DATE: March 21, 1997

In Re:

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

Applicant for Security Clearance

ISCR OSD Case No. 96-0483

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR THE GOVERNMENT

Claude R. Heiny, II, Esquire

Department Counsel

FOR THE APPLICANT

Pro Se

STATEMENT OF THE CASE

On 30 July 1996, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding(1) that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 26 August 1996, Applicant answered the SOR and requested an administrative decision on the record. On 6 February 1997 and again on 1 March 1997, Applicant responded to the Government's File of Relevant Material (FORM)--issued 4 December 1996. The case was assigned to me on 11 March 1997. I received the case on 17 arch 1997 to determine whether clearance should be granted, continued, denied or revoked.

The SOR is attached to this Decision and incorporated by reference.

RULINGS ON PROCEDURE

Attached to Applicant's answer (FORM, Item 3) is an undated orange "post-it" note containing the notation: "1978 arrest not after 86 DISCO clearance but while in [military]." Nothing in the FORM suggests that this notation was communicated to Applicant to permit him to respond. Accordingly, I have not considered this notation in assessing the evidence in this case.

On 10 March 1997, Department Counsel objected to Applicant's second response to the FORM, specifically objecting to my considering as evidence a four page DIS Report of Investigation (ROI) dated 6 May 1996, which Applicant provided in support of his case. Department Counsel cites Paragraph 20, Enclosure 3 to DoD Directive 5220.6 and the Appeal Board's ruling in ISCR Case No. 95-0817, dated 21 February 1997 for the proposition that the ROI is not admissible

over Department Counsel's objection. I disagree; this case is factually distinct from ISCR Case No. 95-0817, which involved the Administrative Judge admitting portions of an ROI favorable to Applicant while excluding those portions which were unfavorable. In this case, Applicant has offered the complete ROI containing information both favorable and unfavorable to Applicant. Further, Paragraph 20 is not an absolute bar to admission of ROIs; it permits consideration of ROIs which are otherwise admissible under the Federal Rules of Evidence--as this one is as a business record--and which are authenticated. And while this ROI is not authenticated, I conclude that failure to satisfy this requirement is not a bar to my consideration of the document. The Appeal Board has implicitly recognized a distinction between ROIs offered by the Government--which generated them--and ROIs offered by an applicant. See, DISCR OSD Case No. 89-2398, dated 10 July 1991.(2) Admission of the challenged ROI satisfies the Directive requirement for me to develop a full record and conduct a fair determination; consideration of the entire ROI--and not just the portions favorable to Applicant--satisfies the fairness requirements of F.R.E. 106. I overrule Department Counsel's objection to the ROI, and will give it the evidentiary weight it deserves.(3)

FINDINGS OF FACT

Applicant denied knowingly ingesting marijuana under paragraph 1.a and denied knowingly ingesting marijuana after being granted a clearance under paragraph 1.e; under paragraph 1.b., he admitted testing positive for marijuana on 6 October 1995, and being suspended from work from 9-20 October 1995, but denied being referred to the company Employee's Assistance Program (EAP); under paragraph 1.c., Applicant admitted the broad outline of the allegation, but denied being arrested or found guilty of drug possession;(4) he denied paragraph 1.d. on the grounds that charges were dismissed within 24 hours of his arrest.

Applicant is a 39-year old employee of a defense contractor seeking to retain a secret clearance.

On 16 May 1975--when he had just turned eighteen--Applicant and a friend were involved with law enforcement officials in a community park in Applicant's hometown.(5) Applicant was cited for possession of alcoholic beverage, but not arrested.(6) On 23 May 1975, the submitted evidence tested positive for barbiturate, "Placidyl"--a prescription drug, and PCP. Applicant was later subpoenaed on drug possession charges and on 14 July 1975 appeared in municipal court on the charges; he pleaded guilty to one reduced count of "Park 5.7 (Park Reg[ulation])" was fined $100.00 plus $19.00 court costs, and ordered to one year active probation and not allowed to return to the park for one year.(7) On 8 November 1978, Applicant borrowed a fellow servicemen's car to run some errands. While returning from the errand, he was stopped by local police.(8) When the police noticed the smell of marijuana emanating from the car, they searched the car and discovered several items which appeared to be marijuana or other drugs. Applicant and his companion were charged with possession of marijuana and amphetamines; however, the charges were dismissed within twenty-fours hours.(9) The seized items later tested positive for marijuana and Etchlorvynol--the generic name for Placydil, a prescription drug used to treat insomnia.(10) While Applicant was in the military at the time of this incident, he did not have a clearance; he later received a top secret clearance on 27 September 1982.

On 14 November 1985, Applicant executed a Personnel Security Questionnaire (PSQ)(DD Form 48)(Item 9) and disclosed the two incidents above. On 8 April 1986, Applicant was interviewed by a Special Agent of the Defense Investigative Service (DIS) and explained the circumstances of both incidents. On 23 April 1986, Applicant was granted a secret clearance, which he has held since that date.(11)

On Friday, 6 October 1995, Applicant underwent a random unannounced urinalysis at his employer and tested positive for marijuana.(12) Applicant was suspended from work from 9-20 October 1995 (Item 4). On Thursday, 12 October 1995, Applicant voluntarily attended evaluation sessions at his company's Employee Assistance Program (EAP). Applicant underwent behavioral analysis, interviews, and psychological testing. The EAP concluded that Applicant did not require any type of substance abuse treatment or counseling. The EAP closed Applicant's file on 25 October 1995 without making any further referral.(13) On Tuesday, 17 October 1995, Applicant underwent a return to duty urinalysis which was negative for drugs/alcohol.(14) Over the next year--on Saturday, 4 November 1995; Tuesday, 30 January 1996;(15) Friday, 10 May 1996; and Friday, 20 September 1996--Applicant underwent scheduled unannounced

urinalyses pursuant to his employer's policy regarding employees who had previously violated the company's drug policy. Each time Applicant tested negative for drugs/alcohol.

National Agency Checks (NAC)[(16)] in November 1995 reported no unfavorable results; local agency checks (LAC) in December 1995 reported no information identifiable with Applicant. Two of Applicant's supervisors--one of whom has known Applicant for sixteen years--were shocked to learn of Applicant's positive urinalysis; neither has ever observed any behavior by Applicant indicative of drug use. Applicant states he has never knowingly use marijuana, has had no other involvement with illegal, and has no intention of using illegal drug in the future.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc*.

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

DRUG INVOLVEMENT (CRITERION H)

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.

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

(1) any drug abuse;

(2) illegal drug possession,

(3) . . .Current drug involvement, especially following the granting of a security clearance. . .will normally result in an unfavorable determination.

Conditions that could mitigate security concerns include:

(1) the drug involvement was not recent.

(2) the drug involvement was an isolated or infrequent event;

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

Burden of Proof

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where 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 or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the 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."

CONCLUSIONS

The Government has not established its case under criterion H. The record evidence on Applicant's May 1975 incident fails to establish that the drugs found at the park were Applicant's. The plea to violation of park regulations does not clearly establish that the alleged offense was drug possession, rather than the citation for possession of alcohol referred to in the incident report. Indeed, the documented fine--$100.00 and costs--appears more consistent with an alcohol violation than a drug possession charge. The record evidence on Applicant's November 1978 incident also fails to establish that the drugs found in the car--not Applicant's car but a borrowed car--belonged to Applicant. Further, despite the arresting officer's claim that he observed the driver of the passing vehicle smoking marijuana, and smelled the strong odor of marijuana coming from the car when he stopped it, Applicant was not charged with operating the vehicle under the influence of drugs, was apparently not tested for drugs or alcohol, and did not have any residue or cigarette butts seized from the car. In addition, the fact that the charges were dismissed so quickly and not reinstated, despite the later positive test result for illegal drugs, suggests that the police accepted Applicant's representation at the time that the car was not his and he had no knowledge of the presence of the drugs in the car. Lastly, Applicant disclosed these two incidents on his November 1985 PSQ, was interviewed by the DIS about the incidents, and was later granted a secret clearance--the retention of which is at issue in this case. While that prior adjudication does not preclude reassessment of the conduct in light of later developments, the prior adjudication is nevertheless instructive. In April 1986--when the clearance was initially granted--the two incidents (eleven and eight years old respectively) were properly found to have no security significance under the existing adjudication guidelines. The intervening eleven years have done nothing to improve the security significance of those incidents, even with a change in the adjudication guidelines.[(17)]

Nor does the addition of the positive urinalysis in October 1995 change the equation. I accept Applicant's explanation of the circumstances under which he tested positive for the presence of marijuana;[(18)] accordingly, the Government's evidence fails to establish the threshold requirement for illegal drug use: that Applicant knowingly used an illegal drug.[(19)] Further, even if I found that Applicant had used marijuana knowingly on that occasion, record evidence provides no other proof of drug abuse, and the single use of marijuana meets all three mitigating factors under drug involvement adjudication factors: remote, isolated, and followed by a demonstrated intent to refrain from drug use in the future. Using the whole person concept, I cannot find that a single instance of marijuana use--even if established--warrants revocation of Applicant's security clearance. I find criterion H. for Applicant.

FORMAL FINDINGS

Paragraph 1. Criterion H: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: 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 grant or continue a security clearance for Applicant.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996 (Directive).

2. This case was issued under the old Directive (1985), which contained a more restrictive exclusion for ROIs, seemingly excluding them even where an authenticating witness was available. Nevertheless, the Appeal Board recognized that the Administrative Judge's obligation to develop a full record and conduct a fair hearing might justify admission of an ROI, particularly where offered by an applicant. The Board noted that the ROI exclusion could not be read in isolation from other provisions of the Directive, i.e. provisions permitting relevant and material documentary evidence to be admitted with relaxation of technical rules of evidence; similar provisions exist in Paragraph 19 of the present Directive. Moreover, the Board ruled that the ROI exclusion should not be construed or applied in a manner that barred the admission of an ROI to the detriment of a fair hearing, citing Directive, Sections D. and F.3--provisions transmitted essentially unchanged into the present Directive. It would be anomalous for me to construe the present ROI exclusion to exclude the kind of documents found admissible under the prior, more restrictive, exclusion.

3. Having admitted the ROI proper, I note that Department Counsel did not object to the attachment to the ROI headed "Strengths and Accomplishments." This was a document generated by Applicant ostensibly reporting evaluations of Applicant by his customers, and given to the DIS at the time of the background investigation. I consider this document properly before me as evidence--either as not within Department Counsel's objection to the ROI, or as part of the ROI as admitted over Department Counsel's objection. Nevertheless, I decline to give this specific document much evidenitary weight because it is impossible to tell from the document how many individuals contributed to the summaries contained within, or their identities. Thus, it lacks indicia of reliability which might justify according it additional weight.

4. Applicant asserts he was cited for having beer in the park, later subpoenaed to appear in court because of drugs found near Applicant, and pleaded "no contest" to unspecified charges based upon advice of counsel.

5. The investigating officers record two different scenarios (Item 7)--one somewhat consistent with Applicant's version of events (Item 5), one less so. The typewritten portion of the report states in pertinent part: "Both Rangers observed [Applicant] and [Applicant's friend] standing around a picnic table approx[imately] 30 years from parking lot. Upon observing approach of stated Rangers [Applicant's friend] made elusive movements towards a brown jacket placed on the end of the table. Upon appraoch (sic) and request of ID by [ranger][Applicant] went to stated jacket and removed a billfold and produced a [state] operator's license. [Applicant was unsteady on his feet and a odor of alocohol (sic) could be detected on his breath. On the ground were several empty beer bottles (Rolling Rock), a full Rolling Rock 12oz. bottle was setting near the jacket. Because of elusive movements of [Applicant's friend][ranger] did make a pat 'feel' of jacket. A solid object about 4" by 7" was felt in left sleeve. Upon search a nearly full 'Windsor Canadian' Whisky (1 pt.) was observed. A further search of breast pockets revealed a silver metal case. Because of condition of [Applicant], and no valid [operator's license] for [Applicant's friend][both] were transported to a phone. . . It was observed that [Applicant's friend] took a jacket from front right passenger seat of [Applicant's] van. . . The jacket from the table was put on by [Applicant] when transported. . . ." The handwritten portion of the report states in pertinent part: "When the Reporting Rangers. . .rode by horseback into the . . . picnic area, two males were observed at a picnic table with a brown shopping bag. When the two males observed me riding to them, the one male [Applicant] took a brown jacket and put something in the pocket, then the other male [Applicant's friend] took the jacket and put a brown paper bag inside it by the sleeve. The brown bag on the table was full of empty Rolling Rock beer bottles. [The other ranger] was on the scene and found the brown bag stuffed in the sleeve containing a pint of Windsor Canadian Whisky. Also on further checking of the jacket a silver metal case was found in the upper left pocket. In the case was four Red capsules, also a small plastic bag tied with a blue tie. Both subjects where (sic) citied (sic) for possession of alcoholic beverage and a bottle of Rolling Rock, with the bottle of Windsor Canadian Whisky confiscated. The case with the capsules and plastic bag was sent to headquarters to be checked." Although the above reports support the conclusion that the jacket in which the case was found belonged to Applicant, the reports do not clearly establish that the silver case was Applicant's--an essential element of any possession charge. Applicant has consistently denied that the silver case (or its contents) was his; the typewritten report supports an inference that Applicant's friend put the silver case into Applicant's jacket while the handwritten report supports the conclusion that the silver case belonged to Applicant. Applicant's later plea to a reduced charge of violating park regulations does little to resolve this question. While it is clear that Applicant was later charged with three counts of drug possession, the disposition of those charges by plea to violation of park regulations does not

clearly establish this incident as a drug conviction. Applicant is estopped from challenging the fact of his conviction, but he is only estopped to the extent that records establish what offense he was convicted of. The Government's evidence fails to establish that violation of Park Regulation 5.7 was anything other than the beer possession charge originally cited in the incident report.

6. The evidence submission sheet prepared by the law enforcement officials the same date as the incident noted that subjects were not in custody (Item 7).

7. Although not specifically stated in the police records (Item 7), I infer that the charge Applicant pleaded to (for estoppel purposes it matters not whether the plea was "guilty" as reported by police or "no lo" as reported by Applicant) was the alcohol possession citation. I reach this conclusion because the criminal docket containing the three drug charges --numbers ------ (possess phencyclidine), ------ (possess placydil), and ------- (possess barbiturate)--were originally listed as violations of section 4729.51 of an otherwise unspecified code; numbers ------ and ------ were merged into number ----------, which was then amended to a violation of Park regulation 5.7.

8. The only police report filed containing specifics of the stop is a 4x6 inch "General Complaint and Offense Report" containing this record of the incident: "While Officer . . . running radar a Motor Vehicle . . . pass by with driver Smoking what to be thought was cannabis. Vehicle was stopped . . .and occupants were asked to get out of the Vehicle. while officers were Patting down subj[ect] a strong smell of Cannabis came from inside of the Vehicle. upon searching the vehicle for Reefer, a small plastic container was found behind the drivers seat upon investigation a bag containing a green plant like substance was found and also various Colored Capsules. Both subj[ects] were placed under arrest and brought to the [police department] where they were booked for possession of cannabis, and after field testing the capsules were also charged for possession of amphetamines. subj[ects] were [identified] as [Applicant] and [another male]." Notably, no burned residue or cigarette butts were seized, and Applicant--who was driving the car--was not noted to be under the influence of either drugs or alcohol, was apparently not required to submit to drug/alcohol testing, nor was he charged with driving under the influence of either drugs or alcohol.

9. The police records do not reflect the reason for the dismissal of charges. Applicant claims it was because the car was not his and the drugs found in the car were not his. Certainly, proof of ownership or control is an essential element of the crime of possession of drugs going to the merits of the offense. The circumstances of the stop raise some questions about the validity of the stop--which would be a technical resolution of the case.

10. Many of the items seized from the car were found to contain no illegal substances.

11. Under the adjudication guidelines in effect at the time, neither drug incident had any current security significance. There was no indication that Applicant was using drugs or had been involved in any drug trafficking or related activity.

12. Applicant states (Item 6) that he obtained and smoked what he thought was a regular cigarette from some new acquaintances (introduced to Applicant by a friend) the weekend before the random urinalysis. The cigarette made Applicant feel queasy and lightheaded. Applicant assumes the cigarette was laced with marijuana because of the test results. He denies knowingly using marijuana.

13. Although the ROI notes that the EAP provider was a referral service only--and not staffed with medically qualified professionals ("credentialed medical professional"as contemplated under the Directive)--the EAP evaluation is nevertheless useful as a threshold assessment relied upon by the employer to assess an individual's need for further evaluation. I have not given the evaluation the weight I would give to a medical evaluation by qualified professionals, but have given it some weight in my decision.

14. Department Counsel suggests that "evidence of marijuana in the urine is routinely undetectable after two weeks following use." (FORM Memorandum, p. 4). I decline to consider this as evidence or as a request for me to take official notice. First, I do not consider this "fact" to be generally known or otherwise susceptible to official notice. Second, Department Counsel has not provided me--or Applicant--with any learned treatise or similar record which might permit me to take official notice of this fact. Third, the alleged fact conflicts with my own understanding of urinalysis testing, that metabolite levels--and thus test windows and results--are subject to a number of factors including the individual's size and weight, metabolic rate, strength and amounts of drug allegedly used, as well as length and frequency of drug

use. None of these factor are known in this case. Attempting to assess these factors is speculative, and I will not speculate as to these factors. Further, while urinalysis is considered scientifically valid, it has known margins of error based on the kind of tests performed (port-a-kit-, radio-immunoassay, gas liquid chromatography, GC-mass spectroscopy, etc.). In making my findings on the urinalyses, I confine myself to assessments reasonably supported by the record evidence: that on dates indicated, Applicant supplied a urine sample which tested positive or negative for the presence of drugs or alcohol based on the test window (otherwise unspecified) applicable to the testing methodology (otherwise unspecified) and confirmatory methodology (otherwise unspecified).

15. Records reflect Applicant received his notification for the unannounced urinalysis on Wednesday, 24 January 1996.

16. FBI, FBI Name Check, OPM, Credit bureau, and Defense Central Investigations Index.

17. Even if I view the evidence in the light most favorable to the Government and adopt the inferences--permissible, not required--urged by Department Counsel, the result in this case cannot change. If I conclude that Applicant possessed illegal drugs on 16 May 1975 and 8 November 1978--and thus has been less-than-forthcoming in his later explanations of those incidents--I am still left with the conclusion that an adverse credibility assessment is no substitute for record evidence and may not be used as the basis for denial or revocation of a clearance absent specific conduct alleged in an SOR. The Government has not alleged falsification in this case, and I may not impose those allegations on this case. Further, if I accept the Government's inferences that Applicant was involved in possession of illegal drugs on two occasions in 1975 and 1978, I am still left with the inescapable fact that the incidents are not recent--almost twenty-two years and eighteen years old, respectively--and are certainly isolated.

18. I do so based on the fact that since the 1975 and 1978 incidents (if then), there is no record evidence to suggest that Applicant has had any involvement with illegal drugs up to the time of his positive urinalysis. National and local agency checks performed at the time of the positive urinalysis were negative for unfavorable information. Applicant's supervisors were surprised that Applicant tested positive, finding it inconsistent with his apparent behavior (in one instance based on sixteen years observation). Finally, Applicant tested negative for drugs on a back-to-duty urinalysis eleven days after the positive urinalysis, and tested negative during four scheduled unannounced urinalyses during the following year, ending in September 1996. While I recognize that Applicant was on notice of the company's intention to subject him to the unannounced tests--thus placing him on a sort of probation--I also note the difficulty, if not impossibility, of Applicant proving the negative, i.e. that he is not a drug abuser. The fact remains that Applicant's conduct from 1978 to October 1995 supports his claims that he is not a drug abuser and his conduct since October 1995 points to the same result. The conduct during this time is consistent with Applicant's claim of innocent ingestion.

19. Again, even if I view the evidence in the light most favorable to the Government and adopt the inferences urged by Department Counsel, the result in this case cannot change. If I conclude that Applicant knowingly used marijuana on or about 6 October 1995--by concluding that his innocent ingestion explanation is not credible--I am still left with the conclusion that a credibility determination is not a substitute for record evidence. I may not infer that Applicant used drugs on other occasions not either admitted by Applicant or proved by the Government. I may not use the credibility assessment to conclude that Applicant has falsified information provided to the Government in the absence of specific SOR allegations asserting falsification. Further, while rejecting Applicant's innocent ingestion explanation permits me to conclude that the Government has established a case under drug involvement, that case is overcome by the record evidence in mitigation. First, I do not consider the single drug use to be "current" under disqualifying factor 3, as it is nearly eighteen months old. Similarly, I consider that single use to not be recent (I note that under the old adjudication guidelines, even regular abuse of marijuana could be mitigated with twelve months abstinence; these guidelines are not binding on me, but are illuminating) because it occurred nearly eighteen months ago. I consider the single incident of drug use to be isolate or infrequent because it occurred once in the eighteen years since the last incident that even remotely qualifies as a drug incident. Finally, I find that Applicant has demonstrated a clear intent not to abuse drugs in the future because of his drug-free lifestyle both before and after the October 1995 urinalysis.