

DATE: June 15, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-04843

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esquire;

Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

This 42-year-old service technician was arrested on 13 occasions between 1983 and 1998.

On two occasions (1983 and 1998), he was convicted and sentenced to more than one year incarceration, bringing him within the provisions of 10 U.S.C. 986. In addition, he used a variety of drugs between 1978 and 1997, and falsified several answers on his recent security clearance application. Several delinquent debts have been paid off, but otherwise mitigation has not been shown. Clearance is denied.

**STATEMENT OF THE CASE**

On September 5, 2003, 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.

In a reply to the SOR received on September 123, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have a hearing before a DOHA Administrative Judge. The case was assigned to me on November 4, 2003. The hearing was delayed to allow me to clear up my backlog of cases waiting to be decided. A Notice of Hearing was issued on April 8, 2004, and the hearing was conducted on May 10, 2004. The transcript was received at DOHA on May `15, 2004.

**FINDINGS OF FACT**

Applicant is a 47-year-old plant engineer. The SOR contains four allegations under Guideline H (Drugs), two which he admits (1.a. and 1.b.), one he denies, and one he answers with an explanation that I deem to be a denial. The specific admissions found in the response are incorporated herein as Findings of Fact.

After considering the totality of the evidence derived from Applicant's testimony and all exhibits, I make the following additional FINDINGS OF FACT as to each SOR allegation:

#### Guideline H (Drugs)

1.a. - Applicant used marijuana, with varying frequency, to include two to three times a month, from 1974-1985 and again from 1990 to approximately October 2003.

1.b. - Applicant purchased marijuana approximately two to three times a year.

1.c. - Applicant informed an agent of the Defense Security Service (DSS) that he "may continue to use marijuana in the future," but he testified at the hearing that this is no longer accurate, i.e., that he intends not to use marijuana in the future.

1.d. - Applicant's conduct in using marijuana from 1974 to as recently as October 2003 brings him under the provisions of 10 U.S.C. 986(2) as someone who "is" a user of marijuana.

### **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 of 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 judgment, irresponsibility, or emotionally unstable behavior.

Eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the Directive's "whole person" concept, I am not permitted to speculate, but can only draw those inferences and conclusions that 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.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private or work life, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the

Government meets its burden (either by an applicant's admissions or by other evidence) and establishes conduct that creates security concerns 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 conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

## CONCLUSIONS

Applicant is a 42-year-old technician for a defense contractor.

Guideline J (Criminal Conduct). Applicant has been arrested, cited, and /or convicted of criminal violations on 12 occasions between 1983 and 1998, an average of almost once a year. In addition, he was the subject of an Emergency Domestic Violence Order in 1994. In his response to the SOR, Applicant admits all 13 allegations, which are also clearly supported by the Government's Exhibits (GX) 1-21. Applicant's explanation as to allegation 1.b. does not refute or even minimize the negative impact of that allegation or of his collective criminal acts over a period spanning some 15 years, and ending in 1998.

SOR 1.a. - Applicant claims a law enforcement officer planted the drugs in Applicant's pocket during this 1998 arrest. His claim is not supported by any other evidence of record. Considering Applicant's drug use and criminal conduct history *and* his admission that he ran away after being stopped by the police in this matter, I find that Applicant's claim (made in his sworn statement and at the hearing) is not credible. Under the legal doctrine of *res judicata*, I am required to accept the trial court's decision and, in any case, I find no reason to question the findings of that court. Accordingly, find against him as to SOR 1.a.

SOR 1.b. - 1.1. The record establishes that Applicant has committed one of more crimes on 12 different occasions between 1983 and 1998.

SOR 1.1. pertains to a conviction by plea of guilty to one count (of five charged) of Burglary in te Second Degree and a sentence to three years in jail, with all but fifteen months suspended.

SOR 1.m. I conclude that allegations 1.a. (1998) and 1.1. (1983) both relate to criminal convictions and sentences of more than one year incarceration. Both allegations thereby come within the provisions of 10 U.S.C. 986, which prohibits the granting or retention of a security clearance by anyone convicted of a crime and sentenced to more than one year. Based on Applicant's criminal history and other misconduct as alleged in the rest of the SOR, an adverse decision finding would be required even in the absence of this statute.

Disqualifying Conditions (DC) 1 - any criminal conduct, regardless of whether the person was formally charged, and 2 - a single serious crime or multiple lesser offenses are clearly applicable. Under Mitigating Conditions (MC), I have considered MC 1 (the criminal behavior was not recent) and found it *not applicable*. Applicant has a long history of 13 different incidents of criminal conduct, ranging from driving without a valid license, assault and domestic violence, burglary to drug possession. In this context, the pattern of criminal misconduct is still too recent to warrant a finding that Applicant is not likely to relapse into past behavior patterns and that he possesses the level of good judgment and reliability required of anyone seeking a security clearance. MC 2 is not applicable since Applicant's criminal conduct is not an isolated incident and there is as yet no clear indication of rehabilitation, as required by MC 3.

Guideline H (Drugs) - Applicant's drug involvement began in 1978, when he was 15. His drug involvement continued until at least 1998 and resulted in three arrests, in August and October 1988, and in 1998. In his December 30, 2002 Sworn Statement to an agent of the Defense Security Service (DSS), Applicant states twice that he is a "cocaine addict" (GX 21). At the hearing, he again stated that he considered himself to be an addict (Tr at 57).<sup>(1)</sup>

DC 1 - any drug abuse and DC 2 - illegal drug possession - is admitted to by the Applicant and is otherwise established by the record. As to possible mitigating conditions, under MC 1, I conclude that Applicant's drug involvement must still be considered recent, in part because of his continuing denial of any possession in 1998. His drug use was certainly not an isolated or infrequent event (MC 2) and, in context, Applicant has failed to "demonstrate [an intent] not to abuse any drugs in the future (MC 3). I also find no evidence that there has been a satisfactory completion of a drug treatment program prescribed by a credentialed medical professional (MC 4).

*Guideline F (Financial Considerations)* - Disqualifying Condition 1 - a history of not meeting financial obligations and 3 inability or unwillingness to satisfy debts are applicable. Mitigating Conditions (MC) 1 is not applicable since the delinquencies are still recent. MC 2 is not applicable since the three debts are not an "isolated" incident. I find that MC 6 is applicable in that Applicant has paid off the delinquent debt cited in SOR 3.a. (the student loan). Applicant has presented a document from his state's student loan agency, undated but referring to interest paid for tax year 2003, stating that a "last payment of \$3,991.34 [was] received on 12/11/2003" and a "Current Balance of "\$0.00." As to SOR 3.b., a delinquent debt/civil judgment for \$1,778.00, and 3.c., a related debt, Applicant testified that he believed his insurance company had paid these debts (Tr at 69, 70), but he has not provided any documentation supporting this claim, despite the record being kept open for this purpose until May 12, 2004 (Tr at 72). Applicant claims he has paid off all three debts but has not documented the paying off of the third debt, for \$1,079.00. On balance, I conclude that Applicant has paid off all three alleged debts and I find for him under Guideline F.

#### Guideline E (Personal Conduct)

SOR 4.a. - alleges that as to Question 24 - Alcohol/Drug Offenses, Applicant admitted the offenses in 1.I. (1991), but omitted mention of not those in 1.a. (1998), 1.j. (October 1988), and 1.k. (August 1988). An examination of the security clearance application (GX 1) shows that in his response to Question 24, Applicant admits a 1990 offense. The year 1990 is not mentioned in the SCA, but the incident appears to be the one stated in 1.i., stated as occurring in February 1991. The other three offenses (those cited in 1.a., 1.j., and 1.k) that were omitted from this answer *are* cited in Applicant's answer to Question 21 - Felony Offenses). The Government was thus placed on notice of the offenses and there is no suggestion of deceit by Applicant. This allegation is found in favor of Applicant.

SOR 4.b. - Applicant answered "No" to Question 26 - Other Offenses, with no explanations or comments. He did inform the DSS agent of these offenses when he spoke to the agent in December 2002, but that was two months after he completed the security clearance application (GX 1). Applicant has not established any excuse for his omission of the covered arrests from his security clearance application.

SOR 4.c. - Applicant's statement of DSS in 2002 reveals the more extensive drug use omitted from his security clearance application. His explanation for why he omitted this usage from the SCA does not mitigate the negative impact of the omission, regardless of the precise date of last use.

SOR 4.d. - Applicant's explanation for why he omitted any mention of the civil judgments cited in SOR 3.a and 3.b. is that he had no knowledge of such judgments when he completed the security clearance application, and that his bills have been paid off. A Credit Bureau Report states the judgment date as being in or about 1999, some five years ago. Based on this and the overall record, I find no support for Applicant's claim of a lack of knowledge,

#### Disqualifying Condition E (Personal Conduct)

DC 2 (deliberate omission, concealment, of falsification of relevant and material facts from an SCA) is applicable. No mitigating conditions apply to all four allegations.

### **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

##### Subparagraph 1.a. . Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. . Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. . Against the Applicant

Subparagraph 1.h. Against the Applicant

Subparagraph 1.i. Against the Applicant

Subparagraph 1.j. . Against the Applicant

Subparagraph 1.k. Against the Applicant

Subparagraph 1.l. Against the Applicant

Subparagraph 1.m. . Against the Applicant

Guideline H (Drugs) Against the Applicant

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2.c. . Against the Applicant

Subparagraph 2.d. Against the Applicant

Subparagraph 2.e. Against the Applicant

Guideline F (Financial Considerations) For the Applicant

Subparagraph 3.a. . For the Applicant

Subparagraph 3.b. For the Applicant

Subparagraph 3.c. For the Applicant

Guideline E (Personal Conduct) Against the Applicant

Subparagraph 4.a. . For the Applicant

Subparagraph 4.b. Against the Applicant

Subparagraph 4.c. Against the Applicant

Subparagraph 4.d. . 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. In the context of the SOR, which does not allege that Applicant comes within the provisions of 10 U.S.C. 986(1) as an addict within the meaning of that provision, I have considered the statute as being applicable and controlling only as to Applicant's two criminal convictions and sentences, as alleged in SOR 1.a and 1.l.