DATE: May 19, 1997

In re:

SSN:

Applicant for Security Clearance

ISCR Case No. 96-0884

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR THE GOVERNMENT

Martin H. Mogul, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

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, amended by Change 3, issued a Statement of Reasons (SOR) dated December 9, 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.

Applicant filed a response, undated, to the allegations set forth in the SOR in which he indicated a decision could be made on the record without a hearing. Applicant subsequently requested a hearing, and the case was assigned accordingly to this Administrative Judge on March 27, 1997. On that date, a hearing was then scheduled for April 22, 1997. At the hearing held as scheduled, nine Government exhibits were admitted and testimony taken from the Applicant. A transcript of the hearing was received by this office on April 30, 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 45 year old defense contractor employee who performs ---------- duties at the local military base. He seeks a Secret security clearance.

Applicant began to use marijuana in 1969. He found the drug relaxing, preferable to alcohol, and continued to smoke it in knowing disregard of the laws proscribing such abuse. From 1975 through 1991, he used marijuana three times a week, purchasing it about ten times per year for his and his spouse's consumption. In spring 1992, Applicant left his job. With limited financial means to purchase "all the extra goodies" (marijuana), Applicant elected to cultivate marijuana in his backyard. He continued his three times weekly use of marijuana, which he obtained from his plants as well as from limited purchases.

Acting on a tip from a confidential reliable informant that Applicant was growing marijuana in his backyard and bringing it into the house to be dried for consumption and sale,[(2)] the local police on August 31, 1992, obtained a search warrant for Applicant's premises. Applicant cooperated with the search executed pursuant to this warrant at 10:03 p.m., and he directed the officers to the basement where they found two marijuana plants and outside in the yard where they discovered three marijuana stalks, all approximately four feet high. Applicant and his spouse turned over to the police an ice bin containing fifty-three grams of loose marijuana. Applicant was arrested and charged with cultivating marijuana, a felony offense. On October 14, 1992, he was found guilty of an amended charge of simple misdemeanor possession of marijuana, and sentenced to a $100.00 fine, $83.50 costs, placed on probation for one year and ordered to participate in drug counseling.

After his August 31, 1992, arrest, Applicant resolved to stop using marijuana as he did not want to find himself in further legal difficulties. As the months passed, he found that he would rather use marijuana than consume alcohol. While he used marijuana only three times in 1993, he smoked it on average a couple times per month in 1994 and 1995, purchasing about $50.00 worth on four separate occasions over that two year time period. In 1996, he smoked marijuana on average once a month with friends, with his last use being on December 31, 1996.

Following the death of his daughter on --------, 1981, Applicant began to use cocaine. After a month of daily use, over the next three years, he used cocaine three times per week. His extensive abuse of cocaine cost him financially about $8,000.00 to $10,000.00 per year from 1981 to 1984. From about 1985 when his abuse was on the order of a couple times a month, he gradually weaned himself off the cocaine to where it was down to three or four times in 1988 and only twice in 1989. Applicant last purchased cocaine in November or December 1989 and has not used it since 1989. He has no intent to use cocaine in the future.

In application for a secret security clearance with a previous employer, Applicant executed a National Agency Questionnaire (NAQ) on July 10, 1995. In response to inquiry concerning his criminal record history, Applicant listed his arrest for cultivation of marijuana and his conviction of simple possession. Applicant answered affirmatively question 20.a. regarding illicit drug abuse and provided further detail in an attachment: "After my daughter passed away in 1981, I used Cocaine, Marijuana and alcohol for about a year and a half. The last uses of these drugs are 1986 Cocaine, 1992 Marijuana and use of alcohol is now at a controlled amount." Applicant also responded yes to question 20.b. concerning illicit drug purchase, manufacture, trafficking, production, or sale, adding, "In 1992, I grew a marijuana plant for the purpose of experimentation." Applicant did not report his abuse of cocaine over the 1987/1989 time frame, that abuse of marijuana which continued after his August 31, 1992 arrest, or his purchases of cocaine and marijuana. He admits he was aware of the Government's concerns regarding illegal drug abuse. Yet, he claims he was not trying to hide it, but was "just trying to get a job." (Transcript, p. 48). When directed to his statement that his last use of cocaine was in 1986, Applicant initially indicated that he did not think the 1986 date was correct for cocaine. (Transcript, p. 57). Applicant proceeded to deny any intentional falsification, testifying "Actually, I'm just not good on dates. I admit that I used cocaine. I can't say exactly when I stopped these drugs." (Transcript, p. 58). Applicant subsequently admitted that when he said he had stopped using cocaine in 1986 he made a statement that was not truthful and correct. (Transcript, p. 59). Similarly, with respect to his last use of marijuana, Applicant initially admitted he knowingly made an untrue statement when he said his last use of marijuana was in 1992. But in response to Government inquiry whether he understood when completing the attachment to question 20.a. that the stated last use of 1992 was not true, Applicant indicated, "When I filled this application out, dated '95, at that time it was basically true, Since the time I filled out these applications, no." (Transcript, p. 58). He explained further, "At that time, I felt I was giving a full and truthful answer because I felt at that time that I would end my use of marijuana, but sense (sic) then I haven't." With respect to his failure to list any purchase of drugs, Applicant testified he did not realize question 20.b. required a breakdown of how many times he purchased it. (Transcript, p. 61). Applicant's detailed responses on the NAQ attachment leave the false impression that he has not used any illegal drug since 1992 (which corresponds to the date of

his criminal offense, a matter of public record) and that his involvement in purchase, manufacture, trafficking, production or sale was limited to the cultivation which led to the criminal charge. Applicant exhibited no difficulty at the hearing recalling the extent of his marijuana abuse on the order of a couple times a month in 1994 and 1995. After review of the entire record, this Administrative Judge finds Applicant intentionally concealed his recent drug use and his illegal drug purchases in an effort to obtain a security clearance.

On October 9, 1995, Applicant executed a second NAQ on which he responded to questions 20.a. and 20.b. as he had on the prior form, *i.e.*, admitting use of cocaine to 1986 and marijuana to 1992 and to cultivation of marijuana in 1992. His disavowal of any intentional concealment with respect to this form is likewise not credible.

On April 22, 1996, Applicant was interviewed by a Special Agent of the Defense Investigative Service (DIS) concerning his financial situation, arrest record, drug and alcohol abuse and counseling. As reflected in a signed, sworn statement executed in conjunction with that interview, Applicant admitted he smoked marijuana recreationally with his spouse on a consistent basis (every weekend) from age 20 until his arrest in August 1992, and to purchasing marijuana in quarter ounce quantities at a cost of $50.00. He was not completely forthcoming, as he stated that since his arrest in August 1992, he shared a joint with friends about four times, the most recent time being in March 1996.[(3)] Applicant admitted to the abuse of cocaine, which he quantified as daily for one month in 1981 and then every other day for two years with gradual weaning, snorting once per month until he stopped in 1989. He denied ever having received any treatment for drug abuse and indicated that he had no intent to use marijuana or cocaine in the future.

Applicant continued to use marijuana on the average of once per month following the interview. On October 4, 1996, he was interviewed by another DIS Special Agent. Applicant admitted that the information he had previously provided to DIS about his use of marijuana since his arrest in 1992 was not correct. He stated that he smoked marijuana on average ounce or twice a month, mostly when offered by friends or relatives and that his most recent use had been that Tuesday (October 1, 1996), and that he spends $50.00 to $100.00 per year on marijuana. With respect to his future intentions, Applicant expressed his intent to keep his use of marijuana at that level, to not increase his involvement or use any other illegal drug. He denied any intent to cultivate marijuana in the future.

Applicant does not think there is anything wrong with the use of marijuana and would like to see it legalized. In an effort to keep his job and obtain the requested clearance, Applicant on January 1, 1997, resolved to cease the use of marijuana. While he does not plan on smoking marijuana in the future, Applicant acknowledges that if it was presented to him, he would probably "take a hit." Although his spouse is no longer using marijuana, he continues to associate with those friends and relatives with whom he used marijuana in the past.

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

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:

(2) the deliberate omission, concealment, or falsification of relevant and material facts from any personnel 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) 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.

(5) a pattern of dishonesty or rule violations

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 those who testified, 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 27 year history of extensive marijuana use and purchase, to include three times weekly abuse from 1975 to August 1992. The extent to which marijuana was a part of Applicant's recreational lifestyle is perhaps best evident in his efforts to cultivate the drug for personal consumption when he was unemployed in 1992 and could no longer afford what he termed "the extra goodies." In addition, following the death of his daughter in 1981, Applicant became heavily involved with cocaine. After using cocaine daily for about a month, he continued to use cocaine on the order of three times per week until 1985 when he began the gradual process, which took four years, of weaning himself off the drug. 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. Moreover, such deliberate disregard for pertinent drug laws raises serious questions as to whether one can be relied on to adhere to the regulations promulgated for the handling and safeguarding of classified information.

In assessing the 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. Of the corresponding mitigating conditions (MC), only MC 1. (drug involvement not recent) has any applicability, and that is only with respect to Applicant's abuse of cocaine. While Applicant's abuse of cocaine is viewed seriously because of its duration from 1981 to 1989 and its extent, which for the first three years was regular in nature, there is no evidence of any recurrence since 1989. Moreover, although his abuse of cocaine is not condoned, it was in reaction to the death of his daughter, which is one of the most difficult situations to deal with in life. Applicant has no intent to use cocaine in the future and by all accounts, he has been successful in managing to cease his abuse. Subparagraphs 1.e. and 1.f. are thus concluded in his favor.

Applicant's abuse of marijuana is contrasted by his attitude towards the drug and the recency of his abuse. As he admitted at the hearing, he does not see any problem with using marijuana and actually prefers it to alcohol. The evidence reflects that he continued to use the drug on average a couple times per month after he completed his NAQ forms in 1995 and about once per month through 1996, despite the fact that he knew the Government was concerned with his drug abuse. His substantial involvement with marijuana is subject to mitigation provided there is demonstrated intent to refrain from any drugs in the future (MC 3.) or successful completion of a drug rehabilitation program (MC 4.). As part of his sentence for the simple possession of marijuana of which he was convicted on October 14, 1992, Applicant was required to undergo drug counseling. There is no evidence that he did so. Applicant submits that he has resolved to cease the use of marijuana. Whereas Applicant as recently as October 4, 1996, admitted to a DIS Special Agent that he would keep his marijuana use at its current level in the future, it is all the more important that his recent change of heart be confirmed by positive action. Applicant's maintenance of a drug-free lifestyle since January 1, 1997, reflects positively, but as Applicant acknowledged at the hearing, if he was presented with marijuana he would probably use it, although he indicates he would not inhale.[(4)] Given the recency of Applicant's last marijuana use, the fact that he enjoys its relaxing effects, his desire to see it legalized, and where he continues to associate with individuals with whom he used marijuana in the past, there is a real risk of future abuse of marijuana by Applicant, notwithstanding his lack of any current intent to use marijuana. Adverse findings are therefore warranted with respect to subparagraphs 1.a. and 1.c. of the SOR, but a favorable finding is entered as to subparagraph 1.d. due to the lack of any current intent. Notwithstanding Applicant's obvious enjoyment of marijuana, he testified credibly that he has not attempted to cultivate the drug since August 1992 as he does not want to suffer additional legal consequences. While the probability of any future cultivation is regarded as remote, subparagraph 1.b. also covers simple possession of marijuana. In light of Applicant's marijuana possession and purchase continuing to December 31, 1996, not enough time has passed for this Administrative Judge to find that his marijuana use, purchase and possession is safely behind him. Hence, subparagraph 1.b. is resolved against him as well.

The concerns engendered by Applicant's twenty-seven year history of drug abuse are compounded by his failure to be forthright about the extent of that abuse on his two NAQ forms as well as in a signed, sworn statement prepared during a DIS interview of April 22, 1996. Applicant is found to have deliberately concealed his more recent drug involvement with cocaine and marijuana as well as his purchases of marijuana, as set forth in the Findings of Fact, in an effort to protect his job and obtain a Secret security clearance. At the time he executed his NAQ forms in 1995 and his signed, sworn statement on April 22, 1996, Applicant's abuse of marijuana was current. Unquestionably, information reflecting recent and especially ongoing involvement with illegal substances has the potential for influencing an agency's investigative and adjudicative decisions. DCs 2. and 3. under the personal conduct adjudicative guidelines are pertinent in this case. Furthermore, his record of three intentional falsifications is enough to establish a pattern of dishonesty referred to in DC 5.

As noted, the materiality and relevancy of the information concealed from the Government precludes favorable consideration of MC 1. Applicant cannot satisfy either the remoteness or isolation requirements of MC 2., as the deliberate falsification occurred three times and as recently as April 22, 1996. Applicant's subsequent candor during his October 4, 1996 interview is to his credit, but it is not sufficiently prompt to qualify for mitigation under MC 3. Nor is there any evidence that the intentional misrepresentations were caused by the improper advice of an authorized person. The Government can ill afford having individuals dictate for themselves the timing and extent of disclosure. 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. This Administrative Judge remains troubled by his efforts at the hearing to deny the knowing and willful nature of his misrepresentations. Subparagraphs 2.a.(1), 2.a.(2), 2.b.(1), 2.b.(2), 2.c.(1), 2.c.(2), 2.d.(1), 2.d.(2) and 2.e.(1) are resolved against him.

Whereas Applicant's criterion E conduct involved deliberate misrepresentations on documents presented to the Government and in an interview with a representative of the Government, his conduct constitutes a felony violation of federal law pursuant to Title 18, Section 1001 of the United States Code.[(5)] The adjudicative guidelines pertaining to criminal conduct apply, not only to Applicant's drug-related criminal behavior,[(6)] but also to his repeated, deliberate falsification. DCs 1. (any criminal conduct) and 2. (a single serious crime or multiple lesser offenses) must also be considered in evaluating Applicant's current security worthiness.

Applicant satisfies none of the pertinent mitigating conditions. There is no evidence of cultivation since 1992, but Applicant continued to possess marijuana to as recently as December 31, 1996. Moreover, his repeated falsifications all occurred within the last two years. His criminal behavior was too recent and repeated for MCs 1. or 2., respectively. There is no evidence of undue pressure on Applicant which contributed to either his marijuana involvement or his falsifications. Nor is there sufficient evidence of rehabilitation. As Applicant testified, he has never been to a drug rehabilitation program or received counseling, despite having been ordered to undergo counseling by the court. His continued abuse of marijuana after the offense raises serious doubts about the extent of his reform of the drug-related conduct. Applicant's October 4, 1996 candor to the second DIS Agent is not enough to overcome his record of previous false statements. Applicant's disavowals at the hearing of the intentional nature of his omissions of recent drug use and purchase lead this Administrative Judge to further question his rehabilitation. Subparagraphs 3.a. and 3.b. are 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.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: 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.b.(1): Against the Applicant

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

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

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

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

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

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

Paragraph 3. Criterion J: AGAINST THE APPLICANT

Subparagraph 3.a.: Against the Applicant

Subparagraph 3.b.: 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 transcript index to the exhibits is not accurate in the following respects: Government Exhibit 3 as admitted is a Statement of Subject dated October 4, 1996; Government Exhibit 4 is a Statement of Subject dated April 22, 1996; Government Exhibit 5 is a Federal Bureau of Investigation record dated November 28, 1995; Government Exhibit 6 is a Criminal History Information Sheet dated November 25, 1995; and Government Exhibit 9 is a record of the local police.

2. There is no evidence that Applicant ever sold marijuana or any other drug.

3. Applicant also denies that he intentionally misrepresented his recent marijuana abuse during the April 1996 interview. Applicant testified, "Between August , the end of September 1992 until April of that date, I very rarely smoked." Applicant acknowledged his prior testimony that he had smoked marijuana approximately 24 times per year, but indicated, "I don't think it's the amount of times; it's whether I'm still using it or not. At the moment, I haven't used it." (Transcript, pp. 67-68). Applicant's efforts to explain away his obvious misrepresentation of only four times total use from August 1992 to March 1996 are not persuasive.

4. Under the Directive, taking a hit off a marijuana joint is considered the use of the drug, whether or not the individual inhales the smoke.

5. 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."

6. Convicted of simple possession, a misdemeanor, Applicant committed felonious conduct when he cultivated the marijuana.