

DATE: November 30, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0438

DECISION OF ADMINISTRATIVE JUDGE

BARRY M SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On July 26, 1999, 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 by Change 4, issued a Statement of Reasons (SOR) to the Applicant. The SOR 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. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On September 13, 1999, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing before a DOHA Administrative Judge. The case was assigned to me for resolution on October 18, 1999. On October 27, 1999, a Notice of Hearing was issued, setting the matter for November 10, 1999, on which date the hearing was conducted.

At the hearing, the Government called one witness⁽¹⁾, and offered 8 exhibits. These exhibits were marked for identification as Government's Exhibits (GX) 1 - 8. Applicant testified in his own behalf and offered 5 exhibits,⁽²⁾ marked for identification as Applicant's Exhibits (AX) A - E. Without objection all of Applicant's and the Government's exhibits were admitted into evidence as marked. The transcript was received at DOHA on November 29, 1999.

The Government opposes the Applicant's request for a security clearance, based on the 9 drug-related allegations under Guideline H (SOR 1.a. - 1.c.) of the attached SOR; six personal conduct-related allegations under Guideline E (SOR 2.a. (1) and (2), 2.b.(1) and (2), and 2.c.(1) and (2)); and two criminal conduct-related allegations under Guideline J (SOR 3.a. and 3.b.).⁽³⁾

In evaluating the evidence, in addition to the general guidelines found in Section E.2.2 of Enclosure 2 to the Directive, and the additional specific guidelines found therein, I considered the following points: (1) whether the evidence supports each and every SOR allegation; (2) whether the evidence comes within one or more of the Directive's three adjudicative

guidelines cited in the SOR; (3) whether the evidence establishes a nexus or connection with Applicant's security clearance eligibility; and (4) whether Applicant has established mitigation and/or extenuation as to any or all of the allegations.

FINDINGS OF FACT

After a thorough review and analysis of Applicant's response to the SOR, in which he "admits" all 9 allegations under Guideline H, and "denies" the remaining allegations; under Guidelines E and J, all the hearing testimony and exhibits from both parties; and closing arguments by both parties as to how the record evidence should be viewed, I make the following findings of fact⁽⁴⁾

:

Guideline H (Drugs)

SOR 1.a. and 1.b. - Applicant used (1991 - Summer 1998) and purchased (1992 - Summer 1998) marijuana, with varying frequency, with use sometimes daily (Transcript (Tr) at 30).⁽⁵⁾

SOR 1.c. - Applicant received treatment from September 2, 1993 to January 24, 1994 for a condition diagnosed as cannabis dependence and psychoactive substance abuse. He failed to complete the treatment. Applicant's mother referred him for this treatment (Tr at 33).

SOR 1.d. - Applicant was arrested on October 14, 1993 for possession of marijuana. This was during his period of treatment as cited in SOR 1.c. Applicant pleaded guilty. He was sentenced to six months in jail suspended upon payment of a fine and completion of a drug treatment program. Applicant failed to pay the fine of \$350.00 and was arrested on a warrant issued by the court. The court-ordered treatment program overlapped the treatment cited in SOR 1.c., above (Tr at 38).

SOR 1.e. and 1.f. - Applicant used and purchased methamphetamine from April 1995 to April 1997. He sometimes used methamphetamine five times a week (Tr at 30, 31). The methamphetamine was used to keep Applicant awake during long work hours (Tr at 40) and he "did use it at the place of employment" (Tr at 41).

SOR 1.g. - Applicant used cocaine in 1992 on approximately five occasions (Tr at 30).

SOR 1.h. - Applicant used psilocybin (hallucinogenic mushrooms) in 1992 (Tr at 30).

SOR 1.i. - Applicant has used lysergic acid diethylamide (LSD) (Response to SOR).

Applicant's wife used drugs with him and they moved to state A to get away from their old lifestyle (Tr at 41). Applicant has stated an intent not to use illegal drugs in the future (Tr at 30). This is a change from his October 1998 statement that he "may occasionally" use marijuana in the future (GX 2). His current explanation is that "working for the government has helped me to realize I can't use drugs" (Tr at 43).

Guideline E (Personal Conduct)

SOR 2.a.(1) and (2) - Applicant falsified material facts on his May 14, 1998 Questionnaire for National Security Positions (SF 86) as to Question 24 - Your Police Record - Alcohol/Drug Offenses by (1) by failing to mention his October 1993 arrest for Possession of Marijuana, as cited in SOR 1.d. and (2) by failing to mention his being cited in 1993 for Possession of Alcohol and ordered to participate in a substance abuse program.

SOR 2.b.(1) and (2) - Applicant falsified material facts on his May 14, 1998 SF 86 as to Question 26 - Your Police Record - Other Offenses by failing to mention (1) his November 1993 arrest for Theft and (2) his being charged in October 1997 for Issuing Bad Checks. His bail in this latter case was set at \$692.52 and he was ordered to make restitution of \$793.00. As of October 28, 1998, he still owed \$443.00. At the hearing, Applicant testified and produced documentation that he had paid off this court-ordered debt as of August 11, 1999 (Tr at 57, 58 and AX D)

SOR 2.c.(1) and (2) - Applicant falsified material facts on his May 14, 1998 SF 86 as to Question 27 - Your Use of Illegal Drugs and Drug Activity by failing to mention (1) his drug use as cited in SOR 1.e., 1.g., and 1.h., above, i.e. methamphetamine, cocaine, and psilocybin/psilocin and (2) his use of marijuana, with varying frequency, at time daily, from 1991 to July 1998.

Guideline J (Criminal Conduct)

SOR 3.a. - Applicant's intentional falsification of any or all of the allegations cited in paragraph 2, above, constitutes a violation(s) of 18 USC 1001.

SOR 3.b. - Applicant's October 1993 arrest for Possession of Marijuana, as cited in SOR 1.d., above, and his being charged with Issuing Bad Checks, as cited in SOR 2.b.(2), above, constituted violations of state law, as shown by GX 3 and GX 8.

Applicant's character is attested to by three friends/work colleagues (AX A, B, and C).

POLICIES

The adjudication process established by DoD Directive 5220.6 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, as amended by Change 4, sets forth specific adjudicative guidelines that must be carefully considered according to the pertinent criterion in making the overall common sense determination required.

In addition, 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. In the present case, none of these nine factors, individually or together, warrant a determination favorable to Applicant.

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.

Considering the evidence as a whole, this Administrative Judge finds the following specific adjudicative guidelines to be most pertinent to this case:

Guideline H (Drug Involvement)

The expressed concern is that "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.

E2.A8.1.2 Conditions that could raise a security concern and may be disqualifying (DC) include:

1. Any drug abuse
2. Illegal drug possession, including cultivation, processing, manufacture, purchase. sale, or distribution.
4. Evaluation of drug abuse or dependence by a licensed clinical social worker who is a staff member of a recognized [\(6\)](#)

drug treatment program.

E2.A81.3. Conditions that could mitigate (MC) security concerns:

None - e.g., Applicant's drug involvement is still recent, in context (MC 1) and was not an isolated or aberrational event (MC 2); Applicant has not yet *demonstrated* an intent not to abuse any drugs in the future (MC 3); and there is no evidence Applicant has successfully completed a prescribed drug treatment program (MC 4).

Guideline E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

E2.A5.1.2. Conditions that could raise a security concern and may be disqualifying include:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . . used to . . . determine security clearance eligibility. . . .;

5. A pattern of dishonesty or rule violation, e.g., falsifications on SF 86, in sworn statements, and of company rules re alcohol use.

Conditions that could mitigate security concerns include:

None ⁽⁷⁾

Condition J (Criminal Conduct)

E2.A10.1.2. 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 - In particular, Applicant's criminal behavior remains recent and was not an isolated incident (MC (1) and (2)); nor is there any evidence of successful rehabilitation (MC 6). Other possible mitigating conditions are not applicable under facts of this case.

The 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 required by the Directive, the Administrative Judge is 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 may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability on the part of an Applicant. 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. When 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 he or she is nonetheless security worthy. As noted by the U.S. Supreme Court in *Department of the Navy V. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates security clearance determinations should err, if they must, on the side of denials." As I understand the Court's rationale, doubts are to be resolved in favor of the Government.

CONCLUSIONS

Drugs

Applicant is 24 years old. He began using drugs in 1991, when he was about 16, and continued until at least the Summer of 1998. In his response to the SOR, Applicant admits all of the SOR's allegations of drug use and involvement. The other record likewise establishes Applicant's longstanding drug activity. According to Applicant, he stopped using drugs in September 1997, around the time he was moving from state A to state B, and concentrating on improving his chances of gaining employment (Response to SOR). Nevertheless, he used marijuana again after moving to state B, in the Spring (May) of 1998 "on isolated incidents" but states an intent not to use it again (Response to SOR). At the hearing he fixed the date of last use at July 1998 (Tr at 42)

Falsifications/Personal Conduct

Second only perhaps to actual violation of rules and regulations for protecting classified material, lying about material facts on security clearance applications and to Defense Security Service (DSS) investigators goes directly to the heart of the security clearance process. The fact of the omission of material information relating to the three questions in Applicant's SCA, as cited in paragraph 2 of the SOR *and* the relevancy of that evidence to Applicant's eligibility for a security clearance is clearly established.

The remaining issue is whether Applicant has provided explanation, mitigation and/or extenuation adequate to overcome the negative impact of the Government's case. Applicant has provided a variety of explanations. In his response to the SOR, Applicant states as to:

Question 24 on the SCA: (1) "I did not answer Question 24 on the security application" and (2) "I did not recall this incident happening." This response is unclear, in that both statements could be meant to apply to both Applicant's October 1993 arrest for Possession of Marijuana *and* to his 1993 citation for Possession of Alcohol *or* the statements could have been meant to be applied separately to the two arrests, i.e., response (1) to SOR 2.a.(1) and response (2) to SOR 2.a.(2).

Question 26 on the SCA: (1) "I did not recall the incident taking place until after I received the denial of my security clearance and I requested a copy of the arrest report. . . ." and (2) "Since this was a part of the bankruptcy in June 1997, I answered this with question 27.a SOR 2.b.(1) refers to Applicant's November 1993 arrest for Theft and SOR 2.b.(2) refers to Applicant's being charged in October 1997 with Issuing Bad Checks.

Question 27 on the SCA: (1) and (2): "I voluntarily gave this information in an interview with a security officer." SOR 2.c.(1) refers to Applicant's use of methamphetamine, cocaine, and psilocybin/psilocin, as alleged in SOR 1.e., 1.g., and 1.h.

As to all three SOR allegations, 2.a., 2.b., and 2.c., Applicant begins by stating: "I deny. I did not answer question [24, 26, and 27] on the security application." Since these three questions are answered "No" in GX 4, this answer was

puzzling. In his hearing testimony, Applicant provided a partial copy of another SF 86 (AX E) (a paper version) he states he filed out before completion of the final version of the SF 86 included in the Government's exhibits (GX 4) (the EPSQ version). His exhibit lacks several pages and is undated, but an attached page appears to be a response from Applicant's employer's security officer, asking for information not on the SF 86 submitted by Applicant. In context, his explanation for the missing pages (Tr at 52, 53) does not ring true.

Applicant's testimony does not match his written response to the SOR. He testified he did not answer the three questions about his drug use and arrests because he "was unsure of the exact dates of my arrests and charges against me, and I chose to leave these questions blank, not knowing the correct information to put there, figuring I would be questioned about these later on" (Tr at 29).

In addition, Applicant's hearing testimony is internally implausible. As to how the "No" answers came to be on the SF 86 signed by Applicant and submitted to DoD, Applicant provides several explanations, i.e., (1) that the company's security officer must have assumed Applicant meant to answer "No," and checked those boxes on Applicant's behalf (Tr at 29); and (2) that Applicant simply failed to notice these three "No" answers when he received the final version of the SF 86 back from the security officer and added his own (Applicant's) signature at the end of the form. These unproven assumptions and negligent, if that, signing of a SF 86 but disclaiming responsibility for its contents are too much of a coincidence and are too implausible to be considered real substantive evidence. On cross examination, Applicant expanded on how the incorrect answers came to be on the SF 86 submitted to DoD (Tr at 44 - 50) but did not adequately explain away his conduct in submitting a signed and sworn SF 86 containing false information about several vital issues.

Applicant's explanations cause a number of additional questions about his reliability and trustworthiness to arise:

- (1) AX E is incomplete, in that the pages containing the important three questions are not part of the exhibit.
- (2) AX E includes a page from the security officer asking for additional information needed to complete a number of specific questions, apparently not adequately completed by Applicant. The page does not mention or ask for information about Applicant's drug use and police record, matters at least as important, if not more so, than completed names and addresses of other individuals. The omission of requests for such answers at least suggests that the form submitted by Applicant to the security officer *did* contain "No" answers to Questions 24, 26, and 27. There is no contrary evidence.
- (3) Applicant was given an opportunity to contact the security officer and obtain a completed copy of the first draft of the SF 86, which, if Applicant was being truthful at the hearing, would likely contain "No" answers to the three questions with which we are concerned. In addition, Applicant was asked by me to request that the security officer submit a statement, through Department Counsel, that the first draft SF 86 as submitted to her by Applicant did or did not contain answers to the three drug and arrest-related questions *and*, if not, how the "No" answers came to be on the final version of the SF 86, as submitted to DoD. Applicant was given seven days, until COB on Friday, November 19, 1999 to transmit such documents to Department Counsel, or in the alternative, if he was unable to contact the security officer or to obtain the documents, to submit a letter from him explaining his efforts (Tr at 53 - 55). No documents or other response were received at DOHA within the time allowed and none have been received as of the date of this decision.

On this record, it is impossible to accept Applicant's explanations as *demonstrating* that his claims of innocence and/or simple neglect as to the falsifications are true and can be accepted as true.

Criminal Conduct

For the reasons stated above as to Personal Conduct, I conclude the omissions in questions were deliberate and therefore violate Title 18 U.S.C. 1001 and that the misconduct described in SOR 1.d. and 2.b.(2) constitute violations of state law.

The three letters from colleagues (AX A, B, and C) are helpful in viewing Applicant's work ethic as a positive one. However, none of them relates to Applicant's failings in his history of drug use and security clearance-related falsifications, and none of them overcomes the weight of the Government's negative evidence.

I was impressed by the testimony of Applicant's mother-in-law (Tr at 60 - 63). She views Applicant as having lacked "wisdom" in the past and that he move to state A "to get away from drugs" in his former state of residence. She was at least partially aware of Applicant's drug involvement in the past and she believes he has shown himself to be rehabilitated. She also believes Applicant to be truthful. This witness's testimony is helpful in understanding Applicant's drug history. However, it is the combination of drug use *and* falsifications that establishes that he is not currently eligible for access to the nation's secrets. However sincere Applicant may be as to his intentions, he has not yet established his ability to conform his conduct to the standards of good judgment, reliability, and trustworthiness required of anyone seeking access to the nations's secrets.

Under the overall facts and circumstances of this case, I conclude that Applicant has not established mitigation or extenuation for any of the SOR allegations.⁽⁸⁾ Applicant is encouraged to takes advantage of the one-year waiting period before he can reapply for a security clearance, to demonstrate that his mother-in-law's confidence is well placed and that his present good conduct can be relied upon to continue.

FORMAL FINDINGS

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

GUIDELINE H (Drugs) Against the Applicant

Subparagraph 1.a - 1.i. Against the Applicant

GUIDELINE E (Personal Conduct) Against the Applicant

Subparagraph 2.a.(1), (2); 2.b.(1) and (2),

and 2.c.(1) and (2) Against the Applicant

GUIDELINE J (Criminal Conduct) Against the Applicant

Subparagraph 3.a. and 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.

BARRY M. SAX

ADMINISTRATIVE JUDGE

1. This was Applicant's mother-in-law, who testified at the request of Department Counsel after Applicant finished his testimony. During his testimony, the mother-in-law, who was in the courtroom to lend support, made a comment in support of her husband audible to all of us. Department Counsel called her to testify and asked her to expand on her comment (Transcript (Tr) at 60).
2. Three exhibits, A, B, and C, were previously submitted as part of applicant's response to the SOR. At the hearing (Tr at 10 -12), these three exhibits were detached from the response and added to Applicant's two hearing exhibits, C and D.
3. The SOR in this matter was issued after July 1, 1999, so that Change 4 to the Directive, which became effective as of that date, applies to this matter. Change 4 uses the term "Guideline," instead of the previously used term "Criterion." Although the SOR uses the term "Criteria," rather than "Guideline," the difference in terminology has no effect on the substantive issues to be resolved.
4. As is made clear in the transcript, the SOR includes some allegations that contain cross-citations to other allegations.

In each case, the correct citations were identified and the SOR in the case file was amended by me, without objection, to conform to the evidence. The SOR contains these corrections in blue ink.

5. In GX 2, at page 3, Applicant gives the date of last use as October 1998. In his answer to the SOR, he states "Spring of 1998." Overall, I conclude the date was most likely the Summer of 1998, specifically the Fourth of July weekend (Tr at 32).

6. GX 7 contains an evaluation of cannabis dependence and psychoactive substances by a person identified as a LCSW, which I take to designate a Licensed Clinical Social Worker, who is an employee of a state operated treatment program. Although the treatment program was clearly not successful, DC 5 is not applicable since GX 7 does not indicate that the treatment program was prescribed by a credentialed medical professional

7. MC 3 is deemed not applicable because Applicant's subsequent admissions do not qualify as "prompt, good faith efforts to correct the falsification(s) before being confronted with the facts. MC 4 is deemed not applicable because the individuals on whose advice he acted are not identified as "authorized personnel." Likewise, none of the other MCs are demonstrated by substantial record evidence.

8. It has not been definitively established whether the treatments cited in SOR 1.c. and 1.d. are the same, different, or overlapping. As close as I can tell, they were different but overlapping (Tr at 37 - 39). Any uncertainty on this point does not affect the overall validity of each allegation.