DATE: October 27, 1997

In Re:

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

Applicant for Security Clearance

ISCR Case No. 97-0466

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR GOVERNMENT

William S. Fields, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On July 22, 1997, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding 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 determine whether a clearance should be granted, continued, denied, or revoked. In a sworn written statement, signed August 12, 1997, the Applicant responded to the allegations set forth in the SOR and requested a hearing.

The undersigned Administrative Judge received the case assignment on August 25, 1997, and held a hearing on October 1, 1997. The Department Counsel presented seven exhibits ("Exhs") and the testimony of no witnesses. The Applicant's case consisted of the presentation of five exhibits and the testimony of three witnesses besides his own. A sixth exhibit was submitted by the Applicant on October 6, 1997, and admitted into evidence without objection. The undersigned Administrative Judge received the transcript ("Tr") of the hearing on October 8, 1997.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following two criteria: paragraph 1, Criterion E (personal conduct) and paragraph 2, Criterion J (criminal conduct). SOR ¶ 1.a. and ¶ 1.b. allege that the Applicant concealed information concerning some arrests on his April 1996 Questionnaire for National Security Positions (SF-86), and SOR ¶ 1.c. and ¶ 1.d. allege that he concealed in writing the same information from a Defense Investigative Service (DIS) agent on two subsequent occasions. SOR ¶ 2.a. alleges that such concealment constitutes a violation of 18 U.S.C. § 1001, and SOR ¶ 2.b. alleges that his arrest in January 1987 for possession of stolen property (as to which he pleaded guilty to a charge of disorderly conduct) is part of a history or pattern of criminal activity that creates doubt about his judgment, reliability, and trustworthiness.

The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following Findings of Fact:

The Applicant is a 36-year-old employee of a U.S. Government contractor. He seeks to obtain a Secret personnel security clearance.

The Applicant attended a vocation/technical school during 1989-93 and in November 1995 was hired by his present employer. He signed a Questionnaire for National Security Positions (SF-86) in April 1996 on which he listed two instances in response to the question concerning his police record, *viz*., a handgun violation, for which he was placed on probation, and a conviction for grand larceny, for which he was sentenced to 2-5 years incarceration and served two years "in jail." Neither offense is identified in SOR ¶ 2 as part of an alleged "history or pattern of criminal activity." The Applicant was paroled from jail sometime in the first part of 1986 for about three years and placed on work release. However, the Applicant did not list three other instances in response to the police record question on the Questionnaire for National Security Positions (SF-86) as discussed below.

1. In July 1986 the Applicant had an argument with his girl friend. She called the police who arrested the Applicant for possession of a weapon, assault, and menacing. It turned out that the weapon belonged to the Applicant's roommate and was in the roommate's possession. The Applicant denied all the charges, and they were dismissed in court. Tr pages 115-116, 147-149, 153-156.

2. In January 1987 the Applicant purchased a used car from a private owner. The seller gave the Applicant out-of-state license plates to use until the Applicant had registered the car in his own name. On the way to his girl friend's house, having just bought the car, the Applicant was stopped by the police who told him that the license plates (not the car itself) had been previously stolen. Although the Applicant did not know they had been stolen, he was arrested for possession of stolen property. The Applicant was taken to the police station, ticketed, fined $50--apparently on a disorderly conduct charge--and released. He did not pay the fine and, unbeknownst to him, an arrest warrant was issued in June 1987. Tr pages 58-59, 131-132, 139-140. In November 1987 the Applicant moved out-of-state. On December 4, 1996, the Applicant paid the $50 fine after learning about the warrant.

3. In September 1988 the Applicant was arrested on numerous charges along with his brother and his uncle arising out of a routine traffic stop on a turnpike by state police. The charges included possession of a weapon and a controlled dangerous substance. The Applicant believes that he was "set up" on false charges. All charges were dismissed in court.

The Applicant was interviewed by a Defense Investigative Service (DIS) agent in August 1996 concerning his arrest record. His signed sworn statement on that occasion disclosed the details of the convictions he had reported on his Questionnaire for National Security Positions (SF-86). The statement declared that he had "satisfactorily completed [his] sentencing and have had no further involvement with the law enforcement." The Applicant was again interviewed in October 1996 by the same agent, who asked him whether he had been arrested and charged on specific dates in July 1986, January 1987, or September 1988. The sworn statement signed by the Applicant on that occasion denies being "arrested and charged" on any of those dates and declares:

"I got out of jail around Dec [*sic*] 86. Therefor[e] I couldn't have committed any crimes from 86 to 90 or [I] would have gone straight back to jail. This never occurred because these charges are not mine. . . . I have never violated my parole through criminal involvement."

The Applicant was subsequently interviewed by a second Defense Investigative Service (DIS) agent. *See* the Applicant's answer to the SOR, August 12, 1997, page 4. He admitted the arrest charges then but told the agent that "they all had been dismissed." Tr pages 126-129, 134-135.

The Applicant was interviewed by a third Defense Investigative Service (DIS) agent in April 1997. In a sworn statement signed by the Applicant on that occasion, the Applicant discussed the above-mentioned three arrests and declared:

"I have not been involved with illegal drugs or weapons since getting out of prison around 1986. I am sorry I was so evasive about these arrests, but I was afraid to admit the truth for fear no one would believe me." *See also* tr pages 110-111.

The Applicant has presented testimony and several letters of recommendation from friends, as well as from supervisors and other associates at work. They attest to his "positive change in his entire life," his professionalism, his work ethic, and to his honesty. The Applicant has not violated any security regulations during his current employment or divulged any private company information to unauthorized persons. He has a general reputation for being trustworthy. Tr page 102. In addition to their 9-year-old daughter, he and his wife have been raising his deceased sister's 7-year-old son since 1995 and his 15-year-old son from a prior relationship since about 1993. Tr pages 104, 125, 145, 150-153. He keeps secrets confided in him by friends. Tr page 146.

POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The criteria, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

CRITERION E - 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 providing 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 applicable.

CRITERION J - 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:

(1) the criminal behavior was not recent;

(2) the crime was an isolated incident;

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section F.3:

a. Nature and seriousness of the conduct and surrounding circumstances.

b. Frequency and recency of the conduct.

c. Age of the applicant.

d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.

e. Absence or presence of rehabilitation.

f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledgeable participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security 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 may only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations.

Dept. of the Navy v. Egan, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum ***quantum*** of the admissible evidence that must be adduced by the

Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence -- rather than as an indication of the Court's tolerance for error below.(1)

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance.(2)

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 the undersigned concludes that the Government established its case with regard to Criteria E and J.

The Applicant has offered a couple of explanations why he did not list his arrests on the dismissed charges in the 1986-88 period on his Questionnaire (SF-86) in April 1996, and why he did not volunteer that information to a Defense Investigative Service (DIS) agent in August and October 1996.

First, there is the explanation that he forgot about them. This is facially reasonable since they occurred some ten years ago. The facility security officer (FSO) that took his completed SF-86 form did not press him to use the continuation space on the form to add other arrests as does the current FSO. Tr pages 91-93. The DIS agent simply asked him what happened on three specific dates during that time period. Tr pages 132, 189. This question probably would not refresh his memory of forgotten incidents. Furthermore, there is the argument that the Applicant had no motivation to conceal dismissed charges from the Government while admitting convictions, one of which--as he had he listed--had resulted in two years' incarceration; in consequence, he must have forgotten about the other arrests. Yet, the FSO had no obligation to press the Applicant, nor was the DIS agent obliged to confront him with details of the arrest charges on the specific dates in question. oreover, he stated in writing in April 1997: "I am sorry I was so evasive about these arrests, but I was afraid to admit the truth for fear no one would believe me." This Administrative Judge concludes that, while poor recall and repression of the memory of adverse incidents clearly played a part in the actions of the Applicant, the credible April 1997 DIS statement undercuts that explanation seriously. The Applicant did not attempt to disavow that statement at the hearing.

Second, there is the explanation that he did not understand the difference between an arrest on charges later dismissed and an arrest on charges on which there was a conviction. The Applicant at the hearing seemed at times to confuse these two concepts. *See*, for example, tr page 133. His October 1996 DIS statement also suggests that he believed that any "arrest" is the same as the commission of a crime that would have constituted a parole violation. Substantial support for this explanation was provided by the Applicant's wife who testified credibly that as late as August 1997 she confronted the Applicant with the distinction between an arrest and a conviction. Tr pages 158-166, 170-172. Yet, the Applicant had been arrested in his late teens on a handgun violation and had served a two year sentence for grand larceny when he was 25 years of age, some eleven years ago. This Administrative Judge does not believe that he did not in 1996--and does not now--know the difference between the term "arrest" and the term "conviction."

The most convincing explanation is that the Applicant answered a question that he himself had contrived, namely, "Have you ever committed a felony or an offense involving firearms, explosives, alcohol, or illegal drugs?" Although question 23 on the SF-86 Questionnaire is entitled "Your Police Record" and uses the terms "charged with" and "arrested for," the Applicant chose to read the question as limited to convictions as testified by the FSO at the hearing. Tr page 88. Both DIS statements commence with the words "regarding arrests." Exh 3 and exh. 4. The Applicant may have at his own peril decided that the Government was uninterested in knowing about arrests on charges that were later dismissed for one reason or another. The Applicant cannot wholly blame his poor memory or his confusion and misunderstanding of terms for making up his own question and for insisting on limiting his answers to that question. The concealment occurred recently and repeatedly and is not satisfactorily mitigated by inadequate advice. Therefore, SOR ¶ 1, relating to concealment, is concluded adversely to the Applicant.

With regard to Criterion J, subparagraph 2.a. of the SOR charges that Applicant's concealment constitutes criminal conduct (18 U.S.C. §1001).[(3)] Conduct violative of that Act of Congress is a Federal felony. DC #1 and DC #2, identified on page 5 ***supra***, are applicable. The undersigned concludes that the Applicant knowingly and willfully concealed his arrests on charges that were later dismissed and therefore concludes SOR ¶ 2.a. adversely to the Applicant.

SOR ¶ 2.b. charges that the Applicant's arrest in January 1987 for possession of stolen property (to which he pleaded guilty to a charge of disorderly conduct) constitutes part of a history or pattern of criminal activity that creates doubt about his judgment, reliability, and trustworthiness. The circumstances of this arrest were unique--the most innocent person could equally have been placed unwittingly in such circumstances--and the charge of possession of stolen property was sensibly dropped ten years ago. Ignorance of a warrant for nonpayment of a $50 fine by one who shortly after its issuance moved out-of-state is understandable. Failure to pay a $50 traffic ticket is hardly security significant ten years later. MC #1 and MC #2, identified on page 5 ***supra***, are applicable. Therefore, SOR ¶ 2.b., relating to criminal conduct, is concluded favorably to the Applicant.

Each case decision is required to consider, as appropriate, the factors listed in Section F.3 and enclosure 2 to the Directive, identified on pages 5-6 ***supra***. The seriousness, frequency, and recency of the Applicant's deliberate concealment militate against the Applicant. His chronological age is much too advanced to serve as convincing extenuation for the sort of evasion to which he admitted. In his favor are the facts that he has clearly improved his lifestyle and has proven himself responsible to his family and conscientious to his employer. The Government cannot take the risk that this Applicant will again conceal material information from the Government when fairly and openly requested.

FORMAL FINDINGS

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Criterion E: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Paragraph 2. Criterion J: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: For Applicant

DECISION

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

Jerome H. Silber

Administrative Judge

1. The rule has been restated as requiring "that security clearances should be revoked [***sic***] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). ***Cf.*** with regard to the ***quantum*** of evidence the DISCR Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DISCR] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).

2. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).

3. The cited provision provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States **knowingly and willfully** falsifies, conceals or covers up by any trick, scheme, or device a material fact, or **makes any false, fictitious or fraudulent statements or representations**, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." (emphasis added.) Such an offense is classified as a Class D felony in accordance with 18 U.S.C. §3559(a); with regard to the maximum fine authorized, *see* 18 U.S.C. §3571.