DATE: May 2, 1997

In Re:

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

Applicant for Security Clearance

ISCR OSD Case No. 96-0797

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

Matthew E. Malone, Esquire

Attorney Advisor

FOR THE APPLICANT

Pro Se

STATEMENT OF THE CASE

On December 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.

Applicant responded to the SOR in writing on January 7, 1997 and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on January 27, 1997. A hearing was convened on February 25, 1997 for the purpose of considering whether it is clearly consistent with the national security to grant, continue, deny, or revoke Applicant's security clearance. Applicant was unable to attend the scheduled hearing because of illness. During a subsequent telephone conference with Applicant and Department Counsel, Applicant persuaded me that he wanted his case decided on the record--which was to include the documents he would be submitting--and was willing to waive his right to the hearing which he had previously requested. The Government's File of Relevant Material (FORM) consisted of 14 exhibits.(1) Applicant submitted 14 exhibits on his own behalf and objected to the admission of all medical records included with the Government's exhibits.

APPLICANT'S MOTION TO SUPPRESS

In the letter which he included with his exhibits, Applicant objects to Department Counsel's submission of his (Applicant's) medical records, citing constitutional grounds and violation of doctor-patient privilege. Earlier Applicant had claimed that he signed releases--granting the Defense Investigative Service (DIS) access to his medical records--under duress (Item # 5 Gov. FORM).

Applicant's motion is denied. He knowingly waived his constitutional right to withhold his medical records from the Department of Defense (DoD) **after** being advised that withholding his records may deny the DoD information they needed to make a determination on his security clearance eligibility, and could result in the revocation of any existing security clearance. (See letter from Defense Legal Services Agency dated September 22, 1995, and Applicant's response: items 4 and 5 of Applicant's Exhibits).

FINDINGS OF FACT

Applicant has admitted, without explanation, the factual allegations pertaining to alcohol consumption (Criterion G) set forth under subparagraphs 1.a. through 1.i., the factual allegations pertaining to drug involvement (Criterion H) set forth under subparagraphs 2.a. through 2.i., the factual allegations pertaining to personal conduct (Criterion E) set forth under subparagraphs 3.a. through 3.d., and the factual allegation pertaining to criminal conduct (Criterion J) set forth under subparagraph 4.a.

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 39 year old employee of a defense contractor. He has worked for his current employer since January 1994, and is seeking to retain the secret clearance which was granted to him in 1988.[(2)] A favorable preliminary determination could not be made on Applicant's current suitability for a security clearance because of alcohol consumption, drug involvement, personal conduct, and falsification.

Applicant first drank alcohol when he was 16 years old in 1974. Shortly after being introduced to alcohol, he began the pattern of consumption which would continue--almost without interruption--until he stopped drinking on February 2, 1995.[(3)] He would drink 12 beers a week--usually four-a-day over the weekends; and three or four times each year, Applicant would drink to the point of intoxication (Item # 6 of Gov. FORM). He last used alcohol on February 2, 1995. At about the same time that he began using alcohol, Applicant was exposed to, and began abusing, marijuana. For the next twenty years including the time that he served in the U.S. Navy (from 1978 to 1986), he would use marijuana with varying frequency--often as regular as daily. Applicant purchased marijuana from 1974 to January 1995. While there was a period of time when he was in the U.S. Navy,[(4)] and did not use marijuana because he was subject to urinalysis, he was not subject to urinalysis between 1986 and September 1994. Applicant last used marijuana on January 31, 1995. He tested positive for marijuana in a urinalysis administered on February 3, 1995; he has tested negative in all subsequent tests.[(5)]

The abuse of alcohol and marijuana has had legal consequences for Applicant. While serving in the U.S. Navy, Applicant received non-judicial punishment under Article 15 of the UCMJ for using marijuana. He was reduced in grade and fined $500.00. In 1987, Applicant had been drinking prior to becoming involved in an altercation which resulted in his being charged with assault and battery. The charges were placed on the stet docket for a year to allow Applicant to pay restitution to the victim. He was arrested for driving while intoxicated in June 1989; he was fined $250.00, sentenced to two days in the country jail and directed to seek alcohol counseling. In January 1991, Applicant was arrested for driving under the influence; his driver's licence was suspended; he was sentenced to 60 days in jail (with all but two weekends suspended), awarded six months probation and ordered to pay costs of $80.00. Applicant was arrested most recently for driving while intoxicated on August 24, 1994, after he had been involved in an accident which caused extensive damage to his new sport utility vehicle. He pleaded guilty to driving under the influence; his driver's license was restricted for three years; he was fined $500.00 (which was suspended), sentenced to six months in the country jail, directed to seek treatment for his alcohol problem, and placed on two years supervised probation through the Drinking Driving Monitor Program.

On three occasions, Applicant has sought treatment for problems related to his use and abuse of alcohol and marijuana.

He was hospitalized at Facility D from July 27 to August 2, 1993, where he was diagnosed with, and treated for: "Alcohol Abuse, Continuous" and "Mixed Substance Abuse including Cannabis" (Item # 9 of Gov. FORM). He remains under the care of Dr. H, the treating physician. (See Item # 7 of Applicant's Exhibits). Applicant received outpatient treatment from Facility F from September 28, 1994 to January 25, 1995; he was treated for "Alcohol Abuse" and "THC Abuse" (Item # 10 of Gov. FORM). From February 3 to arch 2, 1995, Applicant received court-ordered inpatient treatment at Facility G for alcohol and marijuana abuse. The clinical supervisor provided a "guarded prognosis" when Applicant was discharged--opining that he (Applicant) was "ambivalent" about his alcoholism, and was not facing his marijuana use as a serious problem (Item # 11 of Gov. FORM).

The treatment records provided by Facility's D, F, and G contain more specific information about the extent of Applicant's use of marijuana and alcohol. According to the records from Facility D, Applicant had been drinking four to eight beers a day, and had been smoking "two to three joints of marijuana a day since 1979." The treatment records from Facility F do not include specific information about daily or weekly use of marijuana and alcohol,[(6)] but disclose that Applicant had three positive urinalysis (for marijuana) during the time of treatment. The records from Facility F also disclose that Applicant realized his alcohol and marijuana use could jeopardize his security clearance and his employment. The treatment records from Facility G report that Applicant had been "using marijuana regularly for 22 years," and drinking from "one six-pack per week to one six-pack per night." Applicant tested positive for marijuana in a urinalysis administered at the time of his admission to Facility G. The information in these records provides a basis for finding that Applicant was abusing alcohol and marijuana regularly prior to his admission to Facility G on February 3, 1995.

When Applicant completed a Personnel Security Questionnaire (PSQ) on September 4, 1987, he certified that:

....the entries made by me are true, complete and accurate to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both.

In response to questions 15.a. and 15.b which asked if he had used, possessed or purchased any narcotic (to include heroin or cocaine),....hallucinogen (to include LSD or PCP), or cannabis (to include marijuana or hashish), Applicant answered "yes" to both questions and admitted that he used and purchased marijuana between 1976 and 1984. He went on to explain that he had used it from once a month to as often as three to five times a week before he "quit on New Year's Eve 1984" (See Item # 3 of Gov. FORM). In May 1990, Applicant was interviewed by the DIS as a result of his June 1989 arrest for driving while intoxicated (Item # 6 of Gov. FORM). He was questioned about his alcohol and marijuana abuse, and swore--in a statement provided incident to that interview--that he had not used marijuana since 1984, and that he did not intend to use it in the future.

Applicant completed a National Agency Questionnaire (NAQ) on June 14, 1993 (Item # 2 Gov. FORM) which included a certification identical to that contained on the PSQ which he had completed in 1987. He answered "yes" to question 20.a. which asked if he had used marijuana. He answered "no" to the question which asked if he had ever purchased marijuana. Applicant admitted using marijuana "5 or 6 times" on an experimental basis, and again stated that he did not intend to use it in the future. On an NAQ which Applicant completed on May 2, 1994, he again answered "yes" to question 20.a. (admitting use) and "no" to question 20.b .(denying purchasing). And he admitted again that he had used marijuana "5 or 6 times" on an experimental basis, and that he did not intend to use it in the future[(7)] (Item # 1 of Gov. FORM). Applicant finally admitted that he had used and purchased marijuana up to January 31, 1995 during interviews with the DIS in May and June of 1996 (Item # 14 Gov. FORM).

In 1993 while being treated at Facility D for substance abuse, Applicant was diagnosed by Dr. H as having bi-polar disorder or manic depressive illness. Dr. H prescribed lithium and antabuse and "clearly instructed" Applicant to avoid all alcohol, to include mouthwash and cough syrup. In his August 1995 statement to the DIS, Applicant stated that alcohol abuse is "a symptom of (his) illness" (bi-polar disorder) and that he had "unknowingly" been using alcohol to self-medicate his illness (Item # 4 Gov. FORM). There is no information in any of the medical records which would confirm Applicant's statement that alcohol abuse is a "symptom" of bi-polar disorder.

Applicant has submitted numerous letters of reference which attest to his vocational talents and work ethic. His

supervisor for the past nine months thinks highly of Applicant and does not consider him to be a security risk.

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.

ALCOHOL CONSUMPTION

(Criterion G)

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

1. Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use.

3. Diagnosis by a credentialed medical professional of alcohol abuse or alcohol dependence.

5. Consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program.

Conditions that could mitigate security concerns include:

4. Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional.

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:

(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.

PERSONAL CONDUCT

(Criterion E)

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

(2) The deliberate omission, concealment, or falsification of relevant and material facts from any personal security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities,

(3) Deliberate providing false of misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personal security trustworthiness determination.

Conditions that could mitigate security concerns include:

None Applicable

CRIMINAL CONDUCT

(Criterion J)

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

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

Conditions that could mitigate security concerns include:

None Applicable

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 G, H, E, and J.

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 G. Applicant has been abusing alcohol for at least ten years. Evidence of his abuse can be found in his four alcohol-related arrests, in Applicant's admissions, and in the treatment records from Facility's D, F, and G.

In mitigation, Applicant presents 24 months of continuous abstinence from alcohol. In addition to abstaining from alcohol, he has been attending Alcoholics Anonymous (AA) regularly, first as a condition of probation, but more recently, as part of his own recovery program. Applicant was recently discharged early from the Drinking Driver Monitor Program because of his compliance with all of the conditions of his probation. Although he did not receive a favorable prognosis from the credentialed medical professional who prepared the treatment summary when he was discharged from Facility G in March 1995, his abstinence and adherence to an aftercare program in the two years since discharge persuades this Administrative Judge that a revision of the "guarded" prognosis is now warranted. It is significant that the most recent progress notes from Dr. H indicate that Appellant has been making excellent progress in stabilizing his moods--progress which would be unlikely if he were continuing to consume alcohol (See Item # 9 Gov. FORM). Criterion G is concluded for Applicant.

The Government has established its case with respect to Criterion H. Applicant's admissions to the SOR allegations under Paragraph 2 (pertaining to his marijuana abuse), and the information about marijuana abuse in his treatment records from Facility's D, F, and G establish that Applicant abused marijuana regularly until January 31, 1995.

Applicant is credited with having received treatment for marijuana abuse on three occasions. The records indicate that he was receptive to treatment and actively participated in the individual and group counseling sessions. Additional mitigation is found in Applicant's 24 months of continuous abstinence from marijuana--corroborated by urinalysis that have been consistently negative. Allegations 2.d. through 2.f. of the SOR are concluded for Applicant.

While Applicant's claim that he has not used marijuana since his most recent inpatient treatment is unrefuted, his history of marijuana abuse and his failure to remain steadfast to earlier stated intentions--not to use marijuana in the future--provide the background against which to measure his recent behavior and assurances of continued abstention. Four times previously, Applicant has lied about past use of marijuana, and four times previously, Applicant has stated that he did not intend to use marijuana in the future. All the while he was lying about his past marijuana use and stating that he did not intend to use marijuana in the future, Applicant was continuing to use marijuana. He continued to use marijuana even knowing that he was jeopardizing his security clearance and possibly his employment. Because Applicant's behavior evidences a near compulsion to use marijuana, a longer period of abstinence is needed to persuade this Administrative Judge that his need for this substance has finally dissipated. Accordingly, allegations 2.a. through 2.c. and 2.e. through 2.i. are concluded against Applicant.

Criterion E applies to "the deliberate omission...of relevant and material facts from any personnel security questionnaire...deliberately providing false and misleading information...to an investigator in connection with a personnel security...determination." Facts are considered relevant and material when they are capable of influencing a federal agency's decision, e.g., a decision to grant or deny a security clearance. In this instance, Applicant's continuing, regular abuse and purchase of marijuana from the mid-1970's to January 31, 1995 falls well within the definition of materiality. Applicant had deliberately omitted the relevant and material facts about his regular marijuana abuse and purchases from the security questionnaires which he completed on September 4, 1987, June 14, 1993, and May 2, 1994. And Applicant had provided false and misleading information to the DIS in May 1990 when he swore that he had stopped using marijuana in 1984.

Because Applicant had provided misinformation to the DoD on four different occasions over a period of seven years beginning in 1987, his misconduct was neither an isolated event, nor an event far removed from the present. He did not tell the whole truth about his marijuana abuse until he was interviewed by the DIS in May and June of 1996. Under the

circumstances, Applicant cannot be credited with making a prompt good-faith effort to correct the falsification before being confronted with the facts. All allegations in the SOR under Criterion E are concluded against Applicant.

The government has established its case under Criterion J. Applicant willfully withheld information from the DoD on a matter that was clearly relevant and material to his security clearance eligibility in violation of 18 U.S.C. §1001. The information withheld by Applicant had the potential to influence the course of his background investigation in areas of legitimate concern to the DoD. Criterion J. 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 G) 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

Paragraph 2 (Criterion H) AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2.c. Against the Applicant

Subparagraph 2.d. For the Applicant

Subparagraph 2.e. For the Applicant

Subparagraph 2.f. For the Applicant

Subparagraph 2.g. Against the Applicant'

Subparagraph 2.h. Against the Applicant

Subparagraph 2.i. Against the Applicant

Paragraph 3 (Criterion E) AGAINST THE APPLICANT

Subparagraph 3.a. Against the Applicant

Subparagraph 3.b. Against the Applicant

Subparagraph 3.c. Against the Applicant

Subparagraph 3.d. Against the Applicant

Paragraph 4. (Criterion J) AGAINST THE APPLICANT

Subparagraph 4.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 continue Applicant's security clearance.

John R. Erck

Administrative Judge

1. Because the Government exhibits are not marked or otherwise identified, they will be identified numerically according to the order in which they appear in Department Counsel's submission.

2. Applicant states that he has had a security clearance for 15 years (Item # 4 Gov. FORM), however the only reference in the record to when Applicant was granted a security clearance is found in Item 3 of the Government FORM--his 1993 NAQ.

3. There were periods of time when Applicant drank more (See Item #11 Gov. FORM) and there were times when he stopped drinking completely--for nine months in 1987, for 2 ½ months prior to his 1994 treatment at Facility A, and at other times not specified (Items 10 and 11 Gov. FORM)

4. These tests began around the time Applicant received an Article 15 for using marijuana in 1984.

5. Applicant does not indicate the number of times he has been tested since February 1995.

6. Applicant reported drinking alcohol "2-3 times" per week (quantity not specified), and using marijuana "when available."

7. The SOR does not allege that Applicant falsified the NAQ which he completed on May 2, 1994; this NAQ is mentioned because it is one of the items in the FORM submitted by Department Counsel, and because it contains the same misinformation about Applicant's marijuana abuse as did the PSQ he completed in 1987 and the NAQ he completed in 1993. Applicant did not object to the admission of 1994 NAQ.