DATE: August 5, 2005

In Re:

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

Applicant for Security Clearance

ISCR Case No. 03-09470

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant abused marijuana from age 16 (1996) to October or November 2003. Over a 16-month span in 1998/99, he was convicted twice of illegal possession of marijuana, of refusal to submit to chemical test after drunk driving, and of disorderly conduct (fighting). In April 2001, he pleaded nolo contendere to obstructing an officer in execution of duty. His substance abuse and related criminal conduct are mitigated by his abstinence from illegal drugs with no intent to use in the future and a favorable change in his drinking habits, but criminal conduct and personal conduct concerns persist where he deliberately omitted his marijuana use and criminal arrest record from his security clearance application. Clearance is denied.

STATEMENT OF THE CASE

On October 4, 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 drug involvement (guideline H), criminal conduct (Guideline J) and personal conduct (guideline E).

Applicant responded to the SOR on October 19, 2004, and requested a hearing before a DOHA administrative judge. The case was assigned to me on March 14, 2005, and pursuant to notice dated March 18, 2005, I convened a hearing on April 11, 2005. Ten government exhibits and three Applicant exhibits were admitted into the record, and testimony was taken from Applicant and his girlfriend, as reflected in a transcript received on April 22, 2005.

FINDINGS OF FACT

The government alleged under Guideline H, drug involvement, that Applicant used and purchased marijuana from about

1996 to at least October or November 2003, including after he applied for a security clearance, and he was found guilty of illegal possession of marijuana charges filed against him in July 1998 and January 1999. Guideline J, criminal conduct, was alleged because of the marijuana possession offenses, his marijuana purchases, a September 1998 DUI, a November 1999 assault and disorderly conduct, an April 2001 obstructing officer in execution of duty offense, and felonious false statements made on his security clearance application (SF 86).[(2)] These false denials of any alcohol or drug related offenses, any use of illegal drugs, any alcohol-related counseling, and any criminal arrests in the past seven years, were also alleged under Guideline E, personal conduct. In his answer, Applicant admitted his arrests, but denied the allegations of marijuana use and purchase as well as the deliberate falsifications of his SF 86. Applicant's admissions are incorporated as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings:

Applicant is a 25-year-old high school graduate who has been in a defense contractor's apprenticeship program training to be an electrician since March 2002. He is in his last year of the apprenticeship program and seeks a security clearance for his duties.

Applicant used marijuana one to two times weekly on average from about 1996 to October or November 2003. The marijuana cost him on average $30 per month.

After graduating from high school in May 1998, Applicant went to work as an assembly technician. He continued to smoke marijuana for its relaxing effects. In late July 1998, he was arrested for possession of marijuana. He was found guilty, and ordered to pay $200 to a violent crime indemnity fund plus court costs and the charge was filed for one year.

In September 1998, Applicant was pulled over by the police after he was observed weaving. Exhibiting glassy eyes, slurred speech, and a strong odor of alcohol about his person, Applicant was administered field sobriety tests, which he failed. He was arrested for misdemeanor driving under the influence (DUI) and operating left of center. Applicant refused to submit to a chemical test. In October 1998, a judge of the administrative adjudication court sentenced him on the refusal charge to $900 in fines and fees, three months license suspension, 10 hours of community service and participation in a DWI program. Six days later, the district court closed the case since he had pleaded guilty to the chemical test refusal charge. At the advice of his lawyer, Applicant attended one month of counseling after the offense.

In January 1999, Applicant was stopped for speeding. The officer detected a very strong odor of marijuana emanating from the vehicle. Applicant and his passenger were both arrested, Applicant for driving under the influence of marijuana (refusal to submit to urine test) and misdemeanor possession of marijuana. He pleaded nolo contendere to illegal possession and was fined $200 plus costs, placed on one year probation, and ordered to attend substance abuse counseling.

While on probation for the January 1999 marijuana offense, Applicant consumed about ten beers at a private party in November 1999. The police were called to the premises on report of a stabbing of one of Applicant's friends. On report that Applicant had instigated the fight that ensued between the perpetrator and victim, he was arrested for simple assault/battery and disorderly conduct. Applicant was convicted of disorderly conduct (fighting) and sentenced to six months probation, consecutive to the probation term for his January 1999 marijuana offense, to pay restitution plus court costs, and to attend an outpatient mental health evaluation and alcohol counseling. The assault charge was dismissed.

In late November 1999, Applicant was considered to be in violation of his probation because of his arrest for assault and his failure to document that he had completed substance abuse counseling. On the recommendation of his lawyer, Applicant underwent a clinical psychological evaluation in February 2000. Applicant advised the licensed psychologist that he no longer drinks or attends parties and was complying with all the court demands placed on him, including that he was attending court-ordered counseling for substance abuse. The evaluating psychologist opined that continued substance abuse counseling with Alcoholics Anonymous (AA) might be helpful in maintaining his sobriety, and Applicant was not at great risk of for repeating any illegal activity if he remains substance free.

In late March 2000, Applicant and a friend were pulled over for speeding. Applicant was arrested on the bench warrant for violating his probation and he was taken to an adult correctional institution. After spending the night in jail, Applicant was remanded to the custody of the director of the institute of mental health.

In late April 2001, Applicant was charged with obstructing an officer in the execution of duty. He pleaded nolo contendere, was ordered to pay court costs, and the case was filed for one year.

Applicant denies any basis to the charge ("They were just trying to give me the buck." Tr. 82)

Unemployed for the first three months of 2001, Applicant worked in a succession of jobs for the remainder of the year, as a retail stocker, as a landscaper, and then as a forklift operator. In March 2002, Applicant applied for a job with his present employer. He took a pre-employment drug test that was negative for all substances tested. Applicant was also given a security clearance application (SF 86) and asked to complete it by the next morning when he returned for a physical examination. Concerned that he would not be hired if he disclosed his drug use and criminal record, Applicant responded "No" to inquiries into any alcohol/drug offenses, any other offenses in the last seven years, any use of illegal drugs since age 16 or in the last seven years, and any alcohol-related treatment or counseling in the last seven years.

On December 3, 2003, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his criminal history and use of illegal drugs. Applicant provided a signed, sworn statement in which he indicated he had not listed his criminal arrests on his SF 86 out of concern that he would not get a job with his current employer, and he described himself as "a changed person." He attributed his omission of alcohol counseling to the fact that he was in a hurry when he completed the form. Applicant also related he had been using marijuana on average one to two times weekly since age 16 to about one to two months ago and expressed his intent to refrain from future involvement as he realized it would impact his employment. He had no explanation for continuing to use marijuana after he had begun working for the defense contractor.

At his hearing, Applicant testified his marijuana use declined after 1999 (social at parties, no more than "every so often" after he had started working for the defense contractor). (Tr. 63-65, 83) While "on average 1-2 times weekly" use does not mean that Applicant used marijuana with that frequency every week, it stands to reason he would have told the agent of a precipitous decline in the rate of use had that been the case. Applicant's December 2003 representation is more credible.

Applicant also claimed for the first time at his hearing that he had not disclosed his arrest record on his SF 86 because it had been expunged ("And the reason why I didn't put everything down is because it was expunged, which I thought was off my record, wasn't--I thought I was clean with everything, that's why I didn't provide that." Tr. 41) Applicant explained it was his understanding from the judge and his lawyer that "If they say a filing that means a year on my record and then expunged." (Tr. 54) Applicant admitted he had not listed his marijuana use because he figured he wouldn't be hired if he did, and he knew his DUI arrest was still on his record. Based on the available record, Applicant is found to have deliberately omitted from his SF 86 not only his illegal drug use but also his arrest record and alcohol-related counseling.

Applicant attributes his criminal arrest record to immaturity, to doing stupid things, and to being in the wrong place at the wrong time. He has not been arrested since he started working for the defense contractor in March 2002. He has not used marijuana since October or November 2003, and is willing to submit to random drug tests to keep his job. While he continues to consume alcohol, he does not drive after drinking. He and his girlfriend, who have dated since November 2003 and have daily contact, are expecting their first child in late July 2005. She has not seen him intoxicated or under the influence of illegal drugs.

Applicant enjoys his job and has done well in his electrical apprenticeship classes. Considered by one instructor to be "an ideal student," Applicant has shown maturity and responsibility. His work is "always well presented, organized and on time." Applicant's union steward discussed the issues of security concern with Applicant. The union steward is convinced Applicant "believes that all issues leading to these proceedings were cleared from his personal history, and therefore did not need to disclose such information."

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.

After a thorough evaluation of the record evidence, the following adjudicative guidelines are pertinent to an evaluation of Applicant's security suitability:

Drug Involvement. 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.)

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. (E2.A5.1.1.)

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of those who testified, I conclude the following:

Applicant used marijuana once to twice weekly on average from 1996 to October or November 2003. He committed two drug-related offenses within a six-month period in 1998-1999, and continued using marijuana even after he started working for the defense contractor and applied for a security clearance. In December 2003, Applicant admitted he had spent about $30 per month on marijuana. Disqualifying conditions E2.A8.1.2.1. *Any drug abuse*, and E2.A8.1.2.2. *Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*, of Guideline H apply.

Applicant submits in mitigation his abstinence from any illicit drug since October or November 2003, with no intent to use any illegal substance in the future. Illegal drug involvement may be mitigated under the Directive if one or more of the following conditions apply: *The drug involvement was not recent* (MC E2.A8.1.3.1.); *The drug involvement was an isolated or aberrational event* (MC E2.A8.1.3.2.); *A demonstrated intent not to abuse any drugs in the future* (MC E2.A8.1.3.3.); or *Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional* (MC E2.A8.1.3.4.) There is no evidence Applicant has used marijuana in the 16 months preceding his hearing.[(3)] While his immature age was certainly a factor in his drug use (*see* E2.2.1.4.), Applicant still has a heavy burden to prove he is not likely to relapse into use of a drug that he enjoyed on average weekly or twice weekly for several years, including while employed by a defense contractor. In 1999, he stopped socializing with his old high school friends with whom he used marijuana, but he had no problem finding others with whom to use marijuana. However, since his DSS interview in December 2003, there have been positive changes that make future abuse unlikely. His girlfriend, whom he has dated since November 2003, is expecting their child in July 2005. She sees him on a daily basis and has not observed him or

his present roommates using illegal drugs. Applicant's consistently good performance in the apprenticeship program does not guarantee abstinence, but it reflects a level of maturation and dedication to his job. Applicant's desire to retain his employment and his impending fatherhood serve as very significant deterrents to any future abuse. Under the circumstances, MC E2.A8.1.3.3. applies, and favorable findings are returned as to ¶ 1.a., 1.b., 1.c., 1.d. and 1.e. of the SOR.

In addition to the criminal conduct concerns raised by his illegal drug possession, Applicant operated a motor vehicle while under the influence of alcohol in September 1998. Although the DUI charge was not pursued after Applicant submitted to administrative adjudication on the chemical refusal charge, Applicant exhibited obvious signs of alcohol impairment at the time of his arrest. Operating a vehicle under the influence of alcohol or illegal drugs shows a serious disregard for the law and the health and safety of others. After consuming about ten beers at a party, Applicant incited an altercation during which a friend was stabbed in November 1999. He was convicted of disorderly conduct (fighting) and this conduct was considered to be in violation of his probation for a January 1999 marijuana possession offense. In April 2001, Applicant pleaded nolo contendere to obstructing an officer. More recently, and raising greater concern, Applicant committed felonious criminal conduct when he deliberately falsified his SF 86 and elected to not disclose his criminal record history, including his court-ordered substance abuse counseling, and his illegal drug involvement.[(4)]

Under Guideline J, DC 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.

Applicant has not been arrested for any alcohol or drug-related offense since November 1999, but that conduct cannot be viewed as distant in time (*see* MC E2.A10.1.3.1. *The criminal behavior was not recent*) or isolated (*see* MC E2.A10.1.3.2*., The crime was an isolated incident*), since he continued to possess marijuana at least on the occasions of use to October/November 2003, and he made felonious false statements to the government in March 2002. There exists a pattern of criminal activity that creates doubt about his judgment, reliability, and trustworthiness. Yet, Applicant's abstinence from illegal drugs makes recurrence of the drug-related misconduct unlikely. Although Applicant continues to drink alcohol, he and his girlfriend testified it has not been a problem for him. Since he is no longer driving after drinking, the drunk driving is not likely to recur. Little is known of the facts that led to Applicant's April 2001 arrest for obstruction. Applicant testified, unrebutted by the government, that the arresting officer "started to strangle [him] and throw [him] on the side of the cruiser." Applicant admitted he "kind of had it at that point . . . and [he] just told him enough is enough." (Tr. 81) There is no evidence Applicant physically struggled with the officer, and the charge was filed. SOR subparagraphs 2.a., 2.b., 2.c., and 2.d. are resolved in his favor as these criminal acts are not likely to recur.

However, significant security concerns persist because of his failure to provide full and frank answers to the government--behavior that raises personal conduct and criminal conduct concerns. 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 applies to this conduct as well as E2.A.10.1.2.1. under Guideline J.

Security clearance determinations involve a careful weighing of a number of variables known as the whole person concept. (*See* E2.2.1.) To Applicant's credit, he was candid with the Department of Defense about his drug use and arrest record in a December 2003 sworn statement. Although he provided little in the way of detail, he did not deny his criminal arrests and admitted he had used marijuana from age 16 to about October/November 2003. 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.[(5)] 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. Even if I was to assume that Applicant volunteered the information before being confronted (not proven), his rectification more than a year after his SF 86 falsifications was not prompt.

His association with persons involved in criminal activity (drug abuse) has ceased (*see* MC E2.A5.1.3.7.), but he has failed to demonstrate sufficient reform with respect to his intentional false statements. Reluctant to discuss his drug use

at the hearing ("I'd rather not talk about that because it's behind me" Tr. 61), Applicant tended to downplay his drug involvement. When asked about his early use of marijuana, Applicant responded, "When you say 'starting' it wasn't like a cigarette habit. It was just being a kid." (Tr. 62) As for the frequency of his marijuana use, Applicant responded, "It wasn't every day, it wasn't like, you know, I graduated in 1998, all this happening to me." (Tr. 63) When asked about purchase, Applicant answered, "No, never purchased it. I mean I have, but it was very random." (Tr. 64) He also claimed to lack recall of the circumstances under which he last used marijuana (Tr. 80), or of the number of times he smoked marijuana after he started working for the defense contractor ("I don't know. Like I said, after the interview, it's no longer with me now." Tr. 83). When pressed, Applicant testified his use was "every so often . . . at parties."

Concerning his SF 86 omissions, Applicant related in December 2003 that he feared he would not get his job with the defense contractor if he disclosed his drug use and arrests. At his hearing, he claimed the offenses had been expunged, and he understood from his lawyer and the judge that if the offenses had been filed for one year, they would be wiped off his record so they need not be reported. The SF 86 inquiries are unambiguous in requiring disclosure, even of offenses that have been sealed or otherwise stricken from the record. Even if Applicant had assumed in good faith that he did not have to list offenses that had been filed, the January 1999 marijuana possession and November 1999 disorderly conduct charges had not been filed or dismissed. Applicant knew his drunk driving offense was still on his record. (Tr. 55-56) 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 2.e., 3.a., 3.b., 3.c., and 3.d. 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 H: FOR 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

Paragraph 2. Guideline J: AGAINST THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: For the Applicant

Subparagraph 2.c.: For the Applicant

Subparagraph 2.d.: For the Applicant

Subparagraph 2.e.: Against the Applicant

Paragraph 3. Guideline E: AGAINST THE APPLICANT

Subparagraph 3.a.: Against the Applicant

Subparagraph 3.b.: Against the Applicant

Subparagraph 3.c.: Against the Applicant

Subparagraph 3.d.: 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. Under ¶ 2.a. of the SOR, the government alleges as criminal Applicant's purchase of marijuana on a monthly basis, his continued marijuana use after he executed his SF 86, and his July 1998 possession of marijuana offense. Inexplicably, the January 1999 possession of marijuana offense was not alleged as criminal. Moreover, while marijuana use is illegal in the pertinent jurisdiction, the fact that it continued after he completed his SF 86 does not make it any more criminal. It is inconsistent for the government to have failed to allege Applicant's marijuana use (SOR ¶ 1.a.) as criminal while alleging that his continued use after he executed his SF 86 was criminal.

3. As recently reaffirmed by the DOHA Appeal Board in ISCR 02-24452 (decided August 4, 2004), "An unfavorable credibility determination provides a Judge with a basis for deciding to disbelieve an applicant's testimony. However, mere disbelief of that testimony, standing alone, is not a sufficient basis for a Judge to conclude that the applicant did something (e.g., engaged in drug abuse after a given date) for which there is no independent evidence." *See*, *e.g.*, ISCR Case No. 01-26893 (October 16, 2002) at p. 7; ISCR Case No. 97-0356 (April 21, 1998) at p. 3.

4. 18 U.S.C. § 1001 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.

5. *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).