

DATE: August 28, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-14710

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

**APPEARANCES**

**FOR GOVERNMENT**

Marc Curry, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

This 47-year-old Applicant has three drug-related arrests, in 1977, 1981, and 1997. He used marijuana from 1977 to 1997. As a result of the 1981 arrest for selling cocaine, he was convicted and sentenced to one to four years imprisonment, of which he served 18 months. 10 U.S.C. 986 is applicable but his drug use and criminal conduct are independent bases for finding him to be ineligible to hold a security clearance. No mitigation was shown. Clearance is denied.

**STATEMENT OF THE CASE**

On March 6, 2002, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On March 25, 2002, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge on the basis of the written record, without a hearing. Department Counsel submitted a File a Relevant Material (FORM) on April 11, 2001. The FORM includes six Government Exhibits (GX) 1- 6. Instructions accompanying the FORM informed Applicant that any response to the FORM had to be submitted within 30 days of receipt of the FORM. Applicant did not submit any additional response. The case was assigned to me for decision on August 7, 2002.

Along with the procedural guidance in the Directive, this matter is also governed by the provisions of 10 U.S.C. 986, which in pertinent part, requires the denial or revocation of a security clearance for anyone who has been convicted of a crime and sentenced to more than one year imprisonment.

## FINDINGS OF FACT

Applicant is a 47-year-old computer support specialist for a defense contractor. The company is seeking a security clearance for Applicant so that he will qualify for a classified position.

Based on the totality of the record evidence, I also make the following findings of fact under each of the allegations in the SOR:

### Guideline J (Criminal Conduct)

SOR 1.a. - On April 24, 1977, in State A, Applicant was charged with (1) "contributing to the delinquency of a minor" and (2) "possession of a controlled substance." Applicant was convicted of the first charge and fined \$50.00. The second charge, a drug-related charge, was continued for a year without a finding.

SOR 1.b. - On August 10, 1981, Applicant was convicted of selling cocaine, and was sentenced to one to four years in prison. He served approximately one and a half years and was then paroled.

SOR 1.c. - On July 15, 1997, Applicant was arrested and charged in State A with two counts of endangering the welfare of a child. The arrest was for supplying his 16-year-old female babysitter with marijuana.

SOR 1.d. - The facts found under SOR 1.b., above, bring this matter within the scope of 10 U.S.C. 986, in that Applicant was convicted and sentenced to more than one year imprisonment. Under these facts, Applicant is disqualified from holding a DoD security clearance.

### Guideline H (Drug Involvement)

SOR 2.a. - Applicant abused marijuana, with varying degrees of frequency, from 1977 to 1997.

SOR 2.b. - Applicant's involvement with drugs has led to three drug-related arrests as described in paragraph 1, above (SOR 1.a., 1.b., and 1.c.).

## POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood or continuation or recurrence (Directive, E.2.2. 1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above 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 financial judgment and conduct.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

### GUIDELINE J - Criminal Conduct

The Concern: 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. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
- 2 a single serious charge crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

None that are established by the record evidence. [\(1\)](#)

#### Guideline H (Drug Involvement)

*The Concern:* Improper or illegal involvement with drugs, raises questions regarding a person'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.

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

1. Any drug abuse;
2. Illegal drug possession, including cultivation, processing, manufacturing, purchase, sale, or distribution.

Condition that could mitigate security concerns:

None that are established by the evidence of record. [\(2\)](#)

### CONCLUSIONS

10 U.S.C. 986 is both applicable and controlling, since Applicant was convicted and sentenced to more than one year imprisonment and, therefore, is ineligible to hold a security clearance on that basis alone. The only exception to this prohibition is that the Secretary of Defense or one of the Military Services may authorize the clearance in meritorious cases. Applicant's evidence is considered in that context.

Based on the totality of the evidence, I conclude that all the SOR allegations are supported by convincing evidence that there is a nexus or logical connection with Applicant's security clearance eligibility. At the same time, I am unable to find persuasive evidence in mitigation or extenuation as to either Guideline. Three drug arrests in 20 years, the last one five years ago, is a pattern still too recent to mitigate, particularly since Applicant has offered nothing in mitigation except for his own promises of acting properly in the future. Granting the sincerity of his statements, he still falls short of demonstrating that his good conduct and avoiding problems with the law can be relied upon and that his drug use is safely behind him.

I am troubled that Applicant continued to use marijuana for some fourteen years after getting out of prison. I am concerned by Applicant's explanations as to the circumstances of his 1977 arrest for endangering the welfare of a child, particularly the different explanations/statements found in his March 15, 2001 statement to DSS (GX 5) and in his response to the SOR (GX 3). These suggest that Applicant is still in denial about his misconduct. In addition, I find persuasive Department Counsel's argument that since Applicant apparently did not learn anything from his prison experience, it will take substantial evidence of rehabilitation for the Government to have the requisite level of confidence in Applicant. That day is not yet here.

The single most important factor in this case is Applicant's admitted conviction in 1981 for selling cocaine, and his sentence to prison for one to four years. These facts fit squarely within the language and scope of 10 U.S.C. 986(1) and Applicant is therefore ineligible to hold a security clearance, on that basis alone. My remaining task is to determine whether I am required to make a waiver recommendation. In this, I am guided by DOHA Operating Instruction No. 64 (*Processing Procedures for Cases Subject to 10 U.S.C. 986*). Section 3.e. provides that:

If an Administrative Judge issues a decision denying or revoking a clearance *solely* as a result of 10 U.S.C. 986 (emphasis added), the Administrative Judge shall include without explanation either the statement "I recommend further consideration of this case for a waiver of 10 U.S.C. 986" or "I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986. Since, as discussed above, Applicant's history of criminal activity and drug involvement, by itself, is a basis for finding Applicant to be ineligible to hold a security clearance, 10 U.S.C. 986 is not the *sole* basis for the denial. Consequently no recommendation as to a possible waiver is required.

### FORMAL FINDINGS

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

#### GUIDELINE J (Criminal Conduct) Against the Applicant

Subparagraphs 1.a. - 1.c. Against the Applicant

#### GUIDELINE H (Drug Involvement) Against the Applicant

Subparagraphs 2.a. and 2.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.

**BARRY M. SAX**

**ADMINISTRATIVE JUDGE**

1. I have considered MC 1 (the criminal conduct was not recent), but in the context of his history of criminal activity, I am unable to conclude such conduct is now safely in his past; MC 2. - but his criminal; conduct is certainly not an isolated incident; and MC 6 - but there is no clear evidence of successful rehabilitation.
2. In the context of Applicant's history of drug involvement over 20 years, and the related criminal cited in Paragraph 1, above, I am unable to conclude that Applicant's drug use is no longer recent (MC 1). It clearly was a pattern and not an isolated or aberrational event (MC 2).