijuana at age 15 (circa 1977) and continued smoking the drug on average about once or twice weekly until mid-September 1998. The marijuana cost him on average $20 to $30 weekly. He used marijuana while he held a confidential security clearance for his duties with company X, and was arrested on several occasions for illegal drug offenses, as follows:

At age 18, Applicant and a friend were involved in an altercation on the road with three others. Stopped on complaint of assault, Applicant was charged with marijuana possession after the police found the drug in his vehicle. Applicant accepted responsibility, although the marijuana belonged to his friend, and the charge was filed for one year after he paid a fine. In the early 1980s, he began selling small quantities of marijuana to friends on average once or twice weekly. In about 1982, he sold a quarter ounce of the drug to an undercover policeman, and was subsequently arrested on a warrant.[(3)] He pleaded guilty to a felony charge of selling marijuana to an undercover officer, and was sentenced to a 10 year prison term, suspended, with 10 years probation.[(4)] Applicant was required to report to a probation officer for one year. He stopped selling marijuana after this incident for fear of a lengthy prison sentence, but continued his

personal use.

In May 1982, Applicant began working as a shipfitter for company X. Under authority delegated by the Department of Defense, the contractor granted him a confidential security clearance ("green badge") for his duties, which he held until he was laid off in August 1997. In April 1984, Applicant and his spouse married. They have two children, a daughter born in May 1986 and a son born in October 1990. After a six-month strike in 1988, Applicant returned to company X in the sheet metal department, and he was rebriefed about his security responsibilities in November 1989. Applicant executed a SF 312, certifying an agreement between himself and the U.S. government that he would abide by the obligations of his security clearance.

In 1993, shortly after he was discharged from probation, he was arrested for illegal possession of marijuana. Applicant claims the marijuana was not his but rather was found on his friend, although Applicant paid a fine and the charge was filed for one year.

In March 1994, Applicant was arrested and charged with possession of marijuana after his companion was pulled over and the police found marijuana on the seat of the vehicle and on Applicant. Applicant pleaded nolo contendere, was fined about $400, and the charge was filed for one year.

In August 1997, Applicant was laid off from his job at company X due to lack of work. He found employment as a machine assembler for a local engineering company. In September 1998, Applicant was pulled over for running a stop sign. He was arrested for possession of marijuana after he was found with about a quarter ounce of the drug. He pleaded nolo contendere and was placed on one year unsupervised probation and fined $211.50 plus court costs and $200 to a victim fund. Applicant stopped using marijuana after this arrest as his wife threatened to leave him with their two children if he continued his involvement. Applicant successfully pursued expungement and those offenses occurring before 1998 were expunged from his criminal record.[(5)]

At the invitation of company X, Applicant applied to return to work for the defense contractor in December 2001. In response to inquiry of any conviction record, Applicant indicated on his employment application that he had been placed on probation for one year for possession of marijuana in 1997 [sic] in lieu of conviction. On his return to work for company X in April 2002, Applicant certified to his employer he had not been convicted of any other violations than previously indicated on his employment application. He believed he did not have to report those offenses that had been expunged from his record.

Needing a security clearance for his duties as a first class mechanic in the sheet metal department, Applicant executed a security clearance application (SF 86) on April 2, 2002. Uncertain whether his offenses fell within the exemption from disclosure for offenses under the Federal Controlled Substances Act expunged under authority of 21 U.S.C. § 844 or 18 U.S.C. § 3607, Applicant disclosed only his 1998 marijuana possession offense. In response to question 27 concerning any drug use in the past seven years, Applicant indicated use of cannabis in October 1998 on five occasions, as he feared denial of his security clearance if he disclosed his use of marijuana on average once or twice weekly during the period 1995 to his arrest in Fall 1998.[(6)]

Applicant responded "No" to question 29 concerning any use of illegal drugs while in possession of a security clearance.

On May 29, 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his illegal drug involvement and criminal record, and failure to accurately report his drug use and offenses on his SF 86. Applicant admitted he had used marijuana once to twice weekly from age 15 to his last arrest (which he mistakenly indicated was in October 1998), and he detailed his drug-related criminal offenses. He candidly admitted he had not revealed the extent of his drug use on his SF 86 for fear that he would not obtain a clearance. When asked why he had denied on his SF 86 any use of illegal drugs while in possession of a clearance, Applicant told the agent he held a company clearance and thought the question applied only to government security clearances. The following day, the DSS agent confronted Applicant with his application for employment with the defense contractor whereon Applicant had indicated he held a U.S. government clearance called a "green badge" by his employer. Applicant acknowledged he had "made up" an explanation for why he had not affirmatively indicated on his SF 86 he had used illegal drugs while holding a clearance.

Applicant has been involved in martial arts since 1993. A first degree black belt since 2001, Applicant teaches a children's program three times weekly in lieu of having to pay for his own instruction. He displayed a similarly strong work ethic and commitment to his job with the defense contractor where he earned the respect of his peers for his trade knowledge and professionalism. As of November 2004, Applicant was still out of work and collecting unemployment compensation.

Applicant does not intend to use any illegal drug in the future. Under threat from his spouse that she would leave him with their two children if he uses drugs, Applicant no longer associates with those individuals with whom he abused marijuana in the past. Applicant regards illegal drug use as inconsistent with his marital arts as well.

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 with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within 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.

Enclosure 2 of the Directive sets forth personnel 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.

The following adjudicative guidelines are most pertinent to an evaluation of Applicant's security suitability:

Criminal Conduct. A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. (E2.A10.1.1.)

Personal Conduct. 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

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and adjudicative guidelines, and having assessed the credibility of those who testified, I conclude the government established its case under Guidelines J and E. While there is no evidence of any illegal drug involvement since Applicant's last arrest for marijuana possession in 1998, criminal conduct and personal conduct concerns persist, as follows:

Applicant used marijuana on average once or twice weekly from age 15 (circa 1977) to mid-September 1998, and he has a history of drug-related criminal involvement (illegal marijuana possession in 1980, 1993, 1994, and 1998, and felony sale of marijuana in about 1982). Despite his long history of marijuana abuse, which continued while he held a security clearance, there is no evidence of any continuing involvement after 1998. However, his repeated violations of the laws proscribing illegal drug possession and sale raise very serious doubts for his judgment, reliability, and trustworthiness. Under Guideline J, disqualifying conditions E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*, and E2.A10.1.2.2. *A single serious crime or multiple lesser offenses*, apply. Since Applicant served no prison time for the sale of marijuana to the undercover officer, 10 U.S.C. § 986 as amended provides no bar to the granting of a clearance to Applicant. However, neither the inapplicability of 10 U.S.C. § 986 nor the state's expungement of all but the 1998 marijuana possession offense negate the security significance of this criminal

conduct.

Moreover, Applicant committed recent criminal conduct when he falsified his SF 86. Accepting his explanation that he did not realize he had to report his expunged drug offenses on his SF 86, the government did not allege any intentional omission of his criminal record from his SF 86. Security significant Guideline J and Guideline E, personal conduct, concerns are raised by his falsely claiming on his SF 86 that he had used marijuana only five times in the preceding seven years. DC E2.A10.1.2.1. under Guideline J and DC E2.A5.1.2.2. *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* under Guideline E are applicable. Although not alleged but demonstrating similar lack of candor, Applicant falsely denied on the SF 86 that he had ever used illegal drugs while he held a security clearance.

Applicant's felonious false statement on his security clearance application in violation of 18 U.S.C. § 1001[(7)]

is the latest in a pattern of criminal conduct that continued to as recently as March 2002. Required to assess Applicant's criminal conduct as a whole, I find his criminal conduct too recent and repeated to apply under Guideline J either MC E2.A10.1.3.1. *The criminal behavior was not recent,* or MC E2.A10.1.3.2.*, The crime was an isolated incident*, to even the now dated drug offenses. Yet, the presence or absence of a pertinent adjudicative condition is not outcome determinative. Applicant's abstinence from illegal drugs makes recurrence of the drug-related misconduct unlikely. There is no evidence he has been engaged in the sale of marijuana since the early 1980s. He has disassociated himself from those persons with whom he used illegal drugs in the past, and his concern for his family and his commitment to martial arts serve as significant deterrents to any future drug involvement. Accordingly, ¶¶ 1.a., 1.b., 1.c., 1.d., and 1.e. are resolved in his favor. SOR ¶ 1.g. is returned for him as 10 U.S.C. § 986 as amended does not apply.

However, Applicant has not shown sufficient rehabilitation of his deliberate false statement to conclude either ¶ 1.f. or ¶ 2.a. in his favor. To Applicant's credit, he was candid with the Department of Defense about his drug use and arrest record when queried by a DSS agent in late May 2002. As the DOHA Appeal Board has repeatedly articulated, mitigating condition E2.A5.1.3.2. *The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*, is properly applied where the falsification is old and the applicant subsequently provides correct information about matters not covered by the old falsification.[(8)] Whereas Applicant corrected his prior misrepresentations on a recent security clearance application, MC E2.A5.1.3.3. *The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*, is potentially applicable.[(9)] His DSS interview was only eight weeks after he completed the SF 86, so reasonably prompt under the circumstances. All but the 1998 offense had been erased from Applicant's record, and there is no evidence the admission of once to twice weekly drug involvement came after confrontation. Yet, during that same interview, as he admitted the following day, Applicant fabricated an excuse for his failure to respond affirmatively to question 29 on the SF 86 regarding any drug use while he held a security clearance.

Furthermore, compounding the doubts for his judgment, reliability and trustworthiness, Applicant testified inconsistently at his hearing about his use of marijuana since 1995. When asked why he had indicated marijuana use five times in October 1998 on his SF 86 when he had not used marijuana since September 1998, Applicant testified he should have said five to ten times "from August 1998 to that point there." Asked whether this meant he had used marijuana only five to ten times in the seven years preceding his April 2002 SF 86, Applicant responded, "Yes," and agreed with his counsel's characterization of his past marijuana involvement as "very infrequent." (Tr. 76-77) Not only is this inconsistent with his May 2002 representation of marijuana use on average once to twice weekly from age 15 to Fall 1998, but when later asked what his answer would be had he the opportunity to complete the SF 86 again, Applicant testified:

I would say I used it on and off probably 12 times in a year between that time and-- between '95 and 2002, except I didn't use it after '98, so I would say between '95 and '98 I probably used it 12 times a year at the most . . .Probably once [a] month, yeah. (Tr. 81)

On cross examination, he testified that while he used marijuana weekly in the 1980s, he decreased his involvement to

"very sparse" after he started martial arts in 1993. (Tr. 83) Confronted with his May 2002 admission of weekly to twice weekly involvement on average to Fall 1998, he claimed he was nervous during his DSS interview and not correct as to his dates ("nerves or something must have got the best of me." Tr. 87). Yet, he told the agent during that same interview that he had not been candid about his marijuana use on his SF 86 because he feared it would jeopardize his chance of obtaining a clearance. (Ex. 5)

The government must be assured that those granted access understand their responsibility to provide full and frank disclosures at all times. Whereas Applicant continues to place his self-interest ahead of his obligation of complete candor, I am unable to find that it is clearly consistent with the national interest to grant him access. SOR subparagraphs 1.f. and 2.a. are found against Applicant.

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: AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: Against the Applicant

Subparagraph 1.g.: For the Applicant

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparagraph 2.a.: 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. Clearance is denied.

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. 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.

3. At his hearing, Applicant denied he was selling marijuana at the time. He claimed he was set up by his supplier, who "to save his own hide . . . turned in all the little people he was selling amounts to." (Tr. 58) Applicant's claim that he just gave the undercover officer "a little small amount out of [his] own personal thing" is not believable given his felony conviction, prison sentence (deferred) and 10 year probation.

4. Applicant told a DSS agent in May 2002 that he received a ten year suspended sentence, "10 years deferred and 10 years probation." If he got in trouble while on probation he would have had to serve ten years. At his hearing, Applicant testified that the attorney who represented him on the more recent drug charges informed him there was no such thing as a 10-year suspended or a 10-year deferred sentence. (Tr. 59) The offense has been expunged from his record so no records are available to confirm the sentence, but he does not dispute that he was sentenced to a prison term of at least five years (suspended) and had to serve 10 years probation.

5. It is unclear when the offenses were expunged from Applicant's record. While the criminal history record (Ex. D) listing only the 1998 possession of marijuana offense is dated May 28, 2004, Applicant told the DSS agent in May 2002 that his offenses had been expunged. (Ex. 5)

6. At his hearing, Applicant was confronted with the discrepancy between his report of no drug use since his last arrest, which was in mid-September 1998, and his listing on his SF 86 of five times use of cannabis in October 1998, Applicant testified the October 1998 date was incorrect. Given his arrest was in September and conviction was in October 1998, Applicant could well have been confused as to the last date of his marijuana involvement. However, the evidence compels a finding that he deliberately falsified his SF 86 as to the extent and duration of his marijuana use in the seven years preceding his security application. Clearly, it was far in excess of the five times reported by Applicant.

7. By deliberately misrepresenting his drug involvement when he completed his SF 86, Applicant violated 18 U.S.C. § 1001, which provides in part:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully: (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.

8. *See e.g.*, ISCR Case No. 02-09389 (App. Bd. December 29, 2004), citing ISCR Case No. 99-0557 at 4 (App. Bd., July 10, 2000).

9. There are no previous security clearance applications of record, and the government did not explore whether Applicant had completed earlier applications or what he indicated about his drug involvement on such forms, if any.