February 16, 2005

ISCR Case No. 03-08415

DECISION OF ADMINISTRATIVE JUDGE
CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT
Robert E. Coacher, Esquire, Department Counsel

FOR APPLICANT
David P. Price, Esquire

SYNOPSIS

Applicant was arrested three times in 1996 and once in 1998. He :had used marijuana in college, but his usage does not appear on his security clearance questionnaire. The record evidence is sufficient to mitigate or extenuate the negative security implications stemming from Applicant's criminal and personal conduct. Clearance is granted.

STATEMENT OF THE CASE

On October 20, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On December 14, 2003, Applicant's answer to the SOR and request for a hearing was received. I was assigned the case September 28, 2004. On September 28, 2004, a Notice of Hearing scheduled the hearing, which was held on October 6, 2004. The transcript (tr.) of the hearing was received on October 18, 2004.

FINDINGS OF FACT

The SOR alleges Personal Conduct and Criminal Conduct. The Applicant admits he falsified his security clearance application, Standard Form (SF) 86, concerning his marijuana use, but asserts it was an isolated incident. He also states he does not know why his use was not on the SF 86 when he put it on the form he originally submitted. He admits: being arrested in May 1996 for theft; being arrested in September 1996 for disorderly conduct with the charges nolle prossed; being arrested in September 1996 for failure to appear; and admits his falsification on his SF 86 is a violation of 18 U.S.C. § 1001. These admissions are incorporated herein as findings of fact. After a thorough review of the whole record, I make the following additional findings of fact:

The Applicant is 32 years old, has worked for a defense contractor since August 1999,

and is seeking to obtain a security clearance. The Applicant is regarded by those who know him as demonstrating a sense of self-discipline, dedication, diligence, dedication, dependability, pride in his work, commitment, honesty, trustworthiness, sound judgment, professional attitude, and the quality of sagacity. He is thoughtful, conscientious, reliable, kind, courteous, professional, eager to help, and a person of high character. (App Ex A)

In May 1996, Applicant then age 23-was arrested for retail theft. A warrant was issued when he failed to appear. He was detained by store security when he took an electric razor valued at $55 from a department store. The police report jumbled his street address. (Tr. 60) He failed to receive the court summons and, therefore, failed to report to court on the proper date. When he heard nothing further from the court, he hoped the charges had been dropped. In September 1996, he was out with friends and relieving himself behind a convenience store. He was arrested by police urinating beside a dumpster and charged with disorderly conduct. A record check revealed his failure to appear on the retail theft charge. He spent the night in jail. The disorderly conduct charge was *nolle prossed*. He was found guilty of retail theft and sentenced to six months deferred adjudication, 25 hours of community service, to pay a fine and court costs of $105, and required to attend an eight-hour class on retail theft.

In February 1998, he was charged as a principal to aggravated battery. Applicant was out with a friend and others when a fight started. Applicant was watching the fight when the police arrived. The police took information from him. He did not know he had been charged with anything until 2000 when he did some research in connection with his security clearance application. At that time, he learned he had been charged with principal aggravated battery and the disposition listed as "No case filed."

Applicant was in the Air Force from October 1990 through October 1994. Applicant used his G.I. bill benefits to attend university from September 1996 until April 2000, when he obtained his bachelor of science degree. From 1995 to 1998, while in college, Applicant used marijuana approximately once a month. Applicant was in a tough curriculum and realized marijuana was not a way to succeed in life. (Tr.56) If he continued to use marijuana, he believed he would not have made it through his classes. He knew of other students who were using marijuana that did not graduate. On New Year's Day 1999, Applicant made a resolution to stop using marijuana. A resolution he has kept. (Tr. 57) His last use of marijuana was in December 1998. He does not currently use marijuana, nor does he intend to use it in the future. Since 2000 when he graduated from college, he has not associated with any individuals who smoke marijuana.

In May 2000, he completed a hand written version of the SF 86, in which he indicated he had used marijuana. In July 2000, Applicant's interim clearance was denied and he was told a full investigation would be required. Applicant told his manager he assumed this was because he had revealed his marijuana use on his SF 86 and had done some things of which he was not proud. In response to question 26, police record - other offenses, he listed the offenses of principle aggravated battery, disorderly conduct, retail theft, and expired driver's license. In August 2000, he was called and asked to sign an electronically formatted version of his SF 86, i.e., an electronic personal security questionnaire (EPSQ).

He was "a little dismayed" that he was just then being asked to sign the EPSQ (Tr. 69) as he had assumed the SF 86 had gone forward in May 2000, and that his background investigation had been underway for three months. He was dismayed to learn his SF 86 had not yet left his employer.

When he received the EPSQ, he failed to diligently review the form. The EPSQ shows a "no" answer to Question 27, which asked him if he had used marijuana during the pervious seven years. Applicant denies he intentionally falsified his SF 86. He acknowledged he is responsible for the content of his SF 86. He states he will never again sign any document without thoroughly reviewing it. (Tr. 72)

In December 2002, Applicant was interviewed by a Defense Security Service (DSS) special agent. In reviewing his EPSQ the special agent indicated she noted no problem with illegal drugs. Applicant indicated he did not currently have a problem with illegal drugs, but had used marijuana in college. At this point, he learned his EPSQ was silent concerning illegal drug usage. Applicant made a sworn statement (Gov Ex 2) in which he stated he had listed his marijuana usage on his SF 86 and could not explain why it was not on the EPSQ. His testimony at the hearing remained consistent. He has been unsuccessful in his attempts to locate his handwritten SF 86 from the company.

POLICIES

The Adjudicative Guidelines in 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 that are clearly consistent with the interests of national security. In making 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 factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

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. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U. S. 518, 528 (1988), "no one has a `right' to a security clearance." As Commander in Chief, the President has "the authority to ... control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position ... that will give that person access to such information." Id. at 527. The

President has restricted eligibility for access to classified information to "United States citizens ... whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. See Egan, 484 U.S. at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." See Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

The allegations under Guideline E, (Personal Conduct) are unfounded. While the Government has shown Applicant's answer to question 27 was incorrect, this does not prove the Applicant deliberately failed to disclose information about his marijuana use. The Applicant has denied intentional falsification. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance is a security concern. But every inaccurate statement is not a falsification.

Applicant reported his marijuana usage during college, on a handwritten SF 86. He is at a loss to explain why his usage does not appear on his EPSQ. He has been unsuccessful in locating a copy of his original handwritten SF 86. In the summer of 2000, Applicant told his boss he thought it was his marijuana usage and other conduct which caused his clearance application did not go through routinely. He did not properly review his EPSQ given him three months after he completed his original SF 86. He first learned his

marijuana use was not on the form when he was interviewed by the DSS two years later. The special agent indicated there was no problem with drugs to which Applicant agreed there was no current problem, but he had used marijuana in college. Had Applicant wanted to mislead the government, all he had to do was not respond to the special agent's comment. But he chose to acknowledge his college drug usage.

Although not on the form, Applicant revealed his usage to both his boss and to DSS. From Applicant's demeanor and explanation, I believe there was no falsification of his SF 86. However, he was remiss in failing to properly review his EPSQ before he signed it. However, this failure does not amount to intentional falsification. I find Applicant's explanation straightforward and candid. I find for Applicant as to SOR paragraph La., personal conduct.

The Government has satisfied its initial burden of proof under Criminal Conduct, Guideline J. Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. Applicant was arrested four times-three times in 1996 and once in 1998. Because of these arrests, DC 1. (E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.) and 2. (E2.A10.1.2.2. A single serious crime or multiple lesser offenses.) apply.

The three 1996 arrests were for minor offenses, i.e., shoplifting, urinating in public, and failing to appear for the shoplifting offense. He stole an electric razor and was duly punished. He failed to appear at the initial hearing because he never received notice of the hearing due to a jumbled street address in the police report. The disorderly conduct charge was nolle prossed and adjudication of guilt was withheld on the other two charges. These occurred eight years ago. This behavior is not recent MC 1 (E2.A10.1.3.1. The criminal behavior was not recent.) applies. Following these arrest, Applicant attended college and obtained his BS degree. He numerous favorable character reference. MC 6 (E2.A10.1.3.6. There is clear evidence of successful rehabilitation.) applies. I find for Applicant as to SOR 2.a, 2.b, and 2.c.

In 1998, Applicant was charged as a principal to aggravated battery. The assistant state's attorney filed a "no information" and the case was closed. Applicant states he was unaware of the charge until he did some investigating prior to completing his SF 86. This arrest occurred six yearsage. MC 1 and 6 apply. I find for Applicant as to SOR 2.d.

I have found there was no falsification of his SF 86. Therefore 18 U.S.C. section 1001 does not apply. I find for Applicant as to SOR 2.e.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or

duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Personal Conduct.:	FOR THE APPLICANT
Subparagraph La.:	For the Applicant
Paragraph 2 Criminal Conduct.:	FOR THE APPLICANT
Subparagraph 2.a.:	For the Applicant
Subparagraph 2.b.:	For the Applicant
Subparagraph 2.c.:	For the Applicant
Subparagraph 2.d.:	For the Applicant
Subparagraph 2.e.:	For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. Clearance is granted.

Claude R. Heiny
Administrative Judge