DATE: December 12, 1996

In Re:

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

Applicant for Security Clearance

ISCR OSD Case No. 96-0416

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

Claude R. Heiny, II, Esquire

Department Counsel

FOR THE APPLICANT

Pro Se

STATEMENT OF THE CASE

On August 2, 1996, the Defense Office of Hearings and Appeals (DOHA), 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 by Change 3, dated February 13, 1996, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make a preliminary determination that it was clearly consistent with the national interest to grant or continue a security clearance for him.

A copy of the SOR is attached to this Decision and included herein by reference.

The Applicant responded to the SOR in writing on August 21, 1996, and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on August 28, 1996. On October 2, 1996, a hearing was convened for the purpose of considering whether it would be clearly consistent with the national security to grant, continue, deny, or revoke Applicant's security clearance. The Government's case consisted of six exhibits and no witnesses; Applicant relied on three exhibits and his own testimony. A transcript of the proceedings was received on October 16, 1996.

FINDINGS OF FACT

Applicant has admitted all of the factual allegations pertaining to drug involvement set forth under subparagraphs 1.a. through 1.zz. of Criterion H. Applicant's admissions are hereby incorporated as findings of fact.

After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the

following additional findings of fact:

Applicant is a 38 year old employee of a defense contractor. He has been employed by his current employer for more than eight years and is applying for a secret clearance. Applicant had previously held a secret clearance while serving in the U.S. Army. His current suitability for a security clearance has been referred to an Administrative Judge because of his extensive abuse of prescription and nonprescription drugs during the past twenty years

Applicant had not used any type of drug or illegal substance prior to joining the U.S. Army in 1977 after high school. He had heeded his parent's advice which had been not to use drugs or alcohol. He did not begin to use drugs immediately after entering military service, but after experiencing peer pressure for a year, he yielded to this pressure and began using marijuana on a regular basis--at least three times a week. Before leaving the Army in 1980, Applicant had also used the following illegal substances on one or more occasions: hashish, hashish oil, methamphetamine, cocaine, peyote cactus, THC, LSD, Quaaludes, and psilocybin mushrooms. And during this time period, Applicant also used the following prescription drugs illegally: Tylenol #3, Tylenol #4, Valium, Ritalin, Preludin, Biphetamine, Didrex, Ionamin, Phenobarbital, Desoxyn, Seconal, librium, phenobarbital, and Tuinal. While he was experimenting with the listed substances, he continued to use marijuana on an almost daily basis until he was discharged the Army in 1980. After his discharge, he attended college, but continued to use marijuana and cocaine on a recreational basis (weekends and holidays) while he was in college. He also abuse these prescription drugs: Ritalin, Phentermine, Seconal, Voranil, and Placidyl.

In March 1983, Applicant was riding his motorcycle when he was rear-ended at a stoplight by a tractor trailer and thrown from his motorcycle. Since this accident, he has had chronic, severe back pain due to the muscle spasms that have been caused by the nerve damage. any hours of physical therapy have done little to alleviate the relentless pain caused by his condition which has been diagnosed as inoperable by more than one physician. As a consequence of the severe and continuous pain, Applicant reduced his consumption of illegal, recreational drugs and began using and abusing prescription pain killers. When he was unable to obtain relief from legitimate medical providers, he took matters into his own hands; he began taking pain killers which had not been prescribed to him. For several months he took a 100 mg. tablet of Demeral every four to five hours and a tablet of Dilaudid #4 every three to four hours, in addition to his prescribed pain medications. He also abused these prescription pain killers: Darvocet, Tuinal, Avocet, Tylenol #3 and #4, Percocet, Percodan, Valium, Hycodan, Vicodin, Lortab, Desoxyn, Seconal, Talwin, and Tylox. Most of the abuse of prescription pain killers occurred prior to 1987.

In January 1987, Applicant received treatment at Facility A for a condition diagnosed as opiate and barbiturate dependence. He did not complete the program. He received treatment from the same facility for the same condition again from April to September 1987, and again, he did not complete the program. Applicant began treatment at Facility B in August 1988 because of his addiction to opiates and benzodiazepines. He was allowed to continue participating in a methadone maintenance program which he had began at Facility A.[(1)] He has continued to participate in that program up to and including the time of his administrative hearing. Participation in this program requires Applicant to drive from his home to facility B--an hour each way--once a week to receive his weekly dosage of methadone. If he tests positive for a proscribed substance, he receives a three -day supply of methadone and must make the trip twice weekly (Tr.32).

In the time that Applicant has been in the methadone maintenance program, he has been subjected to urinalysis[(2)] on an approximately monthly basis, and on three occasions has tested positive for proscribed substances.[(3)] He tested positive for Darvocet in 1990[(4)], and in 1994, he tested positive for opiates on February 14, and positive for benzondiazepines/opiates on April 4. Applicant admits that he testified positive for these substances as alleged in the SOR, and he admits that he had abused Darvocet prior to the 1990 urinalysis. However, Applicant emphatically denies that he had used or abused either of the substances for which he tested positive in February and April 1994. He contends that the positive urinalysis in 1994 resulted from samples being mistakenly switched. Applicant states that Facility B has since changed its procedures, and it has changed the laboratory which it uses to test samples.

On each occasion when Applicant has been asked to provided information about whether he has used or abused drugs, he has been honest and forthright in disclosing the full extent of his involvement with prescription and illegal drugs.[(5)]

Applicant has submitted signed statements from a supervisor and co-workers. According to these statements, Applicant is highly regarded as a dedicated and hard-working employee who is both honest, trustworthy and very conscientious. There is no evidence that his on-going participation in the methadone maintenance program has ever interfered with his work or job performance.

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations with reasonable consistency that are clearly consistent with the interests of national security. In making those overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines but in the context of the factors set forth in section F.3. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate that the facts proven have a nexus to an applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter.

DRUG INVOLVEMENT

(Criterion H)

Drugs are defined as mood and behavior altering:

(a) drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants and hallucinogens) and

(b) inhalants and other similar substances.

Conditions that could raise a security concern and may be disqualifying:

(1) Any drug abuse;

(2) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

Conditions that could mitigate security concerns:

(3) A demonstrated intent not to abuse any drugs in the future.

(4) satisfactory completion of a drug treatment program prescribed by a credentialed medical professional.

Burden of Proof

The Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to the applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates that it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands that Court's rationale, doubts are to be resolved against an applicant.

CONCLUSIONS

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes that the Government has established its case with regard to Criterion H. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section F.3, as well as those referred to in the section dealing with the Adjudicative Process, both in the Directive.

The Government has met its burden with respect to Criterion H. The evidence establishes that Applicant has used and abused a virtual cornucopia of both illegal drugs and prescription drugs. This substance abuse began soon after Applicant joined the U.S. Army in 1977, and it continued throughout most of the 1980's. Even after his motor vehicle accident in 1983, Applicant continued to use illegal, recreational drugs. He used LSD until 1985, hashish until 1986, cocaine until 1987, and marijuana and morphine until 1988.[(6)] While the focus/emphasis of his drug use shifted after his accident, he did not stop all use of recreational drugs until 1988 after he had begun the methadone maintenance program offered by Facility B. His abuse of prescription drugs which had been extensive prior to the accident increased considerably after the accident when he was leaving no stone unturned in his effort to escape the constant and debilitating pain he had been experiencing.

Applicant is unable to provide a persuasive explanation for his extensive drug abuse, except to say that it was a "mistake." While he blames peer pressure for his decision to use marijuana initially, he cannot blame peer pressure for the extensive drug abuse that followed. Judging from the list of drugs that Applicant admits abusing between 1977 and 1983, it appears that after being introduced to marijuana, he used every drug he could get his hands on, and he used them at every opportunity.

Mitigation for Applicant's extensive abuse of illegal and prescription drugs between 1977 and 1988 is found in his subsequent, successful efforts to bring his drug abuse under control. While Applicant did not succeed when he first sought treatment for opiate dependence during 1987 at Facility A, he is credited with realizing that he had a problem and voluntarily seeking help. His opiate dependence was eventually brought under control in 1988 after he entered treatment at Facility B, and was allowed to remain on a methadone maintenance program.[(7)] Since participating in Factility B's methadone treatment program, Applicant has been subjected to urinalysis at least monthly. There have been only three occasions since 1988--once in 1990 and twice in 1994--when he provided "dirty" urine samples, i.e., samples which tested positive for a drug that has not been prescribed for him. Each of the drugs for which he had tested positive were prescription pain killers. Applicant admits that he used a pain killer (prescribed drug) which had not been prescribed for him in 1990, but denies that he used drugs that were not prescribed for him at any time proximate to his "dirty" urinalysis in 1994. He contends that a mistake was made in labeling his sample on that occasion.

After considering Applicant's current circumstances and his motivation to avoid using drugs except those which have been prescribed for him, this Administrative Judge finds his contention credible. Applicant testified that he is always able to call his physician and receive a prescription for additional pain medication whenever his daily dose of methadone does not relieve the pain[(8)] (Tr. 48). Under these circumstances, taking a non-prescribed pain medication and possibly providing a "dirty" urine sample would be counter-productive and a waste of Applicant's time. A "dirty" sample means that Applicant can receive only a three day methadone supply--rather than the week's supply he receives if his samples are clean. This in turn means that he has to make an extra trip--one hour each way--to the clinic (Facility B) which dispenses the methadone (Tr. 32). This extra trip may not be an obstacle for someone who was using drugs to get high, but it is clearly an unnecessary inconvenience for someone who is seeking relief from pain.

Moreover, to conclude that Applicant has used non-prescribed pain killers subsequent to 1990, I would have to conclude that he lied in his answer to the SOR, and that he lied again at his administrative hearing. On the basis of the evidence presented, I am not prepared to conclude that this Applicant is now lying, especially when he has previously been painfully honest about his past drug use, both when he completed the NAQ in 1993, and when he provided a signed, sworn statement to the DIS in February 1996.

Mitigation for Applicant's drug abuse is also found in his stated and demonstrated intent not to abuse drugs in the future. There is persuasive evidence that Applicant has only a single incident of drug abuse since 1988. And that abuse involved the ingestion of a prescribed pain killer. Given Applicant's history of chronic pain, his unauthorized ingestion

of a prescribed pain medication on a single occasion is an understandable and forgivable lapse, and not a basis for denying his access to classified information.

Favorable consideration has also been given to Applicant's excellent work record. His contributions in the workplace demonstrate that he is now committed to being a productive member of society, in spite of the chronic pain he has experienced for more than 13 years. After years of misconduct and questionable behavior, Applicant has become a model citizen and a powerful example of overcoming adversity. Criterion H is concluded for Applicant.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 (Criterion 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

Subparagraph 1.f. For the Applicant

Subparagraph 1.g. For the Applicant

Subparagraph 1.h. For the Applicant

Subparagraph 1.i. For the Applicant

Subparagraph 1.j. For the Applicant

Subparagraph 1.k. For the Applicant

Subparagraph 1.l. For the Applicant

Subparagraph 1.m. For the Applicant

Subparagraph 1.n. For the Applicant

Subparagraph 1.o For the Applicant

Subparagraph 1.p. For the Applicant

Subparagraph 1.q. For the Applicant

Subparagraph 1.r. For the Applicant

Subparagraph 1.s. For the Applicant

Subparagraph 1.t. For the Applicant

Subparagraph 1.u. For the Applicant

Subparagraph 1.v. For the Applicant

Subparagraph 1.w. For the Applicant

Subparagraph 1.x. For the Applicant

Subparagraph 1.y. For the Applicant

Subparagraph 1.z. For the Applicant

Subparagraph 1.aa. For the Applicant

Subparagraph 1.bb. For the Applicant

Subparagraph 1.cc. For the Applicant

Subparagraph 1.dd. For the Applicant

Subparagraph 1.ee. For the Applicant

Subparagraph 1.ff. For the Applicant

Subparagraph 1.gg. For the Applicant

Subparagraph 1.hh. For the Applicant

Subparagraph 1.ii. For the Applicant

Subparagraph 1.jj For the Applicant

Subparagraph 1.kk. For the Applicant

Subparagraph 1.ll. For the Applicant

Subparagraph 1.mm. For the Applicant

Subparagraph 1.nn. For the Applicant

Subparagraph 1.oo. For the Applicant

Subparagraph 1.pp. For the Applicant

Subparagraph 1.qq. For the Applicant

Subparagraph 1.rr. For the Applicant

Subparagraph 1.ss. For the Applicant

Subparagraph 1.tt. For the Applicant

Subparagraph 1.uu. For the Applicant

Subparagraph 1.vv. For the Applicant

Subparagraph 1.ww. For the Applicant

Subparagraph 1.xx. For the Applicant

Subparagraph 1.yy. For the Applicant

Subparagraph 1.zz. For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to continue Applicant's security clearance.

John R. Erck

Administrative Judge

1. Applicant initially began taking methadone as part of the treatment at Facility A (Tr. 26, 48).

2. Applicant testified that he is subject to random urinalysis which have been administered on at least a monthly basis (Tr. 32)

3. Any substance which has not been specifically prescribed for Applicant's use, to include prescription pain killers.

4. The record does not provide a more specific date.

5. Applicant provided accurate and complete information about his drug abuse history on the National Agency Questionnaire (NAQ) completed by him in November 1993, and in a sworn statement signed by him on February 14, 1996. However, in an NAQ signed by him on August 25, 1995, Applicant admitted only that he was receiving treatment for a dependence on pain medication which had developed after he had been involved in a vehicle accident. He denied all other drug abuse. His testimony that he was directed by his employer to omit information about his drug abuse history from this form in order to preserve his job is found to be credible (Tr. 31). Applicant has demonstrated by his earlier and subsequent disclosures that he is an honest and truthful person, at least with respect to his past drug abuse.

6. Since the record does not disclose the frequency with which Applicant used any of these substance in the months or years prior to his last use, regular use is assumed.

7. Applicant initially began taking methadone as part of the treatment at Facility A (Tr. 26, 48)

8. Applicant testified that he had received prescriptions for Flexaril, Norflex, Methacardinal, Loritab, and Tylox during the past year.