DATE: December 27, 2006

In re:

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

Applicant for Security Clearance

CR Case No. 05-00967

DECISION OF ADMINISTRATIVE JUDGE

MARK W. HARVEY

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, who is thirty-one-years-old submitted a security clearance application in 2003 that contained false information about the recency of his marijuana use, and omitted information about being charged with marijuana possession in 1992 and 2000. At his hearing, he recanted his admission in a 2004 Defense Security Service interview of marijuana use in 1998/1999, asserting he stopped using drugs more than seven years before completing his 2003 security clearance application. His hearing testimony about the recency of his marijuana use was not credible. He failed to mitigate security concerns pertaining to his personal conduct and criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On April 3, 2003, Applicant applied for a security clearance and submitted a Security Clearance Application (SF 86).[(1)] On August 11, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified.[(2)] The SOR alleges security concerns under Guidelines E (Personal Conduct) and J (Criminal Conduct). The SOR 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 him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an answer notarized on September 8, 2005, Applicant responded to the SOR allegations, and elected to have his case decided at a hearing.[(3)] The hearing was initially scheduled for April 19, 2006, with Judge Hogan. Applicant was not present when his hearing was convened. Applicant had an acceptable reason for his absence, and his request to reschedule his hearing was granted. On October 13, 2006, the case was reassigned to me. On November 2, 2006, the hearing was held. On November 28, 2006, DOHA received the record of the hearing (R.), and on December 4, 2006, the

transcript was provided to me.

PROCEDURAL ISSUES

Department Counsel made a motion to amend the SOR to add subparagraph 1(a)(2), which would allege that in June 1999 or 2000, Applicant was charged with driving with a revoked license, driving an uninsured vehicle, possession of marijuana, and possession of drug paraphernalia (R. 11). He pleaded guilty to possession of drug paraphernalia in accordance with his plea agreement, and the other charges were dismissed (R. 11). Applicant did not object to the amendment, instead he explained that he "came clean" during his Defense Security Service (DSS) interview about the 1999 offense (R. 12). I granted Department Counsel's motion to amend the SOR (R. 12).

With the concurrence of the parties, I accepted Applicant's opening statement as evidence (R. 16-23). His opening statement was consistent with his subsequent statement during his presentation of his case.

FINDINGS OF FACT

As to the factual allegations, Applicant admitted that he incorrectly failed to list a 1992 conviction for possession of marijuana in response to Question 24 on his 2003 SF 86.[(4)] He contended that his erroneous answer to Question 24 was based on his belief that he did not have to list this offense because it was expunged. He also answered "No" in response to Question 27, which pertained to whether he illegally used drugs in the last seven years. However, he asserted his answer to Question 27 was accurate. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 31-years-old.[(5)] He was employed as a network administrator for a defense contractor.[(6)] He was recently awarded a bachelor of arts degree (R. 5, 32). From October 2001 to March 2002, he attended vocational school, and obtained his MSFT Certification.[(7)] Applicant has no prior military service.[(8)] Applicant is not married.[(9)] He applied for an upgrade of his clearance in 2005 from Secret to Top Secret (R. 34-35).

The allegations pertain to whether Applicant knowingly and deliberately falsified Questions 24 and 27, of his April 3, 2003, SF 86. Applicant did not list a 1992 marijuana possession charge and conviction, and a 2000 marijuana possession charge. He admitted these charges and the 1992 marijuana possession conviction occurred. Additionally, the SOR alleges he used marijuana until at least 1998 or 1999, and omitted this information from his 2003 SF 86.

In 1992 while he was in high school, the police pulled him out of class, searched his car, and found a small amount of marijuana that he was keeping in a film case in his car.[(10)] He pleaded guilty, and was sentenced to perform 24 hours of community service (R. 38). He was also required to provide a urine sample for testing every week for 90 days. After he completed the community service and urinalysis testing, his record was expunged.[(11)]

In 2000,[(12)] Applicant was arrested for possession of marijuana and possession of drug paraphernalia (rolling papers). Exhibit 2, at 4. He denied that the marijuana and rolling papers were his, but pleaded guilty to possession of drug paraphernalia (*Id.*; R. 49). At his hearing on November 2, 2006, he said he met someone in a bar, and agreed to give him a ride home (R. 53). The acquaintance he met in a bar "dumped his stuff in [Applicant's] car and [Applicant] was forced to take responsibility for" his passenger's marijuana and marijuana paraphernalia (R. 19, 53). The police found the marijuana and marijuana paraphernalia under the passenger's seat in his car (R. 53). His passenger was not charged (R. 53). The possession of marijuana charge was dismissed,[(13)] and he paid a $100 fine for possession of drug paraphernalia (R. 50). Applicant's response to Question 26 of his 2003 SF 86 indicates that in 1999 he received a citation for "possession of cigarette paper" (Exhibit 1, at 9). He did not list the 2000 possession of marijuana charge on his 2003 SF 86 because he was focused on the lack of conviction aspect of the marijuana possession (R. 37). He had also been filling out some other employment applications at that time which asked about convictions rather than arrests or charges (R. 37). He read the question, but ascribed his inaccurate answer to a mistake (R. 38). I find there is substantial evidence that he possessed marijuana in 2000. *See* Exhibit 2, at 4. Moreover, his 2000 arrest for marijuana possession provides some corroboration for his 2004 DSS statement about his marijuana involvement continuing into

1998/1999. I do not find his statement at his 2006 security clearance hearing about mistakenly omitting the 2000 marijuana possession charge to be credible.

In 2003, Applicant answered Question 24 of his 2003 SF 86, which concerns his police record pertaining to his alcohol and drug offenses. It instructs, "For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record." Applicant read the question before he answered it (R. 35). Question 24 asks the following question, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"[(14)] Applicant listed a driving while impaired offense occurring on March 5, 1995, but did not list his 1992 charge of marijuana possession. Applicant explained that the 1995 DUI was actually a conviction for a type of underage drinking (R. 36). In his 2005 response to the SOR, Applicant stated that his employer rushed him and he did not have time to check his police record. Additionally, he believed the marijuana offense, which occurred when he was in high school was expunged. *Id.* He believed that when a record was expunged, it is as though it never occurred, and he did not have to reflect this information on his security clearance application. *Id.* At the time he signed his 2003 SF 86, he was aware that it was a state charge, but he also read the word "expunged" and decided he did not have to list it (R. 17, 39). He thought maybe there was some linkage between the state and federal rules that would have resulted in federal expungement when the state conviction was expunged (R. 40). Applicant's 2005 SF 86 for Question 24 includes the information about the 1992 charge of marijuana possession.[(15)] I do not find his statements about believing he did not have to include the information about the 1992 marijuana possession conviction because it was expunged to be credible.

Question 27 of Applicant's 2003 SF 86 asks about his illegal drug activity. It asks, "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana . . . ?"[(16)] He answered, "No." On April 19, 2004, at pages 2-3, Applicant stated during his DSS interview, "I smoked marijuana a total of maybe 6 times only from approximately the time I was about 15 years old until 1998/99. . . I do not recall why I reflected on my security form that I had not used any illegal substance. I thought I had provided all of the required information and had no reason to omit information concerning my past use of marijuana." Applicant's statement in his DSS interview is specific, and it was made when he did not have a motive to fabricate. Accordingly, I find his 2004 DSS statement to be more credible than his 2005 response to the SOR and his 2006 testimony at the hearing that his marijuana use ended more than seven years before he completed his 2003 SF 86.

When he made his 2004 statement to the DSS special agent, he read each page, initialed each page, and signed it (R. 42-43). The DSS special agent confronted Applicant with his arrests in 1992 and 1999, and then he admitted them (R. 49-51). The DSS special agent gained rapport with Applicant by acting like he was Applicant's friend (R. 43). They discussing fishing. The DSS special agent used his relationship with Applicant's stepfather to gain his trust (R. 51-52). Then he caught Applicant off guard and Applicant admitted marijuana use within the 7-year time limit in Question 27 (R. 52). At his 2006 security clearance hearing, he said he was either confused about what he was doing and was off by a year or so when he filled out his SF 86, or as he filled out his SF 86 he answered "no" because the year of his last drug use was 1996 (R. 18-19). He attributed the placement of the erroneous date in the DSS statement to its being authored by the DSS agent, rather than by himself (R. 18, 27). He was adamant that his most recent marijuana use was outside the 7-year time limit (at least 1996 or before) (R. 52). As indicated previously, I do not find his 2006 statement at his hearing about his most recent marijuana use to be credible.

For Question 27 of Applicant's 2005 SF 86, he answered, "No."[(17)] At his hearing on November 2, 2006, Applicant insisted his 2005 SF 86 was accurate (R. 45). The SOR does not allege that he falsified his 2005 SF 86. I draw no adverse inference against Applicant based on his response to Question 27 on his 2005 SF 86.

Applicant contended his employer caused his mistaken answers on his 2003 SF 86 by rushing him to complete it (R. 26, 45-46). He conceded his employer did not provide advice to him on how to answer the questions (R. 45). He did not receive advice from anyone about the security implications of the expungement of his 1992 marijuana possession conviction (R. 46).

Several character references indicated Applicant was very helpful, responsive and diligent in his information technology assistance to the Department of Defense (Exhibit A, at 1-2). He assisted in the recovery of lost data, and provided outstanding customer support (Exhibit A, at 5). In 2003, his employer lauded his hard work, and provided a pay raise

with a promotion (Exhibit A, at 3). He received another pay raise in recognition of his accomplishments in 2004 (Exhibit A, at 6). Applicant was very interested in obtaining a security clearance, and had made intense efforts to gain his clearance (R. 56-58).

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider Enclosure 2 of the Directive, which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process provision in Section E2.2, Enclosure 2, of the Directive. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Directive ¶ E2.2.1: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (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.

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, facts must be established by "substantial evidence.[(18)] The government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence and prove a mitigating condition. Directive ¶ E3.1.15 provides, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." The burden of disproving a mitigating condition never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).[(19)]

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The scope of an administrative judge's decision is limited. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and

patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Personal Conduct

Under Guideline E, "conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that [applicant] may not properly safeguard classified information." Directive ¶ E2.A5.l.l.

Three personal conduct disqualifying conditions (PC DC) could potentially raise a security concern and may be disqualifying in this case. PC DC 2 applies where there has been "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." Directive ¶ E2.A5.1.2.2. A security concern may result under PC DC 3 when an applicant deliberately provides "false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination." Directive ¶ E2.A5.1.2.3. PC DC 5 applies when an applicant has "a pattern of dishonesty or rule violations." Directive ¶ E2.A5.1.2.5.

For PC DCs 2 and 3, Applicant deliberately gave a false answer to Questions 24 and 27 of his 2003 SF 86, in an attempt to conceal the extent of his marijuana possession and use.[(20)] The evidence of record establishes SOR ¶¶ 1.a and 1.b by substantial evidence because he admited preparing his security questionnaire, he understood the questions, and he deliberately provided answers that omitted important information. His statements of confusion about expungement or whether he was required to list a charge as opposed to a conviction are not credible. The omitted information would have provided the government with material derogatory information. PC DC 5 does not apply to SOR ¶¶ 1.a and 1.b because the falsification occurred on the same 2003 SF 86.

A security concern based on Guideline E may be mitigated by substantial evidence of personal conduct mitigating conditions (PC MC). Under PC MC 1, security concerns may be mitigated when the derogatory "information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability." Directive ¶ E2.A5.1.3.1. The allegations in SOR ¶¶ 1.a and 1.b are established by substantial evidence, and constitute deliberate falsifications. As such SOR ¶¶ 1.a and 1.b are relevant to making a security determination about his judgment, trustworthiness, and reliability.

PC MC 2 applies when the "falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily." Directive ¶ E2.A5.1.3.2. PC MC 3 applies when the "individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts." Directive ¶ E2.A5.1.3.3. Applicant has partially established PC Cs 2 and 3 because only one false SF 86 was submitted to the government on October 29, 2003, over three years ago. Additionally, he made a belated, good-faith effort to correct the record when he admitted the falsification in 2004 to a DSS investigator (albeit after being confronted with the facts). Although his eventual admission that the clearance entries were false was not "prompt," he deserves some credit under the "whole person" concept for providing accurate information in 2004. *See* ISCR Case No. 04-07360 at 2, 3 (App. Bd. Sep. 26, 2006) (indicating when a mitigating condition cannot be fully applied, "some credit" is still available under that same mitigating condition). However, his forthright answers during his 2004 DSS interview were negated when he recanted the recency of his drug use in his 2005 response to the SOR, and at his November 2, 2006, hearing.

PC MC 4 applies when "[o]mission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided."

Directive ¶ E2.A5.1.3.4. There is no evidence that anyone gave Applicant improper or inadequate advice or suggested that he omit information from his SF-86. Security concerns can be mitigated under PC MC 5 when an applicant "has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress." Directive ¶ E2.A5.1.3.5. Under PC MC 5, Applicant receives some credit for eventually disclosing his 1992 marijuana possession conviction, his 2000 marijuana possession charge, and his continued marijuana use until 1998/1999. However, PC MC 5 may not be fully applied because his 2005 response to the SOR and his 2006 statement at his hearing recanted the recency of his marijuana use. Any steps made toward rehabilitation are insufficient in magnitude and too recent to support full application of PC MC 5.

In sum, Applicant's false 2003 SF 86 reflects questionable judgment, untrustworthiness, and dishonesty. Standing individually, it might be regarded as an isolated offense that is somewhat remote in time. Directive ¶¶ 6.3.1 and 6.3.2. However, taken along with his deliberately false statements in his response to the SOR and at his hearing, his personal conduct is not mitigated. His claim that he thought he did not have to include his 1992 conviction because it was expunged, even though he read the instruction for the question which specifically requires that he list sealed conviction(s) is deliberately false. Similarly, he stated that his marijuana use stopped in 1995, when he actually continued to use marijuana until 1998 or 1999.

Criminal Conduct

Under Guideline J, a history or pattern of criminal activity raises questions regarding an applicant's willingness or ability to protect classified information and creates doubt about a person's judgment, reliability and trustworthiness. Directive ¶ E2.A10.1.1.

Two criminal conduct disqualifying conditions (CC DC) could raise a security concern in this case. CC DC 1 applies where there are "[a]llegations or admissions of criminal conduct, regardless of whether the person was formally charged" and CC DC 2 applies in situations where an applicant has committed "a single serious crime or multiple lesser offenses." Directive ¶¶ E2.A10.1.2.1 and E2.A10.1.2.2.

SOR ¶ 2.a alleges that he violated 18 U.S.C. § 1001 by falsifying two answers on his 2003 SF 86. As indicated previously, I find that he deliberately falsified his 2003 SF 86. For a violation of 18 U.S.C. § 1001 to occur, however, the falsification must be material. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995): as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." *See also United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004).

If Applicant had provided accurate answers to Questions 24 and 27 of his SF 86, those accurate answers were capable of influencing the government to deny his security clearance. His marijuana usage until 1998/1999 (from the age of 15 to the age of 25), and his marijuana possession in 2000, were sufficiently recent[(21)] and serious[(22)] to jeopardize his security clearance application.[(23)] Because his marijuana possession and/or use occurred over a decade, and resulted in law enforcement and judicial intervention on two occasions, his omissions to his SF 86 were material. Accordingly, CC DC 1 and 2 apply because Applicant committed a single serious offense, a violation of 18 U.S.C. § 1001, which is a felony.

Security concerns based on criminal conduct can be mitigated by showing that it was not recent (CC MC 1). Directive ¶ E2.A10.1.3.1. As indicated previously in the discussion of materiality under 18 U.S.C. § 1001, there are no "bright line" rules for determining when conduct is "recent."[(24)] If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id*. Applicant's last SOR-alleged incident of criminal conduct was his false statement, when he filled out his security clearance application in 2003. However, the SOR allegation of criminal conduct must be considered along with all the other evidence when applying this mitigating condition. He was not forthright and candid when addressing his culpability in his response to the SOR, dated September 8, 2005, and at his hearing on November 2, 2006.[(25)] Viewing his conduct as a whole, CC MC 1 does not apply.

Criminal conduct security concerns may be mitigated under CC MC 2 when the "crime was an isolated incident,"

Directive ¶ E2.A10.1.3.2, or under CC MC 3 when an applicant demonstrates he "was pressured or coerced into committing the act and those pressures are no longer present in that person's life." Directive ¶ E2.A10.1.3.3. CC MCs 2 and 3 do not apply because Applicant committed the 2003 falsification and then was dishonest in his 2005 response to the SOR and at his 2006 hearing when addressing the falsifications, and no one caused him or influenced him to commit the criminal conduct.

For CC MC 4, security concerns pertaining to criminal conduct may be mitigated when an applicant "did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur." Directive ¶ E2.A10.1.3.4. Applicant voluntarily committed the criminal conduct, and has not shown a sufficient track record of positive or non-criminal conduct. CC MC 4 does not apply.

In regard to CC MCs 5 and 6, security concerns may be mitigated when an applicant was acquitted or "[t]here is clear evidence of successful rehabilitation." Directive ¶¶ E2.A10.1.3.5 and E2.A10.1.3.6. CC MC 5 and 6 do not apply because Applicant was not acquitted of violation of 18 U.S.C. § 1001 and there is a dearth of evidence about changes in his life that establish his successful rehabilitation.

"Whole Person" Analysis

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole person concept under Directive provision E2.2.1. As noted above, Applicant's history of criminal and personal conduct weighs against him because his conduct shows a poor decision-making process. E2.2.1.1. His actions concerning personal and criminal conduct, especially the falsification of his 2003 SF 86 were knowledgeable and voluntary. E2.2.1.2. His SOR-alleged falsification pertains to a single SF 86 in 2003, and would be isolated and not particularly recent, if considered alone. However, his falsifications in his 2005 response to the SOR, and at his 2006 security clearance hearing are very recent. E2.2.1.3. He was in his late 20's when he falsified his 2003 SF 86, and he is sufficiently mature to be fully responsible for his conduct. E2.2.1.4. The falsification was a voluntary decision, motivated by a desire to conceal the extent of his marijuana possession and use. E2.2.1.5 and E2.2.1.7. The absence of rehabilitation and other pertinent behavioral changes increases security concerns, and the potential for pressure, coercion, exploitation, or duress remains. E2.2.1.6 and E2.2.1.8. The likelihood of future falsifications remains substantial because such a short period of time has elapsed since his last false or misleading statement (statement at his hearing on November 2, 2006), and he has not provided sufficient evidence of a change in his lifestyle. E2.2.1.9. His relative youth, and contributions to the national defense provide some mitigation,[(26)] but the possibility remains of compromise of sensitive or classified information. His failure to provide a credible description of his marijuana possession and use at his hearing and in his response to the SOR weighs heavily against him. After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude Applicant has not mitigated the security concerns pertaining to personal and criminal conduct.

The evidence leaves me with grave questions and doubts as to Applicant's security eligibility and suitability. I take this position based on the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), my "careful consideration of the whole person factors"[(27)] and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive. Applicant has failed to mitigate or overcome the government's case. I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Paragraph 2, Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against 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.

Mark W. Harvey

Administrative Judge

1. Exhibit 1, Electronic Standard Form (SF) 86, Security Clearance Application is dated April 3, 2003, on the first page. There is an allegation of falsification of this SF 86 in SOR ¶¶ 1.a and 1.b, and 2.a.

2. Exhibit 6 (Statement of Reasons (SOR), dated August 11, 2005). Exhibit 6 is the source for the remainder of this paragraph.

3. Exhibit 7 (Applicant's response to SOR, notarized on September 8, 2005).

4. Exhibit 7, *supra* note 3, is the source for all factual assertions in this paragraph.

5. Exhibit 1, *supra* note 1, section 1.1, at 1 (Date of birth was in December 1974).

6. *Id.*, section 6.1, at 3.

7. *Id*., section 5, at 2.

8. *Id*., *supra* note 1, section 11, at 6.

9. *Id.*, section 8, at 4.

10. Exhibit 2, statement of Applicant to Defense Security Service (DSS) special agent on April 14, 2003, at 3-4, is the source for the facts in this paragraph, unless otherwise stated.

11. Applicant was unsure about whether his 1992 conviction was actually expunged (R. 16, 41-42). However, for purposes of this decision, I have presumed that it was in fact expunged (R. 42).

12. The record has 1999, 2000, and 2002 as dates for this arrest (R. 19, 36, 44). Ultimately, Applicant concluded the correct year was 2000 (R. 48-49).

13. The state court's dismissal of the marijuana possession charge does not preclude a finding that there is substantial evidence that Applicant possessed marijuana. *See* ISCR Case No. 03-21933 at 2 (App. Aug. 18, 2006) (citing ISCR Case No. 02-01181 at 3-4 (App. Bd. Jan. 30, 2004)).

14. Exhibit 1, *supra* note 1, section 24, at 8.

15. Exhibit 3, Electronic Standard Form (SF) 86, Security Clearance Application is dated April 17, 2005, on the first page. There is no allegation of falsification of this SF 86 in the SOR.

16. Exhibit 1, supra note 1, section 24, at 8.

17. Exhibit 3, Electronic Standard Form (SF) 86, Security Clearance Application is dated April 17, 2005, on the first page. There is no allegation of falsification of the 2005 SF 86 in the SOR.

18. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v.Washington Metro. Area Transit Auth*., 36 F.3d 375, 380 (4th Cir. 1994).

19. "The Administrative Judge [] consider[s] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

20. In ISCR Case No. 04-08934 at 2 (App. Bd. Aug. 17, 2006) the Board stated that Applicant's statements about his intent and state of mind when he executed his SF 86 were relevant but not binding information. Moreover, his statements are considered in light of the record evidence of a whole. *Id*. "The security concerns raised by Applicant's falsification were not necessarily overcome by Applicant's subsequent disclosures to the government. *See* ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004)." *Id*.

21. The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (Judge did not err by concluding drug use not recent with passage of slightly less than two and a half years between last use and hearing) (citing ISCR Case No. 02-10454 at 4 (App. Bd. Nov. 23, 2004)). *See* ISCR Case No. 98-0611 at 2 (App. Bd. Nov. 1, 1999) (not error for Judge to find that last marijuana use nine months before close of record was not recent).

22. In Applicant's case, this includes aspects such as, the seriousness of the misconduct, and the number of violations of the law, regardless of whether the misconduct resulted in an arrest or conviction.

23. The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)).

24. *See generally, e.g.* ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (Although the passage of three years since Applicant's last act of misconduct did not, standing alone, compel the Judge to apply CC MC 1, as a matter of law, the Judge erred by failing to give an explanation why he did not apply that mitigating condition.).

25. "Conduct not alleged in a SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3." ISCR Case No. 03-20327 at 3 (App. Bd. Oct. 26, 2006) (citing ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)).

26. Security concerns are not necessarily overcome by Applicant's favorable professional and work record. *See* ISCR Case No. 04-08934 at 2 (App. Bd. Aug. 17, 2006) (citing ISCR Case No. 01-01642 at 6 (App. Bd. June 14, 2002)).

27. *See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).