DATE: May 9, 1997

In re:

SSN:

Applicant for Security Clearance

DOHA Case No. 96-0598

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR THE GOVERNMENT

Teresa A. Kolb, Esq.

Department Counsel

FOR THE APPLICANT

Gregory Keefe, Esq.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended by Change 3, issued a Statement of Reasons (SOR) dated August 27, 1996, 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 and recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked.

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

On September 15, 1996, Applicant responded to the allegations set forth in the SOR and indicated that a decision could be made in his case without a hearing. Applicant subsequently requested a hearing and the case was assigned accordingly to this Administrative Judge on January 29, 1997. On February 27, 1997, a hearing was scheduled for March 20, 1997. At the hearing held as scheduled, the Statement of Reasons was amended on Government motion to reflect an additional allegation under Criterion E, as follows:

2.a.(3) You used LSD with varying frequency in the late 1980s.

Six Government exhibits and ten Applicant exhibits were admitted into evidence at the hearing. Testimony was taken from the Applicant. A complete transcript of the hearing was received by this office on May 6, 1997.[(1)]

FINDINGS OF FACT

After a thorough review of the evidence in the record, and upon due consideration of same, this Administrative Judge

renders the following findings of fact:

Applicant is a 29 year old ---------- in the ---------- department of a defense contractor (company A), for which he has worked since 1990. He seeks to retain a Secret security clearance which was granted to him on July 25, 1990, by the Defense Industrial Security Clearance Office for his duties with company A.

Following his initial experimentation with marijuana at the age of fourteen or fifteen, Applicant continued to smoke the drug on weekends and days off throughout high school. He tried cocaine on one occasion at his senior prom.

As a college student from about 1986 to 1990, he continued the occasional use of marijuana on weekends while remaining free of any cocaine use until his last year of college when he began to snort the drug with friends. He also used LSD in the late 1980's on about six occasions. Applicant's involvement with illegal drugs did not adversely affect his academic studies, and he graduated *magna cum laude* with a Bachelor's degree in electrical engineering in 1990.

Immediately after graduation, he commenced employment as an ---------- with company A. Shortly thereafter, he was granted a Secret security clearance for his duties there and has since accessed classified information on a regular basis without any adverse incident or security violation. Applicant did not report his drug abuse on his application for the security clearance.

Aware that involvement with controlled dangerous substances such as marijuana and cocaine was illegal and against both company A and Department of Defense policies, Applicant continued to use both marijuana and cocaine while in possession of his Secret security clearance. From 1990 to December 1992, Applicant smoked marijuana twice per week on average and snorted cocaine once to twice per week, usually on Friday and Saturday evenings. During this period, his mother had been diagnosed with cancer and this had a negative effect on his personal life as he became more heavily involved in drugs in an effort to cope with her illness.

After consuming six beers at a holiday party on or about December 12, 1992, Applicant was stopped for crossing the yellow line. Detecting alcohol on Applicant's breath, he was administered a breath test which reflected he was intoxicated. Applicant was arrested for operating a motor vehicle with an illegal percentage of alcohol and operating a motor vehicle while intoxicated. An additional charge of criminal possession of a controlled substance was levied after the police found a packet of cocaine in Applicant's vehicle. At his court appearance in January 1993, Applicant pleaded guilty to the lesser charge of driving while ability impaired, and he was sentenced to a conditional discharge, to pay a $200.00 fine, to attend a mandatory drinking driver program and his driver's license was suspended for ninety days. On his completion of the seven week drunk driving course, his operator's license was reinstated. The illegal possession and operating with an illegal percentage of alcohol offenses were dismissed.

Following his arrest for illegal possession of cocaine, Applicant continued to use the drug, but at the reduced rate of somewhere between ten and twenty times total from 1993 to his last use in May 1996.[(2)] Applicant continued to use marijuana as well, on average twice per week to mid May 1996.

Applicant purchased marijuana from about 1982 and cocaine from 1985 for his personal consumption, spending when his drug use was at its heaviest as much as $100.00 per week. After his December 1992 arrest for illegal possession of cocaine, Applicant no longer purchased cocaine directly from dealers, but instead provided monies to his friends who would purchase the cocaine. Applicant continued to purchase marijuana himself until about May 18, 1996, when he bought an eighth of an ounce of the drug for $50.00.

On August 3, 1995, Applicant was interviewed by a Special Agent of the Defense Investigative Service (DIS), during which he was asked about his arrest for DWI and possession of controlled substance on December 12, 1992, and whether he had ever engaged in any illicit drug use. Embarrassed by his past drug use and fearing loss of his employment if he admitted to drug use, Applicant denied that he had ever used any illegal drug at any time in his life, "even on a one time experimental basis." In describing the circumstances surrounding his December 1992 arrest, Applicant falsely stated that the cocaine found in his vehicle belonged to two individuals to whom he had given transportation. During that interview, Applicant revealed he had been arrested while on business on May 17, 1995, for driving while intoxicated and that he had a court appearance scheduled for August 16, 1995. Applicant signed and

swore to the accuracy of a written statement which contained his false denials of any illicit drug involvement.

Applicant was reinterviewed by the same Special Agent on October 12, 1995, concerning his May 1995 arrest for DWI. He corrected the date of his arrest to ay 3, 1995, and indicated that on October 4, 1995, the original charge was amended to reckless driving of which offense he was found guilty, fined $150.00 plus $125.00 assessment and his license privileges in that state were suspended for thirty days. Applicant did not volunteer to the Agent that he had provided false information about his drug abuse history during the earlier interview as he feared the loss of his job and security clearance.

Sometime prior to May 28, 1996, Applicant was contacted by a DIS Special Agent/polygraph examiner and advised that there were issues that needed to be resolved. Pursuant to mutual agreement, Applicant was interviewed by this Special Agent on May 28, 1996. Applicant admitted he had not been honest in his last interview about his drug use out of embarrassment and fear for his job. He detailed his involvement with marijuana from age 14 or 15 to about May 18, 1996, cocaine at his senior prom and then from his last year of college to the second week of May 1996, and LSD in the form of a drop on a piece of paper. He stated that he would keep his marijuana use to its current level in the future, but that he had no intent to use cocaine or LSD in the future.

After the interview, Applicant resolved to stop using marijuana. He no longer intends to use any marijuana or any other drug in the future. On the advice of legal counsel, Applicant underwent a substance abuse evaluation on February 28, 1997, with no treatment recommended.

Applicant is considered conscientious and responsible by his friends and co-workers. He has an unblemished record with regard to handling classified information at company A.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the seriousness, recency, frequency and motivation for an applicant's conduct; the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the circumstances or consequences involved; the age of the applicant; the absence or presence of rehabilitation, the potential for coercion or duress, and the probability that the conduct will or will not recur in the future. *See* Directive 5220.6, Section F.3. and Enclosure 2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

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.

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.

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

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

(1) any drug abuse

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

Conditions that could mitigate security concerns include:

(1) the drug involvement was not recent

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

PERSONAL CONDUCT

Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

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

(3) deliberately proving 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.

Conditions that could mitigate security concerns include:

None.

CRIMINAL CONDUCT

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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

(1) any criminal conduct, regardless of whether the person was formally charged

(2) a single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

None.

* * *

Under the provisions of Executive Order 10865 and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the

Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, 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 the Court's rationale, doubts are to be resolved against the Applicant.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of the Applicant, this Judge concludes that the Government has established its case with regard to Criteria H, E, and J.

With respect to criterion H, Applicant presents a fourteen year history of marijuana use, for the most part twice per week until May 18, 1996; cocaine abuse up to twice per week from about 1989 to December 1992 with occasional abuse thereafter to mid May 1996; and experimentation with LSD during the late 1980's. He purchased illegal drugs for his personal consumption, not only from friends, but also from street dealers. Applicant's marijuana and cocaine abuse is particularly troubling for it continued while he was in possession of a Secret security clearance and in known contravention of Department of Defense policy. Illegal substance abuse is incompatible with retention of a security clearance due to the obvious potential for inadvertent disclosure when one is under the influence.

In assessing the current security significance of Applicant's abuse of controlled dangerous substances, this Administrative Judge must consider the adjudicative guidelines pertaining to drug involvement set forth in Enclosure 2 to the Directive. Disqualifying conditions (DC) 1. and 2. are clearly both apposite. Applicant's involvement with LSD was confined to the late 1980's when he was in college. Due to its limited extent and remoteness, there is found little probability, if any, of recurrence of that drug. MC 1. (drug involvement not recent) and MC 2. (drug involvement infrequent) work to his favor, but only as to his LSD abuse.

Applicant's abuses of marijuana and cocaine are contrasted by their extent and recency. While Applicant abused cocaine with lesser frequency after his December 1992 arrest (only three to four times per year in contradistinction to twice per week during his heaviest period of abuse), it continued to May 1996. On average, he abused marijuana twice per week since college with no apparent significant decline in frequency. His substantial involvement with cocaine and marijuana is subject to mitigation provided there is demonstrated intent not to use drugs in the future (MC 3.) or satisfactory completion of a drug rehabilitation program (MC 4.). The February 28, 1997, substance abuse evaluation, even with its positive result that no treatment is indicated, is not a substitute for a drug rehabilitation program, particularly where it is not clear that the evaluation was based on an accurate account of Applicant's drug and alcohol history. For example, absent from the report of the evaluation is any reference to Applicant's May 1995 alcohol-related reckless driving conviction. Furthermore, there is no mention of the fourteen year span over which Applicant used marijuana, at times more than twice per week. It is difficult to reconcile the assessment of the counselor, *i.e.*, "patient presents [with] a minimal substance use history," with Applicant's drug abuse as he reported it to the DIS Special Agent on May 28, 1996. MC 3 is considered the only factor of potential applicability.

Applicant submits that he no longer intends to use any illegal drug, to include marijuana, in the future. Whereas Applicant as recently as May 28, 1996, admitted to the DIS Special Agent that he would keep his marijuana use at its current level in the future,[(3)] it is all the more important that his recent change to abstinence be confirmed by positive action. Applicant's maintenance of a drug-free lifestyle since his last DIS interview reflects positively on his ability to abide by his stated resolve. However, his ten months of a drug-free lifestyle is not sufficient to overcome his criterion H conduct, which is rendered all the more egregious because it continued while he had a security clearance. Accordingly,

subparagraphs 1.a., 1.b., 1.c., 1.d., 1.f., and 1.g. are resolved against him. The allegation of LSD abuse was proven, but it is mitigated so as to find for him as to subparagraph 1.e. Subparagraph 1.h. is also concluded for Applicant as he testified credibly that he now has no intent to use marijuana in the future. Despite his recent change of heart, marijuana especially was such a part of his recreational lifestyle to where the risk of future abuse cannot be precluded, however. Hence, the adverse findings as noted.

The concerns engendered by his extensive drug abuse are compounded by his failure to be forthright about his illicit substance involvement with a DIS Special Agent during his interview of August 3, 1995. Applicant deliberately denied any controlled substance abuse because he feared for his job and security clearance. Although not alleged by the Government, Applicant falsified his initial application for a security clearance in that he did not admit to his drug abuse on that occasion either.[(4)] At the time he executed the signed, sworn statement dated August 3, 1995, containing the false denial of any drug use, Applicant's abuse of marijuana and cocaine was ongoing. Unquestionably, information reflecting recent and ongoing involvement in illegal substance use and purchase has the potential for influencing an agency's investigative and adjudicative decisions. DC 2. under the personal conduct adjudicative guidelines (intentional false statements to a security investigator) is pertinent in this case.

As noted, the materiality and relevancy of the information concealed from the Government precludes favorable consideration of MC1. Applicant cannot satisfy either the remoteness or isolation elements of MC 2., as the deliberate falsification occurred in August 1995, at most eighteen months ago, and the evidence reflects he was not candid on his original clearance application. Applicant submits that his subsequent revelation to the Special Agent in connection with a possible polygraph constitutes a prompt, good-faith effort to correct the record. As pointed out by Department Counsel at the hearing, Applicant not only made no effort to contact DIS following his initial interview, he was presented with the opportunity to set the record straight on October 12, 1995, and he elected not to do so. His subsequent candor, coming as it did in his third DIS interview, was not sufficiently prompt for mitigation under MC 3. Finally, there is no evidence that the omission was caused by the improper advice of an authorized person. Assuming Applicant was not given advance notification of his first interview with the Agent, it does not justify blatant falsehood. In his response to the SOR, Applicant indicates he felt intimidated by the Special Agent. There is no evidence of any coercion or undue pressure placed on the Applicant by the Agent. At the hearing, Applicant initially testified that the Agent made him feel that he was going to lose his job. (Transcript, p. 34). When asked by this Judge to explain the source of his discomfort during the interview, Applicant stated, "Just the way that--when he was asking questions about the drugs and everything, he did say to me, 'You know, you can lose your job.' I was just very nervous and embarrassed." (Transcript, p. 63). Assuming Applicant testified credibly, the Agent did nothing more than relate possible adverse consequences of which Applicant was not ignorant. He knew drug use was not condoned under the law, by his employer, or by the Department of Defense and elected to continue the abuse. When asked by the undersigned why he continued to use drugs after the August 1995 interview if he had been told by the Agent that he could lose his job if he abused drugs, Applicant responded, "I have no answer." (Transcript, p. 64).

The Government can ill afford individuals dictating the timing and extent of disclosure. The regard of his co-workers and friends is entitled to some weight in mitigation. Yet, the seriousness of Applicant's deliberate falsification is not overcome by his unblemished record with respect to handling classified information or his positive references. Although the Government is now aware of Applicant's illicit drug involvement, there is little assurance that he will not act similarly in his self-interest in the future if faced with a personally disadvantageous situation. Applicant's candor about his drug use in May 1996 is to his credit, but this Administrative Judge remains troubled by his efforts to excuse his August 1995 falsifications on intimidation by the Agent and his May 1996 admission to intent to continue to use drugs on advice from the Agent that weekend marijuana use is not a problem. Subparagraphs 2.a.(1), 2.a.(2) and 2.a. (3)[(5)] are found against Applicant.

In an effort to conceal his illicit substance involvement from the Government, Applicant not only lied to the Agent but he incorporated his falsehoods into a statement which he swore was "correct and true as written." His intentional misrepresentations constitute a felony violation of federal law pursuant to Title 18, Section 1001 of the United States Code.[(6)] Hence, the adjudicative guidelines pertaining to criminal conduct must also be considered when evaluating his present security worthiness. DC 1. and 2. of the pertinent policy militate against continuation of his clearance. The Directive does not offer specific guidance to aid in the assessment of when criminal conduct is sufficiently distant to

where it is no longer of security concern. With a view toward the common sense standard which is to be applied in the adjudication process, a crime involving dishonesty committed within the last two years is recent. While the Directive provides for mitigation when the conduct is isolated, again it is noted that Applicant denied drug use on his initial security application form. Applicant's conduct was knowing and willful with an intent to conceal and there is no evidence of undue pressure or coercion by the Special Agent. He revealed the details of his drug involvement to a different Special Agent when faced with the prospect of a polygraph examination, but this candor of May 28, 1996, is too recent to enable the affirmative finding of successful reform. Subparagraph 3.a. is thus also concluded against 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: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: Against the Applicant

Subparagraph 1.g.: Against the Applicant

Subparagraph 1.h.: For the Applicant

Paragraph 2. Criterion E: AGAINST THE APPLICANT

Subparagraph 2.a.(1): Against the Applicant

Subparagraph 2.a.(2): Against the Applicant

Subparagraph 2.a.(3): Against the Applicant

Paragraph 3. Criterion J: AGAINST THE APPLICANT

Subparagraph 3.a.: Against the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Elizabeth M. Matchinski

Administrative Judge

1. The original transcript, which was received on April 2, 1997, was incomplete in that pages 30 through 40 were not included. With the facsimile transmission by Capital Hill Reporting of the missing pages on May 6, 1997, the case was then ripe for a decision.

2. The evidence is conflicting as to the frequency of his cocaine use over the 1993 to May 1996 time frame. During an interview with a Defense Investigative Service polygraph examiner on May 28, 1996, Applicant indicated use following his arrest on the order of three or four times per year. In his *pro se* response to the SOR, Applicant stated, "[f]rom 1995 to 1996 I did cocaine approximately twenty (20) times." At the hearing he testified to recalling use of cocaine between 1993 and May 1996 "maybe ten times." (Transcript, p. 54).

3. Applicant testified at his hearing that he only admitted to the Special Agent that he intended to use marijuana in the future because the Agent had led him to believe that the recreational use of the drug on the weekends was not a problem. (Transcript, p. 65). The Department of Defense has a strict prohibition against drugs, and this Administrative Judge views with skepticism any uncorroborated claim that a DIS Special Agent made representations contrary to Government directives. Moreover, it is difficult to believe that the Applicant would indicate an intent to continue to use marijuana if he had no intent to do so. Applicant was well aware that drug use was contrary to both his company and Department of Defense policy as well as illegal. Rather, it is clear to this Judge that the Applicant candidly related his intent to continue use and that his change of heart in all likelihood came after he received the SOR and was placed on notice of the Government's recommendation to revoke his clearance due in part to his drug abuse.

4. Although no formal finding will be made with respect to his falsification of his initial security clearance application since it has not been alleged under criterion E, this Administrative Judge is not free to ignore the information, as under the Directive, each personnel security clearance decision must be a fair and impartial common sense determination based on consideration of all the relevant and material information. DoD 5220.6, paragraph F.3.

5. Although approximately five years had passed since Applicant's last use of LSD, the information may well have influenced an agency's investigative decisions and it remains material for purposes of criterion E.

6. 18 U.S.C. §1001 provides in pertinent part: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up a. . .material fact. . .shall be fined not more than $10,000 or imprisoned not more than five years, or both."