DATE: March 31, 1997

In Re:

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

Applicant for Security Clearance

ISCR OSD Case No. 96-0608

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

William S. Fields, Esquire

Department Counsel

FOR THE APPLICANT

John S. Donnellon, Esquire

STATEMENT OF THE CASE

On October 10, 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 November 14, 1996 and requested a hearing before a DOHA Administrative Judge. The case was reassigned to this Administrative Judge on December 30, 1996 after having been previously assigned to another Administrative Judge on December 2, 1996.(1) On February 12, 1996, a hearing was convened for the purpose of considering whether it is clearly consistent with the national security to grant, continue, deny, or revoke Applicant's security clearance. The Government's case consisted of eight exhibits and one witness; Applicant relied on two exhibits, on his own testimony, and on the testimony of three witnesses. A transcript of the proceedings was received on February 26, 1997.

FINDINGS OF FACT

Applicant has admitted, with explanation, the factual allegations pertaining to drug involvement set forth under subparagraphs 1.d. through 1.j. of Criterion H, while denying, with explanation, the factual allegations pertaining to

drug involvement set forth under subparagraphs 1.a. through 1.c.

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 35 year old employee of a defense contractor. He has worked for his current employer since 1989 and currently holds a top secret clearance. Applicant was first granted a top secret clearance in 1984, two years after being granted a secret clearance is August 1982. A favorable preliminary determination could not be made on Applicant's suitability to retain his clearance because of his marijuana use.

Applicant first used marijuana in 1976 when he was in high school. In March 1980, he was arrested for possession of marijuana and possession of a water pipe. He pleaded guilty to possession of marijuana and was sentenced to 30 days in jail (which was suspended for six months on condition of good behavior) and fined $150.00 (Gov. Exh 1). Applicant was arrested again for possession of marijuana in July 1982. He was fined $180.00 and sentenced to 12 months probation. Applicant denies that the marijuana belonged to him on either occasion.

Applicant has provided inconsistent accounts of the frequency with which he used marijuana while in high school and in the years that followed. When he was first interviewed by the Defense Investigative Service (DIS) in October 1981, he estimated that he had smoked "no more than 1.5 ounces (of marijuana) since 1976" (Gov. Exh. 1). He did not indicate the frequency with which he had used marijuana, but he admitted that he had purchased small quantities of marijuana for his own use. During the second DIS interview in April 1984, Applicant admitted that he had used marijuana on a "weekly to monthly basis" from 1977 to 1979--smoking one to two marijuana cigarettes amongst a group of four or more people (Gov. Exh. 2). He did not smoke marijuana from May 1979 and the summer of 1981. Between July 1981 and October 1981, he smoked "not more than 2 marijuana cigarettes total at no more than 3 separate parties." He did not smoke marijuana again "until 1 week or so before (his) arrest" (for possession of marijuana) in July 1982. From July 1982 until he gave the statement to the DIS in April 1984, Applicant's use of marijuana was limited to inhaling "twice off a marijuana cigarette at (his) 22nd birthday party" (Gov. Exh 2) in November 1983. On the same statement, Applicant admitted that he had experimented with hashish "no more than three times" while in high school.

When Applicant was next interviewed by the DIS in June 1996, he stated--in his own handwriting-- that he had used marijuana "2-3 times per year until 1986" (Gov. Exh. 4). After 1986, he did not use marijuana again until October or 1994, although he admitted that there may have been "another occurrence in 1991." He admitted that he had "shared a marijuana cigarette with (his) wife" while in hotel more than 1000 miles from their home in October 1994. He used marijuana again in February 1995 when he "took one draw of marijuana pipe" while on a camping trip with some high school friends. Applicant's last admitted use of marijuana occurred at a party in August 1995 when he "shared a marijuana cigarette with 8 or 9 people" (Gov. Exh. 4).

Applicant revised his accounts of the frequency with which he had used marijuana when he answered the SOR. According to his "best recollection," he used marijuana only 10-12 times from 1977 to 1979 while in high school "which included no more than 3 uses of hashish." He purchased marijuana only three times and his use of marijuana was limited to "a few drags" on a cigarette on each occasion of use. He did not use any drugs from 1979 through June 1981. He used marijuana on three occasions between July 1981 and October 1981. On July 11, 1982, he was arrested after taking a single "drag" from a hashish pipe. According to his "best recollection," Applicant next smoked marijuana when he took two drags from a marijuana cigarette in November 1983. Applicant has no recollection of smoking marijuana between November 1983 and October 1994, although he admits that the specific incident polygraph administered by the National Security Administration (NSA) gave "positive indications" of additional marijuana use. Applicant also revised the circumstances of his marijuana use in October 1994 and August 1995. In October 1994, he took "several" draws from a marijuana cigarette. In August 1995, he handled and "intentionally" inhaled from a marijuana cigarette without taking a "draw."

At his administrative hearing, Applicant's testimony was reasonably consistent with the information he had provided in answer to the SOR. He described the circumstances in which he had used marijuana in October 1994 as a "hotel room party." After someone lit a marijuana cigarette, Applicant "took a couple of draws of the cigarette" (Tr. 35). He subsequently acknowledged that his wife had used marijuana with him on this occasion (Tr. 49). He continued to insist

his use in February 1995 was a single draw from a marijuana pipe, and his use in August 1995 was limited to holding a cigarette, inhaling from it--without actually putting in his mouth--and then passing it on (Tr. 33).

Beginning with his first statement to the DIS in October 1981, Applicant has repeatedly assured the DoD that he would not use marijuana again. In his first statement he promised:

I have stopped smoking marijuana because I no longer like the effect and do not plan on smoking it again. My last experience with marijuana was in February of 1981 and am sure that I will not use it again.

In April 1984, Applicant provided similar assurances:

As a result of my growing responsibilities connected with my job as well as my community, I do not plan to use drugs of any kind in the future.

Later in August 1984, Applicant signed a policy statement acknowledging that he understood the DoD's policy regarding the use of illegal drugs to include marijuana, and that he was willing to abstain (Gov. Exh. 3). In his most recent statement to the DIS in June 1996, Applicant restated his intention:

It has become clear to me that the occasional use of drugs is not compatible with the responsibilities as a professional that I wish to take on. I have not used drugs of any kind since August of 1995, and never will again.

Fifteen months after he had last used marijuana and four days **before** completing his answer to the SOR, Applicant enrolled in a drug counseling program. His counselor has submitted a letter stating that Applicant has completed a drug treatment program which consisted of attending 12 sessions of a relapse prevention group. She opined that Applicant "has a demonstrated intent not to abuse any drugs in the future." Attached to the counselor's letter is a laboratory report dated November 6, 1996, reflecting that Applicant's "Drug Screen" on that date was negative for marijuana and other drugs. Applicant had entered the drug treatment program on November 10, 1996.

The character witnesses who testified on Applicant's behalf described him as a dedicated, hard-working employee whose reputation for handling classified documents is above repute.

PROCEDURAL RULING

Department Counsel filed a motion *in limine* at the commencement of the hearing asking that the Administrative Judge strike the three exhibits Applicant had attached to his answer. The issues raised by Counsel's motion became moot when Applicant's Counsel withdrew two of the exhibits with notice that the witnesses who had prepared the statements were present and would testify. The third exhibit was re-offered and admitted during the presentation of Applicant's case.

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)

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:

(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

The Government has the burden of proving any controverted facts 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 Criteria 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 established its case with respect to Criterion H. Applicant has admitted that he used marijuana "weekly to monthly" from 1977 to 1979. During that time he also purchased marijuana. Applicant was arrested for possession of marijuana in 1980 and again in 1982. He continued to use marijuana "2-3 times yearly" until at least 1986. More recently, Applicant has admitted that he used marijuana in October 1994, in February 1995 and in August 1995.

If Applicant's statements and testimony regarding his use of marijuana since 1983 were accurate and credible, his marijuana use could be mitigated under the Adjudicative Guidelines set out in the Directive. According to this information, Applicant last used marijuana in August 1995, more than 17 months prior to the hearing. His use prior to

August 1995 was infrequent. Also mitigating are Applicant's stated intention not to use marijuana in the future, his negative "Drug Screen" on November 6, 1996, and his recent completion of a drug treatment program.

But Applicant's statements and testimony about his use of marijuana, prior and subsequent to 1983, are not credible. His statements and testimony are not credible because his attempt to tell a story which is contrary to common sense and human experience has left in its wake, statements with numerous material inconsistencies. Applicant's statement (in answer to the SOR) that he had used marijuana only seven to nine times[(2)] between 1977 and 1979 is inconsistent with his earlier statements about weekly to monthly marijuana use while in high school, and it is inconsistent with his admission that he had purchased small quantities of marijuana for his own use during that time. An individual whose marijuana use had been limited to a "few drags" from a marijuana cigarette on seven to nine occasions would not have found the need to purchase a supply for his own use.

Applicant's statement in answer to the SOR that he stopped using marijuana in May 1979, and did not use again until July 1981, is contrary to his earlier statement and contrary to a common sense interpretation of related evidence. In his June 1996 statement to the DIS, Applicant admitted that he had used marijuana "2-3 times per year until 1986." He did not mention his two year abstinence from 1979 to 1981.[(3)] More telling, Applicant was arrested in March 1980 for possession of marijuana. After pleading guilty to the charge at the time of arrest, he now posits the overworked defense: "it wasn't mine, I didn't know it was there" (Gov. Exh 2). In his answer to the SOR, Applicant claimed that he was arrested in July 1982 after taking a "single" draw from a marijuana pipe. In an earlier statement, he admitted that he had started smoking marijuana "a week or so before" the arrest. Applicant is now saying that--after having smoked marijuana **only** three times since 1979--he would next use it on a public beach in July 1982. If Applicant used marijuana only one time in 1982, I find it incredible that he would use it in a public place, only three months after promising the DoD that he would never use it again, and only two years after he had been falsely arrested (according to Applicant) for possessing marijuana in March 1980. If Applicant had stopped using marijuana--as his answer to the SOR and testimony suggest--he certainly would have avoided a suspicious situation on a public beach. A person living a drug free lifestyle would have learned--from his earlier experience--the consequences of close association with people who are using drugs.

Ironically, Applicant's marijuana use in the late 1970's and early 1980's would not be a relevant concern if he had provided a consistent credible account of these events. His testimony and recent statements are not credible because they contradict his earlier statements and provide information which is contrary to experience and common sense. Because Applicant has misrepresented the facts with respect to his earlier marijuana use and arrests--which are marginally relevant to the issue in his case, I find it difficult to believe his testimony and statements with respect to more recent marijuana use--which Applicant had to know was far more relevant to his security clearance eligibility.

Applicant's testimony and recent statement that he did not use marijuana from November 1983 until October 1994 is contradicted by his June 1996 statement to the DIS. In that statement, written in his own handwriting, Applicant admitted he had used marijuana "2-3 times a year until 1986." He has not suggested that the two year time difference is attributable to the DIS agent's misunderstanding what he had told her during the interview. Applicant did not roll back his last use of marijuana (during the 1980's) to 1983 until he answered the SOR, which coincidentally includes an allegation that Applicant had used marijuana **after** receiving a top secret clearance in September 1984. Significantly, marijuana use by Applicant after November 1983 is more consistent with other evidence--specifically the "positive indication" on the NSA polygraph, and the circumstances under which he used marijuana in October 1994.

According to Applicant's testimony and recent statements, he relapsed after an eleven (or an eight) year abstinence from marijuana in October 1994 when he "shared" a marijuana cigarette with his wife in a hotel room more than 1000 miles from their home. Where did they get the marijuana? Did they bring it with them? Did he go out and buy it on the street in the city they were visiting? Did he send his wife out to buy it? When Applicant initially disclosed information of this incident in his June 1996 statement to DIS, he indicated that he had "shared" a cigarette with his wife; he did not indicate that other people were present. In his answer to the SOR, he reduced the consumption from "sharing" to "several draws," but did not mention that the use occurred at a "party." At the hearing, Applicant testified that he had taken "a couple of draws" after someone "lit a marijuana cigarette" at a hotel room party (Tr. 35). Did Applicant and his wife attend a marijuana "party" in a hotel room 1000 miles from home? Or did Applicant fabricate the "party" to diffuse the obvious, unanswered questions raised by his original account of the incident?

Similar concerns are raised by Applicant's description of his marijuana use in October 1994 and in August 1995. In his June 1996 statement to the DIS, he admitted that he had "shared" a marijuana cigarette with his wife. More recently, he has described his use on that occasion as being limited to taking "several draws" (answer to the SOR) or "a couple of draws." (Tr. 35). In his June 1996 statement to the DIS, Applicant admitted that he had "shared" a marijuana cigarette with eight or nine friends at a party in August 1995. More recently, the "sharing" has been reduced to "inhaling marijuana smoke" without putting the cigarette to his mouth. There may not be a bright-line distinction between "sharing" a marijuana cigarette and taking "several draws." However, I am not persuaded that Applicant would so easily confuse "sharing" a cigarette with merely "inhaling" the smoke from a lit cigarette--without putting it in his mouth.

Another question is raised by Applicant's description of the circumstances under which he last used marijuana in August 1995. Did Applicant's friends continue to associate with him and continue to include him in their marijuana smoking sessions after he had refused marijuana time after time after time--for eight or eleven years?

Finally, Applicant's promise that he will not use marijuana in the future has lost its currency. He has made an almost identical promise on three previous occasions, and on three previous occasions, the DoD relied on Applicant's promise, and granted him access to classified information. After each promise, Applicant defaulted and used marijuana. His most recent promise may be sincere, but I cannot ignore his track record. Applicant's failure to live up to his past promises together with inconsistent statements and unanswered questions about past and recent marijuana use have caused me to seriously doubt his testimony and statements regarding the extent of his marijuana use during the past five years. Unanswered questions and doubts about recent marijuana use have caused me to doubt his resolve to abstain from marijuana in the future. Resolving these doubts against Applicant as I must, Criterion H is 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. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. For the Applicant

Subparagraph 1.f Against the Applicant

Subparagraph 1.g. Against the Applicant

Subparagraph 1.h. Against the Applicant

Subparagraph 1.i. Against the Applicant

Subparagraph 1.j. 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 continue Applicant's security clearance.

John R. Erck

Administrative Judge

1. The case was re-assigned because of the regional rotation.

2. Ten to twelve times before excluding the occasions when he had used hashish.

3. Applicant had mentioned a two year hiatus--in marijuana use-- in his April 1984 statement. This statement is not found to be credible because of his 1980 arrest for possession of marijuana